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the evidence for motive or intent. And the court specifically admonished the jury that it should consider the evidence for these purposes. No final written instruction corrected its instruction during trial.

Because the jurors could find the evidence of the previous transactions relevant to motive or intent only by relying on propensity reasoning, I believe that the court's error could be harmless only if other evidence overwhelmingly established Payne-McCoy's guilt.[20] Instead, however, the rule 404(2) evidence was the State's strongest evidence of Payne-McCoy's guilt. So I do not believe that the error was harmless.

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[20] See, *U.S. v. Davis*, 547 F.3d 520 (6th Cir. 2008); *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

State of Nebraska, appellee, v. Leodan Alarcon-Chavez, appellant.

821 N.W.2d 359

Filed August 17, 2012. No. S-11-779.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **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.
3. **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.
4. **Trial: Prosecuting Attorneys.** Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.
5. **Trial: Prosecuting Attorneys: Juries.** Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and

impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.

6. ____: ____: ____. A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
7. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
8. **Trial: Prosecuting Attorneys: Appeal and Error.** When a prosecutor's conduct was improper, an appellate court considers the following factors in determining whether the conduct prejudiced the defendant's right to a fair trial: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury, (2) whether the conduct or remarks were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction.

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

Melissa A. Wentling, Madison County Public Defender, Kyle M. Melia, and Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellant.

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

WRIGHT, CONNOLLY, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ., and SIEVERS, Judge.

PER CURIAM.

Maria Villarreal died after sustaining multiple stab wounds on March 10, 2010. Leodan Alarcon-Chavez was convicted of first degree murder, use of a deadly weapon to commit a felony, and tampering with a witness. In this direct appeal, Alarcon-Chavez contends that the district court erred in overruling his motion to suppress evidence and in giving a jury instruction that incorrectly stated the law. He also asserts that the prosecutor's closing remarks were so inflammatory that reversal under the plain error standard is warranted. We affirm.

BACKGROUND

EVENTS PRIOR TO STABBING

Alarcon-Chavez and Villarreal began dating and moved into an apartment together in January 2009. Alarcon-Chavez was

the sole leaseholder for their apartment, which was located in Norfolk, Nebraska. Their relationship ended after Alarcon-Chavez informed Villarreal that he was seeing another woman. After the breakup, Villarreal stayed in the apartment and Alarcon-Chavez moved in with a friend. While he was living with his friend, Villarreal called to threaten him on several occasions. Once, she told him that her boyfriend would "adjust accounts" with him.

On two occasions when he knew Villarreal would not be present, Alarcon-Chavez went back to the apartment he had shared with Villarreal. One time, he noticed another man's clothes.

In late February 2010, Villarreal began dating Aniel Campo Pino, and he moved into the apartment with Villarreal and her 3-year-old son.

On March 9, 2010, Alarcon-Chavez saw Villarreal and Pino at a store. Alarcon-Chavez returned to his friend's house around 7 p.m. and began consuming alcohol. Around 11 p.m., he drove across town to Wal-Mart to purchase more beer. While at Wal-Mart, Alarcon-Chavez saw a set of Sunbeam knives, and he testified he decided to purchase them for cooking purposes. He purchased the knives and beer just after 11:30 p.m. He returned to his friend's house and took the beer inside, but left the knife set in the vehicle.

Alarcon-Chavez knew Villarreal went to work early in the morning. So, around 5 a.m. on March 10, 2010, he drove to the apartment where Villarreal was living. He testified that he intended to tell Villarreal and Pino to get out of his apartment. He explained he did not want to live with his friend anymore because he had been sleeping on the floor and using clothes for a pillow.

Stabbing

Alarcon-Chavez arrived at the apartment around 5:10 or 5:20 a.m. He initially got out of the vehicle, but then, after remembering Villarreal's threat that Pino would "adjust accounts" with him, reentered it. Alarcon-Chavez then remembered the knife set, so he opened the package with his teeth and concealed one of the knives on his body.

