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STATE OF NEBRASKA, APPELLANT, V. ROBIE D. CROWDELL, APPELLEE.
STATE OF NEBRASKA, APPELLANT, V. MICHAEL CROWDELL, APPELLEE.

451 N.W.2d 695

Filed February 16, 1990. Nos. 89-434, 89-435.

1. **Constitutional Law: Statutes: Appeal and Error.** Alleged unconstitutionality of a statute presents a question of law, which must be determined by the Supreme Court independent from the conclusion reached by a trial court on the constitutional question.
2. **Constitutional Law: Statutes: Standing.** For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
3. **Constitutional Law: Statutes: Proof.** One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional.
4. **Constitutional Law: Statutes.** Unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
5. **Criminal Law: Statutes: Notice.** An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal.
6. **Criminal law: Statutes: Due Process: Notice.** Due process requires that a penal statute supply adequate and fair notice of the conduct prohibited and also supply an explicit legislative standard defining the proscribed conduct, to prevent arbitrary and discriminatory enforcement at the discretion of law enforcement officials.
7. **Criminal Law: Statutes.** A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence.
8. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
9. **Criminal Law: Statutes: Due Process: Notice.** Neb. Rev. Stat. § 28-707(1)(a) (Reissue 1989) supplies sufficient notice concerning the criminal conduct prohibited by the statute and is in accordance with due process.
10. **Constitutional Law: Statutes.** Neb. Rev. Stat. § 28-707(1)(c) (Reissue 1989) is not void for vagueness and is constitutional.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Exceptions sustained, and causes remanded for further proceedings.

Charles W. Campbell, York County Attorney, for appellant.

Kevin V. Schlender for appellee Robie Crowdell.

Max C. Mankin for appellee Michael Crowdell.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

In separate informations filed in the district court for York County, the State charged each of the defendants, Robie D. Crowdell and Michael Crowdell, with one count of intentional abuse of a minor child, John Jeffrey Crowdell. Intentional violation of Neb. Rev. Stat. § 28-707 (Reissue 1989) is a Class IV felony, which is punishable by maximum imprisonment for 5 years, a $10,000 fine, or both such imprisonment and fine. Neb. Rev. Stat. § 28-105(1) (Reissue 1985).

Section 28-707 provides:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or health; or
>
> (b) Cruelly confined or cruelly punished; or
>
> (c) Deprived of necessary food, clothing, shelter, or care.
>
> . . . .
>
> (4) Child abuse is a Class IV felony if the offense is committed knowingly and intentionally.

Each of the Crowdells filed a motion to quash the information on the claim that § 28-707 is vague and, therefore, unconstitutional as a denial or deprivation of due process guaranteed by the Constitutions of the United States and Nebraska. See, U.S. Const. amend. XIV; Neb. Const. art. I, § 3. Concluding that the provisions of § 28-707(1)(a) and (c) were unconstitutionally vague, the district court sustained Crowdells' motions and quashed the information against each of them insofar as the prosecution was based on § 28-707(1)(a) and (c), which the court had found to be unconstitutional. The State appealed pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1989) (county attorney's appeal from a decision in a

criminal case).

STANDARD OF REVIEW

Alleged unconstitutionality of a statute presents a question of law, which must be determined by the Supreme Court independent from the conclusion reached by a trial court on the constitutional question. See, *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989); *Williams v. Gould, Inc.*, 232 Neb. 862, 443 N.W.2d 577 (1989).

The State's exceptions are twofold. First, the State contends that Crowdells lack standing to attack the constitutionality of § 28-707(1)(a) and (c). Second, the State asserts that § 28-707(1)(a) and (c) are not void and unconstitutional as a denial or deprivation of a defendant's right to due process relative to a criminal statute which is the basis for prosecution of the defendant.

STANDING

> "For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right. . . .
>
> . . . .
>
> "Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a litigant's right under the Constitution. [Citations omitted.]"

State v. Monastero, 228 Neb. 818, 837-38, 424 N.W.2d 837, 849-50 (1988) (quoting from *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987)). See, also, *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985); *State v. Irwin*, 208 Neb. 123, 302 N.W.2d 386 (1981).

Both Crowdells face potential criminal liability as a consequence of conviction on the charges against them in the present proceedings. Thus, punishment for violation of the statute in question creates a direct threat to the liberty of Crowdells, who, therefore, have standing for a constitutional challenge based on the alleged vagueness of § 28-707(1)(a) and (c).

CONSTITUTIONALITY OF § 28-707(1)(a) AND (c)

Crowdells contend that the word "endangers" in § 28-707(1)(a) and the word "necessary" in § 28-707(1)(c) fail to define, with requisite constitutional definitude and sufficiency, the conduct sought to be prohibited by the statute, which thereby deprives them of notice necessary for due process in and from a criminal statute utilized for prosecution of a defendant. The State argues that the questioned language in § 28-707(1)(a) and (c) is easily understood by persons of ordinary intelligence and affords sufficient notice concerning the conduct condemned by the statute.

"One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional." *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 265, 445 N.W.2d 284, 288 (1989). Unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

> "In order to meet constitutional standards of due process, a penal statute must be sufficiently clear so that a person of ordinary intelligence has fair notice of what exactly is forbidden conduct under the act. . . . [I]n construing a penal statute this court will give it an interpretation which meets constitutional requirements if it can reasonably be done. . . ."

224 Neb. at 684, 401 N.W.2d at 151 (quoting from *State v. Neal*, 187 Neb. 413, 191 N.W.2d 458 (1971)).

An essential purpose of a penal statute is to provide notice to the ordinary person concerning conduct which is proscribed as criminal. *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986).

Regarding a constitutional attack on a statute claimed to be vague, we have noted:

> The vice of vagueness in a penal statute was denounced in *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), by the U.S. Supreme Court's statement: "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations omitted.] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.' [Citation omitted.] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' [Citation omitted.]" 461 U.S. at 357-58. See, also, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).

State v. Monastero, 228 Neb. 818, 833, 424 N.W.2d 837, 847 (1988).

"[D]ue process requires that a penal statute supply adequate and fair notice of the conduct prohibited and also supply an explicit legislative standard defining the proscribed conduct, to prevent arbitrary and discriminatory enforcement at the discretion of law enforcement officials." 228 Neb. at 833, 424 N.W.2d at 847.

A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence. *Wounded Shield v. Gunter,* 225 Neb. 327, 405 N.W.2d 9 (1987); *State v. Douglas,* 222 Neb. 833, 388 N.W.2d 801 (1986). When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will

be given their ordinary meaning. *State v. Carlson, supra.*

Crowdells contend that § 28-707(1)(a) is facially vague because, regarding the life or health of a minor child protected by the statute, the meaning of the term "endangers" is not reasonably certain or sufficiently definite. The word "endangers" is not defined by § 28-707 or any other part of the Nebraska Criminal Code pertinent to the charges against Crowdells. However, "endanger" is defined in Webster's Third New International Dictionary, Unabridged 748 (1981) as "to bring into danger or peril of probable harm or loss: imperil or threaten danger to." " '[E]ndanger' means to expose to loss or injury; to jeopardize." *Texas Dept. of Human Services v. Boyd,* 727 S.W.2d 531, 533 (Tex. 1987). Therefore, in § 28-707(1)(a), "endangers" means to expose a minor child's life or health to danger or the peril of probable harm or loss.

As a matter of practicability for general application, child abuse statutes, by virtue of the nature of their subject matter and the nature of the conduct sought to be prohibited, usually contain broad and rather comprehensive language. In response to a challenge to a statute imposing criminal liability on one who " 'causes or permits the life or limb of such child to be endangered,' " *People v. Beaugez,* 232 Cal. App. 2d 650, 655, 43 Cal. Rptr. 28, 32 (1965), the court observed:

> The type of conduct which [this] statute seeks to reach defies precise definition. In number and kind the situations where a child's life or health may be imperiled are infinite. Yet the aim of the statute is not obscure and its objective is a salutary social one. It seeks to protect children from wilful mistreatment whether directly or indirectly applied. The portion of the statute which we construe relates to indirect mistreatment. Frequently it is the only sort of child abuse that can be proved. Unhappily it is a matter of common knowledge that badly mistreated children are received as county hospital patients daily. Because, in most cases, abuse occurs in the privacy of the home, proof of the actor directly responsible is, more often than not, impossible. If children are to be protected against such mistreatment, responsibility must be fixed upon those indirectly responsible—those who wilfully

> permit situations to exist which imperil children. Although the language of the statute is broad and the prohibited behavior is very general, this seems *necessary* in the nature of its subject matter.

