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STATE OF NEBRASKA, APPELLEE, V. SHAWN A. MCGUIRE, APPELLANT.

837 N.W.2d 767

Filed August 23, 2013. No. S-12-279.

1. **Right to Counsel: Appeal and Error.** An appellate court reviews the trial court's decision on a motion to withdraw as counsel for an abuse of discretion.
2. **Prosecuting Attorneys: Conflict of Interest.** Whether an apparent conflict of interest justifies the disqualification of other members of a prosecuting office is a matter committed to the discretion of the trial court.
3. **Right to Counsel: Waiver: Appeal and Error.** When determining whether a defendant's waiver of his or her former attorney's conflict of interest was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
4. **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.
5. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
6. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.
7. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
8. **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.
9. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
10. **Right to Counsel: Waiver: Effectiveness of Counsel.** Appointed counsel must remain with an indigent accused unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.

11. **Attorneys at Law: Conflict of Interest.** Appointed counsel may be removed because of a potential conflict of interest, and such a conflict could, in effect, render a defendant's counsel incompetent to represent the defendant and warrant appointment of new counsel.
12. **Attorney and Client: Conflict of Interest: Words and Phrases.** The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client.
13. **Constitutional Law: Waiver.** Generally, for a waiver of a constitutional right to be valid, it must be made voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.
14. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).
15. **Evidence: Words and Phrases.** Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.
16. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012), considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
17. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. Rather, the determining factor is whether the record is sufficient to adequately review the question.
18. **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.
19. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must first show that counsel's performance was deficient and second, that this deficient performance actually prejudiced his or her defense.
20. ____: ____. The two prongs of the ineffective assistance test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance and prejudice, may be addressed in either order.
21. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** An appellate court will not second-guess reasonable strategic decisions by counsel.
22. **Effectiveness of Counsel: Proof.** To show prejudice on a claim of 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.

23. **Proof: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.
24. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
25. **Homicide: Intent.** An intentional killing committed without malice upon a sudden quarrel constitutes the offense of manslaughter.
26. **Jury Instructions: Proof: Appeal and Error.** The appellant has the burden to show that a questioned jury instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
27. **Trial: Courts: Homicide: Jury Instructions.** A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder. But a trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.
28. **Homicide: Words and Phrases.** Sudden quarrel manslaughter requires sufficient provocation which causes a reasonable person to lose normal self-control.
29. **Homicide: Intent.** The question for sudden quarrel manslaughter is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.
30. ____: ____. The test for sudden quarrel manslaughter is an objective one.
31. **Aiding and Abetting.** Aiding and abetting is simply another basis for holding one liable for the underlying crime.
32. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed.
33. ____: ____. For aiding and abetting, no particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
34. **Criminal Law: Conspiracy.** A person is guilty of criminal conspiracy if the person intends to promote or facilitate the commission of a felony, agrees with one or more persons to commit that felony, and then the person, or a coconspirator, commits an overt act furthering the conspiracy.
35. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.
36. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed.

Sarah M. Mooney, of Mooney Law Office, for appellant.

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

Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

McCormack, J.

I. NATURE OF CASE

After a jury trial, Shawn A. McGuire was found guilty of second degree murder under a theory of aiding and abetting, use of a deadly weapon to commit a felony, and criminal conspiracy to unlawfully possess and deliver a controlled substance. The convictions were based on McGuire's involvement with a cocaine exchange that resulted in the murder of informant Cesar Sanchez-Gonzalez (Sanchez) by Robert B. Nave. McGuire appeals the convictions and argues that he was prejudiced when the district court allowed his trial counsel to withdraw prior to trial and by accepting McGuire's waiver of the conflict of interest created by the former trial counsel's new employment with the Douglas County Attorney's office, which was prosecuting McGuire in this case. McGuire also argues the court impermissibly allowed evidence of prior bad acts and used improper jury instructions. In addition, McGuire argues that his trial counsel was ineffective for failing to request jury instructions regarding robbery and attempted robbery as lesser-included offenses of felony murder. Finally, McGuire argues that the district court erred in upholding the convictions without sufficient evidence and in imposing excessive sentences.

II. BACKGROUND

Sanchez was an informant for the Greater Omaha Safe Streets Task Force. The task force also used Jorge Palacios as an informant. The task force is a joint operation involving the Federal Bureau of Investigation (FBI), the Omaha

Police Department, the Bellevue Police Department, the Nebraska State Patrol, and, at times, the Drug Enforcement Administration. The purpose of the task force is to pool federal and state resources in order to target Mexican drug trafficking organizations and violent street gangs.

In November 2009, Sanchez informed FBI Special Agent Gregory Beninato that a group of Mexican drug traffickers, including Abdul Vann, wanted to conduct a drug transaction in Kansas City, Missouri. A year after the Kansas City drug deal, Vann went to Sanchez' automotive repair shop (auto shop) in South Omaha, Nebraska, in an attempt to purchase cocaine. With this information, "Operation Sheepdog" was formed by the task force with the purpose of identifying the Mexican drug trafficking organization and Vann.

1. Events of September 28, 2010

On September 28, 2010, "Operation Sheepdog" was conducting surveillance on an expected drug deal involving Vann at Sanchez' auto shop. Beninato observed Vann approach and communicate with an African-American male passenger of a Chevrolet Impala with Indiana license plates, which was parked in a fast-food restaurant's parking lot near Sanchez' auto shop. Vann then went in the direction of Sanchez' auto shop and eventually returned to get into the driver's seat of the Impala.

