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Black, we follow the reasoning of those courts that order the attorney fees be awarded directly to the legal services provider. We remand with directions for the attorney fees awarded by the district court to be awarded directly to the Creighton Legal Clinic.

## CONCLUSION

We affirm the judgment in favor of Black in all respects, but modify the designee of the attorney fee award. We direct the district court to amend its order so as to award the attorney fees directly to the Creighton Legal Clinic.

AFFIRMED AS MODIFIED.

MILLER-LERMAN, J., participating on briefs.

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STATE OF NEBRASKA, APPELLEE, V.
THOMAS P. MERCHANT, APPELLANT.
827 N.W.2d 473

Filed March 8, 2013. No. S-12-191.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
5. **Expert Witnesses: Evidence.** Expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue, and expert testimony concerning the status of the law does not tend to accomplish either of these goals.
6. ____: ____. Expert testimony concerning a question of law is generally not admissible in evidence.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

8. **Evidence.** Evidence which is not relevant is not admissible.
9. **Evidence: Words and Phrases.** Relevant evidence means evidence having 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.
10. **Criminal Law: Statutes: Legislature: Intent.** Generally, the established rule is that when construing a criminal statute, the existence of a criminal intent is regarded as essential and relevant, even though the terms of the statute do not require it, unless it clearly appears that the Legislature intended to make the act criminal without regard to the intent with which it was done.
11. **Public Policy: Words and Phrases.** Public welfare offenses are in the nature of neglect where the law requires care, or inaction where it imposes a duty.
12. **Public Policy: Negligence: Intent.** One accused of a public welfare offense, although not intending the violation, is in the position to prevent it with the exercise of reasonable due care.
13. **Criminal Law: Intent: Public Policy: Sentences.** With public welfare offenses, criminal penalties simply serve as an effective means of regulation, dispensing with the conventional mens rea requirement for criminal conduct.
14. **Motor Vehicles: Sales: Licenses and Permits: Public Policy.** The motor vehicle dealer licensing requirement found under Neb. Rev. Stat. § 60-1416 (Reissue 2010) is a public welfare offense.
15. **Motor Vehicles: Sales: Licenses and Permits: Public Policy: Legislature: Intent.** License requirements for buying, selling, and exchanging vehicles are not found in common law, but were created by the Nebraska Legislature with the intent to protect the public interest.
16. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for a new trial.

John S. Berry, of Berry Law Firm, for appellant.

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

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

MCCORMACK, J.

## I. NATURE OF CASE

Thomas P. Merchant was found guilty after a jury trial of the unlawful sale or purchase of a motor vehicle under Neb. Rev. Stat. § 60-1416 (Reissue 2010). Two issues presented by this

appeal are whether the trial court properly admitted "expert" testimony interpreting § 60-1416 and whether mens rea is a required element of that offense.

## II. BACKGROUND

According to Merchant, he was in the business of automotive wholesaling. In June 2011, Merchant arranged to exchange vehicles with Nebraska Auto Auction, Inc. (NAA). NAA is an automobile auction company that facilitates sales and purchases between dealers by guaranteeing the sellers receive payment and the buyers receive clean title to the vehicles purchased.

NAA holds a valid Nebraska auction license. By law, only licensed dealers can participate in the auctions held by NAA. NAA requires all auction participants to fill out necessary paperwork and to provide a copy of their state-issued dealer's license.

On June 1, 2011, Merchant exchanged vehicles through an NAA auction. In total, he sold 9 vehicles and purchased 19 more. For the vehicles he purchased, Merchant wrote separate checks totaling approximately $338,000. The checks were written by Merchant doing business under the title "The Auto Merchant Exchange."

Merchant completed and signed the paperwork associated with these transactions but never provided NAA a copy of a dealer's license. On the NAA registration form, Merchant wrote "wholesale only" and, when requested to provide "Type of Dealer," checked a box indicating "Wholesale." He listed his dealer's license number as "NF-4711."

NAA requested a copy of Merchant's dealer's license, but never received a copy. NAA reported Merchant to the Nebraska Motor Vehicle Industry Licensing Board. After determining Merchant did not have a dealer's license, the State charged Merchant with one count of being an unlicensed dealer.