Alarcon-Chavez entered the apartment and found Villarreal in the kitchen making her lunch. She had a knife in her hand. Villarreal came toward Alarcon-Chavez and grabbed his body and somehow dropped the knife. She was holding Alarcon-Chavez and yelling for the police and for Pino, and Alarcon-Chavez was struggling to escape her grip. Fearing that Pino would attack him, he drew the knife he had concealed on his body. Alarcon-Chavez and Villarreal continued to struggle, and as he tried to get loose, he stabbed Villarreal in the abdomen. Alarcon-Chavez did not remember stabbing her anywhere else. After the stabbing, Villarreal sat on the floor and leaned back onto the carpet. Alarcon-Chavez then heard someone coming and locked the door.

Pino had gone outside before Alarcon-Chavez arrived. He went back to the apartment after he heard Villarreal scream. When he arrived, the door was locked. Villarreal was screaming that he should not come in because a man was stabbing her. Pino told Alarcon-Chavez to come out of the apartment so he could help Villarreal, but Alarcon-Chavez did not respond. Pino left for a few minutes to give Alarcon-Chavez an opportunity to leave, but Alarcon-Chavez was still inside when Pino returned. Pino heard Villarreal saying, "Leo, don't kill me, Leo, don't kill me." Alarcon-Chavez then told Villarreal he was going to kill her and said, "I told you not to leave me because if you did this was going to happen to you." Pino told a neighbor to call the police and then retrieved a friend.

Police officers were dispatched to the apartment. One officer knocked at 6:06 a.m. and tried unsuccessfully to open the door. An officer standing outside of the apartment activated a tape recorder. Villarreal can be heard on the recording pleading for help. She told Alarcon-Chavez to go away and not to kill her. She said that she had been stabbed five times and that Alarcon-Chavez was still in the apartment with her. The recording also revealed numerous expressions of pain from Villarreal, several of which occurred just before the officers entered the apartment. Alarcon-Chavez testified that Villarreal was not asking him not to kill her, but, rather, was begging him not to kill himself.

When another officer arrived, he knocked and announced his presence and tried to open the door. Either Pino or his friend told the officers they needed to get inside. The officers entered the apartment by kicking the door several times. When the officers opened the door, they observed Alarcon-Chavez standing over Villarreal's body with a knife in each hand. Alarcon-Chavez was shot with an electric stun gun and handcuffed. He was covered in blood. As Alarcon-Chavez was being taken out of the apartment, Pino's friend asked him "why [he] didn't do this to [Pino and his friend]," and he responded that "he didn't want to do any harm to [them], the problem wasn't with [them]."

Although she was obviously in pain, Villarreal was alert, coherent, and talking when the officers first entered the apartment. Within a few minutes, her color turned to an ash gray and she stopped speaking. There was a large amount of blood around her. She died as a result of multiple stab wounds. Her most traumatic wound traversed the upper right side of her abdomen. The cut went through the right lobe of her liver and pierced her inferior vena cava. The wound caused a massive intra-abdominal hemorrhage. She also had stab wounds on the right side of her back, on her right tricep, and under her left armpit. She had several deep cuts on her hands which were described at trial by one of the officers as classic defense wounds. The officer explained, "[I]f somebody is attacking you with a knife, your natural reaction is to protect your body [by] bring[ing] your hands up."

Investigation

Several items from the crime scene underwent DNA testing. Villarreal was included as a match for blood found on two knives discovered at the scene, and testing revealed an infinitely low possibility that the blood belonged to anyone else. Villarreal was also a match for blood found on a blue shirt Alarcon-Chavez was wearing at the time of his arrest. Blood found on the shirt also revealed a single male profile. While this blood was never compared with the blood of Alarcon-Chavez, one officer opined that the blood came from Alarcon-Chavez' being shot with the electric stun gun, which would

have penetrated his skin. There were no defensive wounds on Alarcon-Chavez' hands.