Later, a white Chrysler Sebring, which was a rental car with Missouri plates, drove to and parked in the fast-food restaurant's parking lot. An African-American male, later identified as McGuire, exited the Sebring to talk to the passenger of the Impala. McGuire then proceeded to Sanchez' auto shop.

A Hispanic male, later identified as Cesar Ayala-Martinez, driving a GMC Yukon Denali, also arrived and entered the auto shop. Shortly thereafter, McGuire left the shop with Vann, and both got into the Sebring. Vann exited after driving in a circle, and McGuire left. McGuire later came back as the passenger in a black Ford Explorer and reentered Sanchez' auto shop.

Ayala-Martinez testified to the events that occurred in Sanchez' auto shop. Present for the drug exchange on September 28, 2010, were Ayala-Martinez, Sanchez, Vann, McGuire, and

possibly Palacios. Ayala-Martinez had agreed to sell Sanchez, the informant, 500 grams of powder cocaine in exchange for $13,500. Ayala-Martinez handed the cocaine to Sanchez, who handed it to McGuire. McGuire opened the package and tasted the cocaine. Vann stated that "[i]t looks good," and McGuire paid Sanchez, who paid Ayala-Martinez.

2. Events of October 22, 2010

On October 22, 2010, the task force again set up surveillance at Sanchez' auto shop for another proposed drug deal involving Vann. Prior to the deal, Sanchez and Ayala-Martinez agreed that Ayala-Martinez would sell Sanchez 1½ kilograms of powder cocaine in exchange for $40,500. The task force members were briefed that they were conducting surveillance on Vann, McGuire, and Ayala-Martinez.

Richard Lutter, a narcotics investigator for the Nebraska State Patrol, was conducting surveillance on October 22, 2010, as a member of the task force for "Operation Sheepdog." Lutter was exiting a parking lot near 24th and G Streets, where he observed McGuire standing next to a white Nissan. According to Lutter, McGuire was conversing with the passengers of the Nissan and was holding a black bag underneath his right arm. As Lutter drove past the vehicles, McGuire proceeded to a Sebring parked 20 yards behind the Nissan.

Beninato and FBI Special Agent Paris Capalupo were stationed in a parking lot with a direct view of Sanchez' auto shop. At approximately 12:50 p.m., a white Chrysler Sebring pulled up and parked on the south side of the auto shop. McGuire exited the vehicle.

At around the same time, Vann and two unknown individuals, later identified as Kim Thomas and Nave, arrived at the auto shop. Beninato observed McGuire interact with both Thomas and Vann as he exited the Sebring. McGuire then proceeded in the direction of Sanchez' auto shop. Sometime after McGuire entered the shop, Capalupo observed Nave put his hood over his head and pull a handgun from his waistband. Nave proceeded to enter Sanchez' auto shop. Beninato testified that as Nave entered, McGuire almost instantaneously exited.

The events that occurred in the auto shop were not witnessed by any members of the task force. Ayala-Martinez testified that on October 22, 2010, he went to Sanchez' auto shop to sell 1½ kilograms of powder cocaine. When he arrived at the shop, Ayala-Martinez went into the office where Sanchez, Palacios, and Vann were waiting. McGuire arrived alone, approximately 20 minutes later. McGuire wanted Vann to test the cocaine by "cooking" the powder cocaine with baking soda and water. Vann and Palacios left the store to buy baking soda.

Shortly after Vann and Palacios exited the auto shop, McGuire told Sanchez that he was going to get some tea and left the office. Ayala-Martinez testified that within seconds of McGuire's exiting, Nave entered the office. According to Ayala-Martinez, Sanchez then pulled a revolver out of his desk drawer and was attempting to open the chamber while the gun was pointing down. Before Sanchez could raise his weapon, Nave shot Sanchez two or three times. Nave then pointed the gun at Ayala-Martinez and asked for the cocaine. Ayala-Martinez pointed to the cocaine, and Nave ran out with it. Sanchez later died due to the gunshot wounds.

After witnessing Nave enter the auto shop with the gun, Beninato and Capalupo proceeded in their vehicle toward the auto shop. Capalupo observed Nave run out the door of the auto shop and fire several shots at Palacios. Thomas ran from the back of the building and began firing at Palacios and Ayala-Martinez, who had exited the building.

At this time, McGuire was in the driver's seat of the Sebring. After firing shots, Thomas and Nave ran straight to the Sebring and got in the vehicle. McGuire then sped off at a high rate of speed down I Street. Beninato and Capalupo pursued the vehicle.

The Sebring crashed head on into a pickup truck near 20th and I Streets. McGuire immediately fled from the driver's seat. Thomas and Nave exited the vehicle and huddled near the driver's-side rear door. Thomas complied with orders to get on the ground, while Nave fled. On the driver's side of the Sebring, 10 live rounds of ammunition, head-stamped or marked "9mm CCI Luger," were found.

Thomas was handcuffed and taken into custody at the scene of the accident. A search of Thomas revealed a pair of black gloves. Nave was apprehended by Lutter, who had also pursued the Sebring to the crash scene. Capalupo and another officer arrested McGuire after a 3- to 5-minute pursuit. A search of McGuire revealed a roll of cash with $20 and $50 bills on the outside and regular paper on the inside of the roll, in an attempt to make the cash roll appear to contain a larger amount of cash. The search also revealed keys to the Sebring, an electronic ignition key for a Nissan, a black Kansas City hat, and $3,858.

