a different judge. The State is ordered to specifically comply with the plea agreement it made with Landera when resentencing takes place. We also note for purposes of resentencing that the trial court erred in imposing minimum sentences that exceed the minimum sentence authorized by statute.

SENTENCES VACATED, AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V.
RUSSELL S. PITTMAN, APPELLANT.
817 N.W.2d 784

Filed July 24, 2012. No. A-11-415.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
4. ____: ____. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** To establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
6. **Effectiveness of Counsel: Proof: Appeal and Error.** To show prejudice due to ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
7. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.

8. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
9. ____: ____. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
10. ____: ____. If trial counsel was ineffective, then the defendant suffered prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
11. ____: ____. When a defendant suffers prejudice from appellate counsel's failure to bring a claim of ineffective assistance of trial counsel, an appellate court considers whether appellate counsel's failure to bring the claim qualifies as a deficient performance under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, the appellate court examines whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel. If it was, then the defendant suffered ineffective assistance of appellate counsel. If it was not, then the defendant was not denied effective appellate counsel.
12. **Kidnapping: Sentences.** Neb. Rev. Stat. § 28-313(3) (Reissue 2008) does not create a separate offense, but is a mitigating factor which may reduce a defendant's sentence if he or she is convicted on a charge of kidnapping.
13. ____: ____. Neb. Rev. Stat. § 28-313 (Reissue 2008) creates a single criminal offense, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim.
14. ____: ____. Neb. Rev. Stat. § 28-313(3) (Reissue 2008) provides mitigating factors which may reduce the sentence of those charged under § 28-313, and their existence or nonexistence should be determined by the trial judge.
15. **Criminal Attempt: Kidnapping: Sentences.** An attempted kidnapping in which Neb. Rev. Stat. § 28-313(3) (Reissue 2008) is applicable should be classified as a Class III felony offense, for which Neb. Rev. Stat. § 28-105 (Reissue 2008) provides the applicable sentencing range.
16. **Kidnapping: Sentences: Effectiveness of Counsel.** If trial counsel fails to object when the court imposed a sentence based on the classification of a kidnapping charge wherein Neb. Rev. Stat. § 28-313(3) (Reissue 2008) is applicable as a Class II felony offense and imposed a sentence which exceeded the statutory range available for a Class III felony offense, trial counsel's performance is deficient. Such deficient performance clearly prejudices the defendant, as it subjects him or her to a sentence which exceeds the statutory range available for the crime of which he or she was convicted.
17. **Kidnapping: Sentences: Effectiveness of Counsel: Appeal and Error.** If a defendant's appellate counsel does not raise on direct appeal any assertion that his or her trial counsel was ineffective in failing to object when the court imposed a sentence based on the classification of a kidnapping charge wherein Neb. Rev.

Stat. § 28-313(3) (Reissue 2008) is applicable as a Class II felony offense, appellate counsel's failure is clearly deficient performance and is clearly prejudicial to the defendant.

18. **Attorney and Client: Trial: Testimony: Waiver.** A defendant who has been fully informed of the right to testify may not acquiesce in his or her counsel's advice that he or she not testify, and then later claim that he or she did not voluntarily waive such right.
19. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics, and when reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Leo J. Eskey, of Leo J. Eskey Law Offices, for appellant.

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

MOORE and PIRTLE, Judges.

PER CURIAM.

I. INTRODUCTION

Russell S. Pittman appeals from an order of the district court for Saunders County denying his motion for postconviction relief following an evidentiary hearing and from an order denying his motion to alter or amend judgment. Pittman was initially convicted on a variety of charges, including attempted kidnapping. On appeal, Pittman asserts he was entitled to postconviction relief because he received ineffective assistance of counsel, because the sentence imposed by the trial court on the attempted kidnapping charge was void, and because his conviction on that charge was not final. Pittman also asserts that the district court erred in denying his motion to alter or amend requesting additional findings of fact. We find merit to Pittman's assertion that his counsel was ineffective for not challenging the classification of his attempted kidnapping charge, but find no merit to the remainder of Pittman's assertions. As such, the order denying Pittman's motion for postconviction relief is affirmed in part and in

part reversed, and the cause is remanded with directions. The order denying Pittman's motion to alter or amend judgment is affirmed.

