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CONCLUSION

The record is insufficient to review on direct appeal Ramirez' claim of ineffective assistance of counsel, and accordingly, we decline to address it. The district court did not abuse its discretion in sentencing Ramirez to 25 to 30 years' imprisonment for first degree sexual assault. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN D. SCOTT, APPELLANT.

824 N.W.2d 668

Filed November 30, 2012. No. S-11-894.

1. **Constitutional Law: Statutes: Judgments: Appeal and Error.** The constitutionality and construction of a statute are questions of law, regarding which the Nebraska Supreme Court is obligated to reach conclusions independent of those reached by the court below.
2. **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.
3. **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 such discretion a factor in determining admissibility.
4. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
6. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
7. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
8. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and

unless an abuse of discretion is shown, the trial court's determination will not be disturbed.

9. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.
10. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
11. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of constitutionality.
12. **Constitutional Law: Statutes: Appeal and Error.** As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth.
13. **Constitutional Law: Statutes.** A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech. A statute may be invalidated on its face, however, only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies. Stated another way, in order to prevail upon a First Amendment facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court.
14. **Criminal Law: Intent.** Mens rea should apply to each of the statutory elements which criminalize otherwise innocent conduct.
15. ____: ____. Neb. Rev. Stat. § 28-1351 (Cum. Supp. 2012) requires that at the time of an alleged violation, the defendant had actual knowledge that members of a group engage in or have engaged in any of the specified criminal activities for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members.
16. **Constitutional Law: Criminal Law: Statutes.** Neb. Rev. Stat. § 28-1351 (Cum. Supp. 2012) is not so overbroad as to infringe First Amendment rights of association.
17. ____: ____: ____. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
18. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and furthermore cannot maintain that the statute

is vague when applied to the conduct of others. A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.

19. **Motions for Mistrial: Motions to Strike: Proof: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. The defendant must prove that the alleged error actually prejudiced him or her, rather than created only the possibility of prejudice.
20. **Trial: Due Process: Evidence.** Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith or the prosecution.
21. **Evidence: Words and Phrases.** Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
22. **Trial: Evidence: Juries: Appeal and Error.** Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.
23. **Verdicts: Juries: 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 would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
24. **Judges: Trial.** As a general rule, a judge is required to be present at all stages of a trial.
25. ____: ____. The temporary absence of the trial judge is not reversible error unless the defendant shows prejudice resulting from the absence.
26. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal.
27. **Appeal and Error: Words and Phrases.** Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed in part, and in part vacated and remanded with directions for resentencing.

Steve Lefler, of Lefler & Kuehl Law, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Steven D. Scott appeals his convictions for second degree assault, use of a deadly weapon to commit a felony, and unlawful membership recruitment into an organization or association, a Class IV felony under Neb. Rev. Stat. § 28-1351 (Cum. Supp. 2012). Scott claims that the district court for Douglas County erred with respect to numerous evidentiary and other trial rulings and when it rejected his constitutional challenges to § 28-1351. We affirm Scott's convictions. We reject Scott's argument that the district court imposed excessive sentences, but we note plain error in Scott's sentencing, wherein the sentencing court erroneously ordered the sentence for use of a deadly weapon to be served concurrently with the sentence for unlawful recruitment. We therefore vacate Scott's sentences and remand the cause to the district court to resentence so that the sentence for use of a deadly weapon is ordered to run consecutively to the other sentences imposed.

STATEMENT OF FACTS

The charges against Scott arose from allegations that he assaulted Samuel Kelley on November 20, 2010. Kelley testified at trial that he met Scott when they were both middle school students. Kelley and Scott were friends through middle school and high school.

Kelley testified that he was "kicked out" of his parents' house in October or November 2009 when he was 20 years old. Scott offered to let Kelley stay at his apartment. Kelley knew that in high school, Scott and three of his friends called themselves "the White Rider Clique." Scott was still involved with the group when Kelley moved into Scott's apartment in 2009. While staying with Scott, Kelley came to realize that the group was involved in criminal activities. Scott referred to the group as the "family," and the group would have "family meetings" where they would "talk about family business." Scott was one of the "bosses," and Scott described the group to Kelley as a criminal organization whose hierarchy was based on the characters from the television series the "Sopranos." The goals of the group were to "start small and get big and recruit." Scott

told Kelley that if he were to become part of the group, he "would need to watch a good amount of the Sopranos' seasons so [he] could get a better feel for what the family was like by watching the TV show."

Kelley testified that Scott asked Kelley to sell marijuana for him. Kelley agreed to do so because he was short on cash. Their arrangement was that Scott would front Kelley an ounce of marijuana and that Kelley would pay Scott $90 after he had sold the ounce, keeping any additional money from the sale. Scott obtained the marijuana from one of the other members of the "family." Kelley sold marijuana for Scott three or four times during the month that he lived with Scott.