Officers learned that a vehicle parked outside the apartment belonged to Alarcon-Chavez. By looking through the window, an officer saw a package for three Sunbeam knives protruding from a Wal-Mart bag; one of the knives was missing. An officer believed that a knife found inside the apartment was the missing knife. After discussing with the prosecutor what was observed in the vehicle, officers decided to tow the vehicle without first obtaining a warrant. Department policy permitted the officers to seize the vehicle and later obtain a search warrant. The vehicle was transported and secured in the Norfolk Police Division's sally port, and a search warrant was obtained.

The following items were recovered from the vehicle: a knife; a package of three knives in a Wal-Mart bag with the middle knife missing; an unbent piece of plastic, which appeared to be cut from the package of knives; a barbell; a baseball bat; a warning citation for speeding; a purchase contract showing the vehicle was purchased on March 7, 2010; and another Wal-Mart bag with a holder for jumper cables. The State charged Alarcon-Chavez with murder in the first degree, use of a deadly weapon to commit a felony, and tampering with a witness. The latter charge was based upon an incident between Alarcon-Chavez and Villarreal for which Alarcon-Chavez was charged with terroristic threats and use of a weapon to commit a felony.

Motion to Suppress

Alarcon-Chavez moved to suppress all physical evidence seized by the officers during the search of his vehicle, and following a hearing, the court made the following factual findings:

> Officers were called to an apartment where [Villarreal] was found with multiple stab wounds. [Alarcon-Chavez] was present in the apartment in the possession of a knife and was arrested. Law enforcement officers were directed to an automobile in the apartment parking lot. A three-knife set was in plain view in the vehicle in which

one knife was missing. The knife recovered at the apartment appeared to be part of that set. The vehicle was then impounded and transported into police custody. A search warrant was obtained the next day and the car was searched.

Based upon this evidence, the district court concluded that the officers had probable cause to seize the vehicle. The court reasoned that because the officers had probable cause to conduct a warrantless search of the vehicle, they were also authorized to seize the vehicle and to search it after obtaining a warrant. Accordingly, the court denied the motion to suppress.

Trial and Jury Instructions

A jury trial was held from June 13 to 16, 2011. At the jury instruction conference, the court proposed giving NJI2d Crim. 3.1, the standard step instruction defining the elements of first degree murder, second degree murder, and manslaughter, in that order. Alarcon-Chavez objected to the proposed instruction.

Alarcon-Chavez' proposed instruction did not challenge the elements of the crimes. Rather, it contested the order in which the jury was to consider them. The court overruled Alarcon-Chavez' objection, reasoning that the jury was required to read all instructions in connection with one another and that the instructions adequately informed the jury there were three levels of homicide.

Closing Arguments

During closing argument, the State discussed Alarcon-Chavez' credibility and truthfulness. The prosecutor questioned Alarcon-Chavez' claim that he opened the package of knives with his teeth, arguing the evidence showed it was cut open. The prosecutor asserted that the knife purchase was not a spontaneous decision, as claimed by Alarcon-Chavez, and that Alarcon-Chavez did not go back to the apartment for the purpose of telling Villarreal and Pino to leave. The prosecutor called Alarcon-Chavez' claim that Villarreal was begging for him not to kill himself "absolutely preposterous and insulting." The prosecutor also likened the case to

the O.J. Simpson case. In concluding, the prosecutor said, "[T]he defense told you to focus on credibility. But they call [Alarcon-Chavez] anyway."

When Alarcon-Chavez' defense attorney began his closing argument, he told the jury he would not go through all the evidence or "sit and read [the jury] instructions." One of the prosecutor's first statements in rebuttal was that it was smart for the defense not to discuss the evidence or the jury instructions very much because both essentially said to "go back and find [Alarcon-Chavez] guilty." The prosecutor asked the jury to be "fair to dead people" and again challenged Alarcon-Chavez' credibility, commenting, "You saw him lying."

Finally, the prosecutor told a story about General Anthony McAuliffe's being informed that he was surrounded and that he should surrender. McAuliffe responded, "'Nuts,'" and when General George Patton learned of the response, he said, "[A] man that eloquent has to be saved." Turning back to the case, the prosecutor asked, "[W]hat do you say to this crazy theory[?]" and stated, "What you're going to have to do is go back there and fill out guilty. That is the most eloquent answer you can give, and that is the short answer, the same answer [General] McAuliffe would have given." Alarcon-Chavez did not object to any of the prosecutor's closing remarks.