II. BACKGROUND

On September 1, 1995, Pittman was convicted after a bench trial of several offenses, including attempted kidnapping. The trial court imposed sentences for each conviction and ordered them to be served consecutively. With respect to the attempted kidnapping conviction, the court sentenced Pittman for a Class II felony offense, which is what the State alleged was the appropriate classification in the information charging Pittman. Pittman appealed his convictions and sentences to this court, and we affirmed the decisions of the trial court. See *State v. Pittman*, 5 Neb. App. 152, 556 N.W.2d 276 (1996).

On August 3, 2009, Pittman filed an amended petition for postconviction relief. In his amended petition, Pittman alleged a variety of grounds for postconviction relief, including assertions that he had received ineffective trial and appellate counsel, that the attempted kidnapping charge should have been classified as a Class III felony offense, and that his due process rights were violated. An evidentiary hearing was held on the amended petition, and following the hearing, the trial court entered an order denying and dismissing Pittman's amended petition for postconviction relief.

Pittman filed a motion to alter or amend judgment requesting that the trial court amend its order to include findings of fact as required under Neb. Rev. Stat. § 29-3001 (Reissue 2008). The trial court subsequently entered an order denying Pittman's motion to alter or amend judgment. This appeal followed.

III. ASSIGNMENTS OF ERROR

Pittman assigns, restated, that the district court erred in denying relief for four reasons. First, Pittman asserts that the court erred in failing to find that his trial and appellate counsel had been ineffective. Second, Pittman asserts that the court erred in failing to find that the sentence imposed on the attempted

kidnapping conviction was void. Third, Pittman asserts that the court erred in failing to find that his conviction on that charge was not final. Finally, Pittman asserts that the court erred in failing to grant his motion to alter or amend to include more specific factual findings.

IV. STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

[2-4] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id*. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Davlin, supra*.

V. ANALYSIS

1. Ineffective Assistance of Counsel Claims

Pittman first asserts that the district court erred in denying postconviction relief because the court erred in not finding that his trial and appellate counsel were ineffective. Pittman asserts that his appellate counsel was ineffective for failing to raise a variety of assertions regarding the alleged ineffectiveness of his trial counsel, including his trial counsel's failure to challenge the improper classification of the attempted kidnapping charge and his trial counsel's failure to properly investigate the case, consult with Pittman, and make appropriate objections. We find merit to the assertion concerning the proper classification of the attempted kidnapping charge, but no merit to the remainder of Pittman's assertions.

[5,6] To establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on

direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington, supra*, to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Davlin, supra*. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id*. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id*.

[7,8] When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise. *Id*. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. When, as here, the case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland* test. See *State v. Davlin, supra*.

[9-11] If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim. *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009). If trial counsel was ineffective, then the defendant suffered prejudice when appellate counsel failed to bring such a claim. See *id*. We must then consider whether appellate counsel's failure to bring the claim qualifies as a deficient performance under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In other words, we examine whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel. If it was, then the defendant suffered ineffective assistance of appellate counsel. If it was not, then the defendant was not denied effective appellate counsel. *State v. Davlin, supra*.

(a) Counsel's Failure to Challenge Classification of Crime

Pittman first asserts that his appellate counsel was ineffective in failing to raise on direct appeal that his trial counsel had been ineffective for failing to challenge the classification of his attempted kidnapping charge. The record reflects that the attempted kidnapping charge was treated as a Class II felony offense at Pittman's arraignment and at his sentencing, that his trial counsel did not object or raise to the trial court that the classification was erroneous and that the proper classification should have been a Class III felony offense, and that his appellate counsel failed to raise on direct appeal that such failure was ineffective assistance of trial counsel. Because we conclude that the proper classification of the attempted kidnapping charge should have been a Class III felony offense, we find merit to Pittman's assertion in this appeal.