Prior to trial, the court held a hearing to determine whether Merchant's prior convictions were admissible for purposes of impeachment. The State offered a certified copy of the judgment from the clerk of the district court for Weld County, Colorado. The exhibit showed that Merchant was convicted

of theft of more than $400 in August 1996 and was sentenced to 24 years of incarceration. The exhibit does not state when Merchant was released, but does indicate that the court last modified the sentence in February 2003. Counsel for Merchant objected to the admission of the exhibit, arguing that it was "somewhat convoluted and confusing" and that it does not prove by the preponderance of the evidence that Merchant was convicted of a felony in the past 10 years. The judge overruled the objection and, without further explanation, stated that the conviction represented by the exhibit could be used for impeachment purposes.

Additionally, the State requested a motion in limine to prevent Merchant from testifying about or putting on evidence concerning his lack of knowledge of the law requiring a license to conduct sales and/or purchases of motor vehicles in the State of Nebraska. The trial court granted the motion in limine.

At trial, the State called William S. Jackson as a witness. Jackson is the executive director with the State of Nebraska Motor Vehicle Industry Licensing Board. The board is responsible for licensing and regulating the manufacturers, distributors, salespersons, dealer agents, manufacturer representatives, and finance companies for Nebraska vehicles.

Jackson testified that in order to sell or purchase a vehicle in Nebraska, a person must be a licensed motor vehicle dealer, a licensed salesperson of a licensed dealer, or a bona fide consumer. He testified that a bona fide consumer is a person who purchases a vehicle, pays all taxes on the vehicle, and registers the vehicle prior to reselling. He also testified that a bona fide consumer cannot sell more than eight vehicles during a 1-year period.

Jackson further testified that the term "wholesale" refers to any dealer-to-dealer transaction and that "wholesale" transactions require a license. Merchant's counsel objected to this portion of the testimony, stating that it was irrelevant and that it invaded the province of the jury. The objection was overruled. Additionally, Jackson testified that he searched the Nebraska Motor Vehicle Industry Licensing Board's records and found no record of either Merchant's or The Auto

Merchant Exchange's having a license to buy and sell vehicles in Nebraska.

The State also called Shane L. Fox to testify. Fox is an investigator with the Wyoming Department of Transportation. Fox's duties in that position included monitoring and enforcing various motor vehicle dealer licenses for the State of Wyoming. Fox testified that he searched for Merchant and The Auto Merchant Exchange in the Wyoming Department of Transportation records and found that neither Merchant nor his company was a licensed dealer in the State of Wyoming. He also testified that the dealer No. NF-4711 used by Merchant was not a valid license number in Wyoming.

After the testimony of Fox, the State rested. Prior to testifying, Merchant made two offers of proof for the granted motion in limine. In his first offer of proof, Merchant testified that he had contacted a Wyoming attorney who told him he could wholesale vehicles in the State of Wyoming without a license. He also testified that he had contacted dealers in Nebraska who informed him that he did not need a license in Nebraska because he was a wholesaler in Wyoming. His second offer of proof would have been the testimony of a Wyoming attorney who, according to Merchant, would have testified that the Wyoming Department of Transportation told Merchant he could legally "wholesale" vehicles between dealers without a license.

The State objected to these offers of proof on the ground that Merchant's lack of knowledge of the illegality of his actions was irrelevant to any elements of the charged crime. Both objections on both offers of proof were sustained.

Merchant then took the stand. During direct examination, Merchant testified that he transported wholesale cars with his truck and trailer for a $250-per-car transportation fee. Merchant testified that he had done previous business in Nebraska with the Husker Auto Group. Merchant also admitted during direct examination that he had been convicted of a felony within the past 10 years.

On cross-examination, Merchant testified that he was directly involved with the NAA transactions that occurred on June 1, 2011. He testified that money did exchange hands and

that he personally wrote checks for the vehicles purchased. He testified that he filled out and signed most of the paperwork for these transactions and that the paperwork "reassigned" ownership of the vehicles. He acknowledged that he was not a licensed motor vehicle dealer in Nebraska or any state and that he was not working for a licensed dealer. Merchant admitted that he did not title, register, or pay taxes on the vehicles purchased at the NAA auction on June 1.