(Emphasis in original.) 232 Cal. App. 2d at 656-57, 43 Cal. Rptr. at 32-33.

In *State v. Fisher*, 230 Kan. 192, 631 P.2d 239 (1981), the Supreme Court of Kansas, when confronted with a constitutional challenge to the Kansas child abuse statute which prohibited willfully "endangering a child," rejected a "vagueness" attack on the statute, concluding:

> The wording of the statute is broad, but the purpose is likewise broad; to prevent people from placing children in situations where their lives and bodies are obviously in imminent peril. . . . [I]f a child is endangered, it may be injured; it is the likelihood of injury against which the statute speaks. We conclude that [the child abuse statute] is clear and understandable; that ordinary persons can determine what conduct is proscribed by a common-sense reading of the statute; that the statute conveys a sufficiently definite warning when measured by common understanding; and that it is not void for vagueness.

230 Kan. at 199-200, 631 P.2d at 246.

The Supreme Court of Pennsylvania, in *Commonwealth v. Mack*, 467 Pa. 613, 359 A.2d 770 (1976), rejected a "facial vagueness" challenge to a child abuse statute which imposed criminal liability if one "knowingly endangers the welfare of [a] child" and stated:

> "[T]he purpose of juvenile statutes, as the one at issue here, is basically protective in nature. Consequently these statutes are designed to cover a broad range of conduct in order to safeguard the welfare and security of our children. Because of the diverse types of conduct that must be circumscribed, these statutes are necessarily drawn broadly. It clearly would be impossible to enumerate every particular type of adult conduct against which society wants its children protected. We have therefore sanctioned statutes pertaining to juveniles which proscribe conduct producing or tending to produce a *certain defined result* . . . rather than itemizing every

> undesirable type of conduct. . . ." *Commonwealth v. Marlin*, 452 Pa. 380, 386-87, 305 A.2d 14, 18 (1973) (emphasis in original).
>
> . . . Phrases such as "endangers the welfare of the child" and "duty of care, protection or support" are not esoteric. Rather, they are easily understood and given content by the community at large. An individual who contemplates a particular course of conduct will have little difficulty deciding whether his intended act "endangers the welfare of the child" by his violation of a "duty of care, protection, or support."

359 A.2d at 772.

Other courts which have held that the word "endanger," or similar language derived from "to endanger," in a child abuse statute withstands a constitutional attack for facial vagueness include the following: *People v. Vandiver*, 51 Ill. 2d 525, 283 N.E.2d 681 (1971) (a child abuse statute which contained "wilfully to cause or permit the life of [a] child to be endangered, or the health of [a] child to be injured, or wilfully cause or permit [a] child to be placed in such a situation that its life or health may be endangered," 51 Ill. 2d at 527, 283 N.E.2d at 682, "is not so vague as to constitute an unconstitutional deprivation of due process of law," 51 Ill. 2d at 530, 283 N.E.2d at 684); *People v. Bergerson*, 17 N.Y.2d 398, 218 N.E.2d 288, 271 N.Y.S.2d 236 (1966) (child abuse statute, "Wilfully causes or permits the life or limb of any child . . . to be endangered, or its health to be injured," N.Y. Penal Law § 483 (McKinney 1944), was constitutional against a "vagueness challenge"); *State v. Sammons*, 58 Ohio St. 2d 460, 391 N.E.2d 713 (1979) (child abuse statute which prohibited "endangering children" was not unconstitutionally vague); *People v. Kailey*, 662 P.2d 168 (Colo. 1983) (child abuse statute prohibiting placement of a child "in a situation that endangers the child's life or health" was constitutional, 662 P.2d at 169 n.1); *State v. deBoucher*, 135 Ariz. 220, 660 P.2d 471 (1982) (a child abuse statute which prohibited placing a child " 'in a situation where its person or health is endangered' " was "sufficiently clear to allow members of society to comprehend their legal duty," 135 Ariz. at 227, 660 P.2d at 478); *People v. Rogers*, 104 Ill. App. 3d 326,

432 N.E.2d 975 (1982); and *State v. Coe*, 92 N.M. 320, 587 P.2d 973 (1978).

Michael Crowdell directs us to *State v. Meinert*, 225 Kan. 816, 594 P.2d 232 (1979), and states that the Supreme Court of Kansas, in *Meinert*, held that "the language 'endangering of life' is too indefinite to pass constitutional muster." Brief for appellee Michael Crowdell at 7. We have examined the *Meinert* opinion and find no such conclusion by the Kansas Supreme Court. Rather, the court concluded that the phrase "unjustifiable physical pain" was too vague and uncertain to establish a reasonably definite standard for determination of criminal guilt in accordance with due process.

Consequently, we conclude that the word "endangers," used in § 28-707(1)(a), has an easily and commonly understood meaning and is not vague. For that reason, § 28-707(1)(a) supplies sufficient notice concerning the criminal conduct prohibited by the statute and is in accordance with due process.

Crowdells also contend that the word "necessary," used in § 28-707(1)(c) regarding deprivation of food, clothing, shelter, or care, is too vague and uncertain to comport with the due process requirement of notice pertaining to conduct proscribed by a penal statute. "Necessary" is defined as "1a . . . items (as of food, clothing, shelter, medical care, equipment or furnishing) that cannot be done without: things that must be had (as for the preservation and reasonable enjoyment of life) . . . 2: that cannot be done without: that must be done or had: absolutely required." Webster's Third New International Dictionary, Unabridged 1510-11 (1981).

In a challenge to the phrase "necessary sustenance" in a child abuse statute, the Supreme Court of Georgia defined that phrase: " 'Sustenance is "that which supports life; food; victuals; provisions;" . . . Our statute, in the use of the word "sustenance," means that necessary food and drink which is sufficient to support life and maintain health.' " *Caby v. State*, 249 Ga. 32, 33, 287 S.E.2d 200, 201 (1982) (quoting from *Justice v. The State*, 116 Ga. 605, 42 S.E. 1013 (1902)). Consequently, in relation to a child's sustenance, the Georgia court held that the word "necessary" in the Georgia child abuse statute was not unconstitutionally vague.

Also, in *State v. Joyce*, 361 So. 2d 406, 407 (1978), the Supreme Court of Florida found no merit in the contention that "necessary food, clothing, shelter, or medical treatment," contained in a Florida child abuse statute, was constitutionally defective from the standpoint of notice required for due process. In a similar manner, the Supreme Court of Washington, in *State v. Brown*, 52 Wash. 2d 92, 323 P.2d 239 (1958), examined the word "necessary" in a Washington child abuse statute which punished the willful failure to provide " '*necessary* food, clothing, shelter, or medical attendance' " to a child. 52 Wash. 2d at 94, 323 P.2d at 241. The Washington court stated that "the word *necessary*, as used in such statutes, relates to the minimum standard of the quality and quantity of food, clothing, shelter, and medical attendance" for a child protected by the Washington child abuse statute. *Id.*

Robie Crowdell asserts that "necessary" in § 28-707(1)(c) is not subject to a reasonably uniform application and asserts:

> The standard of living will also differ among individual jurors thereby causing different expectations as to the amount and type of food, clothing, shelter or care which is necessary. These determinations will depend on the socio-economic background of the individual jurors as well as their own experiences and opinions on parenting techniques.

Brief for appellee Robie Crowdell at 9. The socioeconomic approach, suggested by Robie Crowdell, was expressly rejected by the Supreme Court of Ohio in *State v. Sammons*, 58 Ohio St. 2d 460, 462-63, 391 N.E.2d 713, 714-15 (1979), when the court stated:

> In advancing this premise appellant sets forth that "[s]tudies have demonstrated that the working class (i. e., blue collar) parents tend to emphasize conformity to external standards of orderliness, obedience, and respect for adults, and are more likely to rely on the use of physical force as a means of punishment. In contrast middle class (i. e., white collar) parents tend to emphasize self-direction, individualism, and realization of potential, and are more likely to rely on verbal interaction in response to persistent misbehavior."

The foregoing discussion as advanced by appellant in support of the claimed vagueness of this statute is of little weight in applying what may be considered to be a reasonable standard of duty of care and protection of one's children generally to be applied throughout the community.

Whatever the color of the collar, a generally acceptable standard of societal attention to the needs and care of our offspring is not difficult of either determination or application. The norm in our society is for a parent to strive to see that his children are reasonably well nourished, housed, and clothed and reasonably protected from harm, and provided with necessary health care.

We, too, reject the contention that potential socioeconomic differences render the statute constitutionally infirm.