As noted, Pittman was charged with attempted kidnapping. The State asserted that he had attempted to abduct the victim with intent to terrorize her or to commit another felony. In the opinion issued by this court upon Pittman's direct appeal, we concluded that the State presented sufficient evidence at trial to demonstrate that he took a substantial step toward kidnapping the victim. The evidence at trial, however, also demonstrated that Pittman never succeeded in restraining the victim and did not cause her any serious bodily injury.

At the time of Pittman's conviction, Neb. Rev. Stat. § 28-313(1) (Reissue 2008) provided that a person commits kidnapping if he or she abducts another with intent to commit a felony. Neb. Rev. Stat. § 28-312(2) (Reissue 2008) defines the term "abduct" as meaning to restrain a person with intent to prevent his or her liberation, and § 28-312(1) defines the term "restrain" as meaning to restrict a person's movement in such a manner as to interfere substantially with his or her liberty.

At Pittman's trial, there was no dispute that he had not succeeded in restraining the victim's movement in such a manner as to substantially interfere with her liberty, had not successfully abducted her, and had not actually kidnapped her. Instead,

the charge and subsequent conviction were for his unsuccessful attempt to do so.

Because Pittman was charged with and convicted of a criminal attempt, classification of the charge against him required application of Neb. Rev. Stat. § 28-201(4) (Reissue 1995). That statute provided that criminal attempt is a Class II felony offense when the crime attempted is a Class IA felony offense and that criminal attempt is a Class III felony offense when the crime attempted is a Class II felony offense.

At the time of Pittman's attempt conviction, § 28-313(2) provided that kidnapping is a Class IA felony offense, unless § 28-313(3) was applicable. At that time, § 28-313(3) provided that "[i]f the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial," then the offense was classified as a Class II felony offense. Thus, if Pittman had been successful in kidnapping the victim, the classification of the kidnapping charge that could have been brought against him would have depended on whether the victim had been released or liberated without suffering serious bodily injury. § 28-313(2) and (3).

[12-14] The Nebraska Supreme Court has held that § 28-313(3) does not create a separate offense, but is a mitigating factor which may reduce a defendant's sentence if he or she is convicted on a charge of kidnapping. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). Section 28-313 creates a single criminal offense, even though it is punishable by two different ranges of penalties "depending on the treatment accorded to the victim." *State v. Becerra*, 263 Neb. at 759, 642 N.W.2d at 148. As such, § 28-313(3) provides mitigating factors which may reduce the sentence of those charged under § 28-313, and their existence or nonexistence should be determined by the trial judge. *State v. Becerra, supra*.

As a result, the issue before us is really whether Pittman's conviction for attempted kidnapping should have been considered a Class II felony offense (because the crime which he attempted was considered a Class IA felony offense) or a Class III felony offense (because the crime which he attempted was considered a Class II felony offense) at the time of his

sentencing. Although the court did not indicate at sentencing how the court was classifying the charge against Pittman, the court imposed a sentence of 20 to 25 years' imprisonment; that sentence would have exceeded the statutory range for a Class III felony offense, but was within the statutory range for a Class II felony offense. See Neb. Rev. Stat. § 28-105 (Reissue 1989).

As the Supreme Court noted in *State v. Becerra*, 263 Neb. at 759, 642 N.W.2d at 148, the effect of § 28-313(3) is to provide a different classification and range of penalty for kidnapping "depending on the treatment accorded to the victim." When a victim is kidnapped, § 28-313(3) provides that the classification is lowered to a Class II felony offense and the sentencing range is mitigated when the victim is released or liberated without suffering serious bodily injury. In the present case, where the victim was never actually abducted such that she could or needed to be released or liberated, the question asked by the sentencing judge should have been whether she suffered serious bodily injury; if not, the statutory mitigation in § 28-313(3) should have been applied, the court should have considered the crime that Pittman was convicted of attempting to be a Class II felony offense, and the subsequent attempt conviction should have been classified as a Class III felony offense.

