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STATE OF NEBRASKA, APPELLEE, V. DAVID G. CASTILLAS, APPELLANT.

826 N.W.2d 255

Filed February 8, 2013. No. S-11-685.

1. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2012), and the trial court's decision will not be reversed absent an abuse of discretion.
2. **Criminal Law: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. 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.
3. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **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.
6. **Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403.
7. **Verdicts: Appeal and Error.** Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
8. **Motions to Dismiss: Evidence: Waiver: Appeal and Error.** When a court overrules a defendant's motion to dismiss at the close of the State's case in chief and the defendant proceeds to trial and introduces evidence, the defendant waives the appellate right to challenge the trial court's overruling of the motion to dismiss.
9. **Sentences.** It is possible, in limited circumstances, to correct an inadvertent mispronouncement of a valid sentence.
10. ____. When a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed.
11. ____. If there is a conflict between the court's sentence and its truth in sentencing advisement, the statements of the minimum and maximum limits control.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Beau G. Finley, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

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

WRIGHT, J.

NATURE OF CASE

David G. Castillas was convicted of two counts of discharging a firearm at a dwelling while in or near a motor vehicle, one count of second degree assault, and three counts of use of a deadly weapon to commit a felony. He was sentenced to 5 to 20 years in prison on each conviction of discharging a firearm, 5 to 10 years in prison on the conviction of second degree assault, and 5 to 10 years in prison on each conviction of use of a weapon to commit a felony. All sentences were to be served consecutively. Castillas appeals his convictions and sentences.

SCOPE OF REVIEW

[1] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2012), and the trial court's decision will not be reversed absent an abuse of discretion. *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

[2] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. 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. Howell*, 284 Neb. 559, 822 N.W.2d 391 (2012).

[3] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

FACTS

Background

On June 5, 2010, a driveby shooting occurred at the home of Donald Jones in Omaha, Nebraska. On June 11, another driveby shooting occurred at the home of William Harris, who lived with his mother at the home, also located in Omaha. During the second shooting, Harris' mother sustained a bullet wound to her left arm.

Castillas, Travis Davis, Tiffany Fitzgerald, and Brandy Beckwith were charged in connection with the shootings. On April 26, 2011, the State was granted leave to file additional charges against Castillas. It filed an amended information charging Castillas with two counts of discharging a firearm at a dwelling while in or near a motor vehicle, one count of second degree assault, and three counts of use of a deadly weapon to commit a felony.

Castillas filed a motion in limine to exclude evidence of or testimony regarding an incident following the shootings, during which Castillas allegedly possessed a firearm and brandished it at Donald Betts, a witness for the State. Castillas also moved to exclude any photographs of him handling a firearm. Castillas alleged that evidence on this issue would not be reliable or relevant, that such evidence would be excludable under § 27-404(2), and that any probative value under § 27-403 would be outweighed by unfair prejudice. He also claimed the evidence would be improper propensity evidence prohibited under § 27-404. Both motions were overruled.

Jury Trial

Castillas' trial commenced on May 4, 2011, in Douglas County District Court. The State called Davis, Fitzgerald, and Beckwith. All three testified that on June 5, 2010, they drove with Castillas to Jones' house. They testified that Castillas and Davis shot at the residence multiple times with firearms. They also testified that on the night of the second shooting, all four individuals, along with a person named "Lars," drove to Harris' house and that Castillas and Davis each fired at the residence.

Events of June 4 and 5, 2010

On the evening of June 4, 2010, Castillas and Davis were "partying" with Fitzgerald and Beckwith. The four of them were taking photographs of themselves holding guns, to "look cool." One of the guns was a .45-caliber pistol that belonged to Davis, and the other was a .22-caliber rifle that belonged to Fitzgerald's father. Fitzgerald recalled that the photographs marked as exhibits 93, 94, 95, and 97 were taken that specific night, because she recognized the black dresses she and Beckwith were wearing.

Davis testified that Castillas and Fitzgerald argued about Betts on the night of the first shooting. Betts had been dating Fitzgerald, who was Castillas' girlfriend, and Castillas wanted revenge. Betts was the son of Jones, and he occasionally lived with Jones. Davis had never met Betts, but he became upset with Betts due to rumors that Betts had fired a weapon at Davis' car.