We find that the word "necessary," relative to the condemned deprivation of food, clothing, shelter, or care in § 28-707(1)(c), is a word with an ordinary meaning which supplies a constitutionally sufficient standard based on common usage and understanding. Therefore, § 28-707(1)(c) is not void for vagueness and is constitutional.

For the foregoing reasons, we sustain the State's exceptions, reverse the district court's judgments, and remand these causes for further proceedings.

EXCEPTIONS SUSTAINED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

DIANE M. LEDOUX, APPELLEE, V. EDWARD L. LEDOUX, APPELLANT.

452 N.W.2d 1

Filed February 23, 1990. No. 88-172.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although the Supreme Court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion. The same

standard of review applies to visitation determinations by the trial court.

2. **Constitutional Law.** The free exercise clause of the first amendment to the U.S. Constitution forecloses governmental regulation of religious beliefs.
3. **Child Custody.** Courts must preserve an attitude of impartiality between religions and may not disqualify a parent solely because of his or her religious beliefs.
4. **Constitutional Law.** A state may abridge religious practices upon a demonstration that some compelling state interest outweighs a complainant's interests in religious freedom.
5. **Child Custody.** The paramount consideration in all cases involving the custody or visitation of a child is the best interests of the child.
6. _____. Courts have a duty to consider whether religious beliefs threaten the health and well-being of a child.
7. **Courts: Parental Rights: Constitutional Law.** When a court finds that particular religious practices pose an immediate and substantial threat to a child's temporal well-being, a court may fashion an order aimed at protecting the child from that threat. In so doing, a court must narrowly tailor its order so as to result in the least possible intrusion upon the constitutionally protected interests of the parent.
8. **Child Custody.** The custodial parent normally has the right to control the religious training of the child.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

John J. Respeliers and Thomas K. Harmon, of Respeliers & DeMari, for appellant.

Alan G. Stoler for appellee.

Carolyn R. Wah for amicus curiae Watchtower Bible & Tract Society of New York, Inc.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The appellant, Edward L. LeDoux, a noncustodial father, claims that the Douglas County District Court erred in entering a marriage dissolution decree that restricted religious activities between himself and his children.

In the decree, the trial court ordered LeDoux, a Jehovah's Witness, to refrain from exposing or permitting any other person to expose his minor children to any religious practices or teachings inconsistent with the Catholic religion. The court

further ordered that while visiting their father, the children be permitted to engage in activities normally permitted by the Catholic religion. LeDoux contends that the dissolution decree is contrary to law and the evidence. He further complains about the length of summer visitations. Lack of longer summer visitations was not assigned as error and will not be considered on appeal. See *Federal Land Bank of Omaha v. Victor*, 232 Neb. 351, 440 N.W.2d 667 (1989). We affirm.

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although the Supreme Court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion. *Miles v. Miles*, 231 Neb. 782, 438 N.W.2d 139 (1989). The same standard of review applies to visitation determinations by the trial court.

Edward LeDoux and Diane M. LeDoux were married on July 30, 1977, at St. Adalbert's Catholic Church in Omaha. Two children were born during the marriage, Andrew Davis LeDoux, born July 20, 1981, and Peter Kyle LeDoux, born January 9, 1985. Both were baptized in the Catholic faith. At the time of trial, Andrew was attending St. Cecelia's grade school, a Catholic parochial school in Omaha. In July 1985, Edward LeDoux began worshiping as a Jehovah's Witness. Diane and Edward LeDoux separated on April 1, 1986.

On April 17, 1987, Diane LeDoux filed a petition for legal separation, requesting custody of the minor children. She moved that Edward LeDoux's visitation rights with the parties' children be restricted and structured. Following a hearing on Diane LeDoux's motion, the trial court entered a temporary order on April 29, 1987, granting Edward LeDoux reasonable rights of visitation. He was ordered not to involve the minor children in any of his religious activities. A subsequent motion filed by appellant requesting that his minor children accompany him to religious services was denied by the trial court. Edward LeDoux in a cross-petition asked for dissolution of the marriage.

At trial, the principal contested issue dealt with visitation rights and specific restrictions Diane LeDoux wished to permanently impose upon appellant with regard to his religious

activities with the minor children.

Evidence was adduced concerning appellant's religious beliefs and their effect on the minor children. Diane LeDoux testified to various incidents in the family home brought on by the beliefs of appellant. Prior to the parties' separation, Edward LeDoux asked Andrew to say grace. The boy started to recite the "Hail Mary," a Catholic prayer. Appellee testified, "Ed got so mad and told him, 'How dare you, how dare you say that.' He got up and he dumped his chair over, and he went into the living room and . . . stared into space for 45 minutes." On Valentine's Day of 1986, Edward LeDoux refused to do anything with his family, and on Christmas of 1986, appellant "said he was going to rip up all the Christmas stuff and . . . throw it out." Appellee further recounted an incident on Easter of 1987, when "Ed wanted to come into the house and take the kids to a memorial service. He came into the house and went up to Andy's room and grabbed him by the arm and wouldn't let him go. We had an argument. I finally had to call the police, and they came and talked him home."

Scott S. McQuin, an elder in the Jehovah's Witnesses church, agreed that there were differences between the Jehovah's Witnesses faith and other religions. McQuin stated the following differences: Jehovah's Witnesses go door to door carrying on religious conversations with people to encourage interest in the Bible. Members of the Jehovah's Witnesses religion are counseled strongly against allowing their children to participate in sports activities with people outside the congregation, and the children are discouraged from participation in organizations such as Cub Scouts or Boy Scouts. Parents would be strongly counseled about the dangers involved in being in those kinds of organizations. Jehovah's Witnesses encourage higher education for vocational purposes only, not to advance philosophical teachings. In addition, McQuin stated that Jehovah's Witnesses observe only one holiday, that being the memorial of the death of Jesus Christ, and they believe that patriotism is divisive.

Dr. Joseph L. Rizzo, a certified clinical psychologist who had counseled Andrew, was called to testify by the appellee. He indicated that conflicts in the Catholic and Jehovah's Witnesses

religions were an obvious contributing factor to the stress felt and manifested by Andrew. Dr. Rizzo testified that Andrew was quite uncomfortable and fearful about visits with his father. "[Andrew] spoke very strongly about the father trying to get him — trying to read him religious stories and trying to get him to pray, and things of this nature."

Dr. Rizzo said he became concerned when he learned that Andrew had voluntarily skipped visits with the appellant. "Andy was angry, and Andy stated that he basically didn't want to be with Dad . . . ." Dr. Rizzo said that Andrew's specific concerns with regard to his father would come and go throughout the period of several months, "the concerns of whether or not the father would play with Andy, whether or not the father would pray, would do religious things that Andy felt he was not supposed to do."

Andrew attended the scheduled visitations with appellant on September 16, 1987, September 18 through 20, 1987, and again on September 23, 1987. However, following each visit Andrew wet himself and had the equivalent of a nightmare. Dr. Rizzo concluded that "those are reflections of stress applications, unless something unusual physically is happening." When asked whether it would be in the best interests of Andy to participate in religious activities with his father at the present time, Dr. Rizzo testified:

> Andy does not feel comfortable with his father. . . . Andy is avoiding his father.
>
> Andy is familiar with the things that a young child does, and Andy is familiar with the kind of church services he goes to. . . .
>
> . . . I believe he would, therefore, avoid going to the services with him. And he has been very strong in that.
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> . . . .
>
> . . . [T]he religious aspect would be a part of it. And, frankly, Andy is not open to hardly anything positive from his father right now.
>
> I believe strongly that Andy wonders whether or not Dad really is willing to accept Andy for the kid he is and, therefore, "Will Dad do the things that I'm interested in rather than doing the things that Dad is interested in?"

When asked whether he felt long periods of visitation between Andrew and appellant would have an effect on Andrew, Dr. Rizzo testified that "without any further development and work between Andy and his father, I do believe Andy would experience very substantial stress. And I really firmly believe he wouldn't tolerate the visitation more than a few days."

On cross-examination, Dr. Rizzo admitted that Diane LeDoux could have imparted some of her strong feelings and objections to appellant's religion to Andrew, "but I think also clearly some of this could be childlike misperceptions on Andy's part himself." When asked whether there is something seriously threatening Andrew's health, Dr. Rizzo answered, "I believe that Andy is diagnosable of having a maladjustment problem currently. Yes, he is under stress. Yes, it is serious. It is not the most serious, but it is significant . . . ." Dr. Rizzo concluded that religion, particularly appellant's religion, is one of the factors that has caused the stress that Andrew is experiencing.