[15] As noted above, there was no dispute in this case that Pittman did not succeed in restraining or abducting the victim, and there was no dispute that the victim suffered no serious bodily injury. Indeed, at sentencing, the court concluded that Pittman's actions "did cause or threaten serious harm, *although not bodily harm*." As such, it is clear that the attempted kidnapping in this case should have been classified as a Class III felony offense, for which the applicable sentencing range at the time was 1 to 20 years' imprisonment. To hold otherwise and classify the charge against Pittman as a Class II felony offense, as the sentencing court did, would suggest the absurd result that a defendant who is unsuccessful in attempting to restrain or abduct a victim would be subject to the same sentence as a defendant who is actually successful in abducting a victim if that victim is released or liberated without suffering serious bodily injury. See *State v. Stein*, 241 Neb. 225, 486 N.W.2d

921 (1992) (in construing statute, it is presumed Legislature intended sensible, rather than absurd, result).

[16] At sentencing, Pittman's trial counsel failed to argue that the mitigating factors of § 28-313(3) were applicable and that the sentencing court should have classified the charge as a Class III felony offense. Pittman's trial counsel failed to object when the court imposed a sentence based on the classification of the charge as a Class II felony offense and imposed a sentence which exceeded the statutory range available for a Class III felony offense. Therefore, trial counsel's performance was deficient. Such deficient performance clearly prejudiced Pittman, as it subjected him to a sentence which exceeded the statutory range available for the crime of which he was convicted.

[17] Pittman's appellate counsel did not raise on direct appeal any assertion that his trial counsel had been ineffective in this regard. This failure was clearly deficient performance and was clearly prejudicial to Pittman. As such, we find that the district court in this postconviction action erred in failing to grant Pittman relief on this claim of ineffective assistance of counsel. We reverse Pittman's sentence on the attempted kidnapping conviction and remand the cause with directions to the district court to vacate Pittman's sentence on the attempted kidnapping conviction and to resentence him based on the statutory penalties for a Class III felony applicable at the time of Pittman's conviction.

(b) Other Claims of Ineffective Assistance of Counsel

Pittman also argues that his appellate counsel was ineffective in failing to raise on direct appeal other alleged instances of trial counsel's ineffectiveness. Pittman asserts that his trial counsel was ineffective in failing to adequately investigate Pittman's case, in failing to adequately consult with him, and in failing to make critical objections in Pittman's defense. We find no merit to these assertions.

Pittman alleges that his trial counsel failed to investigate certain aspects of the case, which Pittman had asked him to do, including the protection order that served as the basis for his

arrest, the location of his arrest, the condition of his vehicle, his explanation for items found in his vehicle, dispatch tapes and calls to the 911 emergency dispatch service, and notes written by Pittman located in his home. Based on the record before us, we conclude that Pittman has failed to demonstrate deficient performance or any prejudice in trial counsel's failure to investigate in these areas.

Pittman next contends that his trial counsel failed to investigate or call both the woman who was currently Pittman's girlfriend at the time of the crimes and a former girlfriend as defense witnesses after Pittman gave their names to trial counsel. Pittman admitted on cross-examination at the postconviction evidentiary hearing that trial counsel did contact and speak with both women. In addition, trial counsel testified that if he felt that the current girlfriend or anyone else would have been beneficial to Pittman's defense, he would have called him or her to testify. Again, Pittman has failed to demonstrate deficient performance or any prejudice in trial counsel's actions. We find no merit to Pittman's assertions that his appellate counsel was ineffective for failing to raise on appeal claims related to his trial counsel's alleged failure to investigate the case.

Pittman next contends that his trial counsel did not spend a sufficient amount of time consulting with him before his trial. He contends that his primary contact with trial counsel was only minutes before or after hearings and that this time was not sufficient. However, trial counsel's application for attorney fees documents numerous telephone calls between Pittman and trial counsel and Pittman acknowledged at the evidentiary hearing that there were numerous telephone calls between the two. Trial counsel testified that he could not recall the conversations with Pittman, but that as part of standard procedures with clients, he would discuss the pros and cons of a jury trial, whether the defendant should testify, and possible defenses. Pittman has not indicated there was information that he did not have the time to convey or that he was not able to convey to trial counsel in the conversations they had over the telephone or at his hearings. Pittman has failed to demonstrate that trial counsel was deficient or that he was prejudiced by trial counsel's actions.