In the office area of Sanchez' auto shop, four Winchester 9-mm cartridge casings were found on the floor. No firearms were found in the office. A search of the white Nissan found a yellow sporting goods store bag on the passenger front seat containing a box of "CCI" ammunition, a pair of black gloves, and packaging material for black duct tape. Ten rounds were missing from the "CCI" ammunition box. Also found in the Nissan were three black head coverings.

Inside the Sebring, investigators found black duct tape consistent with the packaging found in the Nissan. A .357 Magnum pistol, a ".38 Special cartridge" revolver, a Smith & Wesson 9-mm pistol, and a .45-caliber Glock semiautomatic pistol were recovered from the Nissan. A firearms expert testified that the bullet recovered from Sanchez' body during the autopsy was fired from the 9-mm Smith & Wesson. Each of the four casings found in the auto shop were also from the 9-mm Smith & Wesson.

The Nissan was owned by Monique Pridgeon. Pridgeon testified that she was dating McGuire on October 22, 2010. Pridgeon testified that, while dating, she had witnessed McGuire talk to Vann in Omaha and had witnessed McGuire talk to Thomas in Kansas City.

On October 22, 2010, Pridgeon allowed McGuire to borrow her car. The previous night, Pridgeon had gone to a sporting goods store to purchase bullets for the shooting range. She also purchased a little blue bag to hold change. When she returned home, she placed the blue bag on her dresser and put the bullets, which were in a yellow bag, in her garage. When

she purchased the bullets, the box was sealed and she had not removed any bullets before or after placing the ammunition in the garage.

Pridgeon did not realize her bag and box of ammunition were missing until after she was questioned by investigators. She testified that although she thought the bag was blue—the bag found on McGuire was black—the fanny pack found on McGuire appeared to be similar to the bag she purchased. Pridgeon testified that only she, her mother, and McGuire had keys to her garage.

The State charged McGuire with the first degree murder of Sanchez, alleging two theories of the crime: felony murder and premeditated murder. It also charged him with use of a deadly weapon to commit a felony and criminal conspiracy to unlawfully possess and distribute a controlled substance.

3. Appointed Counsel's Motion to Withdraw

At a hearing on September 20, 2011, McGuire's trial counsel, Chad Brown, filed a motion to withdraw as counsel for McGuire. Brown explained that he sought to withdraw from the case because he had accepted a position with the Douglas County Attorney's office in the felony division. He was terminating his private practice and felt it was necessary to withdraw because of the conflict of interest. The court asked McGuire if he understood, and the following exchange occurred:

> THE COURT: All right. Have you had an opportunity to discuss this with your attorney . . . ?
>
> [McGuire]: Yes.
>
> THE COURT: How do you feel about this?
>
> [McGuire]: Kind of confused a little bit.
>
> THE COURT: Yeah. You understand that [Chad] Brown is asking to withdraw because he's terminating his private practice, regardless of whether he was rejoining the Douglas County Attorney's Office or not? So do you object that I let him out, release him from further representation duties to you?
>
> [McGuire]: I mean —

> THE COURT: I didn't hear you. You understand, if . . . Brown withdraws, I'm going to appoint [Daniel] Stockmann, okay?
>
> [McGuire]: He's fine (indicating).
>
> THE COURT: . . . Stockmann's fine with you?
>
> [McGuire]: Yes.

The district court allowed Brown to withdraw and appointed Daniel Stockmann as trial counsel.

4. Motion to Disqualify Prosecutor's Office

After being appointed, Stockmann believed that McGuire should file a motion to disqualify the Douglas County Attorney's office in light of Brown's employment with the office. In November 2011, Stockmann filed a motion to withdraw and a hearing was held. Stockmann told the district court that he advised McGuire to file the motion but that McGuire refused to do so. The district court denied the motion and stated:

> THE COURT: So they don't feel there's an issue here, the State does not. . . . Stockmann, I think, is just — in zealously representing your interest, has advised you that that's an issue you should pursue. Now it's my understanding you've advised him you do not wish for him to pursue that strategy and, if he persists in pursuing that strategy, I'm not — asking — you want a new attorney appointed; is that correct?
>
> [McGuire]: Yes, sir.
>
> THE COURT: All right. So, to the extent there's any potential conflict here —
>
> And, again, you feel you've been able to fully discuss this with . . . Stockmann? I'm not asking you to tell me what you discussed but — the specifics, but you feel that you've been able to discuss this issue with . . . Stockmann to the fullest extent, that you feel like he's answered all of your questions regard[ing] this potential conflict and, to the extent that there is any potential conflict, you waive your opportunity or right to pursue that potential conflict issue; is that correct?
>
> [McGuire]: Yes, sir.

> THE COURT: All right. Therefore, . . . Stockmann, your motion to withdraw is — under the circumstances, I'll — you've been told by your client he does not want you to pursue this, so the issue you raised in your motion to withdraw is fairly moot, wouldn't you think?

The district court went on to find that McGuire "has waived any potential conflict [and] is doing that knowingly, willingly, intelligently and voluntarily."

5. Pretrial and Trial

Before trial, the State filed a motion in limine and notice of intent to use Neb. Evid. R. 404(2)[1] evidence. The State requested authorization to adduce evidence of the drug deal that had occurred on September 28, 2010, involving McGuire and Ayala-Martinez at Sanchez' auto shop. The evidence was to be used for the limited purposes of showing McGuire's motive, intent, and knowledge. Following a hearing, the district court found by clear and convincing evidence that the State had proved McGuire's involvement in the September 28 drug deal. It concluded that the evidence was admissible to prove McGuire's knowledge that a substantial amount of cocaine would change hands during the October 22 transaction and to prove McGuire's motive and intent to commit a robbery on that date. The court reasoned that McGuire's motive and intent to commit the robbery was key to the State's felony murder charge.