Kelley testified that Scott also asked him to get close to two known drug dealers they had met at a party in order to determine their whereabouts so that Kelley and Scott "could jump them and steal their drugs or cash or whatever they had on them." Kelley said "yes" to Scott, but instead of carrying out the plan, Kelley warned the targets of Scott's intent.

On November 20, 2009, Kelley signed up to join the U.S. Army Reserve. Kelley told Scott that because he had joined the Army, he would no longer sell marijuana. Scott told Kelley that he still had to sell one last ounce that Scott had obtained for him but that whether or not he sold the ounce, he still owed Scott $90. Kelley moved back to his parents' home and left the ounce of marijuana at Scott's apartment. Kelley did not answer Scott's calls over the next 2 weeks because he knew Scott wanted him to sell the ounce of marijuana. Scott and another member of the "family" came to see Kelley at his parents' house. Scott told Kelley that because he did not join the "family," in addition to the $90 Kelley owed for the ounce of marijuana, he owed Scott rent for the time he stayed in the apartment. Scott told Kelley to pay $300 "or bad things are going to happen." Kelley did not pay, and he avoided contact with Scott until he left for basic training in South Carolina in February 2010.

Kelley returned to Omaha in August 2010. Kelley did not see Scott again until a night in November when he was leaving a party at his friend Nate Chalupa's house and, as he got into his car, Scott "ran up behind [Kelley], hit [him] with a

hammer a couple of times." Kelley testified that when getting into his car, he dropped his key. As he reached down for the key, he heard a voice say, "what the fuck is up?" Kelley recognized the voice as Scott's and said the phrase was one that Scott commonly used. Kelley was hit in the head two or three times before he turned around and grabbed the wrist of the person hitting him. The person was wearing black clothes and a black ski mask and was holding a small ball peen hammer. Jacob Novacek, a friend of Kelley's, tackled the attacker to the ground. As Kelley kicked the attacker, the ski mask was pulled off and Kelley recognized him as Scott. Kelley and Novacek backed off. Scott got up and came after Kelley with the hammer and hit him in the forehead and once or twice in the head. Chalupa had come out of his house and punched Scott once or twice before Scott ran off. As he was running, Scott stopped and said to Kelley, "don't get the cops involved, your family is next." Novacek ran after Scott but did not catch him. Friends took Kelley to a hospital where he got six stitches in his forehead and four staples in the top of his head.

The State charged Scott with second degree assault, use of a deadly weapon to commit a felony, and terroristic threats. The State amended the information to add a count of unlawful membership recruitment into an organization or association in violation of § 28-1351. Scott filed a motion to quash in which he asserted that § 28-1351 was unconstitutional because it was unconstitutionally vague and overbroad and violated his rights of free speech and assembly. After a hearing, the court rejected Scott's constitutional challenges to § 28-1351, finding that the statute was not vague or overbroad and did not infringe Scott's rights to free speech and assembly, because it did not criminalize his association with a group but instead criminalized unlawful recruitment of others into the group through prohibited means.

At trial, the State presented Kelley's testimony as described above. During Kelley's testimony, the State asked about the police investigation of his allegations against Scott. Kelley testified that after he talked to police at the hospital, officers came to his house to question him about the assault. The State asked, "And did they show you a photo line-up?" to which

Kelley replied, "They did." The State then asked, "And were you able to pick someone out of that photo line-up?" to which Kelley replied, "I was." At that point, Scott objected based on hearsay, and after the court overruled the objection, Scott's counsel approached the bench and moved for a mistrial based on testimony regarding an out-of-court identification by use of a photographic array. The court did not immediately rule on the motion and recessed the trial for the day.

The next day, outside the presence of the jury, the court stated that it would sustain Scott's hearsay objection to the questioning regarding the photographic identification and would instruct the jury to disregard it. The court overruled the motion for a mistrial, reasoning that the witness had already identified the defendant and that an instruction to the jury to disregard the questioning would be adequate.

When the jury returned to the courtroom, the court instructed as follows: "Yesterday right when we finished, there was a back and forth about a photo array and an objection was made regarding that exchange. The objection is sustained, and you will please disregard the exchange having to do with the photo array." The State continued its direct examination of Kelley. The court did not give, and Scott did not request, a written instruction on the matter.

Later in the trial, the State called Novacek, the friend who was with Kelley at the time of the assault, as a witness. During Novacek's direct examination, the State asked Novacek whether he recognized anyone in the courtroom as the person who assaulted Kelley, and Novacek identified Scott. The court overruled Scott's objection based on foundation and improper discovery. The State twice asked Novacek whether police had asked him to identify the assailant or had shown him a photographic lineup. The court twice overruled an objection by Scott, and Novacek twice replied, "No."

After Novacek's testimony, the court called a recess, during which Scott moved for a mistrial on the basis that the State had not disclosed prior to trial that Novacek would identify Scott as the assailant. Scott's counsel stated that he had been told that Kelley and Chalupa were the only witnesses who would identify Scott. Scott's counsel argued that if he had

known Novacek would identify Scott, he would have deposed Novacek in order to more effectively cross-examine him at trial. The State argued in response that it had provided all the evidence it was required to provide Scott prior to trial but that the State itself did not know prior to Novacek's testimony that he was able to identify Scott. The court denied Scott's motion for mistrial.