Verdict and Sentencing

Alarcon-Chavez was found guilty on all counts. He was sentenced to life imprisonment, with credit for 534 days of time served, for murder in the first degree; to an indeterminate term of not less than 19 nor more than 20 years' imprisonment for use of a deadly weapon to commit a felony; and to an indeterminate term of not less than 1 nor more than 2 years' imprisonment for tampering with a witness. The sentences were to run consecutively. Alarcon-Chavez timely appealed.

ASSIGNMENTS OF ERROR

Alarcon-Chavez assigns the district court erred in denying his motion to suppress and in failing to give his proposed jury instruction. He also assigns that reversal is warranted under the plain error standard due to the prosecutor's closing remarks.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review.[1] Regarding historical facts, we review the trial court's findings for clear error.[2] But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[3]

[2] 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]

ANALYSIS

Motion to Suppress

Alarcon-Chavez asserts the district court erred in finding it was lawful for the officers to seize his vehicle without a warrant. The district court relied on *Chambers v. Maroney*[5] and *State v. Franklin*[6] in concluding that the officers could lawfully seize the vehicle and then search it at a later time after obtaining a warrant.

In *Chambers*, a gas station was robbed by two men. Witnesses described the clothing of the robbers and a vehicle which sped away just after the robbery. Within an hour, police stopped a vehicle fitting the description, occupied by men wearing the described clothing. The occupants were arrested, and police drove the vehicle to the station and searched it without a warrant.

The U.S. Supreme Court first recognized:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting

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[1] *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

[2] *Id.*

[3] *Id.*

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

[5] *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970).

[6] *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975).

> the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.[7]

The Court then reasoned that the vehicle could have been searched when stopped because there was probable cause to search it and it was readily mobile. The Court held the warrantless search was valid because both factors still existed at the station house.

In *Franklin*, the defendant was arrested as he approached and entered a vehicle on a public street. Officers began to search the vehicle, but after a disturbance, the vehicle was towed to the police lot and the search continued. Partly relying on *Chambers*, we upheld the entire search. We opined that if there is "probable cause for the arrest of an accused in his motor vehicle on a public highway" and "probable cause for the search of the vehicle at that time, a search a short time later while the vehicle is still in police custody is not unreasonable even though made without a warrant."[8]

Alarcon-Chavez argues the district court erred in relying on *Chambers* and *Franklin* because the defendants in those cases were arrested in their motor vehicles in public areas, whereas he was arrested inside the apartment and the vehicle was parked on private property. To support the distinction he draws between a seizure of a vehicle on private property and one on public property, he relies on *Coolidge v. New Hampshire*.[9] There, the U.S. Supreme Court held that exigent circumstances were required for the automobile exception to apply and that no such circumstances existed because officers developed probable cause well before the warrantless search, the vehicle was parked in the defendant's driveway, the objects sought from the vehicle were neither dangerous nor stolen, and the suspect was not fleeing the area.

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[7] *Chambers, supra* note 5, 399 U.S. at 52.

[8] *Franklin, supra* note 6, 194 Neb. at 642, 234 N.W.2d at 617.

[9] *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), *overruled on other grounds, Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990).

The U.S. Court of Appeals for the Fourth Circuit addressed similar arguments in *U.S. v. Brookins*.[10] Officers were patrolling open-air drug markets when they observed a vehicle backing into a driveway. They saw the defendant and another man standing near the vehicle. The defendant reached into the vehicle and then handed the other man a clear plastic sandwich bag. Both men then speedily walked away from the vehicle, and the plastic bag was discarded. Upon inspection, the bag contained 26 small rocks of "suspected crack cocaine."[11] The defendant was arrested nearby.