At the jury instruction conference, McGuire offered a proposed jury instruction to replace jury instruction No. 5, which concerned the elements of second degree murder. The proposed instruction included the element "not upon a sudden quarrel." Jury instruction No. 5, as given to the jury, used only the sudden quarrel language under "Section III" when describing the elements of manslaughter. The proposed addition of "not upon a sudden quarrel" to the elements of second degree murder was denied by the district court.

After a 10-day jury trial, McGuire was convicted of second degree murder, use of a deadly weapon to commit a felony,

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[1] Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2012).

and criminal conspiracy to unlawfully possess and deliver a controlled substance. The district court sentenced McGuire to consecutive terms of imprisonment of 40 to 60 years for the conviction of second degree murder, 25 years for the conviction of use of a deadly weapon to commit a felony, and 40 years for the conviction of criminal conspiracy.

III. ASSIGNMENTS OF ERROR

McGuire assigns as error, restated and summarized: (1) the district court's allowing Brown to withdraw, (2) the district court's allowing McGuire to waive the conflict of interest, (3) the district court's admission of the September 28, 2010, events as prior bad acts, (4) ineffective assistance of trial counsel, (5) the district court's not using McGuire's proposed manslaughter instruction, (6) the district court's finding sufficient evidence to support all three convictions, and (7) the district court's abuse of discretion by imposing excessive sentences.

IV. STANDARD OF REVIEW

[1-3] We review the trial court's decision on a motion to withdraw as counsel for an abuse of discretion.[2] Likewise, whether an apparent conflict of interest justifies the disqualification of other members of a prosecuting office is a matter committed to the discretion of the trial court.[3] However, when determining whether a defendant's waiver was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.[4]

[4] 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[5] and rule 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[6]

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[2] See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[3] See *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437 (2008).

[4] See *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006).

[5] Neb. Rev. Stat. § 27-403 (Reissue 2008).

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

[5] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.[7]

[6] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.[8]

[7] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.[9]

[8] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[10]

[9] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[11]

V. ANALYSIS

1. Motion to Withdraw and Waiver of Conflict of Interest

McGuire's first attorney, Brown, moved to withdraw because he had been hired by the office prosecuting McGuire.

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[7] *State v. Alarcon-Chavez*, 284 Neb. 322, 821 N.W.2d 359 (2012).

[8] *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

[9] *State v. Reinpold*, 284 Neb. 950, 824 N.W.2d 713 (2013).

[10] *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

[11] *In re Interest of Samantha L. & Jasmine L.*, 284 Neb. 856, 824 N.W.2d 691 (2012).

After granting the motion, the district court appointed Stockmann to represent McGuire. As his newly appointed attorney, Stockmann advised McGuire to file a motion requesting the district court to recuse the prosecuting office from the case. Stockmann advised McGuire that Brown's employment with the prosecuting office could have an adverse effect on McGuire's ability to receive a fair trial. Despite his attorney's advice, McGuire refused to file such a motion. Based on McGuire's refusal, the district court held that McGuire had waived the issue and allowed the prosecuting office to continue with the trial.

McGuire now argues that the district court erred in two ways in its handling of this situation. First, McGuire argues that the district erred in allowing Brown to end his representation of McGuire. Second, McGuire argues that the district court erred by accepting McGuire's waiver of the conflict of interest and by not disqualifying the prosecuting office.

(a) Motion to Withdraw

McGuire argues that the district court committed reversible error in granting Brown's motion to withdraw. McGuire alleges the withdrawal prejudiced him, because the newly appointed trial counsel had very little time to prepare for trial and had to do so without access to prior counsel to help expedite the trial preparations. We disagree and hold that the district court did not abuse its discretion in granting Brown's motion to withdraw.

[10] Brown was appointed to represent McGuire, who was deemed indigent. We have held that appointed counsel must remain with an indigent accused unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se; (2) appointed counsel is incompetent, in which case new counsel is to be appointed; or (3) the accused chooses to retain private counsel.[12] The State concedes, and the record reflects, that McGuire did not choose to proceed pro se or with private counsel. Rather, the State argues that

[12] See *State v. Molina, supra* note 2.

the district court did not abuse its discretion, because Brown became "incompetent" by way of his new employment with the Douglas County Attorney's office, which was the office prosecuting McGuire.

[11,12] We have held that appointed counsel may be removed because of a potential conflict of interest and that such a conflict could, in effect, render a defendant's counsel incompetent to represent the defendant and warrant appointment of new counsel.[13] The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another or where a lawyer's representation of one client is rendered less effective by reason of his or her representation of another client.[14]

Here, Brown's new employment did create a conflict of interest. He was ending his private practice and joining the Douglas County Attorney's felony division, which was prosecuting McGuire. He could not maintain his representation of McGuire while being employed by the prosecution.

McGuire argues that the conflict only came to be once the court allowed Brown to withdraw. In other words, if the district court did not grant his withdrawal, Brown would be unable to begin employment with the Douglas County Attorney's office.

We disagree. Such an action would not have prevented a conflict of interest, because Brown told the court that he was terminating his private practice. Forcing Brown to represent McGuire would have created a different conflict of interest, because it would have prevented Brown from seeking alternative employment. We refuse to set a rigid rule of law that prevents an attorney from changing employment without first seeing all of his or her clients' cases to the end. The decision on a motion to withdraw should remain at the discretion of the trial court.