The trial court found that there were numerous beliefs and practices of Jehovah's Witnesses which were in contravention of those of the Catholic religion. In addition, the trial court noted that Edward LeDoux wants to take his children with him when he goes door to door to have Bible discussions with other people. Edward LeDoux stated that he wants his children to believe the way that he does. The trial court did not pass judgment on these or any other beliefs of the Jehovah's Witnesses, but did not ignore that these beliefs were still contrary to the way that Diane LeDoux, the custodial parent, wants to raise the children. Taking note of the stress that Andrew was already experiencing, the trial court concluded that exposing the minor children to more than one religious practice would have a deleterious effect upon the minor children. The court found that exposing the children to two religions would not only affect the relationship between Edward LeDoux and the minor children, but also would affect the well-being of the minor children themselves.

In a decree entered December 17, 1987, the trial court placed custody of the parties' two minor children with appellee. After establishing a specific visitation schedule, the trial court

directed appellant not to "expose or permit himself or any other person to expose the minor children of the parties to any religious practices or teachings that are inconsistent with the religious teachings espoused by the [appellee], being the Catholic religion by which the children are being raised." The trial court further ordered that at such times as the children were in appellant's possession during visitation, appellant could not prevent or preclude the minor children from engaging in activities normally permitted by the Catholic religion.

The free exercise clause of the first amendment to the U.S. Constitution forecloses governmental regulation of religious beliefs. "Government may neither compel affirmation of a repugnant belief . . . nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . . ." *Sherbert v. Verner*, 374 U.S. 398, 402, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). Courts must preserve an attitude of impartiality between religions and may not disqualify a parent solely because of his or her religious beliefs. *Burnham v. Burnham*, 208 Neb. 498, 304 N.W.2d 58 (1981); *Goodman v. Goodman*, 180 Neb. 83, 141 N.W.2d 445 (1966).

Although the prohibition against infringement of religious belief is absolute, the immunity afforded religious practices by the first amendment is not so rigid. A state may abridge religious practices upon a demonstration that some compelling state interest outweighs a complainant's interests in religious freedom. *Sherbert v. Verner, supra*. See, also, *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

The paramount consideration in all cases involving the custody or visitation of a child is the best interests of the child. Neb. Rev. Stat. § 42-364 (Reissue 1988). See, also, *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988). Courts have a duty to consider whether religious beliefs threaten the health and well-being of a child. *Burnham, supra*. See, also, *Morris v. Morris*, 271 Pa. Super. 19, 412 A.2d 139 (1979); *Munoz v. Munoz*, 79 Wash. 2d 810, 489 P.2d 1133 (1971). Prohibiting a court from considering " 'religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child.' " *Burnham, supra* at

502, 304 N.W.2d at 61 (quoting *Bonjour v. Bonjour*, 592 P.2d 1233 (Alaska 1979)). "The right to practice religion freely does not include liberty to expose . . . the child to . . . ill health . . . ." *Prince v. Massachusetts*, 321 U.S. 158, 166-67, 64 S. Ct. 438, 88 L. Ed. 645 (1944). Thus, when a court finds that particular religious practices pose an immediate and substantial threat to a child's temporal well-being, a court may fashion an order aimed at protecting the child from that threat. *Osier v. Osier*, 410 A.2d 1027 (Me. 1980) (citing *Sherbert v. Verner, supra*, and *Levitsky v. Levitsky*, 231 Md. 388, 190 A.2d 621 (1963)). See, also, *Goodman v. Goodman, supra*; *Matter of Bentley v Bentley*, 86 A.D.2d 926, 448 N.Y.S.2d 559 (1982). In so doing, a court must narrowly tailor its order so as to result in the least possible intrusion upon the constitutionally protected interests of the parent. *Osier, supra.*

A de novo review of the record discloses no abuse of discretion on the part of the trial court. There is ample evidence to conclude that the stress Andrew was experiencing posed an immediate and substantial threat to his well-being. The stress that Andrew was experiencing was neither hypothetical nor tenuous. In Dr. Rizzo's words, Andrew's stress is serious. The fact that the involuntary exposure to disparate religions was but one factor in the source of Andrew's stress does not detract from the trial court's conclusion that these religious differences have and will continue to have a deleterious effect on Andrew and, likewise, the other minor child, Peter.

The order of the trial court is narrowly tailored in that it imposes the least possible intrusion upon Edward LeDoux's right of free exercise of religion and the custodial mother's right to control the religious training of a child. The custodial parent normally has the right to control the religious training of the child. *Goodman v. Goodman, supra.* The dissolution decree merely forecloses the exposure of the LeDoux children to those practices and teachings which are inconsistent with the Catholic religion. The appellant is free to discuss beliefs of the Jehovah's Witnesses with his children so long as they are consistent with the Catholic religion. Because appellant has had previous exposure to the Catholic religion, he should not have difficulty in recognizing those beliefs of the Jehovah's Witnesses and

Catholic religions which are conflicting.

AFFIRMED.

GRANT, J., concurring.

I concur fully in the court's opinion and holding. I write only to add that I see no reason why a court should not use its common sense in applying the command of Neb. Rev. Stat. § 42-364 (Reissue 1988) that "visitation of minor children shall be determined on the basis of their best interests." I do not see how one parent with one set of religious beliefs and one parent with a different, conflicting set of religious beliefs can raise their minor children with full training and instruction in each parent's beliefs without reducing their minor children to a totally confused, psychologically disastrous state. The trial court in this case was not promoting one religion over another, but was trying to so act that these young children could retain their sanity and survive mentally to an adult age when they could choose their own beliefs. In view of the best interests of the children, I see no error, constitutional or otherwise, in the trial court's actions.

HASTINGS, C.J., and BOSLAUGH, J., join in this concurrence.

FAHRNBRUCH, J., concurring.

I concur with the majority opinion. The parents' religious conflict has clearly detrimentally affected the general welfare of the older child. Because of the magnitude and intensity of the conflict, it not only likely will, but inevitably will, detrimentally affect the general welfare of the younger child. The majority opinion protects the welfare of the LeDoux children by adhering to the prior holdings of this court that the custodial parent normally has the right to control the religious training of the children of a marriage. *Goodman v. Goodman*, 180 Neb. 83, 141 N.W.2d 445 (1966). See, also, *Burnham v. Burnham*, 208 Neb. 498, 304 N.W.2d 58 (1981).

SHANAHAN, J., dissenting.

The majority wanders into theological smoke from the fire of fervent faith fueled by divergent dogma and eventually emerges grasping a solution referenced to religion rather than legal rationale.

The trial court's order restricting religious contact and

communication between Edward LeDoux and his children undeniably infringes on religious freedom inherent in the parent-child relationship. The question is whether the order, religiously restrictive and affirmed by this court, is a permissible invasion of Edward LeDoux's religious freedom or free exercise of religion guaranteed by the first amendment to the U.S. Constitution and article I, § 4, of the Nebraska Constitution.

The 1st amendment to the U.S. Constitution applies to the states through the 14th amendment to the U.S. Constitution. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

Free exercise of religion, guaranteed by the first amendment to the U.S. Constitution, is protected from unconstitutionally applied state power, whether judicial or legislative. See *N. A. A. C. P. v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). Beyond question, "the free exercise of religion is a fundamental constitutional right." *Johnson v. Robison*, 415 U.S. 361, 375 n.14, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974). Free exercise of religion, of course, does not mean that a state, through appropriate judicial or legislative action, may never interfere in a private religious matter, for, as the Supreme Court has expressed:

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."

Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972)).

Moreover, in addition to constitutional considerations, a modicum of pragmatism dictates that "[c]ourts should proceed cautiously and with circumspection when dealing with religious issues." *Khalsa v. Khalsa*, 107 N.M. 31, 36, 751 P.2d 715, 720 (1988). "[I]ntervention in matters of religion is a perilous

adventure upon which the judiciary should be loathe to embark." *Wojnarowicz v. Wojnarowicz*, 48 N.J. Super. 349, 354, 137 A.2d 618, 621 (1958).

Before today, this court had never directly dealt with the question whether a child's noncustodial parent who has religious tenets contradictory to those of the custodial parent may be judicially precluded from communicating the contradictory religious information to a child involved in a marital dissolution. In *Goodman v. Goodman*, 180 Neb. 83, 141 N.W.2d 445 (1966), this court recognized that there must be judicial impartiality toward conflicting religious beliefs of a child's parents in a marital dissolution proceeding and then expressed a general rule that the custodial parent ordinarily determines the religious training of a child. However, the *Goodman* court stated: "We question whether even a noncustodial parent might legally be, or should be, enjoined from imparting religious instruction to his child in the absence of a showing of serious threat to the health or well-being of the child." *Id.* at 89, 141 N.W.2d at 449.