The defendant's wife fled the scene in the vehicle, which officers found about 15 minutes later in the driveway of a residence belonging to her mother. Police obtained the keys and in subsequent warrantless searches recovered several items of evidentiary value. The defendant's motion to suppress was granted. The district court found that the automobile exception, which allows law enforcement officers to search a vehicle without a warrant under certain circumstances, did not justify the warrantless search because the vehicle was not readily mobile.

On appeal, the Fourth Circuit reversed. The court rejected the defendant's argument that under *Coolidge*,[12] the automobile exception would never apply to a vehicle situated on private, residential property. The court noted that in an opinion[13] postdating *Coolidge*, the U.S. Supreme Court held that the automobile exception has no separate exigency requirement and applies if the vehicle is readily mobile and probable cause exists to believe it contains contraband. The Fourth Circuit found that the two requisites were met and that therefore, the automobile exception justified the warrantless search.

The Fourth Circuit also discussed the district court's determination that for a search to come within the holding of

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[10] *U.S. v. Brookins*, 345 F.3d 231 (4th Cir. 2003).

[11] *Id.* at 233.

[12] *Coolidge, supra* note 9.

[13] *Maryland v. Dyson*, 527 U.S. 465, 119 S. Ct. 2013, 144 L. Ed. 2d 442 (1999).

Chambers,[14] the seizure must occur immediately incident to arrest. In rejecting this determination, the Fourth Circuit opined that although *Chambers* involved a situation in which the vehicle was seized immediately after an arrest, "the reasoning supporting the subsequent search was that probable cause still obtained."[15] The court then held that the seizure and subsequent searches were lawful because the officers had probable cause to search the vehicle without obtaining a warrant.

The facts Alarcon-Chavez relies upon to distinguish *Chambers* are of no consequence. He argues that probable cause alone was not sufficient to support the seizure of his vehicle, because his vehicle was located on private property and he was not arrested in his vehicle following a traffic stop. But *Brookins*[16] also involved a seizure of a vehicle from private property and an arrest that occurred away from the vehicle that did not follow a traffic stop. The search in *Brookins* was upheld because the vehicle was readily movable, the officers had probable cause to search the vehicle at the time it was discovered, and the probable cause factor still obtained at the time of the search.

The pertinent inquiry in this case, which differs from *Brookins* in that the officers obtained a warrant before searching Alarcon-Chavez' vehicle, is whether officers could have immediately searched the vehicle without a warrant.[17] That is determined by whether the vehicle was readily mobile and the officers had probable cause to believe the vehicle contained contraband or evidence of a crime.[18]

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[14] *Chambers, supra* note 5.

[15] *Brookins, supra* note 10, 345 F.3d at 238.

[16] *Brookins, supra* note 10.

[17] See *Chambers, supra* note 5 (opining that if there is probable cause to conduct immediate warrantless search of vehicle, it is constitutionally permissible to seize and hold vehicle until warrant is obtained).

[18] See, *Dyson, supra* note 13; *U.S. v. Claude X*, 648 F.3d 599 (8th Cir. 2011); *U.S. v. Kennedy*, 427 F.3d 1136 (8th Cir. 2005); *Brookins, supra* note 10; *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996); *State v. Sanders*, 15 Neb. App. 554, 733 N.W.2d 197 (2007).

Both requisites were met in this case. The vehicle was operational and therefore readily movable. Probable cause supported an at-the-scene search because officers knew Villarreal had been severely injured with a knife, a Sunbeam knife was found in the apartment, and a set of Sunbeam knives with one knife missing was clearly visible from outside of the vehicle. Given probable cause to search the vehicle in the parking lot of the apartment, it was equally permissible for the officers to tow the vehicle and later obtain a warrant. We therefore conclude the district court did not err in overruling Alarcon-Chavez' motion to suppress.

Jury Instructions

Alarcon-Chavez argues that under *State v. Smith*,[19] his murder conviction must be reversed because the jury instruction on manslaughter did not require the State to prove that the killing was not the result of a sudden quarrel. We assume without deciding that Alarcon-Chavez' objection to the instruction was sufficient to preserve this issue for our review.