Sometime after midnight on June 5, 2010, Castillas accused Fitzgerald of continuing to talk to Betts. Castillas took the rifle, Davis took his pistol, and the four got into Beckwith's car. Beckwith drove, with Davis in the front passenger seat, Fitzgerald in the rear passenger seat, and Castillas in the rear driver's-side seat. Castillas gave Beckwith directions to Jones' house. As they drove past the house, Castillas and Davis both fired at it. Davis sat on "the [front passenger] window sill" and fired his pistol across the roof of the car, and Castillas fired the rifle out the back window. Davis testified he fired at least five

or six shots and heard Castillas fire at least two or three shots. The group then returned to Fitzgerald's house.

Jones testified that on June 4, 2010, he lived in Omaha with his wife and three of his children. Betts occasionally resided there as well. At approximately 1:30 a.m. on June 5, while Jones and his wife were in their bedroom, a bullet was fired through the bedroom wall. The couple hid in the closet as several more shots were fired. When the shooting stopped, Jones called the 911 emergency dispatch service. He testified there were no bullet holes in his house prior to this shooting. Betts was not at the house when the incident occurred.

A crime scene technician with the Omaha Police Department crime laboratory testified that she collected shell casings lying in front of Jones' house. She found five shell casings in the street and located 23 bullet holes in the house, which appeared to have been caused by bullets of two different sizes. Several bullets from the house were placed in an envelope along with the five shell casings found in the street.

Events of June 10 and 11, 2010

On June 10, 2010, Castillas, Davis, Fitzgerald, Beckwith, and "Lars" were partying at Fitzgerald's house. Castillas mentioned that Betts "hangs out" at Harris' house, and Castillas and Davis talked about "shooting that house up." The five went in Beckwith's car. Davis was in front, and Castillas was in the rear driver's-side seat. Castillas had the same .22-caliber rifle, and Davis had a new 9-mm weapon that he had just obtained. Castillas and Davis fired at Harris' house. After the shooting, they returned to Fitzgerald's house.

Harris' mother lived in Omaha with Harris and her other son. She was asleep during the early morning hours of June 11, 2010, and was awakened when a bullet struck and passed through her left arm. She fell on the floor as several more shots were fired at her house.

Other Trial Evidence

On June 11, 2010, several hours after the second shooting, Betts went to Fitzgerald's house to talk to her about the shootings. While Betts was talking to Fitzgerald outside, Castillas

and Davis came outside. Castillas went back inside, and Betts saw him in an upstairs window with a gun that looked like the .22-caliber rifle used in the shootings.

Det. David Schneider attempted to speak with Fitzgerald following the shootings. Fitzgerald and Beckwith eventually went to an Omaha police station and spoke with Detective Schneider. Initially, they were untruthful, but they later admitted that they were involved in the driveby shootings and provided a detailed account. A detective went to Fitzgerald's house and seized the .22-caliber rifle, two empty magazines, and another magazine that contained 11 rounds of .22-caliber ammunition.

Davis was arrested at his residence, and police seized his .45-caliber pistol. He initially denied involvement in the shootings but subsequently provided a detailed account that matched the accounts given by Fitzgerald and Beckwith. Detective Schneider learned that Beckwith had taken Castillas to meet a family member near Crete, Nebraska, and that Castillas had gone to Texas. Castillas was apprehended in Corpus Christi, Texas, and transported back to Nebraska.

The .22-caliber rifle seized from Fitzgerald's house and the .45-caliber pistol from Davis' house were sent to the Omaha Police Department crime laboratory for ballistic comparison. A senior technician for the crime laboratory analyzed shell casings from both shootings. She testified that the five shell casings from the first driveby shooting were from a .45-caliber pistol and that two of the bullets recovered from the first shooting had characteristics that were consistent with the .22-caliber rifle. Regarding the second driveby shooting, the technician determined that 11 shell casings were from the .22-caliber rifle, 5 were from a 9-mm weapon, and all of the bullets recovered that were suitable for comparison were consistent with a 9-mm weapon.

After the evidence was presented, the State rested. Castillas moved to dismiss all charges against him for lack of evidence. The motion was overruled, and Castillas called Fitzgerald to testify.