Whether a noncustodial parent in a marital dissolution proceeding may be enjoined from religious communication with a child of the noncustodial parent, a question raised but unanswered in *Goodman*, has been addressed by several courts outside Nebraska. For example, in *In re Marriage of Murga*, 103 Cal. App. 3d 498, 504-05, 163 Cal. Rptr. 79, 82 (1980), the court observed that

> in the majority of American jurisdictions that have considered the question, the courts have refused to restrain the noncustodial parent from exposing the minor child to his or her religious beliefs and practices, absent a clear, affirmative showing that these religious activities will be harmful to the child. . . . The refusal to intervene in the absence of a showing of harm to the child reflects the protected nature of religious activities and expressions of belief, as well as the proscription against preferring one religion over another.

As the court noted in *Munoz v. Munoz*, 79 Wash. 2d 810, 812-13, 489 P.2d 1133, 1135 (1971):

> The courts are reluctant . . . to interfere with the

> religious faith and training of children where the conflicting religious preferences of the parents are in no way detrimental to the welfare of the child. The obvious reason for such a policy of impartiality regarding religious beliefs is that, constitutionally, American courts are forbidden from interfering with religious freedoms or to take steps preferring one religion over another. [Citations omitted.]
>
> . . . .
>
> Thus, the rule appears to be well established that the courts should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from taking the children to a particular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child.

See, also, *Hanson v. Hanson*, 404 N.W.2d 460, 463 (N.D. 1987): "[M]ost courts . . . have refused to restrain a noncustodial parent during visitation periods from exposing the minor child to his or her religious beliefs and practices, absent a clear, affirmative showing that these religious activities will be harmful to the child."

Furthermore, harm that justifies a restrictive infringement of a parent's constitutionally protected freedom of religious expression "should not be simply assumed or surmised; it must be demonstrated in detail." *Felton v. Felton*, 383 Mass. 232, 234, 418 N.E.2d 606, 607 (1981). See, also, *Hanson v. Hanson, supra*. Similarly, a judicial finding that a noncustodial parent's religion has a detrimental effect on a child cannot be based on "mere conjecture," *Morris v. Morris*, 271 Pa. Super. 19, 412 A.2d 139, 144 (1979), or "mere conclusions and speculation," *Robertson v. Robertson*, 19 Wash. App. 425, 427, 575 P.2d 1092, 1093 (1978).

In *Felton v. Felton, supra*, the court considered the question whether or how to accommodate diverse religious practices of parents, living apart, in the upbringing of a minor child and stated:

> The parents together have freedom of religious expression

and practice which enters into their liberty to manage the familial relationships. [Citations omitted.] But the "best interests" of the child are to be promoted, and when the parents are at odds, the attainment of that purpose may involve some limitation of the liberties of one or other of the parents. . . .

If the dominating goal of the enterprise is to serve a child's best interests . . . then it might be thought to follow that a policy of stability or repose should be adopted by which the child would be exposed to but one religion (presumably that of the custodial parent) at whatever cost to the "liberties" of the other parent. The law, however, tolerates and even encourages up to a point the child's exposure to the religious influences of both parents although they are divided in their faiths. This, we think, is because the law sees a value in "frequent and continuing contact" of the child with both its parents . . . and thus contact with the parents' separate religious preferences. There may also be a value in letting the child see, even at an early age, the religious models between which it is likely to be led to choose in later life. And it is suggested, sometimes, that a diversity of religious experience is itself a sound stimulant for a child. [Citation omitted.] In all events, the question that comes to the courts is whether, in particular circumstances, such exposures are disturbing a child to its substantial injury, physical or emotional, and will have a like harmful tendency for the future. [Citation omitted.] The critical literature warns against perverting a quest for the child's best interests into one for the psychic comfort of the parents — a warning against overvaluing the parents' constitutional liberties. [Citations omitted.] A warning is equally in order against depriving a parent of all connection with the child, or connection on the religious plane, out of an exaggerated fear of injury to the child.

383 Mass. at 233-35, 418 N.E.2d at 607-08. See, also, *Compton v. Gilmore*, 98 Idaho 190, 560 P.2d 861 (1977); *Khalsa v. Khalsa*, 107 N.M. 31, 751 P.2d 715 (1988); *Morris v. Morris, supra*.

Recognizing that a court should be extremely cautious in its intervention into the religious training of a child, which is an extremely private matter, the court in *In re Marriage of Mentry*, 142 Cal. App. 3d 260, 269-70, 190 Cal. Rptr. 843, 850 (1983), stated that

> the decision to intervene must not only be conditioned upon a clear affirmative showing of harm or likely harm to the child and the exhaustion of mediation but must concomitantly reflect the considered judgment that such harm presents a graver problem than those attendant upon coercive intervention in family privacy.

With the foregoing backdrop of judicial observations and reasoning expressed by courts in other jurisdictions, the sequence of events in the LeDoux proceedings is noteworthy. On April 17, 1987, Diane LeDoux filed the petition for a legal separation from Edward LeDoux and to obtain custody of the LeDoux children, Andrew and Peter. The district court, on April 28, excluded Edward LeDoux from the family's residence and, on May 19, set a rigid schedule for Edward LeDoux's visitation of his children, a schedule which limited Edward's contact with his children to 3 1/2 hours during 1 day of each week and visitation throughout alternate weekends.

Diane LeDoux, a Catholic, readily acknowledged that she did not want the LeDoux children to be involved in religious activities of Edward LeDoux, whose religion was Jehovah's Witnesses, because she had "done research into [Jehovah's Witnesses and] found it to be totally opposite of my religion." Diane LeDoux harbored "some rather strong feelings about religion . . . strong dislike or distaste" for Edward LeDoux's religion, conveyed her sentiments regarding Jehovah's Witnesses to 6-year-old Andrew, and went so far as to tell Andrew that the Jehovah's Witnesses "would mess up his [Andrew's] mind just like they messed up the mind of his father." Also, Diane LeDoux told Andrew that "his father is not supposed to show him any books" or discuss religion and Bible stories with him.

In mid-May 1987, Diane LeDoux took Andrew to Dr. Rizzo, a psychologist, who observed that the child was "a very bright, precocious, verbal child, very energetic, very active, high drive;

and, yet, during the course of my time with him, he was very anxious, uncomfortable, at times angry, angry about the situation in terms of his father and, on occasion, was angry with myself as well."

At trial, in answer to the question "Is it unusual that people have some difficulty in adjusting to divorce, men, women, and children?" Dr. Rizzo responded: "Of course not." On the subject of Andrew's "stress," cross-examination by Edward LeDoux's lawyer produced the following:

> Q. . . . Doctor, do children have difficulty sometimes adjusting to divorce, separation from their father or mother?
>
> A. Certainly.
>
> Q. And sometimes they get angry about it?
>
> A. Yes.
>
> Q. And sometimes they blame one parent over the other, don't they?
>
> A. Yes.
>
> Q. Particularly blame the parent who leaves the house, leaves the family?
>
> A. That does happen.
>
> . . . .
>
> Q. Do you think it's possible that Andy might be angry at [his father], might be misfocusing or confused and having some difficulty in adjusting to the fact that he's five years old and his father has left?
>
> A. There's no doubt in my mind that Andy is very angry with his father and that truly the issue of religion could become an unnecessary stumbling block.

Dr. Rizzo further testified that "from a relational standpoint, [Andrew] felt that being with his father was not a lot of fun" and that

> with Andy being as bright as he is and also being very energetic, he requires a lot of intense time; and that one has to find things that he's interested in and be willing to shift and get into different activities, perhaps, when you're sitting down and playing with him every 15 minutes.

According to Dr. Rizzo, Andrew "didn't feel that Dad played

with him the way he wanted him to play; that Dad did the things he wanted to do, not the things that Andy wanted to do."

Also, Dr. Rizzo testified that Andrew "spoke very strongly about [Edward LeDoux's] trying to get him [Andrew] — trying to read him religious stories and trying to get him to pray, and things of this nature," and that Andrew was "afraid that his father was going to . . . force him to pray, force him to read religious books" when Diane LeDoux had told Andrew that "his father was not supposed to do that." When asked whether Andrew was "mouthing the beliefs of his mother when [Andrew] talks about Jehovah's Witnesses," Dr. Rizzo responded, "I would have to say there is no doubt that the child is probably mouthing some of those things" which had been "put into his ears by his mother."