In *Smith*, we found a jury instruction erroneous because it required the jury to convict on second degree murder if it found the killing was intentional and because the instruction did not permit the jury to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel. The jury instruction here is substantially similar to the one given in *Smith*.

Despite Alarcon-Chavez' contentions, this is not a structural error requiring automatic reversal. In *Smith*, we classified the error as trial error and noted:

> Before an error in the giving of jury instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant. The appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[20]

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[19] *Smith, supra* note 4.

[20] *Id.* at 734-35, 806 N.W.2d at 394.

We concluded in *Smith* that the defendant failed to meet his burden because the evidence was insufficient for a jury to reasonably conclude that provocation existed so as to justify an instruction on sudden quarrel manslaughter.

We reach the same conclusion here, although for a slightly different reason. The jury was instructed that it could return one of several verdicts: guilty of first degree murder, guilty of second degree murder, guilty of manslaughter, or not guilty. From these, the jury convicted Alarcon-Chavez of first degree murder.

We have held that a defendant convicted of first degree murder under a step instruction cannot be prejudiced by any error in the instructions on second degree murder or manslaughter because under the step instruction, the jury would not have reached those levels of homicide.[21] And other courts have also concluded that when a jury is instructed on first and second degree murder and the defendant is found guilty of first degree murder, any error in the instruction for manslaughter or any improper failure to instruct the jury on manslaughter does not require reversal.[22]

Here, the jury considered how Villarreal's death occurred and concluded Alarcon-Chavez killed her purposely and with deliberate and premeditated malice. In so concluding, the jury necessarily considered and rejected that the killing was the result of provocation and was therefore without malice. The jury found the evidence met the elements of first degree murder. Under these circumstances where the jury found that premeditation, intent, and malice existed beyond a reasonable doubt, Alarcon-Chavez was not prejudiced and his substantial rights were not affected by the manslaughter instruction.

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[21] See *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). See, also, *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

[22] See, *State v. Soto*, 162 N.H. 708, 34 A.3d 738 (2011); *State v. Yoh*, 180 Vt. 317, 910 A.2d 853 (2006); *State v. Williams*, 977 S.W.2d 101 (Tenn. 1998); *People v. Mullins*, 188 Colo. 23, 532 P.2d 733 (1975); *McNeal v. State*, 67 So. 3d 407 (Fla. App. 2011), *review denied* 77 So. 3d 1254 (Fla. 2011); *State v. Barnes*, 740 S.W.2d 340 (Mo. App. 1987).

PROSECUTORIAL MISCONDUCT

[3] Alarcon-Chavez argues that the prosecutor's closing remarks deprived him of his right to a fair trial and that reversal under the plain error standard is proper. 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.[23] The U.S. Supreme Court has noted that "the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'"[24]

[4-8] Generally, in assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.[25] Prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial, and prosecutors are not to inflame the prejudices or excite the passions of the jury against the accused.[26] A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.[27] Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.[28] When a prosecutor's conduct was improper, this court considers the following factors in determining whether the conduct prejudiced the defendant's right to a fair trial: (1) the degree to which the prosecutor's conduct or remarks tended to

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[23] *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).

[24] *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). Accord *Barfield, supra* note 23.

[25] See *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008).

[26] *Id.*

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

[28] *Id.*

mislead or unduly influence the jury, (2) whether the conduct or remarks were extensive or isolated, (3) whether defense counsel invited the remarks, (4) whether the court provided a curative instruction, and (5) the strength of the evidence supporting the conviction.[29]

Alarcon-Chavez relies on *State v. Barfield*,[30] in which this court held under the plain error standard that a prosecutor's statements during closing arguments required reversal and a new trial. In closing arguments, the prosecutor referred to the defendant as a "'vicious dictator,'" a "'tower of terror,'" a "'two-headed hydra,'" a "'monster of mayhem,'" and a "'king of killers.'"[31] As a part of the defense's closing argument, the defense attorney read the definition of "lie" from a dictionary. On rebuttal, the prosecutor's first statement to the jury was as follows:

> "You know, in 20 years as a prosecutor the hardest thing I think I've had to do is sit there with a straight face when a criminal defense lawyer had to look up the definition of 'lie' in a dictionary. Why, I thought that was printed on the back of their business cards."[32]

We concluded that these comments were "clearly improper"[33] and that to leave such conduct uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. We noted that the prosecutor's comments were "of a very serious nature" and that "the prosecutor's unacceptable remarks" did not "reflect a single, isolated instance, but were numerous."[34] After finding the evidence was not overwhelming against the defendant, we determined a retrial was necessary.