During the State's redirect examination of one of the police detectives, the State asked the detective whether photographic lineups, if they had been done, would have been done by other detectives. The court overruled Scott's objection, and the detective replied that if lineups were done, they would have been done by others.

At the beginning of the trial, Scott filed a motion in limine to prevent admission of evidence that the police had found firearms during searches of Scott's vehicle and his home. The court reserved ruling on the motion in order to consider the evidence in the context in which it was offered. An officer who searched Scott's home and vehicle testified at trial that he found an assault rifle in Scott's home and firearms in the glove box and trunk of his vehicle. The court overruled Scott's relevance objections.

In his defense, Scott presented testimony of witnesses, including Grant Arbaugh, who testified that he was at the party the night Kelley was assaulted. Arbaugh witnessed the assault and saw the attacker after the ski mask came off. Arbaugh stated that he knew Scott and that the attacker was not Scott. During cross-examination, the State asked Arbaugh where on his body he had tattoos. The court overruled Scott's objection based on relevance. Arbaugh testified that he had tattoos on his knees and back and in response to further questioning testified that the tattoo on his back said "Family above all." On redirect examination by Scott, Arbaugh testified that the tattoo referred to his actual family rather than to his friends.

After deliberations, the jury found Scott guilty of second degree assault, use of a deadly weapon to commit a felony, and unlawful membership recruitment into an organization or association. The jury found him not guilty of terroristic threats. The court entered judgment based on the verdicts.

Scott filed a motion for new trial or to vacate the judgment on various bases. He amended the motion to include an assertion that the trial judge "repeatedly left the courtroom during testimony." The judge who had presided over the trial retired after the judgment was entered, and the motion was randomly assigned to a new judge. At a hearing on the motion, the court received into evidence five affidavits offered by Scott. The affidavits were of friends and family of Scott who had attended the trial. Each affiant stated that he or she "was present for the entirety" of the trial and "saw the Trial Court repeatedly leave the courtroom during various phases of the trial." Scott's counsel stated at the hearing that four of the affiants were present and could testify further if the court wished. The State told the court that it could obtain and provide affidavits of the judge who presided over the trial, the bailiff, and another person who was present at the trial "to further delineate the allegations of the judge leaving the courtroom." Scott's counsel conceded that the judge's absences were not made a part of the record and stated that he did not think that the judge had absented himself during objections or anything counsel "would consider to be important to the unfolding of the trial." Scott's counsel further stated that the judge left the bench "four or five times," that the "longest period of time [the judge] would have been gone was . . . two or three minutes," and that most times "would have been shorter than that." The State's counsel said that the judge "got up and left the bench . . . four or five times" but had gone out a door 15 feet from the bench and returned after being gone "a few seconds at most." The court overruled Scott's motion for new trial.

The court sentenced Scott to imprisonment for 4 to 5 years for second degree assault, 4 to 5 years for use of a deadly weapon, and 1 to 2 years for unlawful membership recruitment. The court ordered the sentences on the assault and use of a deadly weapon convictions to be served consecutively to one another and ordered the sentence on the unlawful recruitment conviction to be served concurrently to the other two sentences.

Scott appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Scott claims that the court erred when it (1) rejected his constitutional challenges to § 28-1351, (2) overruled his motion for mistrial based on Kelley's testimony regarding an out-of-court identification based on a photographic array, (3) allowed Novacek's identification of Scott at trial, (4) overruled his objections to evidence regarding firearms found during searches of his home and vehicle, (5) overruled various hearsay objections, (6) allowed evidence regarding Arbaugh's tattoo, and (7) overruled his motion for new trial based on the trial judge's absences from the courtroom. Scott also asserts that there was not sufficient evidence to find that he was part of a "gang," that the cumulative errors resulted in an unfair trial, that the court erred when it overruled his motion for new trial based on various issues, and that the court imposed excessive sentences.

STANDARDS OF REVIEW

[1] The constitutionality and construction of a statute are questions of law, regarding which we are obligated to reach conclusions independent of those reached by the court below. *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

[2] 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. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[3-5] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *State v. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Vigil, supra*. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

[6] The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

[7] Apart from rulings under the residual hearsay exception, we will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds. *State v. Vigil, supra*.

[8] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[9] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). And in our review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact. *Id*.

[10] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

ANALYSIS

The District Court Did Not Err When It Rejected Scott's Claim That § 28-1351 Is Constitutionally Vague or Overbroad or That It Violates First Amendment Rights.

Scott first claims that the district court erred when it rejected his constitutional challenges to § 28-1351. Scott asserts that the statute is unconstitutionally vague and overbroad because

it violates the First Amendment by infringing his rights of free association. The First Amendment in part prohibits laws that "abridg[e] the freedom of speech . . . or the right of the people peaceably to assemble." We conclude that the district court did not err when it rejected Scott's constitutional challenges to § 28-1351.