We find that Brown was incompetent to represent McGuire due to his new employment. Further, we find that McGuire has

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[13] *Id.*

[14] See *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994).

failed to provide specific evidence of how he was prejudiced by Brown's withdrawal. Therefore, we hold that the trial court did not abuse its discretion in allowing Brown to withdraw as McGuire's trial counsel.

(b) Waiver of Conflict of Interest

McGuire argues that the district court erred when it allowed McGuire to waive the alleged conflict of interest created by Brown's new employment with the prosecuting office. McGuire makes two arguments. First, McGuire argues that it should be an absolute requirement that the court immediately disqualify the prosecuting office in situations where a prosecutor in the office previously represented the defendant. Second, McGuire argues that the district court erred in accepting his waiver, because he did not properly understand why Brown had withdrawn from his case and thus, did not understand why requesting recusal was important. We reject both arguments.

First, in *State v. Kinkennon*,[15] we rejected a per se rule of requiring disqualification of a prosecuting office when a conflict of interest with a defendant arises. We held that the ultimate goal of maintaining both public and individual confidence in the integrity of our judicial system can be served without resorting to such a broad and inflexible rule.[16] A per se rule would unnecessarily limit mobility in the legal profession and inhibit the ability of prosecuting attorney's offices to hire the best possible employees because of the potential for absolute disqualification in certain instances.[17] In his brief, McGuire does not challenge this reasoning, and we find no reason to reevaluate our precedent.

Second, we find that under these unique circumstances, McGuire has voluntarily, knowingly, and intelligently waived the alleged conflict of interest created by Brown's employment

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[15] *State v. Kinkennon, supra* note 3.

[16] *Id.*

[17] *Id.*

with the prosecuting office. Our research finds it to be exceedingly rare for a defendant to waive a conflict of interest that could result in disqualifying the prosecutor's office. However, our precedent does establish that a defendant can waive a right to assistance of an attorney unhindered by a conflict of interest,[18] and under Neb. Rev. Stat. § 24-739 (Reissue 2008), parties can consent to waiving a judicial disqualification. Because recusal is not a per se rule in this instance, we hold that a defendant can waive a conflict of interest that would disqualify the prosecuting office.

[13] Generally, for a waiver of a constitutional right to be valid, it must be made voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences.[19] A waiver is permissible provided a defendant "'knows what he is doing and his choice is made with eyes open.'"[20]

Here, the unique facts demonstrate that McGuire voluntarily, knowingly, and intelligently waived the possible disqualification of the prosecuting office. McGuire's second attorney, Stockmann, fully informed him of the relevant circumstances and likely consequences of waiving the disqualification. In fact, Stockmann was so concerned about McGuire's decision to not file the motion to recuse that he sought the court's permission to withdraw from the case for that reason.

Additionally, the record demonstrates that during Stockmann's hearing to withdraw, the district court fully discussed the disqualification issue with McGuire. McGuire then affirmatively waived his right to pursue the issue. Based on McGuire's statements in court, the district court found that McGuire voluntarily, knowingly, and intelligently waived the issue of disqualification. There is no evidence to demonstrate otherwise, and therefore, the district court's decision to accept the waiver was not clearly erroneous.

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[18] See *id.*

[19] See *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984).

[20] *Id.* at 137, 354 N.W.2d at 625 (quoting *Adams v. U. S. ex rel. McCann*, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 268 (1942)).

2. Rule 404(2) Evidence—Events of September 28, 2010

McGuire argues the district court erred in admitting the events of September 28, 2010, as rule 404(2)[21] evidence. McGuire argues that the evidence was offered to show a propensity to commit the charged crime and that it was substantially outweighed by its potential for unfair prejudice. We disagree, because the events of September 28 establish McGuire's motive, intent, and knowledge to commit the robbery on October 22.

[14-16] Rule 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.

Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner.[22] But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2).[23] Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.[24] An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to

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[21] § 27-404(2).

[22] *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 244, 184 L. Ed. 2d 129.

[23] *Id.*

[24] *Id.*

consider the evidence only for the limited purpose for which it was admitted.[25]

Prior to trial, the State filed a motion in limine and notice of intent to use the evidence of the September 28, 2010, drug deal as rule 404(2) evidence. A hearing was held. At the hearing, the State argued that under our holding in *State v. Collins*,[26] the admission of the evidence was proper for the purposes of showing motive, intent, and knowledge. As noted, the district court admitted the evidence for the purposes of proving McGuire's motive, intent, and knowledge to commit a robbery on October 22.

In *Collins*, we affirmed the admission of evidence under rule 404(2) that the defendant had organized and previously participated in drug deals with the two victims in the defendant's trial for first degree murder and attempted first degree murder.[27] We determined that the evidence was admissible to show the defendant's motive, intent, and knowledge to rob the victims during the charged crimes. The previous transactions showed the defendant's knowledge that the victims would have significant amounts of cocaine with them and where they would keep it.[28] Because of this knowledge, a juror could have reasonably inferred that the defendant wanted the cocaine for himself because he understood that he would gain more profit without sharing the proceeds of subsequent drug sales with the victims. This profit was his motive to rob both men and showed his intent to do so.[29] "And this robbery is, of course, key to the State's felony murder theory—that [the defendant] was guilty of first degree murder because [a victim] was killed during the commission of the robbery."[30]

The same reasoning applies here. McGuire's involvement in the September 28, 2010, drug deal was relevant to show