Alarcon-Chavez asserts that the prosecutor improperly described portions of his testimony as untruthful. At one

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[29] See *id.*

[30] *Barfield, supra* note 23.

[31] *Id.* at 512, 723 N.W.2d at 313.

[32] *Id.* at 514, 723 N.W.2d at 314.

[33] *Id.* at 511, 723 N.W.2d at 312.

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

point, the prosecutor questioned Alarcon-Chavez' claim that he opened the knife set using his teeth. But this statement was not improper because it was supported by evidence adduced at trial[35] which showed the set was cut open. The prosecutor also argued that the knife set was purchased with the purpose of killing Villarreal and that Alarcon-Chavez did not return to the apartment simply to reclaim the premises. These statements are also not improper, because evidence supported them. Specifically, Alarcon-Chavez purchased the knife set less than 6 hours before entering the apartment and stabbing Villarreal, and although he brought the beer into his friend's apartment, he left the knife set in his vehicle. Pino overheard Alarcon-Chavez tell Villarreal he was going to kill her and overheard him say, "I told you not to leave me because if you did this was going to happen to you." A reasonable inference from this evidence is that Alarcon-Chavez purchased the knives, and later entered the apartment, for the purpose of killing Villarreal.

The prosecutor also called Alarcon-Chavez' claim that Villarreal was begging for him not to kill himself "absolutely preposterous and insulting." Evidence supported this because nothing from the tape recording indicated that Villarreal was begging Alarcon-Chavez not to kill himself, and, rather, the evidence showed that Villarreal was begging for her own life.

Alarcon-Chavez also challenges the prosecutor's statements, "[T]he defense told you to focus on credibility. But they call [Alarcon-Chavez] anyway" and "You saw [Alarcon-Chavez] lying." He asserts these also were improper attacks on his credibility. The first comment came after the prosecutor had detailed specific examples of evidence that contradicted Alarcon-Chavez' testimony. And following the second statement, the prosecutor gave an example of where other evidence contradicted Alarcon-Chavez' testimony. Viewed in context, these comments simply summarized the prosecutor's remarks

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[35] See, *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006) (stating that prosecutor's argument must be based on evidence); *State v. Swillie*, 240 Neb. 740, 484 N.W.2d 93 (1992) (opining that it is not prejudicial for prosecutor to make remarks based on deductions and inferences drawn from evidence).

concerning the inconsistencies between Alarcon-Chavez' testimony and other evidence and were not improper.

The remainder of the challenged comments consist of the prosecutor's story about General McAuliffe, the request to the jury to be "fair to dead people," the prosecutor's likening the case to the O.J. Simpson case, and the prosecutor's statement early in rebuttal that it was smart for the defense not to discuss the evidence or the jury instructions very much because they essentially said to "go back and find [Alarcon-Chavez] guilty." Even assuming these comments were improper, it cannot be said that they prejudiced Alarcon-Chavez. These were a few isolated comments in a long closing argument and rebuttal, and the evidence that the murder was premeditated and deliberate was, as described earlier, plenary.

Moreover, any resulting prejudice to Alarcon-Chavez was not of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, and fairness of the judicial process. The comments from *Barfield*[36] that met that standard were repetitive, clearly improper, and quite egregious. The comments at issue here simply do not rise to that level.

CONCLUSION

For the reasons discussed, we conclude Alarcon-Chavez' assignments of error are without merit, and we affirm his convictions.

AFFIRMED.

STEPHAN, J., participating on briefs.
HEAVICAN, C.J., not participating.

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[36] *Barfield, supra* note 23.