In further cross-examination of Dr. Rizzo, the following exchange occurred:

> Q. Isn't that the source of his stress, though, the fact that his mother has told him one way and his father another?
>
> A. Yes.
>
> Q. With regard to religion?
>
> A. Certainly, religion.
>
> Q. And if one of them would stop pulling, there wouldn't be the stress; isn't that correct?
>
> A. Or if they both came to some other ground, certainly.
>
> . . . .
>
> Q. Would the stress that you told us about be removed if neither party said anything about religion to the child?
>
> A. Well, the issue of stress would be gone; but, then, the issue of the relationship would emerge as the primary issue.
>
> Q. And the relationship during divorce is sometimes, I think you told us, difficult?
>
> A. Yes.
>
> Q. Particularly for the parent that moves out?
>
> A. Yes.
>
> Q. And it takes some time to reestablish that relationship?

A. Yes.

Concerning Andrew's bed-wetting in the fall of 1987, Dr. Rizzo expressed the opinion that "the wetting experiences were reflecting the stress that Andy was feeling for being with his father during visitation when he hadn't seen Dad for some time for overnight; so it was his experience of stress at that time."

Dr. Rizzo acknowledged that part of Andrew's stress was attributable to the fact that Andrew was "very highly sensitive to his father probably saying anything about religion, any kind of mention about prayer, any kind of mention of a book," after Diane LeDoux had informed Andrew that his father was not supposed to show him any books, including Bible stories, or discuss religion with Andrew. However, Dr. Rizzo also acknowledged that with the cooperation of parents, a child might be introduced to two different religions in a manner which would not be stressful.

From the foregoing evidence, one cannot reach the reasonable conclusion, based on a clear and affirmative showing, that Edward LeDoux's religious activities, in and of themselves, are, or will be, harmful to Andrew LeDoux. See, *Khalsa v. Khalsa*, 107 N.M. 31, 751 P.2d 715 (1988) (general testimony about the parents' conflicting religious beliefs which caused a child to be upset or confused is insufficient to demonstrate harm to a child and justify prohibition of a noncustodial parent's religious instruction to the child); *Hanson v. Hanson*, 404 N.W.2d 460 (N.D. 1987) (possibility that noncustodial parent's religion may strain the parent-child relationship falls short of the necessary clear and affirmative showing of harm to justify restriction on the noncustodial parent's expression of religious beliefs); *Morris v. Morris*, 271 Pa. Super. 19, 412 A.2d 139 (1979) (judicial inquiry regarding a parent's religious belief in reference to child custody and visitation is limited to determining whether a religious belief or practice has a detrimental effect on a child); *Robertson v. Robertson*, 19 Wash. App. 425, 575 P.2d 1092 (1978) (child's alarm at parental religious beliefs is insufficient to justify an order restricting the noncustodial parent's religious instruction of the child); *Compton v. Gilmore*, 98 Idaho 190, 560 P.2d 861 (1977) (a child's unusual behavior after visiting the

noncustodial parent was attributable to the occurrence of visitation as an occasion or opportunity to express parental conflict and was unattributable to the noncustodial parent's religious practices); *Munoz v. Munoz*, 79 Wash. 2d 810, 489 P.2d 1133 (1971) (duality of religious beliefs does not per se create a conflict in a child's mind).

For some unexplained reason, this court's majority recounts testimony that "Jehovah's Witnesses observe only one holiday, that being the memorial of the death of Jesus Christ, and they believe that patriotism is divisive." As the court remarked in *Levitsky v. Levitsky*, 231 Md. 388, 398, 190 A.2d 621, 626 (1963):

> There are a number of cases holding that the fact that a parent teaches a child religious doctrines which are at variance with those of the majority is not a ground for a change of custody, and this rule has been applied in cases involving Jehovah's Witnesses and their tenets against saluting the flag, military service and the observance of Christmas, or one or more of those matters.

If religious beliefs in Jehovah's Witnesses regarding military service, flag-saluting, and observance of Christmas are insufficient or impermissible bases to change child custody, as pointed out in *Levitsky*, those religious beliefs and practices are impotent for the initial determination of child custody. Furthermore, "[q]uestions regarding the celebration of Christmas and birthdays or relating to participation in the electoral process or military service are not within the ambit of religious views which may reasonably be construed as endangering the mental or physical health of the child." *Clift v. Clift*, 346 So. 2d 429, 435 (Ala. Civ. App. 1977). In LeDouxes' case, nothing established that tenets of Jehovah's Witnesses concerning holidays or patriotism are detrimental to the LeDoux children. For that reason, reference to any religious perspective of holidays or patriotism is intellectually offensive and legally irrelevant to a rational resolution of the child visitation issue.

There is another curious consequence of the conclusion reached by the majority of this court. Concerning visitation of the LeDoux children, the trial court ordered that Edward

LeDoux "shall not expose or permit himself or any other person to expose the minor children of the parties to any religious practices or teachings that are inconsistent with the religious teachings espoused by [Diane LeDoux], being the Catholic religion by which the children are being raised." That order, the majority believes, is "narrowly tailored" to impose the "least possible intrusion" on Edward LeDoux's right to free exercise of his religion and Diane LeDoux's right to determine religious training for the LeDoux children. An order quite similar to that reviewed in LeDouxes' case existed in *Felton v. Felton*, 383 Mass. 232, 237, 418 N.E.2d 606, 609 (1981), where the father, a member of Jehovah's Witnesses and the noncustodial parent, was granted child visitation " 'provided that he refrains from giving his children any religious training or education which shall be in conflict or contrary with the religious training and beliefs of the custodial parent,' " a member of the Congregational Church. With practical perspicacity, the *Felton* court noted that the child visitation order "on its face would require subtle interpretation and raise infinite difficulties of enforcement." 383 Mass. at 237, 418 N.E.2d at 609.

Morris v. Morris, 271 Pa. Super. 19, 412 A.2d 139 (1979), is an illustration of a narrowly tailored child visitation order, when a noncustodial parent's religious beliefs or practices cause detriment to a child. In *Morris*, the child, a baptized Catholic, was in custody of her mother and would probably, although not necessarily, be psychologically damaged as the result of the child's accompanying her father, the noncustodial parent, during his door-to-door dissemination of doctrine embraced by Jehovah's Witnesses. The trial court prohibited the father from taking the child on such door-to-door proselytistic endeavors. In upholding the restriction in the visitation order, the *Morris* court commented: "The order is, at any rate, quite liberal. Appellant is not prohibited from seeing [his daughter], nor from discussing his beliefs with her, but only from forcing her to accompany him on his door-to-door visits." 412 A.2d at 147.

This court's majority attempts to avoid the subtle interpretations and infinite difficulties in enforcement of the LeDoux visitation order by bootstrapping the certainty which is

necessary for enforceability of the visitation order:

> [Edward LeDoux] is free to discuss beliefs of the Jehovah's Witnesses with his children so long as they are consistent with the Catholic religion. Because [Edward LeDoux] has had previous exposure to the Catholic religion, he should not have difficulty in recognizing those beliefs of the Jehovah's Witnesses and Catholic religions which are conflicting.

While the boundless breadth of the restrictive child visitation order in the present appeal may engender countless quodlibets concerning the dichotomy of dogma between Jehovah's Witnesses and Catholicism, resort to Edward LeDoux's comprehension of Catholicism is hardly an objective standard for evaluating whether there is compliance or noncompliance with the visitation order, renders a catechism indispensable for a proceeding to punish contempt of court or change existing visitation rights, and, in quintessential imprudence, casts a judge in the role of a theological umpire.

What the majority has characterized as a "narrowly tailored" visitation order is, in reality, a judicial straitjacket, constricting Edward LeDoux and preventing him from discussing with his children any religious belief or practice which may contradict or conflict with Catholic doctrine. Thus, the LeDoux visitation order prohibits Edward LeDoux's free exercise of his religion in reference to his children and, consequently, constitutes a denial of religious freedom protected by the state and federal Constitutions.

In summary and conclusion, dissolution of the LeDoux marriage was traumatic to all concerned, parents as well as children. Yet, it was Diane LeDoux's distaste or dislike for Jehovah's Witnesses doctrine and her intense indoctrination of the children, especially Andrew, which resulted in Andrew's reactive disturbance when he was confronted with his father's activities of a religious nature, paternal conduct that had been maternally condemned as something which Edward LeDoux was not "supposed to do." It is all too clear that day by day Andrew had to be taught to turn away from another's religion practiced in a different way. Through such inculcation, Edward LeDoux's reading a telephone book to Andrew could be made a

taboo.

The restrictive visitation order applies to both LeDoux children, Andrew and Peter. Putting aside the fact that the testimony about possible detriment related to only one of the LeDoux children, Andrew, there is no clear and affirmative showing that any of Edward LeDoux's religious beliefs were, or would likely be, detrimental to the well-being of the LeDoux children. The religious restriction should have been excised from the child visitation order and the district court's judgment reversed accordingly.

