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11/03/2026 01:02 PM CST

and that the county court and the district court erred in not sustaining Bromm's motion to suppress. Accordingly, we reverse the decision of the Court of Appeals.

Because the Court of Appeals determined that the evidence should be suppressed, it did not consider Bromm's assignments of error and arguments concerning the horizontal gaze nystagmus test, administration of the preliminary breath test, and alleged errors in the arresting officer's report. We therefore remand the cause to the Court of Appeals to consider Bromm's remaining assignments of error.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. BILLY RAMIREZ, APPELLANT.

825 N.W.2d 801

Filed February 8, 2013. No. S-12-251.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.
2. ____: ____. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
4. **Criminal Law: Juries.** The determination of whether an injury is a "serious bodily injury" is a question of fact for the jury.
5. **Criminal Law: Restitution: Damages.** Neb. Rev. Stat. § 29-2280 (Reissue 2008) vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which a defendant is convicted.
6. **Sentences: Restitution.** After the sentencing court determines that a conviction warrants restitution, it then becomes the sentencing court's factfinding responsibility to determine the victim's actual damages and the defendant's ability to pay.
7. ____: ____. Under Neb. Rev. Stat. § 29-2281 (Reissue 2008), the sentencing court may hold a hearing at the time of sentencing to determine the amount of restitution.
8. **Effectiveness of Counsel: Records: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.

9. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

Billy Ramirez was convicted by a jury of third degree assault, a Class I misdemeanor under Neb. Rev. Stat. § 28-310 (Reissue 2008). The district court sentenced him to 24 months of probation and ordered him to pay restitution to the victim pursuant to Neb. Rev. Stat. § 29-2280 (Reissue 2008). Ramirez appeals the restitution order and alleges ineffective trial counsel.

BACKGROUND

Brant Van Boening and his wife, Joy Van Boening, were on a bicycle ride in Hall County, Nebraska. The couple had stopped their bicycles on the shoulder of the road to allow a few vehicles to pass. One of the vehicles waiting to pass was a truck driven by Ramirez, who was waiting to turn right.

While Joy was waiting for the vehicles to pass, Ramirez told her to "get the fuck out of the way." Joy abided and quickly crossed the road. Brant, however, remained on the shoulder and began cleaning his glasses. At the time, Ramirez believed Brant was challenging him to get out of his truck. Ramirez "laid on the horn" and told Brant to get out of his way. Brant then walked behind Ramirez' truck and began reading Ramirez' license plate number out loud. Ramirez exited the vehicle, and a verbal confrontation ensued.

After 15 to 20 seconds of arguing, Ramirez retreated to his truck and began to leave. As Ramirez pulled away, Brant stated, "[s]ee you later, ese." Ramirez, a man of Mexican heritage, took offense, stopped his truck, and again confronted Brant. According to Ramirez, he then "backslapped" Brant with his right hand. According to Joy and Brant, Ramirez punched Brant. Brant "heard a pop" and "saw white" when he was struck by Ramirez.

When a sheriff's deputy arrived on the scene, Brant reported that his jaw was causing him pain. The deputy noted that Brant's face was not swollen or bruised. The deputy offered to have an ambulance dispatched, but Brant declined in favor of seeking his own medical treatment. Ramirez was given a citation for third degree assault and was allowed to leave.

After returning home, Brant's jaw became swollen and he was unable to open or close his mouth. Brant called his dentist, Dr. David Stoddard, and went to his office 2 days after the incident. Stoddard took an x ray, which revealed that his jaw was fractured in two places. Stoddard referred Brant to Dr. Martin Tilley, an oral and maxillofacial surgeon. Tilley wired Brant's jaw shut for 6 to 7 weeks.

Voir Dire and Trial

Ramirez was charged with first degree assault under Neb. Rev. Stat. § 28-308 (Cum. Supp. 2012) and the lesser-included offense of third degree assault under § 29-2280. Before trial, LaDonna Ortega was removed from the jury pool during voir dire. According to Ramirez, Ortega was the only member of the venire with a Hispanic surname. When questioned, Ortega told the court that she had worked with Brant's parents. After voir dire was completed, the court, off the record, took the peremptory strikes from counsel. When court resumed, the court dismissed 14 members of the venire, including Ortega. Explanations were not given by the court or by counsel for any of the dismissals.