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[25] *Id.*

[26] *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 944, 799 N.W.2d at 708.

that he knew there would be a large amount of cocaine in Sanchez' auto shop on October 22 and knew how the drug transaction would take place. A juror could reasonably infer that this knowledge gave McGuire a profit motive to rob Sanchez. And a defendant's motivation may support an inference that the defendant intended to commit the act that would accomplish the goal implied by his motivation—especially when the State proves that the defendant participated in a plan to commit the act.[31]

When the underlying felony for a felony murder charge is a robbery, the intent that the State must prove is the intent to commit the robbery, not the intent to kill.[32] So as in *Collins*, McGuire's intent to rob Sanchez was key to the State's felony murder theory. It is true that McGuire did not personally shoot Sanchez. But the State claimed that McGuire aided and abetted a robbery which resulted in the robbery victim's death. And under an aiding and abetting theory of felony murder premised on an underlying robbery, even if a coparticipant in the robbery caused the victim's death, the defendant aider and abettor can be convicted of felony murder if the State proves the defendant intended to rob the victim.[33] Therefore, the district court did not err in allowing the events of September 28, 2010, to be elicited at trial. Under rule 404(2), the testimony was independently relevant to demonstrate McGuire's motive, intent, and knowledge to rob Sanchez.

3. Ineffective Assistance of Trial Counsel

McGuire argues that his trial counsel should have requested jury instructions for the crimes of attempted robbery and robbery, allowing the jury to consider convicting McGuire of robbery or attempted robbery as opposed to first degree murder, second degree murder, or manslaughter. He further argues that

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[31] See, *State v. Collins, supra* note 26; 22A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5240 (2012).

[32] See, *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013) (citing *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996)).

[33] See *id*.

"[t]he evidence produced a rational basis for acquitting . . . McGuire of felony murder and convicting him of robbery or attempted robbery, and therefore trial counsel's performance was deficient when he did not propose the trial court use robbery or attempted robbery jury instructions as lesser included offenses."[34] We reject this claim because McGuire failed to sufficiently plead that he was actually prejudiced by his trial counsel's failure to request the proposed instructions.

[17,18] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal.[35] Rather, the determining factor is whether the record is sufficient to adequately review the question.[36] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[37]

[19-21] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[38] the defendant must first show that counsel's performance was deficient and second, that this deficient performance actually prejudiced his or her defense.[39] The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order.[40] An appellate court will not second-guess reasonable strategic decisions by counsel.[41] In this case, there was not an evidentiary hearing and therefore, we have no evidence concerning trial counsel's strategy.

[22,23] We can, however, address whether McGuire was prejudiced from his trial counsel's alleged error. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result

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[34] Brief for appellant at 37.

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

[36] *Id.*

[37] *Id.*

[38] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[39] *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

[40] *Id.*

[41] *Id.*

of the proceeding would have been different.[42] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[43]

The alleged error could not have prejudiced McGuire. The jury did not convict McGuire of felony murder. Therefore, McGuire's argument, as stated in his brief, does not demonstrate actual prejudice because the error did not result in him *actually* being convicted of felony murder. His trial counsel's error was harmless.

Not only was the "error" harmless, the "error" was likely beneficial. If the jury was instructed on the crimes of robbery and attempted robbery, which the evidence in this case does support, the only change in outcome that could have occurred is McGuire's being convicted of felony murder. Had McGuire been convicted of robbery, for instance, the evidence supports that during the commission of that crime, Sanchez was shot and killed. Under our felony murder statute, McGuire could have been convicted of first degree felony murder for the death of Sanchez during the robbery.[44] Instead, he was convicted of second degree murder under an aiding and abetting theory. McGuire does not present an argument of how instructing on robbery or attempted robbery would have resulted in an acquittal of McGuire on the second degree murder charge.

Therefore, from our review of the record, trial counsel's alleged ineffectiveness did not prejudice McGuire. This assignment of error is without merit.

4. Proposed Manslaughter Instruction

McGuire argues that the district court erred in denying his proposed jury instruction for second degree murder. McGuire wanted to add "not upon a sudden quarrel" to the language of the second degree murder instruction. He relies on *State v.*

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[42] *Id.*

[43] *Id.*

[44] See, Neb. Rev. Stat. § 28-303 (Reissue 2008); *State v. Quintana*, 261 Neb. 38, 621 N.W.2d 121 (2001), *modified on denial of rehearing* 261 Neb. 623, 633 N.W.2d 890.

Smith[45] for his argument that the failure to include the sudden quarrel language resulted in an instruction that did not require the jury to consider voluntary and involuntary manslaughter. We agree that the instruction was in error but find that the error did not result in prejudice.

[24] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[46]

[25] In *Smith*,[47] we held that an intentional killing committed without malice upon a sudden quarrel constitutes the offense of manslaughter. After a lengthy discussion on what constitutes manslaughter, we explained:

> Because of our holding today, the step instruction given in this case was not a correct statement of the law. Specifically, the step instruction required the jury to convict on second degree murder if it found that [the defendant] killed [the victim] intentionally, but it did not permit the jury to consider the alternative possibility that the killing was intentional but provoked by a sudden quarrel, and therefore constituted manslaughter.[48]

A review of the instructions given to the jury in this case demonstrates a similar incorrect statement of law. In the relevant parts, the jury was instructed as follows:

> SECTION II
>
> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [McGuire] of the crime of murder in the second degree are:
>
> 1. That [McGuire], on or about October 22, [2]010, did kill Cesar Sanchez-Gonzalez;

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[45] *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

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

[47] *State v. Smith, supra* note 45.