Following the conclusion of the testimony, the court held a jury instruction conference. Castillas objected to instruction No. 11, which dealt with voluntary flight. His objection was

overruled, and the court instructed the jury. After submission of the case, the jury found Castillas guilty of all six counts. Each of Castillas' three convictions for use of a deadly weapon to commit a felony required a mandatory minimum sentence of 5 years. See Neb. Rev. Stat. §§ 28-1205(1)(c) (Cum. Supp. 2012) and 28-105(1) (Reissue 2008). Both of his convictions for discharging a firearm at a dwelling while in or near a vehicle also required mandatory minimum terms of 5 years each. See Neb. Rev. Stat. § 28-1212.04 (Supp. 2009) and § 28-105(1). His conviction for second degree assault had no mandatory minimum sentence. See Neb. Rev. Stat. § 28-309 (Supp. 2009) and § 28-105(1).

Castillas' Sentences

A sentencing hearing was held on July 28, 2011. The court stated it intended that for purposes of parole eligibility, Castillas should serve 25 years in the Nebraska Department of Correctional Services after credit for good time. It initially sentenced Castillas to aggregate consecutive prison sentences of 50 to 80 years.

After the court's first sentence pronouncement, the court inquired whether counsel agreed that Castillas would be eligible for parole consideration in 25 years. The prosecutor opined that the court's understanding was incorrect. Counsel disagreed on the calculation of parole eligibility. In response to defense counsel's statement that Castillas might not be eligible for parole for 35 years, the court stated that was not the court's intention.

Before anyone left the courtroom, the court pronounced the following sentences, which in the aggregate amounted to 30 to 80 years:

- Count I, discharging a firearm at a dwelling while in or near a motor vehicle, 5 to 20 years.
- Count II, use of a deadly weapon to commit a felony, 5 to 10 years.
- Count III, second degree assault, 5 to 10 years.
- Count IV, use of a deadly weapon to commit a felony, 5 to 10 years.
- Count V, discharging a firearm at a dwelling while in or near a motor vehicle, 5 to 20 years.

- Count VI, use of a deadly weapon to commit a felony, 5 to 10 years.

The court's "truth in sentencing" advisement informed Castillas: "That will be a total of 30 to 80 years, meaning you have to serve 25 years to be released on parole. And after 40 years, if you lose no good time, you'll be released." The court's written order directed that the sentences be served consecutively and gave Castillas credit for 379 days served.

ASSIGNMENTS OF ERROR

Castillas alleges, summarized and restated, that (1) the court erred in allowing testimony at trial concerning whether he possessed firearms after the second shooting, (2) the court erred in admitting photographs of Castillas possessing firearms, (3) the evidence at trial was insufficient, (4) the court erred in overruling Castillas' motion to dismiss at the end of the State's case, (5) the court erred in giving jury instruction No. 11 with regard to voluntary flight, and (6) the court erred in ordering a sentence that was substantially different from its intended sentence.

ANALYSIS

Evidence Related to Possession of .22-Caliber Rifle After Second Shooting

The State introduced evidence that Betts went to Fitzgerald's home several hours after the second shooting. Betts saw Castillas holding a weapon that looked like the rifle Castillas was alleged to have used in both shootings. Before trial, Castillas moved to prohibit the State from presenting such testimony. The court overruled the motion.

Castillas alleges that during the trial, he was granted a continuing objection to this evidence and that, therefore, his alleged error concerning the admission of the evidence has been preserved for review on appeal. Castillas claims that admission of the evidence violated §§ 27-403 and 27-404.

Section 27-404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may,

> however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Castillas asserts that the State offered no proper purpose for this evidence and that the court should have held a rule 404 hearing.

The State argues that Castillas waived any objection to this evidence by his failure to object during Betts' testimony. Although Castillas moved to exclude the evidence before trial, he did not object or renew his motion during Betts' testimony that he went to Fitzgerald's house after the second shooting and saw Castillas with a gun that looked like the .22-caliber rifle Castillas allegedly used in the shootings. The State claims that Castillas did not raise the necessary objection, because although he had received a continuing objection during the direct examinations of Davis, Fitzgerald, and Beckwith, he did not object or renew his objection during Betts' testimony.

Neb. Rev. Stat. § 25-1141 (Reissue 2008) provides:

> Where an objection has once been made to the admission of testimony and overruled by the court it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received.

The State claims § 25-1141 does not apply to testimony given by a different witness when no objection is made to that witness' testimony. We agree. Castillas failed to object to Betts' testimony and has therefore waived his objection to such testimony.