At the trial, Ramirez argued that he did not break Brant's jaw. He alleged that Brant's jaw must have been broken after the incident. At trial, the State offered the testimony of

Stoddard and Tilley. Both agreed that, based on their training and expertise, Brant's injury was consistent with being hit in the face or mouth. Stoddard noted that it would not take much force to fracture Brant's jaw because Brant is a "slightly-built guy." Tilley testified that it was not uncommon for there to be no swelling or bruising with a fractured jaw. Additionally, both Brant and Joy testified that Brant's jaw did not suffer any additional injuries between the time of the assault and the x ray taken at Stoddard's office.

At the close of evidence, both the charge of first degree assault and the charge of the lesser-included offense of third degree assault were submitted to the jury. After deliberations, the jury found Ramirez guilty of third degree assault. A restitution hearing was held, and the district court sentenced Ramirez to 24 months of probation and ordered him to pay restitution for Brant's medical bills of $2,256.62 and for his lost income of $500.

ASSIGNMENTS OF ERROR

Ramirez has assigned that the district court erred in ordering Ramirez to pay restitution for medical expenses after the jury convicted him only of third degree assault. Ramirez also alleges that his trial counsel was ineffective in failing to challenge the racial composition of the jury and in failing to make a *Batson*[1] challenge to the striking of the only member of the prospective jury panel with a Hispanic surname.

STANDARD OF REVIEW

[1,2] Sentences within statutory limits will be disturbed by an appellate court only if the sentence complained of was an abuse of judicial discretion.[2] An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.[3]

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[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[2] *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

[3] *Id.*

[3] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[4]

ANALYSIS

Restitution

The crux of Ramirez' restitution argument is that by not convicting him of first degree assault, the jury did not believe that Ramirez had broken Brant's jaw, which Ramirez argues is a per se "serious bodily injury" under § 28-308. Therefore, according to Ramirez, restitution for the broken jaw was improper under § 29-2280, because the damages were not "a direct result of the offense for which the defendant has been convicted." We disagree.

[4] First, Ramirez' underlying argument that a broken jaw is a per se "serious bodily injury" is without merit. The determination of whether an injury is a "serious bodily injury" is a question of fact for the jury.[5] Nebraska law does not classify injuries, such as a broken jaw, as a per se "serious bodily injury."[6] Rather, the jury is free to make such a determination on its own for purposes of a conviction.[7] Thus, the jury's decision to not convict Ramirez of causing "serious bodily injury" does not necessarily mean the jury found that Ramirez did not break Brant's jaw.

[5] Second, it is the sentencing court, not the jury, that determines what damages a victim suffered for purposes of restitution. Section 29-2280 vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which a defendant is convicted.[8] In its relevant part, the restitution statute states:

> *A sentencing court* may order the defendant to make restitution for the actual . . . loss sustained by the victim as a direct result of the offense for which the defendant

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[4] *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012).

[5] See *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

[6] See *id.*

[7] *Id.*

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

> has been convicted. . . . Whenever the *court* believes that restitution may be a proper sentence . . . the *court* shall order that the presentence investigation report include documentation regarding the nature and amount of the actual damages sustained by the victim.[9]

(Emphasis supplied.)

[6,7] After the sentencing court determines that a conviction warrants restitution, it then becomes the sentencing court's factfinding responsibility to determine the victim's actual damages and the defendant's ability to pay.[10] Under Neb. Rev. Stat. § 29-2281 (Reissue 2008), the sentencing court may hold a hearing at the time of sentencing to determine the amount of restitution.[11] The sentencing court's determination of "restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record."[12] To be relied upon by the sentencing court, the evidence must be sworn and corroborated.[13]

Here, restitution was a proper penalty for Ramirez' third degree assault conviction. Jury instruction No. 2 sets out the following: "**The elements of Assault in the Third Degree are:** (1) That . . . Ramirez caused bodily injury to Brant . . . . (2) That [Ramirez] did so intentionally or knowingly. (3) That [Ramirez] did so on or about June 27, 2010, in Hall County, Nebraska." Therefore, by convicting Ramirez of third degree assault, the jury necessarily found that Ramirez intentionally, knowingly, or recklessly caused bodily injury to Brant.

Nebraska statute allows a victim to recover medical costs and lost income associated with bodily injuries suffered during the crime for which the defendant was convicted.[14] Under § 29-2282, restitution is warranted "[i]f the offense results in bodily injury." Section 29-2282 states that "*the court* may

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[9] § 29-2280.

[10] See *State v. Clapper*, 273 Neb. 750, 732 N.W.2d 657 (2007).

[11] See *id.*

[12] § 29-2281.