The statute challenged by Scott, § 28-1351(1), provides in part:

> A person commits the offense of unlawful membership recruitment into an organization or association when he or she knowingly and intentionally coerces, intimidates, threatens, or inflicts bodily harm upon another person in order to entice that other person to join or prevent that other person from leaving any organization, group, enterprise, or association whose members, individually or collectively, engage in or have engaged in any of the following criminal acts for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members[.]

The statute thereafter lists various criminal acts, including, inter alia, robbery, assault, theft, and violations of the Uniform Controlled Substances Act involving possession with intent to deliver, distribution, delivery, or manufacture of a controlled substance.

[11] We note first that a statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of constitutionality. *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012). We further note that the wisdom of a statute is not at issue in a constitutional challenge and that it is not this court's duty to determine whether the statute should have been enacted. See *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 545-46, 731 N.W.2d 164, 176 (2007) (this court "'does not sit as a superlegislature to review the wisdom of legislative acts'") (quoting *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003)).

Scott's First Amendment arguments are interwoven with his overbreadth arguments. In effect, he argues that § 28-1351 is overbroad because it punishes conduct that is protected by the

First Amendment. Therefore, Scott's First Amendment challenge will be analyzed in connection with his argument that § 28-1351 is overbroad.

[12,13] As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). A statute is unconstitutionally overbroad and thus offends the First Amendment if, in addition to forbidding speech or conduct which is not constitutionally protected, it also prohibits the exercise of constitutionally protected speech. *Id.* A statute may be invalidated on its face, however, only if its overbreadth is "substantial," i.e., when the statute is unconstitutional in a substantial portion of cases to which it applies. *Id.* Stated another way, in order to prevail upon a First Amendment facial attack to the constitutionality of a statute, the challenger must show either that every application of the statute creates an impermissible risk of suppression of ideas or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court. See *id.*

As support for his argument that § 28-1351 is overbroad and infringes First Amendment rights, Scott refers us to *State v. Manzanares*, 152 Idaho 410, 272 P.3d 382 (2012), in which the Idaho Supreme Court rejected a constitutional challenge to a statute criminalizing recruitment into a "criminal gang." See Idaho Code Ann. § 18-8504(1)(a) (Cum. Supp. 2009). Scott maintains that the reasoning of the partial dissent in that case was more persuasive than that of the majority. The dissent in *Manzanares* reasoned that the statute's definition of "criminal gang" was broad enough to include intimate or expressive associations that were entitled to First Amendment protection and, in addition, that the statute required no intent on the part of the defendant that the recruit engage in criminal activity. *Id.* (Horton, J., specially concurring in part, and in part dissenting).

We do not believe the rationale of the partial dissent in *Manzanares* controls the outcome of the current challenge. As an initial matter, the Idaho statute at issue in *Manzanares*

differs from § 28-1351 in significant respects. The Idaho statute makes it a crime merely to recruit a member regardless of the methods used and, at least in the view of the dissent, regardless of whether the defendant intends for the recruit to engage in criminal activity. Nebraska's statute, however, does not criminalize every method a person might use to recruit or retain members; instead, it is a crime only when the accused "coerces, intimidates, threatens, or inflicts bodily harm" on the target. The focus of § 28-1351 is on the methods used to recruit or retain members.

Furthermore, § 28-1351 does not use the problematic "criminal gang" language of the Idaho statute; instead, it refers to an "organization, group, enterprise, or association whose members, individually or collectively, engage in or have engaged in any of" the specific listed criminal acts "for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members." The Nebraska statute defines the type of associations at issue as being limited to those whose members engage in criminal activity, which activity is at least part of the purpose of the association. Such definition narrows the statute such that it is not so broad as to encompass constitutionally protected association.

[14,15] We further note that § 28-1351 includes a requirement that the defendant "knowingly and intentionally" commit the act. Such mens rea should be applied to all the elements of the crime. See *State v. Ryan*, 249 Neb. 218, 226, 543 N.W.2d 128, 137 (1996) ("[m]ens rea should apply to each of the statutory elements which criminalize otherwise innocent conduct"), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). As we read the statute, in order to convict a person charged with violating § 28-1351(1), the State must prove that at the time of the alleged violation, the defendant had actual knowledge that members of the group "engage in or have engaged in" any of the specified criminal activities "for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members."

[16] With this reading of the statute, we conclude that § 28-1351 is not so overbroad as to infringe First Amendment

rights of association. It does not criminalize mere recruitment by any means; instead, it criminalizes specific behaviors used to recruit or retain members. Simply asking or peacefully encouraging a person to join a group would not constitute coercion, intimidation, threats, or the infliction of bodily harm. Furthermore, the statute does not target intimate or expressive associations but instead focuses on associations for which members engage in specified criminal activities, and the statute requires that an individual charged under the statute must be aware of such activities.