[18,19] Pittman also contends that his trial counsel did not have a meaningful conversation with him about his right to testify. Pittman testified at the evidentiary hearing that he had a discussion with trial counsel on the first and last days of trial about whether he would testify. Trial counsel did not recall having specific conversations with Pittman about his testifying but assumed that they did have such conversations and that they decided he would not testify. According to Pittman's own testimony, he was informed by his trial counsel that he could testify, but he chose not to do so. A defendant who has been fully informed of the right to testify may not acquiesce in his or her counsel's advice that he or she not testify, and then later claim that he or she did not voluntarily waive such right. *State v. Rhodes*, 277 Neb. 316, 761 N.W.2d 907 (2009). Furthermore, trial counsel is afforded due deference to formulate trial strategy and tactics, and when reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel. *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009). Pittman has failed to demonstrate that trial counsel's performance was deficient in regard to Pittman's right to testify. We find no merit to Pittman's assertion that his appellate counsel was ineffective for not raising on appeal claims related to his trial counsel's alleged failure to consult with him.

Pittman next argues that his trial counsel was ineffective in failing to object to a violation of the sequestration order. He argues that trial counsel failed to object to the presence of a particular witness for the State in the courtroom at the suppression hearing because her presence was a violation of the sequestration order. However, the record does not show that she entered the courtroom during the suppression hearing. Further, that witness did not testify at the suppression hearing, and Pittman testified at the evidentiary hearing on his postconviction motion that her testimony at trial was limited and was not significant. Pittman has failed to demonstrate that trial counsel's performance in regard to the sequestration order was deficient or that he was prejudiced by trial counsel's actions. We find no merit to Pittman's assertion that his appellate counsel was ineffective for not raising on appeal claims related to

his trial counsel's alleged failure to object to this alleged violation of the sequestration order.

Pittman has failed to show that trial counsel was ineffective in any other regard and, in turn, has failed to show that appellate counsel was ineffective in failing to raise on direct appeal any other instances of ineffective assistance of trial counsel. See *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009). As such, with the exception of our finding above concerning trial counsel's failure to challenge the improper classification of the attempted kidnapping charge and appellate counsel's failure to assert on appeal that trial counsel was ineffective in that regard, we find no merit to Pittman's assertions of ineffective assistance of counsel.

2. Void Sentence on Attempted Kidnapping Conviction

Pittman next argues that the trial court erred in failing to find that his sentence for attempted kidnapping was void because the attempted kidnapping conviction should have been considered a Class III felony offense, not a Class II felony offense. As we determined above, the attempted kidnapping conviction in this case should have been classified as a Class III felony offense for purposes of sentencing, rather than a Class II felony offense, and Pittman is entitled to be resentenced on that conviction in accordance with our analysis above.

3. Finality of Pittman's Conviction

Pittman next contends that his convictions are not yet final and that therefore, we can retroactively apply *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), to Pittman's case and conclude that the search of Pittman's vehicle following his arrest violated the Fourth Amendment. In *Gant*, the Court held that a warrantless search of a defendant's vehicle after the defendant has been handcuffed and placed in the back of a squad car violates the Fourth Amendment's prohibition of unreasonable searches and seizures. The Court noted that such searches are illegal unless the defendant "is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Arizona v. Gant*,

556 U.S. at 351. Pittman argues that based on *Gant*, the search of his vehicle following his arrest violated his Fourth Amendment right against unreasonable searches and seizures and we should exclude the evidence discovered due to the illegal search.