Following Merchant's testimony, jury instructions were given to the jury. In relevant part, jury instruction No. 3 stated the following:

> Regarding the crime of Unlawful Sale or Purchase of Motor Vehicle, the State must prove beyond a reasonable doubt that:
>
> (1) On the day he sold or purchased a motor vehicle described in the evidence . . . Merchant did not possess a valid Nebraska Motor Vehicle Dealer's license, Motor Vehicle Auction Dealer license, Motor Vehicle Salesperson license, or Motor Vehicle Dealer's Agent license, and
>
> (2) Any one of the following:
>
> (a) . . . Merchant did not acquire the vehicle he sold or purchased for use in business or for pleasure purposes, or
>
> (b) the motor vehicle sold was not titled in . . . Merchant's name, or
>
> (c) the motor vehicle sold was not registered to . . . Merchant in accordance with the laws of his resident state, or
>
> (d) . . . Merchant sold more than eight registered motor vehicles within a twelve month period;
>
> and
>
> (3) . . . Merchant did so on or about June 1, 2011, in Lancaster County, Nebraska.

Counsel for Merchant objected to the use of this instruction and alleged that the bona fide consumer portion of the instruction was unnecessary and confusing. Merchant's proposed instruction stated:

> [R]egarding the crime of acting without a license, the State must prove beyond a reasonable doubt that:

> . . . Merchant acted as a motor vehicle dealer, an auction dealer, a motor vehicle salesperson, or dealers agent without having first obtained a license and . . . Merchant did so on or about June 1st, 2011, in Lancaster County, Nebraska.

The court overruled Merchant's objection and did not give the proposed instruction.

During the State's closing argument, the prosecutor stated: "Wholesaler is defined in Nebraska Statutes. It means any person actively and regularly engaged in the act of selling, leasing for a period of 30 or more days, or exchanging new or used motor vehicles, who buy, sell, exchange . . . ." Counsel for Merchant objected and requested permission to approach. Counsel for Merchant stated there was no definition of "wholesaler" in the statutes and that the prosecutor's statement was misleading. The trial court agreed, and counsel asked for "either mistrial or . . . per curiam Instruction." The trial court agreed to give an instruction and told the jury that "wholesaler" is not defined and that the State was simply interpreting the statutes at issue.

After closing arguments, the jury convicted Merchant of the unlawful sale or purchase of a motor vehicle. An enhancement hearing was held to determine whether Merchant was a habitual criminal. The State offered exhibit 11, and the court admitted it over the objections of Merchant. Exhibit 11 was a letter from the Colorado Department of Corrections outlining Merchant's criminal history. Merchant was classified as a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 2008) and was sentenced to 12 to 30 years' imprisonment.

## III. ASSIGNMENTS OF ERROR

Merchant claims, restated and summarized, that the trial court erred when it (1) prevented Merchant from testifying about his knowledge of the licensing requirement and his lack of mens rea, (2) allowed Jackson to testify to his interpretation of the licensing requirements, (3) submitted jury instruction No. 3 to the jury, (4) allowed the prosecution to impeach Merchant with a prior conviction, (5) denied the motion for retrial after the prosecutor misstated the law during closing

arguments, (6) found the evidence to be sufficient to support the conviction, and (7) excessively sentenced Merchant.

## IV. STANDARD OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[1] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[2] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[3]

[4] Whether jury instructions given by a trial court are correct is a question of law.[4] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[5]

## V. ANALYSIS

### 1. Jackson's Testimony

We begin with Merchant's second assignment of error. Merchant asserts that the trial court erred in allowing the State's witness to testify as to his interpretation of the law regarding the licensing of motor vehicle dealers in the State of Nebraska. We agree.

The Nebraska rules of evidence provide the relevant standards for the admissibility of testimony for both lay witnesses and experts. Neb. Evid. R. 701, Neb. Rev. Stat. § 27-701 (Reissue 2008), states:

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[1] *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

[2] *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012).

[3] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[4] *State v. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d 608 (2012).

[5] *Id.*

> If the witness is not testifying as an expert, his testimony in the form of opinions or inference is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Likewise, Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), allows expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." For both lay and expert witnesses, the testimony must aid the jury in either understanding the evidence or determining a fact at issue.

Specifically, Merchant challenges the following questions and answers during the direct examination of Jackson by the State. The prosecutor asked, "And in the state of Nebraska a license is required in order to be able to do that legally; is that correct?" to which Jackson replied affirmatively. The prosecutor followed with, "And that's whether it be wholesale or retail?" Counsel for Merchant objected, stating, "Objection, your Honor, that goes — first of all, relevance. Second of all, that's . . . for the jury to say." The objection was overruled, and the prosecutor restated her question: "It [d]oesn't matter whether we're talking about something that's described as wholesale or something that's described as . . . retail, in the state of Nebraska you have to have a license?" Jackson again responded in the affirmative.