[17,18] With regard to Scott's vagueness challenge, we note that the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. See *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009). To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and furthermore cannot maintain that the statute is vague when applied to the conduct of others. *Id*. A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court. *Id*. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied. *Id*.

Scott's argument with regard to vagueness is not entirely clear. He argues that the statute does not clearly define a "criminal gang." However, § 28-1351 does not use the words "criminal gang" and instead refers to recruitment into an "organization, group, enterprise, or association whose members, individually or collectively, engage in or have engaged in" specific criminal acts "for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members." The acts for which Scott was charged were clearly prohibited by the statute. He was accused of using coercion, intimidation, threats, and the infliction of bodily harm to prevent Kelley from discontinuing his relationship with the "family," at least until Kelley completed the final marijuana sale by paying Scott. Scott knew of the criminal acts

of the group. Because the acts for which Scott was charged clearly fall within the prohibition of § 28-1351, we conclude that he does not have standing to assert a claim of unconstitutional vagueness.

Having concluded that Scott has not shown that § 28-1351 is unconstitutionally vague, overbroad, or violative of First Amendment rights, we find no merit to his claim that the district court erred when it rejected his challenges.

Testimony Regarding Photographic Array Identification Did Not Merit a Mistrial.

Scott claims that the district court erred when it overruled his motion for mistrial based on Kelley's testimony that the police had shown him a photographic array and that he was able to pick someone out of the array. We conclude that such testimony did not warrant a mistrial.

Although we have held that testimony regarding an out-of-court identification is hearsay, see *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992), in this case, Kelley did not testify that he identified Scott in a photographic lineup, only that he was shown the lineup and that he was able to identify "someone." To the extent it could be inferred that he identified Scott, we note that the trial court ruled the testimony inadmissible and instructed the jury to disregard it. Furthermore, the instructions at the end of the trial included an instruction that the jury was not to consider any evidence the judge had told them to disregard.

[19] The decision whether to grant a motion for mistrial is within the trial court's discretion and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. *Id.* The defendant must prove that the alleged error actually prejudiced him or her, rather than created only the possibility of prejudice. *Id.*

Scott argues that despite the court's instruction, there was prejudice because the State "reintroduced" the evidence when

it asked other witnesses about photographic lineups. Brief for appellant at 32. However, in the incidents to which Scott refers, no witness testified that anyone had identified Scott in a photographic lineup. Instead, Novacek testified that he had not been shown a photographic lineup, and a police detective testified that if a photographic lineup had been conducted in this case, it would have been conducted by another detective. Nothing in these exchanges would have caused the jury to consider the evidence in connection with Kelley's photographic lineup testimony that the court had told the jury to disregard.

We conclude that the district court did not abuse its discretion when it overruled Scott's motion for mistrial based on testimony related to any photographic array.

The District Court Did Not Err When It Allowed Novacek to Identify Scott at Trial.

Scott claims that the district court erred when it rejected his challenge based on *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), to Novacek's in-court identification of Scott. He asserts that the State had not told him prior to trial that Novacek would identify him. Scott argues that if he had known Novacek was going to identify him, he would have prepared differently for his cross-examination of Novacek and would have deposed Novacek prior to trial. We conclude that *Brady* was not applicable to this evidence and that the court did not err when it allowed the evidence.

[20] In *Brady*, the U.S. Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith or the prosecution." 373 U.S. at 87. We have stated that there are three components of a true *Brady* violation: "'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" *State v. McGee*, 282 Neb. 387, 394, 803 N.W.2d 497, 504 (2011) (quoting *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)).

We determine that there was not a *Brady* violation in this instance and that this assignment of error is without merit. The testimony at issue is Novacek's identification of Scott as the person who attacked Kelley. This evidence was not favorable or exculpatory to Scott but was instead inculpatory. It is not the type of evidence to which *Brady* is directed. For completeness, we note that to the extent Scott's argument is that the State acted improperly in some other way, the record shows the State informed the district court that it did not know prior to trial that Novacek could identify Scott and therefore could not have taken steps to suppress such evidence.

We conclude that there was not a *Brady* violation, because the evidence was not exculpatory. The district court did not err when it rejected Scott's challenge to the testimony.

The District Court Did Not Err When It Admitted Evidence That Firearms Were Found During Searches of Scott's Home and Vehicle.

Scott claims that the district court erred when it overruled his objections to evidence that police found firearms when they searched his home and his vehicle. We conclude that the court did not err.

Scott argues that his ownership of guns was not relevant to the charges against him because he was not accused of using a firearm to assault Kelley. He asserts that unfair prejudice outweighed the probative value of the evidence. As the State notes, Scott's objection at trial was based only on relevance. He did not assert an objection based on Neb. Evid. R. 403, which generally provides for the exclusion of evidence where the risk of prejudice outweighs its probative value.