[13] See *State v. McLain*, 238 Neb. 225, 469 N.W.2d 539 (1991).

[14] See Neb. Rev. Stat. § 29-2282 (Reissue 2008).

require payment of necessary medical care, including, but not limited to, physical or psychological treatment and therapy, and payment for income lost due to such bodily injury." (Emphasis supplied.) Therefore, Ramirez' conviction for third degree assault warranted the sentencing court's decision to hold a restitution hearing to determine the loss suffered by Brant due to his bodily injuries.

At that restitution hearing, the sentencing court properly received evidence under § 29-2280 to determine the amount of damages. Brant, under sworn testimony, and without objection, testified that he was struck in the face by Ramirez, that such strike resulted in a broken jaw, and that he incurred medical expenses and lost income as a direct result of the injury. To corroborate his damages, Brant laid the foundation for his medical bills incurred as a result of the injury. These exhibits were received and admitted into evidence by the sentencing court.

When afforded the opportunity to present testimony and evidence at the restitution hearing, Ramirez refused and stated that the entire process was a "charade." However, when given the opportunity to speak directly to the court after the restitution hearing but before the sentence was imposed, Ramirez made the following unsworn statement:

> Now, with regards [sic] to the injuries, the restitution, it was never proven that I actually caused that injury. Dr. Stoddard, the dentist that he went to see, noted the day after the incident that he saw no bleeding, no swelling, no injuries of any sort. When he went to the surgeon four days later, it was also noted that he didn't see any injuries, any bleeding, any swelling. Something had to have happened from the time that I actually slapped him to the time he went to see the surgeon.

Ramirez' statement was an unsworn and uncorroborated statement made after the court received the evidence concerning restitution. Under our precedent, the sentencing court could not properly rely on Ramirez' statement for purposes of determining restitution.[15]

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[15] See *State v. McLain, supra* note 13.

Even considering Ramirez' statement, we find the evidence presented at the restitution hearing clearly established that Ramirez broke Brant's jaw and that such injury resulted in documented medical care expenses and lost income. Brant, without objection, testified that Ramirez broke his jaw during the assault for which Ramirez was convicted. In contrast, when given the opportunity to raise a defense, Ramirez failed to provide any competent evidence to support his theory that he did not break Brant's jaw. Therefore, Ramirez' argument that his conviction did not warrant restitution is without merit.

Therefore, we hold that the district court did not abuse its discretion in requiring Ramirez to pay restitution for Brant's medical expenses and lost income for his conviction for third degree assault.

Claims of Ineffective Assistance of Counsel

[8,9] Ramirez also raises claims of ineffective assistance of trial counsel. A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[16] Rather, the determining factor is whether the record is sufficient to adequately review the question.[17] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[18]

Ramirez has assigned that his trial counsel was ineffective during voir dire in two ways. First, trial counsel failed to challenge the racial composition of the jury. Ramirez alleges that the jury was composed of only Caucasians and that the entire jury pool had proportionally fewer Hispanics than resided in Hall County, Nebraska, at the time of the trial. Second, Ramirez argues that trial counsel was ineffective in failing to raise a *Batson* challenge to the striking of Ortega, who Ramirez alleges was the only member of the prospective jury with a Hispanic surname.

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[16] *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011).

[17] *Id.*

[18] *Id.*

At this time, the record is insufficient to address Ramirez' claims. There is no evidence in the record of the racial composition of the jury pool, the procedure utilized for the jury pool, or the racial composition of the Hall County community. Additionally, for purposes of the *Batson* challenge, the record is unclear on whether Ortega was even peremptorily struck by the State. Furthermore, the record does not include defense counsel's objections, if any, to the removal of Ortega or the State's reasons for exercising the alleged peremptory challenge.

An evidentiary hearing is required to properly resolve these issues, and therefore, these issues are not appropriate for review on direct appeal. Ramirez is free to raise these issues of ineffective assistance of trial counsel in a motion for postconviction relief.

CONCLUSION

The jury's decision to convict Ramirez of assault in the third degree does not preclude the sentencing court from ordering restitution for Brant's broken jaw. A broken jaw is not a per se "serious bodily injury," and the jury's rejection of assault in the first degree does not implicate the sentencing court's findings of fact on the damages actually suffered by Brant. We also find that the record is insufficient to address both of Ramirez' claims of ineffective assistance of counsel.

AFFIRMED.

JEREMIAH J., APPELLANT, V.
DAKOTA D., APPELLEE.
826 N.W.2d 242

Filed February 8, 2013. No. S-12-517.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was