[48] *Id.* at 734, 806 N.W.2d at 394.

2. That he did so in Douglas County, Nebraska; and

3. That [McGuire] did so intentionally, but without premeditation.

SECTION III

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict [McGuire] of the crime of manslaughter are:

1. That [McGuire], on or about October 22, 2010, did kill Cesar Sanchez-Gonzalez;

2. That he did so in Douglas County, Nebraska; and

3. That he did so without malice, either:

a. Intentionally upon a sudden quarrel, or

b. Unintentionally while in the commission of an unlawful act.

EFFECT OF FINDINGS

You must separately consider in the following order the crimes of murder in the first degree, murder in the second degree, and manslaughter.

For the crime of murder in the first degree, you must decide whether the state proved each element beyond a reasonable doubt. If the state did so prove each element, then you must find [McGuire] guilty of murder in the first degree and stop.

If, however, you find that the state did not so prove, then you must proceed to consider the crimes of murder in the second degree and manslaughter until you find [McGuire] guilty of one of the crimes or find him not guilty of all of them.

The error in these instructions is similar to the error outlined in *Smith*. If the jury finds beyond a reasonable doubt that McGuire aided and abetted the intentional killing of Sanchez without premeditation, the jury is instructed to stop and not review the elements of other homicide offenses, including manslaughter. Thus, the jury would never consider whether Nave killed Sanchez upon a "sudden quarrel," which would have reduced McGuire's conviction to manslaughter. Jury instruction No. 5 was an incorrect statement of law.

[26] However, in order for us to reverse on a jury instruction, the evidence must support the inclusion of "upon a

sudden quarrel" and the defendant must have been prejudiced by the exclusion of that language.[49] The appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[50]

[27] A trial court is required to give an instruction where there is any evidence which could be believed by the trier of fact that the defendant committed manslaughter and not murder.[51] But a trial court is not obligated to instruct the jury on matters which are not supported by evidence in the record.[52] In the context of this case, McGuire was prejudiced by the erroneous jury instruction only if the jury could have reasonably concluded on the evidence presented that his intent to kill was the result of a sudden quarrel.

[28-30] Sudden quarrel manslaughter requires sufficient provocation which causes a reasonable person to lose normal self-control.[53] The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.[54] The test is an objective one.[55]

McGuire fails to explain in his appellate brief how the jury could have reasonably concluded that Sanchez was killed during a sudden quarrel. The evidence shows that before entering the auto shop, Nave cinched up his hood over his head, removed a loaded gun from his waistband, and proceeded to enter the shop. According to Ayala-Martinez, Nave shot Sanchez upon entering the office, stating that "he came in, and he already had the weapon in his two hands, and he just

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[49] See *State v. Freemont, supra* note 46.

[50] See *State v. Smith, supra* note 45.

[51] *Id.*

[52] *Id.*

[53] See *id.*

[54] See *id.*

[55] See *id.*

looked at him and fired." There was no scuffle or altercation, and no words were exchanged. When Nave entered, Sanchez was holding an unloaded revolver, but the revolver was pointing down. There is no evidence that Nave saw Sanchez holding the revolver. In fact, it should be noted that the gun allegedly held by Sanchez was not found by investigators. Further, outside surveillance confirms that Nave was in and out of the auto shop quickly.

We conclude that there is no evidence in this record upon which the jury could have concluded that Nave was provoked, lost the power of reasoning, and acted rashly without due deliberation. Nave's actions outside of the auto shop of cinching his hood and pulling the gun, when considered with the fact that he immediately shot Sanchez upon entering the office, demonstrate that Nave intended to shoot Sanchez before any alleged provocation. There is no evidence in this record upon which the jury could have concluded that McGuire (through the aiding and abetting instruction) committed sudden quarrel manslaughter instead of second degree murder. We therefore conclude that the improper jury instruction was not warranted by the evidence and did not prejudice McGuire. This jury instruction error does not require the reversal of his second degree murder conviction.

5. Sufficiency of Evidence

McGuire argues that the evidence was insufficient to support his convictions for second degree murder, criminal conspiracy to unlawfully possess and distribute a controlled substance, and use of a deadly weapon to commit a felony. McGuire argues, summarized, that there was insufficient evidence establishing that he was a conspirator to the crimes and insufficient evidence to establish that he aided and abetted. Because there was considerable evidence demonstrating cooperation between McGuire and Nave, Thomas, and Vann, there is sufficient evidence in the record to support the convictions.

McGuire was convicted of second degree murder and use of a deadly weapon to commit a felony under an aiding and abetting theory. Under Neb. Rev. Stat. § 28-304(1) (Reissue 2008),

"[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Further, under Neb. Rev. Stat. § 28-1205(1)(a) (Cum. Supp. 2012), "[a]ny person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state commits the offense of use of a deadly weapon to commit a felony." It is undisputed that McGuire was not the shooter.

[31-33] However, under Neb. Rev. Stat. § 28-206 (Reissue 2008), "[a] person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he [or she] were the principal offender." We have stated that aiding and abetting is simply another basis for holding one liable for the underlying crime.[56] By its terms, § 28-206 provides that a person who aids or abets may be prosecuted and punished as if he or she were the principal offender. We have stated that aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed.[57] No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.[58] Mere encouragement or assistance is sufficient.[59]

A rational jury could conclude beyond a reasonable doubt that McGuire intended to aid and abet the crime committed by Nave. Before the theft of the cocaine and the shooting, law enforcement surveillance described three individuals—McGuire, Nave, and Thomas—as being in proximity to each other and the Sebring immediately before the crime. While inside the auto shop, McGuire had a roll of cash filled with paper to make it appear like he had substantially more money. This indicates that McGuire never had intentions of buying the cocaine. When McGuire exited the shop, Nave instantaneously entered the shop with his gun drawn.