Photographs of Castillas, Davis, Fitzgerald, and Beckwith

During the trial, the State introduced four photographs. Three of the photographs show Castillas with a rifle that resembles the .22-caliber rifle allegedly used in the shootings; the fourth does not depict a firearm. Exhibit 93 is a photograph of Castillas holding a .22-caliber rifle and posing alongside Fitzgerald, who is holding Davis' .45-caliber pistol.

Exhibit 94 is a photograph of Castillas posing by himself with a .22-caliber rifle. Exhibit 95 is a photograph of Castillas holding the rifle and posing alongside Beckwith, who is holding Davis' .45-caliber pistol. Castillas objected to these photographs, claiming they were irrelevant, were unfairly prejudicial, and violated § 27-404(2). The court overruled these objections.

Castillas claims the photographs were overly prejudicial. In support of his argument, Castillas attacks the credibility of Fitzgerald, who testified that the photographs were taken the evening of the first shooting. He asks this court to disregard such testimony, because Fitzgerald lied repeatedly to the police in order to get out of trouble and wrote false accounts of the shootings months after they occurred and because there was no other independent evidence offered to establish that the photographs were taken on the date claimed by Fitzgerald.

[5] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). Fitzgerald's credibility does not control the admission of the photographs. On appeal, we do not examine the credibility of the witnesses. Fitzgerald's testimony established that the photographs were taken near the time of the first shooting. Both Davis and Beckwith acknowledged the photographs were taken, and Beckwith acknowledged they were taken on the night of either the first or second shooting.

[6] Whether the evidence was unfairly prejudicial was a decision for the trial court, whose decision we will not reverse unless there is an abuse of discretion. See *id*. The fact that evidence is prejudicial is not enough to require exclusion under § 27-403, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011). We conclude Castillas has not established that the admission of the photographs was unfairly prejudicial. The court did not abuse its discretion in admitting these photographs.

Castillas' argument that the photographs should have been excluded under § 27-404(2) is also without merit. The evidence established that the photographs were taken on or near the night of the first shooting. They were admissible as intrinsic evidence because they corroborated testimony of the witnesses that Castillas had access to and was in possession of a .22-caliber rifle at the time of the shootings.

Sufficiency of Evidence

[7] In reviewing a sufficiency of the evidence claim, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. See *State v. Howell*, 284 Neb. 559, 822 N.W.2d 391 (2012). The relevant question 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. See *id*. Only where evidence lacks sufficient probative value as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id*.

Castillas claims that the evidence was insufficient to find him guilty of any of the six counts alleged in the amended information. He claims the State failed to provide even a viable narrative of why the shootings occurred. We disagree. The evidence established that Castillas had a desire to injure Betts.

Castillas asserts that Davis had a stronger motive to commit the crimes, because Davis may have believed that Betts and Harris fired shots at Davis' car. The fact that Davis might have had a motive to injure Betts and Harris supports the evidence that both Castillas and Davis participated in the shootings.

Castillas also argues that the State's dependence upon Davis, Fitzgerald, and Beckwith to support the accusation that Castillas shot at both houses is insufficient, because all three admitted to lying to police when questioned about these incidents.

These arguments have no merit. The credibility of Davis, Fitzgerald, and Beckwith is not part of our review for sufficiency of the evidence. We do not pass on the credibility of witnesses or reweigh the evidence. Viewing the evidence in the light most favorable to the State, a rational trier of fact

could have found beyond a reasonable doubt that Castillas committed the crimes charged. Castillas' argument that no rational trier of fact would have found him guilty of these six offenses because the State's witnesses were not credible is without merit.

Motion to Dismiss

Castillas claims the court erred in overruling his motion to dismiss, which was made after the State presented its case in chief. After the State rested, Castillas started to make a motion to dismiss. The court stated that Castillas could defer the motion, which he did. Castillas then called Davis to the stand. Later, while the jury was on a lunch break, Castillas moved to dismiss. He claimed the State had failed to make a prima facie case against him on any of the charges. The court overruled the motion. Castillas then called his final witness, Fitzgerald.

[8] When a court overrules a defendant's motion to dismiss at the close of the State's case in chief and the defendant proceeds to trial and introduces evidence, the defendant waives the appellate right to challenge the trial court's overruling of the motion to dismiss. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). Castillas waived his argument by calling Fitzgerald as a witness after the State had rested and after his motion to dismiss was overruled. His assignment of error is without merit.