NEBRASKA STATE BANK, A CORPORATION, APPELLEE, V. WALTER E. PEDERSEN ET AL., APPELLANTS, DALE KNUDSEN ET AL., APPELLEES.

452 N.W.2d 12

Filed February 23, 1990. No. 88-183.

1. **Equity: Mortgages: Reformation.** A separate suit in equity to reform a mortgage to correct a mutual mistake of the parties is not necessary.
2. **Equity: Mortgages: Reformation: Foreclosure.** The reformation of a mortgage to correct a mutual mistake is incidental to the foreclosure of a mortgage and any and all equitable rights the mortgagee can show he or she has in it.
3. **Reformation: Intent.** A court may, although not requested by either party, reform an instrument to the ascertained intentions of the parties.
4. _____: _____. Reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument.
5. **Reformation: Intent: Presumptions: Evidence.** To overcome the presumption that the written instrument correctly expresses the intention of the parties and obtain reformation, the evidence must be clear, convincing, and satisfactory.
6. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.
7. **Reformation: Fraud.** Reformation may be ordered where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party.
8. **Reformation: Intent.** A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.

9. **Reformation: Words and Phrases.** For purposes of reformation, mutual mistake is defined as a belief shared by the parties, which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about the instrument.
10. **Reformation: Intent.** The fact that one of the parties denies that a mistake was made does not prevent a finding of mutual mistake, nor prevent reformation.
11. _____: _____. An erroneous omission or deletion, even by a scrivener, from an instrument intended to reflect the agreement of the parties is a mutual mistake and is contrary to the real intention and agreement of the parties.
12. **Mortgages.** An individual need not be personally obligated for the debt of another in order to mortgage his or her property as security for the debt of another.
13. **Mortgages: Liens: Intent.** Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, are not an extinguishment of the mortgage, but a renewal thereof, and do not give priority to an intervening lien, especially where it is done in good faith and without any intention to release the lien of the mortgage.
14. _____: _____: _____. The intent of the parties regarding release of the lien of a mortgage controls, not the recorded release.
15. _____: _____: _____. Where the holder of a senior mortgage discharges it of record and contemporaneously takes a new mortgage, he or she will not, in the absence of paramount equities, be held to have subordinated his or her security to an intervening lien unless the circumstances of the transaction indicate this to have been his or her intention, or such intention upon his or her part is shown by extrinsic evidence.
16. **Mortgages: Presumptions: Intent.** Ordinarily, it is presumed that one must have intended to keep alive his mortgage title, where it was essential to his security against an intervening title; and this presumption applies although the party through ignorance of such intervening title may have actually discharged the mortgage and canceled the notes, and really intended to extinguish them.
17. **Mortgages: Liens.** Generally, where an existing lien has been discharged and released by the holder and a renewal taken without knowledge of the existence of an intervening lien against the property, the mortgagee will be regarded as acting under such a mistake of fact as to entitle him or her to relief by a restoration of his or her priority if the rights of innocent parties are not involved.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Kurt A. Hohenstein, of Rager & Hohenstein, P.C., for appellants Pedersen et al.

Norris G. Leamer, of Leamer Law Office, for appellant Melvin Pedersen.

William Horneber, of Horneber Law Offices, for appellee Bank.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

The defendants Pedersen appeal the judgment of the district court which foreclosed the mortgage of the plaintiff, Nebraska State Bank (Bank) of South Sioux City, Nebraska. Defendants Pedersen assign as error that the district court erred in holding that the 1983 mortgage of the Bank was paramount to the recorded mortgages of defendants Pedersen, in construing the 1983 mortgage and note to be an obligation of LeRoy and Dee Ann Pedersen, in holding that the 1983 mortgage granted a mortgage over property owned by LeRoy and Dee Ann Pedersen, in allowing parol evidence to vary the terms of the written 1983 mortgage, and in deciding the case contrary to the evidence and the law. We affirm.

This litigation arose as the result of a series of mortgages executed by the defendants Walter E. and Elsie Pedersen to the Bank, with intervening conveyances of the mortgaged property to children of the Pedersens, LeRoy Pedersen, Melvin Pedersen, and Dorothy Pedersen, and to LeRoy's wife, Dee Ann, for what are assumed to be legitimate estate planning purposes.

The Bank filed a petition on January 22, 1987, requesting foreclosure on a mortgage covering the following parcels of land located in Dakota County:

> *Tract 1* —NE 1/4 NE 1/4 of Sec. 31, Twp. 29, R. 7 Except [certain described property]; also the NW 1/4 NW 1/4 SE 1/4 NW 1/4 and SW 1/4 NE 1/4 of Sec. 32, Twp. 29, R. 7 [less certain parcels of land no longer involved in this appeal]. *Tract 2* — NW 1/4 of Sec. 8, Twp. 28 N, R. 7 E. . . . *Tract 3*—SE 1/4 of Section 8, Twp. 28 North, R. 7 E. . . . *Tract 4*—[a] SE 1/4 of Section 31, Twp. 29, R. 7E; [b] W 1/2 SW 1/4 and SW 1/4 NW 1/4 of Sec. 32, Twp. 29, Range 7 E.; and [c] the SE 1/4 of Sec. 5, Twp. 28, Range 7 East . . . .

(Emphasis supplied.)

Although not part of the land covered by the mortgage

sought to be foreclosed, also mentioned by the parties is the following parcel of land: *Tract X* "-SW1/4 of Section 4, Township 28 North, Range 7 East . . . ."

At trial all parties stipulated that mortgages of The Federal Land Bank of Omaha are first and superior liens against Tract X, Tract 4, and Tract 3.

Evidence presented at the trial held on November 19, 1987, established the following facts.

On March 31, 1975, Walter and Elsie Pedersen gave the Bank a mortgage in the amount of $135,220, covering Tracts 1, 2, 3, 4, and X—1,090 acres. This mortgage was recorded on April 1, 1975.

On June 7, 1976, Walter and Elsie Pedersen gave the Bank a mortgage in the amount of $37,616, covering Tracts 1, 2, 3, 4, and X—1,090 acres. This mortgage was recorded on June 8, 1976.

Although the details are not clear from the record, at some time prior to December 21, 1976, Walter and Elsie Pedersen conveyed the "SW1/4 of Section 4, Township 28 North, Range 7 [Tract X]"—160 acres—to their son LeRoy Pedersen.

On December 21, 1976, Walter and Elsie Pedersen, in consideration of "one dollar and other valuable considerations," conveyed to LeRoy Pedersen the "SE1/4 of Section 5, Township 28 North, Range 7 [part (c) of Tract 4]" and the "SE1/4 of Section 8, Township 28 North, Range 7 [Tract 3]" by a warranty deed which noted the encumbrance of a first mortgage held by the Bank on the property.

That same day LeRoy Pedersen gave Walter Pedersen a promissory note in the amount of $56,000. Subsequently, on various dates, Walter Pedersen assigned unpaid principal on the promissory note to his daughter, Dorothy Pedersen, and his son Melvin Pedersen, each receiving a total assignment of $24,000 of unpaid principal, leaving a balance of $8,000 unpaid principal unassigned.

On December 21, 1976, LeRoy and Dee Ann Pedersen also gave Walter Pedersen the following real estate mortgages: (1) a mortgage in the amount of $38,400, covering part (c) of Tract 4; (2) a mortgage in the amount of $56,000, covering Tract 3; and (3) four mortgages each in the amount of $6,000 and each

covering Tract 3.

Walter Pedersen subsequently assigned two of the $6,000 mortgages to Dorothy Pedersen and two of the $6,000 mortgages to Melvin Pedersen.

The deed from Walter and Elsie Pedersen, all of the mortgages from LeRoy and Dee Ann Pedersen, and all of the assignments of mortgage from Walter Pedersen were recorded on January 6, 1978.

The inference to be drawn from Dee Ann Pedersen's testimony at trial is that the foregoing intrafamily transactions were part of the estate planning of Walter and Elsie Pedersen.

On January 16, 1979, Walter and Elsie Pedersen gave the Bank a real estate mortgage in the amount of $174,020.43, covering Tracts 1, 2, 3, 4, and X—1,090 acres. This mortgage was recorded on January 17, 1979. Unaware that Walter and Elsie Pedersen had conveyed away some of the land covered by the 1975, 1976, and 1979 mortgages because the July 10, 1978, financial statement provided to the Bank by Walter Pedersen indicated ownership of 1,090 acres, the Bank, on January 16, 1979, also executed a release of mortgage releasing the 1975 mortgage and the 1976 mortgage. The release of mortgage was recorded on January 17, 1979.