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[56] See *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012).

[57] *Id.*

[58] *Id.*

[59] *Id.*

Furthermore, the fact that Nave entered the auto shop specifically demanding drugs indicates that he was working with McGuire and Vann. Only McGuire and Vann had purchased drugs from Sanchez through Ayala-Martinez before. There is no evidence that Nave was involved in the prior deal. Therefore, the only logical way for Nave to know there was going to be a large amount of drugs in the auto shop was by being told by McGuire and Vann.

After Nave committed the murder and robbery, he fled with Thomas in the Sebring, driven by McGuire. Subsequent to his arrest, it was determined a box of 9-mm bullets had been taken from McGuire's girlfriend's garage. The box of 9-mm bullets, head-stamped "CCI," was found in the front seat of the Nissan; however, 10 rounds were missing. This was the same Nissan that Lutter had seen McGuire standing next to prior to the robbery. In fact, when McGuire was arrested, he had an electronic ignition key for a Nissan.

Investigators found 10 live 9-mm rounds, head-stamped "CCI," next to the Sebring where Nave had been standing. Nave was attempting to load a gun with the 9-mm rounds following the crash. In the Sebring, investigators found black duct tape that was consistent with the packaging in the Nissan. The evidence overwhelmingly supports that the Nissan and Sebring were intended to be used together in the crime. The evidence also overwhelmingly supports the jury's likely conclusion that McGuire provided Nave with 9-mm bullets, head-stamped "CCI."

Therefore, a rational jury could conclude that McGuire aided and abetted Nave in the murder of Sanchez (which involved a handgun) by providing information on the drug deal, providing a getaway car, and providing bullets. As such, the evidence is sufficient to uphold McGuire's convictions for second degree murder and use of a deadly weapon to commit a felony.

[34] McGuire also unsuccessfully argues that his conviction for criminal conspiracy to unlawfully possess and distribute a controlled substance is not supported by the evidence. A person is guilty of criminal conspiracy if the person intends to promote or facilitate the commission of

a felony, agrees with one or more persons to commit that felony, and then the person, or a coconspirator, commits an overt act furthering the conspiracy.[60] The State claimed that McGuire conspired to possess and then distribute cocaine. In relevant part, Neb. Rev. Stat. § 28-416(1) (Cum. Supp. 2010) makes it unlawful "for any person knowingly or intentionally . . . [t]o manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance." Cocaine is a controlled substance.[61] So we must affirm McGuire's conviction where there is evidence from which a rational jury could find beyond a reasonable doubt that he intended to promote or facilitate the crime of possession with intent to distribute cocaine, that he agreed with others to commit that crime, and that he or another coconspirator committed an overt act in furtherance of the conspiracy.

The evidence supports that McGuire conspired with Vann, Thomas, and Nave to acquire possession of cocaine with intent to distribute it. All of the evidence supporting McGuire's aiding and abetting Vann also applies here. Ayala-Martinez testified that McGuire wanted to test the 1½ kilograms of powder cocaine before purchasing. It was McGuire who had the roll of cash to "purchase" the cocaine. It was McGuire who aided and abetted Nave in the murder of Sanchez for the cocaine. And the cocaine was found in the Sebring driven by McGuire after he had crashed the vehicle. From these facts, a rational jury could conclude that McGuire conspired to possess cocaine with the three other men.

6. Excessive Sentences

McGuire argues that his sentences were plainly unjust due to his minimal criminal record and because he was less "culpable" than Nave, who received a substantially similar

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[60] See, Neb. Rev. Stat. § 28-202 (Reissue 2008); *State v. Nave*, 284 Neb. 477, 821 N.W.2d 723 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 1595, 185 L. Ed. 2d 591 (2013).

[61] See Neb. Rev. Stat. § 28-405(a)(4) [Schedule II] (Cum. Supp. 2010) and § 28-416(7) and (8).

sentence. McGuire was sentenced to terms of imprisonment of 40 to 60 years for the conviction of second degree murder, 25 years for the conviction of use of a deadly weapon to commit a felony, and 40 years for the conviction of criminal conspiracy. All of the sentences were to be served consecutively to each other. McGuire concedes that his sentences are within the statutory range. Accordingly, we review the sentences for an abuse of discretion.[62]

[35,36] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[63] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[64]

Beyond having a minimal criminal record and arguing he was less culpable than Nave, McGuire gives few reasons why his sentences were excessive. However, this was a serious crime of violence. McGuire aided and abetted in the cold-blooded murder of Sanchez. Additionally, according to the presentence investigation, McGuire has failed to take responsibility for his involvement in the events of October 22, 2010. Further, McGuire scored in the high-risk level to reoffend on an assessment test.

In light of these considerations noted by the sentencing court and the State, we conclude that McGuire has not shown that the sentencing court abused its discretion with respect to the amount of incarceration imposed for each conviction. We reject McGuire's argument that the court imposed excessive sentences.

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[62] *State v. Pereira, supra* note 10.

[63] *Id.*

[64] *Id.*

VI. CONCLUSION

For the reasons discussed, we affirm McGuire's convictions and sentences.

AFFIRMED.

HEAVICAN, C.J., and CASSEL, J., not participating.