Jury Instruction on Flight

Before the case was submitted to the jury, the court gave instruction No. 11, which provided:

> The voluntary flight of [Castillas] immediately or soon after the occurrence of a crime, with which [Castillas] has been charged, is a circumstance not sufficient of itself to establish guilt, but a circumstance nevertheless which you may consider in connection with all the other evidence in this case to aid you in determining the question of the guilt or innocence of [Castillas].

Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower

court's decision. *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012). Castillas claims he was prejudiced by instruction No. 11 because the instruction forced the jury to conclude that his departure from Omaha was a flight. He argues that the jury should have been instructed in such a way that they could differentiate between the term "flight" and mere departure. He alleges that there was no way for the jury to discern the difference between flight and departure and that without a definition of flight, the jury would not be able to consider the distinction between the two. He claims there is little evidence in the record to suggest that he left Omaha to avoid apprehension or detection.

Castillas' arguments have no merit. In *State v. Lincoln*, 183 Neb. 770, 772, 164 N.W.2d 470, 472 (1969), this court upheld the giving of a flight instruction that stated:

> "You are instructed that the voluntary flight of a person immediately or soon after the occurrence of a crime, with which the person so fleeing has been charged, is a circumstance, not sufficient of itself to establish guilt, but a circumstance nevertheless which the Jury may consider in connection with all the other evidence in the case to aid you in determining the question of the guilt or innocence of such person."

This instruction is substantively the same as the instruction given in the case at bar.

Beckwith testified that she took Castillas to Crete "days to a week" after the second shooting. She responded "[y]es" when asked whether Castillas had requested to be taken to Crete only after Detective Schneider was "kind of poking around." Beckwith was then asked, "Did [Castillas] tell you why he wanted to be taken to Crete, Nebraska?" Beckwith responded that Castillas said that "if they were looking for anybody they were looking for him." There was sufficient evidence for the jury to infer flight, see *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011), and the court did not err in giving instruction No. 11 to the jury.

Additionally, Castillas did not submit a proposed jury instruction or request a more specific instruction containing a definition of flight. If he desired a more precise jury instruction,

Castillas should have requested one at the time the instructions were being considered. See *State v. Lewis*, 241 Neb. 334, 488 N.W.2d 518 (1992). His failure to offer a more specific instruction precludes his raising this objection on appeal. See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

Sentencing

Castillas claims that the court erred by imposing sentences which failed to achieve the court's expressed intent of making Castillas eligible for parole in 25 years. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

At the sentencing hearing, the court initially pronounced consecutive sentences resulting in an aggregate sentence of 50 to 80 years. The court stated: "It means that after 25 years, you'll be considered eligible for consideration — is that right?" The prosecutor and defense counsel then disagreed about the calculation of parole eligibility. In response to defense counsel's statement that the sentence pronounced might make Castillas ineligible for parole for 35 years, the court stated that was not the court's intention. The court then stated:

> My intention is that with the mandatory minimums, . . . Castillas should serve 25 years in the Nebraska Department of Correctional Services after credit for good time. So if the numbers [minimum portion of each sentence] would add up to 30, that would give it a 25-year mandatory minimum — 25-year minimum, I'm sorry. After mandatory of 20, he would have 10 years for which he would get good time credit, which would be divided in half for the 25. So we will start over.

The court sentenced Castillas to an aggregate prison sentence of 30 to 80 years: 5 to 20 years on counts I and V, for shooting at a dwelling from a vehicle, and 5 to 10 years on counts II, IV, and VI, for use of a weapon to commit a felony, and count III, for second degree assault. All sentences were to be served consecutively.

For its truth in sentencing advisement, the court informed Castillas that he would be sentenced to a total of 30 to 80

years, that he would have to serve 25 years to be released on parole, and that after 40 years, if he lost no good time, he would be released.

The statutory sentencing requirements for the charges are as follows:

- Counts I and V: discharging a firearm at a dwelling while in or near a vehicle, a violation of § 28-1212.04, Class IC felony, punishable by a mandatory minimum of 5 years and a maximum of 50 years. § 28-105(1).
- Counts II, IV, and VI: use of a deadly weapon, a firearm, to commit a felony, a violation of § 28-1205(1)(c), Class IC felony, punishable by a mandatory minimum of 5 years and a maximum of 50 years. § 28-105(1).
- Count III: second degree assault, a violation of § 28-309, Class III felony, punishable by a minimum of 1 year and a maximum of 20 years. § 28-105(1).