[21] Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011). The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion. *Id.*

We determine that the evidence was relevant to the unlawful recruitment charge under § 28-1351 in that the jury could see it as further circumstantial evidence that Scott and the "family" were involved in one or more of the criminal activities listed in the statute, which might be accomplished by use of firearms. The firearms would support Kelley's testimony that the group members saw themselves as a "Sopranos"-style group, and not as an innocent association of individuals.

We conclude that the trial court did not abuse its discretion when it determined that the firearms evidence was relevant and allowed its admission.

The District Court Did Not Commit Reversible Error When It Rejected Scott's Hearsay Objections.

Scott claims that the district court erred when it overruled his hearsay objections to various pieces of testimony. We conclude that such instances either were not error or were harmless error. Furthermore, the admission of such items of evidence did not deny Scott due process.

Scott notes various points in the trial when he raised a hearsay objection to testimony and the court overruled the objection. He makes little argument regarding any specific evidence. An example of the evidence claimed to have been prejudicial was the admission of Kelley's testimony regarding Scott's efforts to find Kelley after he moved out of Scott's apartment by asking Kelley's friends. Scott argues that he was denied due process because the court overruled numerous hearsay objections.

[22,23] Having reviewed the objections noted by Scott, we conclude that to the extent the court's overruling any of the objections was error, it was harmless error. Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant. *State v. Freemont, ante* p. 179, 817 N.W.2d 277 (2012). 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 would surely have been rendered, but, rather, whether

the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *Id*.

The pieces of testimony noted by Scott were not of great import in the context of the trial and in light of other evidence supporting the charges against Scott. A rational trier of fact would not have accorded much weight to the items complained of, and the outcome was surely not attributable to their admission. To the extent any of the testimony cited by Scott was inadmissible hearsay, we conclude that its admission was harmless error. Scott was not denied due process.

The District Court Did Not Err When It Admitted Evidence Regarding Grant Arbaugh's Tattoos.

Scott claims that the district court erred when it overruled his relevance objections to questions during the State's cross-examination of Arbaugh. We reject this argument.

Arbaugh was a witness for the defense. In its cross-examination of Arbaugh, the State asked questions regarding Arbaugh's tattoos, which included a tattoo that read "Family Above All." Scott argues the testimony was unfairly prejudicial because it indicated that Arbaugh was in a gang with Scott and that it was improperly used to damage Arbaugh's credibility.

The testimony was only that Arbaugh had the tattoo and what it said. There was no testimony to the effect that the tattoo meant he was part of a gang, and to the contrary, Arbaugh testified on redirect that it referred to his actual family, not to his group of friends. To the extent the State was asking the questions in an attempt to show that Arbaugh was a member of the "family" about which Kelley testified, such evidence was relevant to the jury's assessment of Arbaugh's credibility. Such evidence would show the nature of his association with Scott. Any prejudice which might result was not unfair prejudice, because it was relevant and Scott had the opportunity on redirect to let Arbaugh explain the meaning of the tattoo.

We conclude that the district court did not abuse its discretion by allowing this evidence, and we reject this assignment of error.

Scott Has Not Shown Prejudice as a Result of the Judge's Absences During Trial, and the District Court Did Not Err When It Denied the Motion for New Trial on This Basis.

Scott claims that the district court erred when it overruled his motion for new trial based on several brief instances in which the trial judge absented himself from the courtroom. Although we disapprove of the judge's practice, we conclude that Scott did not establish prejudice resulting from the judge's absences and that the district court did not err when it overruled the motion for new trial on this basis.

[24,25] In *State v. Smith*, 256 Neb. 705, 710, 592 N.W.2d 143, 147 (1999), we stated that "[a]s a general rule, a judge is required to be present at all stages of a trial." However, we have recognized that "the absence of the trial judge from the courtroom is not always prejudicial." *Id.* In both *Smith* and *Shaffer v. State*, 124 Neb. 7, 244 N.W. 921 (1932), this court concluded that under the circumstances of those particular cases, the record did not show that any prejudicial error resulted from the temporary absence of the judge and that therefore, the absence did not amount to reversible error. In *Smith*, we cited with favor cases from other jurisdictions holding that the temporary absence of the trial judge is not reversible error unless the defendant shows prejudice resulting from the absence.

In the present case, Scott has not shown prejudice resulting from the trial judge's conduct. He argues that the absences sent a message to the jury that those portions of the trial when the judge left were not important. However, Scott made no objection to the judge's absences during the trial and made no record of such absences or how such absences correlated to particular testimony. The affidavits that Scott submitted in support of his motion for new trial were not specific regarding the number of absences or the points in the trial when such absences occurred. Scott has not shown with any specificity the number, duration, or timing of the absences and has not shown any prejudice that resulted from the absences.

As we noted in the above-cited cases, we again emphasize that a judge should be present at all stages of the trial and

should avoid absences for any length of time while proceedings are underway. However, because Scott did not show prejudice resulting from the judge's admittedly brief absences, we conclude that the district court did not abuse its discretion when it rejected these assertions as a basis for a new trial.