Gant was decided in 2009, well after Pittman's convictions in 1995. Pittman argues, however, that we can retroactively apply *Gant* to his case because his convictions are not yet final. In support of this argument, he relies on *United States v. Johnson*, 457 U.S. 537, 562, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982), in which the Court held that "a decision of [the U.S. Supreme Court] construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered." In *Johnson*, a decision of the Court construing the Fourth Amendment was rendered while the defendant had a petition for rehearing pending. The Court affirmed the U.S. Court of Appeals for the Ninth Circuit's retroactive application of such Fourth Amendment case to the defendant's case.

In the present case, Pittman argues that his convictions are not yet final because his sentence for attempted kidnapping was void from the moment it was imposed and subject to remand. We find no merit to this argument. Although his sentence for attempted kidnapping was improper and he will be resentenced on such conviction, Pittman's convictions were final at the time the decision in *Gant* was rendered.

4. Motion to Alter or Amend Judgment

Finally, Pittman asserts that the trial court erred in denying his motion to alter or amend judgment because the court's order denying his amended petition for postconviction relief failed to determine the issues and make findings of fact as required by § 29-3001. This statute provides that if a court grants a hearing on a motion for postconviction relief, it is obligated to "determine the issues and make findings of fact and conclusions of law." *Id*. We conclude that the court's order was sufficient to satisfy the statute.

In its order, the trial court first set forth a procedural summary of the case. It then stated that Pittman was arguing that

his trial counsel was ineffective, and it set out the applicable case law for ineffective assistance of counsel claims. The court concluded that "[t]he record reflects that the issues raised in [Pittman's] application for postconviction relief were both known to [Pittman] and apparent from the record. The issues related to the performance of trial counsel are procedurally barred." Next, the court stated that Pittman was also arguing that his appellate counsel was ineffective for failing to argue on appeal that trial counsel was ineffective. The court set out case law applicable to ineffective assistance of appellate counsel claims and then noted that the issues that were raised and decided on direct appeal could not be raised again in the postconviction action, because they were barred, and that the court did not consider them. The court further stated:

> After review of all of the evidence, argument and briefing of the parties, the court concludes that [Pittman] has failed to demonstrate that appellate counsel's performance was deficient or that appellate counsel failed to raise a claim—as to the performance of trial counsel—which failure resulted in actual prejudice to [Pittman].

We conclude that the trial court's order denying Pittman's amended petition for postconviction relief is sufficient to satisfy § 29-3001 in that it determines the issues and makes findings of fact and conclusions of law. Accordingly, the trial court did not err in denying Pittman's motion to alter or amend judgment. We find no merit to Pittman's assertions to the contrary.

VI. CONCLUSION

We conclude that Pittman's trial counsel and appellate counsel were ineffective in failing to raise at sentencing and on direct appeal that the attempted kidnapping conviction was a Class III felony offense for purposes of sentencing, rather than a Class II felony offense. We reverse Pittman's sentence for attempted kidnapping and remand the cause with directions to the district court to vacate Pittman's sentence on the attempted kidnapping conviction and to resentence him on the conviction based on the then-existing statutory penalties for a Class III felony offense. The remainder of the district court's

order denying Pittman's motion for postconviction relief is affirmed. Accordingly, the order of the district court denying Pittman's motion for postconviction relief is affirmed in part and in part reversed, and the cause is remanded with directions. The order denying Pittman's motion to alter or amend judgment is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

IRWIN, Judge, participating on briefs.

MOLLY M. PATTON, APPELLANT AND CROSS-APPELLEE, V. CURTIS L. PATTON, APPELLEE AND CROSS-APPELLANT.

818 N.W.2d 624

Filed July 24, 2012. No. A-11-461.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** An appellate court's review in an action for dissolution of marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Child Support: Rules of the Supreme Court: Insurance: Proof.** The Nebraska Child Support Guidelines provide that the increased cost to the parent for health insurance for the children shall be prorated between the parents. The parent paying the premium receives a credit against his or her share of the monthly support, provided that the parent requesting the credit submits proof of the cost of health insurance coverage for the children.
6. **Child Custody: Child Support: Rules of the Supreme Court: Time: Words and Phrases.** The Nebraska Child Support Guidelines relative to joint physical custody provide that a "day" shall be generally defined as including an overnight period.