[9,10] It is possible, in limited circumstances, to correct an inadvertent mispronouncement of a valid sentence. *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009). Hence, it was permissible for the court to resentence Castillas to correct the sentence to match the court's intention. The court stated its intention to structure an aggregate sentence that would result in Castillas' being eligible for parole in 25 years. In imposing a sentence, it is appropriate for a sentencing court to consider how good time credit affects a sentence, that is, when a defendant will be eligible for parole and mandatory release. See *State v. Cadwallader*, 230 Neb. 881, 434 N.W.2d 506 (1989). The sentences on all six convictions were within the statutory limits. And when a valid sentence has been put into execution, the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. *State v. Clark, supra*.

Though the sentences pronounced were valid, they did not match the court's intention. The court miscalculated when Castillas would be eligible for parole and for mandatory discharge.

Parole eligibility is governed by Neb. Rev. Stat. § 83-1,110 (Reissue 2008), which provides in relevant part: "(1) Every committed offender shall be eligible for parole when the

offender has served one-half the minimum term of his or her sentence as provided in [§] 83-1,107 . . . . No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term." Pursuant to Neb. Rev. Stat. § 83-1,107(2)(a) and (3) (Cum. Supp. 2012), the term of a committed offender is reduced "by six months for each year of the offender's term and pro rata for any part thereof which is less than a year," but "reductions of terms . . . may be forfeited, withheld, and restored" by correctional facility officials. Section 83-1,110 makes clear that these good time reductions do not apply to mandatory minimum sentences.

In *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002), we considered whether good time credit should be applied to the maximum portion of a sentence before the mandatory minimum sentence had been served. We held that it could not, because good time credit applies only after the mandatory minimum has been served. One of the purposes behind § 83-1,107, the good time credit statute, was to ensure that no one would reach mandatory discharge before reaching parole eligibility. We stated in *Johnson v. Kenney, supra*, that it would defeat the legislative intent if a defendant reached mandatory discharge before being eligible for parole, because the minimum portion of the sentence would have no meaning.

In calculating parole eligibility in *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012), this court held that a defendant must serve the mandatory minimum plus one-half of the remaining minimum sentence before becoming eligible for parole. A jury found William D. Kinser, Jr., guilty of felony flight to avoid arrest. After finding that he had five previous felony convictions, the district court concluded that Kinser was a habitual criminal and sentenced him to a term of not less than 18 nor more than 30 years' imprisonment. Kinser argued that the sentencing order must be reversed because the court intended for him to be eligible for parole after 10 years, whereas under the sentence imposed, he would not be eligible for parole for 14 years.

We held that with the minimum sentence of 18 years, Kinser was required to serve a minimum of 10 years plus one-half of

the remaining 8 years before he would be eligible for parole. During sentencing, the court had stated:

> "[Kinser] will be sentenced . . . [o]n Count I [fleeing to avoid arrest], which is the felony, [to] not less than 18 years and not more than 30 years. The minimum will include the mandatory minimum of 10 years with a two-year revocation of his license. Those sentences will be served concurrent. I give him credit for 190 days that he has served."

Id. at 568-69, 811 N.W.2d at 233.

On appeal, Kinser claimed that the district court erred in sentencing him as a habitual criminal and in imposing an erroneous sentence. We found that the sentencing court did not clearly state that Kinser would be eligible for parole after serving 10 years, but that even if it had, the question would be resolved by Neb. Rev. Stat. § 29-2204(1) (Reissue 2008). Any discrepancy between the minimum sentence of 18 years for Kinser's flight to avoid arrest conviction and the statements of the sentencing court regarding parole eligibility would be controlled by the court's statements with regard to the minimum sentence. Pursuant to our holding in *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002), good time credit would not reduce the 10-year mandatory minimum portion of Kinser's sentence for flight to avoid arrest. Thus, assuming no loss of good time credit, Kinser was required to serve the 10-year mandatory minimum plus 4 of the remaining 8 years of the minimum sentence, less credit for time served, before becoming eligible for parole.

Logically, a defendant must serve the mandatory minimum portion of a sentence before earning good time credit toward the maximum portion of the sentence. *Johnson v. Kenney, supra*, indicates that a defendant receives no good time credit until after serving any mandatory minimum. Thus, a defendant would be unable to earn good time credit against either the minimum or maximum sentence until the defendant had served the mandatory minimum sentence. As noted in *State v. Kinser, supra*, the parole eligibility date is determined by subtracting the mandatory minimum sentence from the court's minimum sentence, halving the difference, and adding that difference to

the mandatory minimum. Similarly, the mandatory discharge date is computed by subtracting the mandatory minimum sentence from the maximum sentence, halving the difference, and adding that difference to the mandatory minimum.