[5,6] We find that Jackson's testimony interpreting the statutes was not relevant and was unfairly prejudicial to Merchant. In *Kaiser v. Western R/C Flyers*,[6] the issue at trial was whether the relevant zoning ordinance barred operation of a model airplane airfield near Springfield, Nebraska. Both parties introduced expert testimony in support of their respective interpretations of the ordinance. We held both parties' expert evidence to be irrelevant and explained:

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[6] *Kaiser v. Western R/C Flyers*, 239 Neb. 624, 477 N.W.2d 557 (1991).

> [E]xpert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue[,] and . . . expert testimony concerning the status of the law does not tend to accomplish either of these goals. Expert testimony concerning a question of law is generally not admissible in evidence. . . . The interpretation of a zoning ordinance presents a question of law, and we decline to consider any expert testimony as to what constitutes a "commercial" or a "private" recreational use under the Springfield zoning ordinances.[7]

(Citations omitted.)

In *Sports Courts of Omaha v. Brower*,[8] a law professor testified, over objection, that the actions taken by an attorney serving as monitor and agent of a corporation constituted a disposition of collateral under provisions of the Nebraska Uniform Commercial Code and that appropriate notice was not given. We rejected this testimony as irrelevant, because the testimony did not help the trier of fact understand the evidence or determine a fact issue.[9] Likewise, in *Sasich v. City of Omaha*,[10] the plaintiff brought an action seeking an injunction against certain Omaha, Nebraska, zoning ordinances. In dicta, we criticized the trial court for admitting expert testimony from a legal scholar on the status of the zoning laws.[11] We stated that such evidence is irrelevant and inadmissible and noted that such scholarship "should not reach a judge's attention by way of the witness stand."[12]

Here, Jackson's testimony improperly interpreted the dealer licensing statute for the court. Much like the testimony in *Kaiser*, Jackson interpreted the actions of Merchant to be in violation of the statute. Jackson testified that Merchant's self-described job title of "wholesaler" was included in the

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[7] *Id.* at 628, 477 N.W.2d at 560.

[8] *Sports Courts of Omaha v. Brower*, 248 Neb. 272, 534 N.W.2d 317 (1995).

[9] *Id.*

[10] *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984).

[11] *Id.*

[12] *Id.* at 873-74, 347 N.W.2d at 99.

definition of "[m]otor vehicle dealer" under Neb. Rev. Stat. § 60-1401.26 (Reissue 2010), which Jackson testified was subject to licensing requirements under § 60-1416. Similar to *Kaiser*, where the meaning of a zoning ordinance was considered a question of law, Jackson's interpretation of what "wholesale" means and whether "wholesaling" requires a license is a question of law and is inappropriate for expert testimony. Jackson's testimony did not aid the jury in determining the factual issues of the case and therefore was irrelevant.

The State argues that Merchant did not properly preserve this issue for appeal and that Merchant's use of the term wholesaler "opened the door"[13] to Jackson's testimony. Neither argument has merit. First, the State argues that Merchant did not properly object to the testimony during trial and that a party may not assert a different ground for an objection on appeal.[14] Although the legal proposition is correct, it is inapplicable. Merchant properly objected to Jackson's testimony as being irrelevant, and the admission of the testimony constitutes a ground for remand.

Second, the State argues that Merchant "'opened the door'"[15] by introducing evidence that he was a "wholesaler" not subject to the licensing requirements. By "'opening the door,'"[16] the State argues that irrelevant evidence becomes relevant. We disagree. Merchant's labeling himself as a "wholesaler" does not permit the State to introduce testimony that a "wholesaler" is in fact covered by the law. Such testimony is still irrelevant and impinges on the role of the judge to instruct the jury on the law.[17]

We find Jackson's testimony to be improper and the trial court's decision to admit this "expert" testimony to be an abuse of discretion. Jackson's testimony instructed the jury on how to make its decision of Merchant's guilt. Only the trial court

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[13] Brief for appellee at 27.

[14] See *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[15] See *State v. Harrold*, 256 Neb. 829, 855, 593 N.W.2d 299, 318 (1999).

[16] Brief for appellee at 27.

[17] See *Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992).

should be instructing the jury on the relevant law.[18] Thus, it is patently clear to this court that admitting Jackson's testimony was an abuse of discretion. We remand the cause for a new trial.

### 2. Remaining Assignments of Error

[7] An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.[19] However, we find it prudent to discuss some of the remaining assignments of error to provide guidance to the trial court on these issues which are likely to resurface on remand.