There Was Sufficient Evidence To Support Scott's Conviction for Violating § 28-1351.

Scott asserts that there was insufficient evidence to establish that Scott was part of a "gang" under § 28-1351. We note that "gang" is not an element of § 28-1351, and we conclude that there was sufficient evidence to support the conviction under § 28-1351 as written.

Scott's argument regarding sufficiency of the evidence relates only to his conviction under § 28-1351; he asserts that other than Kelley's testimony regarding the "family," there was no evidence to establish that Scott was in a "gang." However, § 28-1351 does not refer to a "gang," and therefore, the State was not required to prove that Scott was in a "gang." Instead, the statute refers to an "organization, group, enterprise, or association whose members, individually or collectively, engage in or have engaged in" specific criminal acts "for the benefit of, at the direction of, or on behalf of the organization, group, enterprise, or association or any of its members." Kelley's testimony in itself was sufficient to show that Scott and his friends were an "organization, group, enterprise, or association." He testified that Scott described the group as a criminal organization that styled itself after the "Sopranos." His testimony also established that Scott involved Kelley in selling marijuana, a violation of the Uniform Controlled Substances Act, which is one of the criminal acts listed in § 28-1351. Kelley's testimony also indicated that Scott at least planned to carry out a theft of drugs, another crime. Kelley testified that at least one other member of the group provided marijuana for Scott and Kelley to sell, and it therefore can be inferred that the crimes in which Scott got Kelley involved were for the benefit of the group. The evidence was sufficient to establish the required elements of § 28-1351.

Given the language of § 28-1351, we also consider whether there was sufficient evidence that Scott's actions were intended to entice Kelley to join or prevent him from leaving the association. There is no direct evidence of Scott's intent, but circumstantial evidence can be sufficient to infer intent. See *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007) (perpetrator's state of mind is question of fact, and such fact may be proved by circumstantial evidence).

We acknowledge first that the assault on November 20, 2010, might not be evidence to support the conviction under § 28-1351 because, by that time, it is probable that Scott no longer intended to recruit Kelley or keep him in the organization, and it is more probable that the motive for the assault was to carry through on earlier threats. However, the charge under § 28-1351 in the information and the court's instruction to the jury regarding the charge referred to events occurring from November 1, 2009, through November 20, 2010. Actions by Scott during that timeframe, particularly in the early part of the timeframe, could reasonably have been found to be intended to recruit or retain Kelley as a member of the "family." There was evidence that in November or December 2009, Scott told Kelley that he had to pay for the last ounce of marijuana that Scott had obtained for Kelley to sell "or bad things are going to happen." Scott also told Kelley that he owed Scott money for rent because Kelley did not join or wish to retain membership in the family. To the extent that the sale of marijuana was part of the activity of the "family," Scott's threats to Kelley could be seen by the jury as an attempt to keep Kelley in the "family," at least to the extent of completing one final sale. In the words of § 28-1351, Scott's actions in late 2009 could be seen as coercing, intimidating, or threatening Kelley with the intent to entice him to join or to prevent him from leaving the organization. This evidence was sufficient to support the conviction under § 28-1351.

We conclude that there was sufficient evidence to support Scott's conviction under § 28-1351.

Scott Was Not Denied a Fair Trial, and the District Court Did Not Err When It Denied His Motion for New Trial.

Scott asserts that the cumulative impact of all errors of which he complains resulted in an unfair trial. He also claims that the district court erred when it overruled his motion for new trial based on various errors during trial. Scott's argument in this regard is dependent upon the arguments we have already rejected with respect to his other assignments of error. Therefore, we also find these assignments of error to be without merit. See *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

The District Court Did Not Impose Excessive Sentences.

Finally, Scott asserts that the district court imposed excessive sentences. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011). Although we conclude below that the district court committed plain error when it failed to make the use of a deadly weapon sentence consecutive to all other sentences, we conclude that the length of the sentences as to each count was not an abuse of discretion.

In the sentencing order filed October 17, 2011, the district court ordered the following sentences: assault count, 4 to 5 years, consecutive to the use of a deadly weapon count and concurrent with the unlawful recruitment count; use of a deadly weapon count, 4 to 5 years, consecutive to the assault count and concurrent with the unlawful recruitment count; and unlawful recruitment count, 1 to 2 years, concurrent to the assault count and concurrent to the use of a deadly weapon count.

Scott acknowledges that the sentences were within statutory limits, but he argues that they were "excessive and disproportionate to the severity of the offense when considered with his background and lack of prior record." Brief for appellant at 43. He notes that for the three convictions, he was sentenced to imprisonment for a total of 8 to 10 years. Scott gives little

specific argument to support the assertion that the sentences were excessive.

The State refers us to the record where the sentencing court stated that the crime was a serious crime of violence with no rational motivation. The State notes the violent nature of the offense, Scott's unwillingness to take responsibility, and the probation officer's recommendation for substantial periods of incarceration. The State concedes Scott's lack of criminal history, but notes that he scored in the very high risk range for procriminal attitude/orientation and the high risk range for antisocial behavior.