Mandatory minimum sentences cannot be served concurrently. A defendant convicted of multiple counts each carrying a mandatory minimum sentence must serve the sentence on each count consecutively.

Accordingly, the court was required to sentence Castillas to consecutive terms for each conviction carrying a mandatory minimum. The court incorrectly computed Castillas' parole eligibility date because it mistakenly used 20 years as the mandatory minimum sentence instead of the required 25 years. Five of the convictions were Class IC felonies, each carrying a mandatory 5-year minimum. See § 28-105(1).

Castillas was sentenced to 30 to 80 years. Subtracting the mandatory minimum sentence, 25 years, from the court's minimum sentence, 30 years, leaves 5 years for which Castillas could receive good time credit. Castillas must serve half of those 5 years, or 2½ years, plus the mandatory minimum of 25 years before becoming eligible for parole. Accordingly, under the court's sentence, Castillas would be eligible for parole in 27½ years, assuming no loss of good time.

Similarly, subtracting the mandatory minimum sentence of 25 years from the maximum sentence of 80 years leaves 55 years for which Castillas could receive good time credit. Castillas must serve half of those 55 years, or 27½ years, plus the mandatory minimum of 25 years before becoming eligible for mandatory release. Accordingly, under the court's sentence, Castillas would reach his mandatory discharge date in 52½ years, assuming no loss of good time.

In summary, based on the sentences pronounced by the court, Castillas will be eligible for parole in 27½ years and eligible for mandatory discharge in 52½ years, assuming no loss of good time. However, the court told Castillas that he would be eligible for parole in 25 years and subject to mandatory discharge in 40 years, assuming no loss of good time.

[11] If there is a conflict between the court's sentence and its truth in sentencing advisement, the statements of

the minimum and maximum limits control. Pursuant to § 29-2204(1), in imposing an indeterminate sentence upon an offender, the court shall:

> (A) Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony . . . .
>
> . . . .
>
> (b) Advise the offender on the record the time the offender will serve on his or her minimum term before attaining parole eligibility assuming that no good time for which the offender will be eligible is lost; and
>
> (c) Advise the offender on the record the time the offender will serve on his or her maximum term before attaining mandatory release assuming that no good time for which the offender will be eligible is lost.
>
> If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility or between the statement of the maximum limit of the sentence and the statement of mandatory release, the statements of the minimum limit and the maximum limit shall control the calculation of the offender's term.

Castillas argues that because the court intended to give an aggregate sentence making him eligible for parole after 25 years, the intention of the sentencing court should prevail. Castillas asserts that because the sentences rendered in this case clearly did not comport with the intention of the court, the sentences are erroneous. He requests that this court remand the cause for resentencing in conformity with the trial court's articulated intentions.

Castillas' actual aggregate sentence is computed based on the court's statement of the minimum and maximum limits of 30 to 80 years. As computed above, Castillas will be eligible for parole in 27½ years and subject to mandatory discharge in 52½ years, assuming no loss of good time.

Castillas was sentenced after he was convicted; therefore, no prejudice based on the court's mathematical error has been shown. He was given valid sentences within the statutory range, even though the sentences were contrary to the court's

intentions. If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility or between the statement of the maximum limit of the sentence and the statement of mandatory release, the statements of the minimum limit and maximum limit shall control the calculation of the offender's term. See § 29-2204(1).

CONCLUSION

For the reasons set forth, we find no merit to any of Castillas' assignments of error. We therefore affirm the judgments of conviction and the sentences imposed.

AFFIRMED.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
RANDALL J. BROMM, APPELLANT.
826 N.W.2d 270

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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. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal.
3. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
4. **Evidence: Proof: Words and Phrases.** Direct evidence is that evidence which proves the fact in dispute directly without inference or presumption.
5. **Evidence.** Direct evidence encompasses not just testimonial evidence, but the admission of documents and other tangible items.
6. **Search and Seizure: Police Officers and Sheriffs.** The purpose of the exclusionary rule is to deter police misconduct.
7. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Negligence.** The exclusionary rule should not apply when police mistakes are the result of negligence rather than systemic error or reckless disregard of constitutional requirements.