#### (a) Mens Rea

Merchant argues that he should have been allowed to testify regarding his knowledge of the licensing requirement, his lack of intent, or his lack of mens rea. We disagree. Such testimony is irrelevant, because § 60-1416 is a public welfare offense which does not require proof of mens rea.

[8-10] All relevant evidence normally is admissible. Evidence which is not relevant is not admissible.[20] "Relevant evidence means evidence having 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."[21] Generally, the established rule is that when construing a criminal statute, the existence of a criminal intent is regarded as essential and relevant, even though the terms of the statute do not require it, unless it clearly appears that the Legislature intended to make the act criminal without regard to the intent with which it was done.[22] As explained by the U.S. Supreme Court in *United States v. Balint*[23]:

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[18] See *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999).

[19] *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[20] See Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008).

[21] Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008).

[22] See *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

[23] *United States v. Balint*, 258 U.S. 250, 252, 42 S. Ct. 301, 66 L. Ed. 604 (1922).

> [I]n the prohibition or punishment of particular acts, the State may in the maintenance of a public policy provide "that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*.

[11-13] We have held that public welfare offenses do not fit neatly into an accepted classification of common-law offenses because they are not in the nature of positive aggressions or invasions with which the common law dealt.[24] Rather, the offenses are "'in the nature of neglect where the law requires care, or inaction where it imposes a duty.'"[25] One accused of such an offense, although not intending the violation, is in the position to prevent it with the exercise of reasonable due care.[26] With public welfare offenses, criminal penalties simply serve as an effective means of regulation, dispensing with the conventional mens rea requirement for criminal conduct.[27]

In *State v. Perina*,[28] we recently determined that misdemeanor motor vehicle homicide is a public welfare offense which does not require proof of mens rea. We noted that motor vehicle homicide was a traffic law, not found in common law, based on the negligence of the driver. The law exists not to prevent "'evil conduct,'" but, rather, to deter negligent conduct in hopes of protecting the traveling public.[29] Thus, mens rea is not a required element of misdemeanor motor vehicle homicide.

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[24] *State v. Perina, supra* note 22.

[25] *Id.* at 468, 804 N.W.2d at 169 (quoting *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952)).

[26] *State v. Perina, supra* note 22.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 473, 804 N.W.2d at 172.

Here, the Legislature has made it explicitly clear that the motor vehicle dealer licensing requirements, under which Merchant was convicted, are regulatory measures intended to protect Nebraska's public welfare. Neb. Rev. Stat. § 60-1401.01(1) (Reissue 2010) states:

> The Legislature finds and declares that the distribution and sales of motor vehicles, motorcycles, and trailers in the State of Nebraska vitally affects the general economy of the state, the public interest, the public welfare, and public safety and that in order to promote the public interest and the public welfare and in the exercise of its police power, it is necessary to regulate motor vehicle, motorcycle, and trailer dealers, manufacturers, distributors, and their representatives doing business in the State of Nebraska.

[14,15] Therefore, we find that acting without a dealer's license under § 60-1416 is a public welfare offense, which does not require proof of mens rea. License requirements for buying, selling, and exchanging vehicles are not found in common law, but were created by the Nebraska Legislature with the intent to protect the public interest. Thus, all evidence and testimony regarding Merchant's knowledge of the dealer's licensing requirement, his lack of intent, or his lack of mens rea are irrelevant.

(b) Jury Instruction No. 3

Merchant argues that jury instruction No. 3 was misleading and confusing and that it prevented the jury from determining whether his conduct of wholesaling vehicles violated the law. We agree.

First, we must compare the instruction with the motor vehicle industry licensing statutes found under chapter 60, article 14, of the Nebraska Revised Statutes. Section 60-1416 states that "[a]ny person acting as a motor vehicle dealer . . . without having first obtained the license provided in section 60-1406 is guilty of a Class IV felony . . . ." Motor vehicle dealer is defined under § 60-1401.26 as

> any person, other than a bona fide consumer, actively and regularly engaged in the act of selling, leasing for a

> period of thirty or more days, or exchanging new or used motor vehicles, trailers, and manufactured homes who buys, sells, exchanges, causes the sale of, or offers or attempts to sell new or used motor vehicles.