In light of the considerations noted by the sentencing court and the State, we conclude that Scott has not shown that the sentencing court abused its discretion with respect to the amount of time imposed on each count. We reject Scott's argument that the court imposed excessive sentences.

The District Court Committed Plain Error When It Failed to Order That Scott's Sentence for Use of a Deadly Weapon Be Served Consecutively to All Other Sentences.

Although we reject Scott's argument that the district court imposed excessive sentences, we note plain error because the court explicitly ordered Scott's sentence for use of a deadly weapon to be served concurrently with his sentence for unlawful recruitment. The sentence for use of a deadly weapon should have been ordered to run consecutively to any other sentence imposed. We therefore vacate that portion of the sentence and remand the cause to the district court with directions to enter a new sentencing order in which the sentence for use of a deadly weapon is ordered served consecutively to all other sentences.

[26,27] An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal. *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009). Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

Under Neb. Rev. Stat. § 28-1205(3) (Cum. Supp. 2012), the sentence for a conviction for use of a deadly weapon "shall be consecutive to any other sentence imposed." Our appellate courts have accorded plain meaning to this statute and have held that a sentence for use of a deadly weapon must be served consecutively to other sentences and not concurrently with any sentence. *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004); *State v. Russell*, 248 Neb. 723, 539 N.W.2d 8 (1995); *State v. Tucker*, 17 Neb. App. 487, 764 N.W.2d 137 (2009). Therefore, in the instant case, the district court committed plain error when it explicitly ordered that the sentence for use of a deadly weapon would run concurrently with the sentence for unlawful recruitment. Instead, the court should have ordered that the sentence for use of a deadly weapon should run consecutively to both the sentence for assault and the sentence for unlawful recruitment and that the sentence for use of a deadly weapon not be served concurrently with any other sentence.

Furthermore, by making the use of deadly weapon sentence concurrent with the unlawful recruitment sentence, which in turn was ordered to run concurrently with the assault sentence, the court also implicitly ordered the use of a deadly weapon sentence to run concurrently with the assault sentence. Such result would also violate § 28-1205(3) and would be inconsistent with the court's proper order that the assault sentence and the use of a deadly weapon sentence be served consecutively to one another. The order that the use of a deadly weapon sentence and the unlawful recruitment sentence be concurrent was plain error, and a new order wherein the use of a deadly weapon sentence and the unlawful recruitment sentence be consecutive will resolve this sentencing issue.

We therefore vacate the portion of the sentencing order in which the court stated that Scott's sentence for use of a deadly weapon should run concurrently with his sentence for unlawful recruitment. We remand the cause to the district court with directions to enter a new sentencing order in which the sentence for use of a deadly weapon is ordered to run consecutively to both the sentence for assault and the sentence for unlawful recruitment. The sentence for use of a deadly weapon shall not

be ordered to run concurrently with any other sentence, either explicitly or implicitly.

CONCLUSION

We conclude that the district court did not err when it rejected the constitutional challenges to § 28-1351. We further reject Scott's remaining assignments of error. We therefore affirm Scott's convictions. However, we note plain error in that the court ordered the sentence for use of a deadly weapon to run concurrently with the sentence for unlawful recruitment. We vacate the sentences because the sentence for use of a deadly weapon was erroneously ordered to run concurrently with the sentence for unlawful recruitment, and we remand the cause to the district court with directions to resentence so that the sentence for use of a deadly weapon shall run consecutively to all other sentences imposed.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED WITH DIRECTIONS FOR RESENTENCING.

GREG KRZYCKI, AS TRUSTEE OF THE SHIRLEY M. KRZYCKI TRUST, APPELLEE, V. ROBIN KRZYCKI, APPELLANT.

824 N.W.2d 659

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1. **Decedents' Estates: Banks and Banking.** All personal accounts in Nebraska are subject to Neb. Rev. Stat. §§ 30-2715 through 30-2746 (Reissue 2008), concerning nonprobate transfers of accounts.
2. **Decedents' Estates: Banks and Banking: Contracts.** Pursuant to Neb. Rev. Stat. § 30-2719(a) (Reissue 2008), a contract of deposit that contains provisions in substantially the form provided in this subsection establishes the type of account provided, and the account is governed by the provisions of Neb. Rev. Stat. §§ 30-2716 to 30-2733 (Reissue 2008) applicable to an account of that type.
3. **Decedents' Estates: Banks and Banking: Contracts: Evidence: Intent.** Only if a contract of deposit does not conform to the statutory forms provided in Neb. Rev. Stat. § 30-2719(a) (Reissue 2008) may evidence be presented on the issue of the intent of the depositor.
4. **Decedents' Estates: Banks and Banking: Contracts: Intent.** Neb. Rev. Stat. § 30-2719(b) (Reissue 2008) provides that when a contract of deposit does