Under § 60-1401.26, the only exception to a person who buys and sells motor vehicles from being considered a "[m]otor vehicle dealer" is a person who is a "bona fide consumer." Bona fide consumer is defined under Neb. Rev. Stat. § 60-1401.07 (Reissue 2010) as

> an owner of a motor vehicle, motorcycle, or trailer who has acquired such vehicle for use in business or for pleasure purposes, who has been granted a certificate of title on such motor vehicle, motorcycle, or trailer, and who has registered such motor vehicle, motorcycle, or trailer, all in accordance with the laws of the residence of the owner, except that no owner who sells more than eight registered motor vehicles, motorcycles, or trailers within a twelve-month period shall qualify as a bona fide consumer.

Based on our comparison of jury instruction No. 3 to the relevant statutes, we observe that the instruction is incomplete. Summarized, the law requires a person who buys and sells vehicles either to be a bona fide consumer or to be licensed.[30] Instruction No. 3(A)(1) correctly states that in order to find Merchant guilty, the jury must find that he did not have a proper license. Instruction No. 3(A)(2) is also correct in requiring the jury to determine whether Merchant was a "bona fide consumer." But instruction No. 3(A) is incomplete because it assumes the transactions made by Merchant were sufficient to establish that he was a "motor vehicle dealer." At trial, Merchant's crucial argument was that his "wholesale" transactions were not covered under the definition of "[m]otor vehicle dealer" and, thus, that he was not subject to the licensing requirement. Therefore, a crucial, and contested, element of the crime is whether Merchant's transactions classified him as a motor vehicle dealer. This factual determination should be made by the jury and not assumed

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[30] Compare §§ 60-1416, 60-1401.26, and 60-1401.07.

by the instructions. Such an omission would be prejudicial because it withdraws from the jury an essential issue or element in the case.[31]

Therefore, we find that instruction No. 3 does not "adequately cover the issues."[32] An adequate instruction should also ask the jury to determine whether Merchant bought, sold, exchanged, caused the sale of, or offered or attempted to sell new or used motor vehicles on or around June 1, 2011. Adding such an instruction allows the jury to determine all of the elements and essential facts in this case.

### (c) Prior Conviction, Closing Argument Misstatement, and Excessive Sentence

Merchant contends that the trial court erred by admitting his prior conviction, not granting his motion for new trial after the prosecutor's misstatement during closing arguments, and giving an excessive sentence. Because we have determined that the trial court committed reversible error by admitting Jackson's "expert" testimony, we do not need to address these assignments of error, as they are unlikely to occur again on remand.

The prior conviction assignment of error is unlikely to occur again. Merchant objected to the use of the certified document provided by the Weld County District Court because it did not give the date when Merchant was released from incarceration for his previous felony conviction. At trial, the trial court was able to infer from the document that Merchant was incarcerated until at least February 2003. Thus, the conviction was within 10 years of the start of the trial, making it admissible for purposes of impeachment.[33] Such an inference, however, cannot be made for a trial occurring in February 2013 or after. Therefore, this issue is unlikely to occur on remand.

Likewise, we find that the prosecutorial misstatement and excessive sentence assignments of error are unlikely to occur

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[31] See *State v. Brown, supra* note 18.

[32] See *State v. Kibbee, supra* note 2, 284 Neb. at 103, 815 N.W.2d at 897.

[33] Neb. Evid. R. 609(2), Neb. Rev. Stat. § 27-609(2) (Reissue 2008).

on remand. We need not address these three assignments of error.

(d) Sufficiency of Evidence

[16] Having found reversible error, we must determine whether the totality of the evidence admitted by the trial court was sufficient to sustain Merchant's conviction. The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court would have been sufficient to sustain a guilty verdict.[34]

The evidence admitted showed that Merchant purchased and sold vehicles with NAA on June 1, 2011. The evidence established that Merchant did so without a valid motor vehicle dealer's license. Furthermore, there was sufficient evidence demonstrating that Merchant was a not a bona fide consumer when he purchased and sold the vehicles. Thus, all the evidence, whether properly admitted or not, was sufficient to sustain a guilty verdict on the crime charged and the Double Jeopardy Clause does not bar retrial.

## VI. CONCLUSION

The trial court erred in admitting Jackson's testimony interpreting § 60-1416 to apply to the "wholesale" transactions conducted by Merchant. We remand the cause for a new trial consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[34] *State v. Payne-McCoy, supra* note 4.

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SUSAN C. WULF, APPELLANT, V.
SHARAD KUNNATH, M.D., APPELLEE.
827 N.W.2d 248

Filed March 8, 2013. No. S-12-307.

1. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
2. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an