On January 16, 1980, Walter and Elsie Pedersen gave the Bank a real estate mortgage in the amount of $192,292.58, covering Tracts 1, 2, 3, 4, and X—1,090 acres. At this time the Bank was still unaware that Walter and Elsie Pedersen had conveyed away part of the property covered by the mortgage because the September 10, 1979, financial statement provided to the Bank by Walter Pedersen still indicated ownership of 1,090 acres. The mortgage was recorded on January 17, 1980.

The financial statement provided to the Bank by Walter Pedersen on September 9, 1980, indicated for the first time that Walter and Elsie Pedersen claimed ownership of only 930 acres, rather than 1,090 acres. Walter Pedersen told Randall Lanning, a vice president of the Bank handling Walter and Elsie Pedersen's loan file, that 160 acres (Tract X) had been deeded to LeRoy Pedersen. Due to the change in the number of acres, in January 1981 the Bank requested a title search. The title search revealed the 1976 deed conveying to LeRoy Pedersen Tract 3

and part (c) of Tract 4. Presumably the title search also revealed the mortgages from LeRoy and Dee Ann Pedersen to Walter Pedersen, covering Tract 3 and part (c) of Tract 4. Although there was reference to the assignments of the four $6,000 mortgages on the reverse side of the 1981 title search, Lanning failed to see this information.

On February 12, 1981, Walter and Elsie Pedersen gave the Bank a real estate mortgage in the amount of $248,802.81, covering Tracts 1, 2, 3, and 4, but not Tract X—930 acres. Although only Walter and Elsie Pedersen were listed as mortgagors in the grantor clause, the mortgage was signed by Walter, Elsie, LeRoy, and Dee Ann Pedersen. Lanning testified that the Bank requested the signatures of LeRoy and Dee Ann Pedersen because of the 1976 conveyance of Tract 3 and part (c) of Tract 4 to LeRoy Pedersen. Dee Ann Pedersen testified that Lanning told her that she and LeRoy would not be obligated on the debt if they signed the mortgage document. Although the signatures of Walter and Elsie Pedersen were acknowledged, the signatures of LeRoy and Dee Ann Pedersen were not. The mortgage was recorded on February 13, 1981.

On February 12, 1981, Walter and Elsie Pedersen also entered into a subordination agreement with the Bank regarding Tract 3 and part (c) of Tract 4. The subordination agreement stated that Walter and Elsie Pedersen were holders of real estate mortgages from LeRoy and Dee Ann Pedersen dated December 21, 1976, and recorded on January 6, 1978, in mortgage record book 86, pages 512-21 inclusive, of the real estate records of Dakota County, Nebraska. The agreement further stated that the Bank held a real estate mortgage of Walter and Elsie Pedersen, covering the above-described property in the amount of $248,802.81, dated February 12, 1981, and recorded on February 13, 1981. The agreement then provided that Walter and Elsie Pedersen subordinated their "ownership and contractual rights" in Tract 3 and part (c) of Tract 4 to the lien of the Bank's real estate mortgage. The lien of the Bank's mortgage was to be "senior and prior to the rights and heir of the mortgages recorded in Mortgage Record Book 86, page 512-521 inclusive, of the real estate records of Dakota County, Nebraska." Walter and Elsie Pedersen signed the

subordination agreement, but their signatures were not notarized. (It should be noted that pages 512-21 inclusive, of mortgage record book 86, cover not only the mortgages on Tract 3 and part (c) of Tract 4 from LeRoy and Dee Ann Pedersen to Walter Pedersen, but also the assignments of mortgages from Walter Pedersen to Melvin Pedersen and Dorothy Pedersen.)

On May 11, 1983, Walter and Elsie Pedersen gave the Bank a master note in the amount of $350,000. On that day Walter and Elsie Pedersen also gave the Bank a real estate mortgage in the amount of $350,000, covering Tracts 1, 2, 3, and 4, but not Tract X—930 acres. Although again only Walter and Elsie Pedersen were listed as mortgagors in the grantor clause, the mortgage was signed by Walter and Elsie Pedersen on May 11, 1983, and by LeRoy and Dee Ann Pedersen on May 16, 1983. The Bank requested that LeRoy and Dee Ann Pedersen sign the 1983 mortgage for the same reason they signed the 1981 mortgage, i.e., because of LeRoy Pedersen's ownership interest indicated on the title search. Dee Ann Pedersen testified that in 1983 she asked if the mortgage was the same as before in that she and LeRoy would not be obligated on the debt and that Lanning said that was correct. All signatures were acknowledged, and the mortgage was recorded on May 17, 1983.

Although it was the May 11, 1983, mortgage the Bank sought to foreclose, the Bank in its amended petition also requested "such other and further relief as the Court may deem just and equitable." All Pedersens were named as defendants to the action.

On December 18, 1987, the trial court rendered a judgment in favor of the Bank in the amount of $404,149.66 as of November 19, 1987, plus interest at 14.5 percent per annum accruing at a rate of $113.03 per day. The Bank's lien was subject only to the lienhold interest of The Federal Land Bank of Omaha and the unpaid real estate taxes. On March 8, 1988, the court issued an order of sale. On April 20, 1988, the sheriff's sale took place, and the land was sold to the Bank for $282,541.82. On May 10, 1988, the court issued an order confirming the sale.

Some preliminary observations and conclusions may be reached. Tracts 1 and 2 are owned by Walter and Elsie Pedersen, and the Bank is the only entity with a mortgage lien on these premises. Therefore, foreclosure in favor of the Bank was appropriate. Parts (a) and (b) of Tract 4 are also owned by Walter and Elsie Pedersen, upon which the Bank has a lien subject to the prior lien of The Federal Land Bank of Omaha. Tract 3 and Part (c) of Tract 4 are owned by LeRoy and Dee Ann Pedersen subject to the superior lien of The Federal Land Bank. The Bank claims a lien on these premises second only to The Federal Land Bank. Tract X appears to be owned by LeRoy and Dee Ann Pedersen and is not involved in this appeal.

Thus, at issue is the priority of the Bank's lien, if any, on Tract 3 and part (c) of Tract 4 as to all parties other than The Federal Land Bank, whose superiority is conceded.

LeRoy and Dee Ann Pedersen claim that because they are record title owners of Tract 3 and part (c) of Tract 4 and they are not parties to the 1983 mortgage because their names do not appear in the grantor clause, the Bank does not even have a lien on these premises. Although not alleged or requested in the amended petition, the Bank contends that the omission of the names of LeRoy and Dee Ann Pedersen from the grantor clause was a scrivener's error and requests that the document be reformed to conform to the intentions of the parties.

A separate suit in equity to reform a mortgage to correct a mutual mistake of the parties is not necessary. *Gurske v. Strate*, 165 Neb. 882, 87 N.W.2d 703 (1958). The reformation of a mortgage to correct a mutual mistake is incidental to the foreclosure of a mortgage and any and all equitable rights the mortgagee can show he or she has in it. *First Fed. Sav. & Loan Assn. v. Thomas*, 230 Neb. 465, 432 N.W.2d 222 (1988). A court may, although not requested by either party, reform an instrument to the ascertained intentions of the parties. *First Fed. Sav. & Loan Assn. v. Thomas, supra.*

Reformation may be granted to correct an erroneous instrument to express the true intent of the parties to the instrument. *Jelsma v. Acceptance Ins. Co.*, 233 Neb. 556, 446 N.W.2d 725 (1989). To overcome the presumption that the written instrument correctly expresses the intention of the

parties and obtain reformation, the evidence must be clear, convincing, and satisfactory. *Jelsma v. Acceptance Ins. Co., supra*. Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved. *Haines v. Mensen*, 233 Neb. 543, 446 N.W.2d 716 (1989).

Reformation may be ordered where there has been a mutual mistake or where there has been a unilateral mistake caused by the fraud or inequitable conduct of the other party. *Jelsma v. Acceptance Ins. Co., supra*. The Bank, here, argues no fraud and, hence, in order for reformation to be an appropriate remedy, there has to have been a mutual mistake. A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties. *Jelsma v. Acceptance Ins. Co., supra*. For purposes of reformation, mutual mistake is defined as a belief shared by the parties, which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about the instrument. *Jelsma v. Acceptance Ins. Co., supra*.

The fact that one of the parties denies that a mistake was made does not prevent a finding of mutual mistake, nor prevent reformation. *Omaha Door Co. v. Mexican Food Manuf. of Omaha*, 232 Neb. 153, 439 N.W.2d 776 (1989).

An erroneous omission or deletion, even by a scrivener, from an instrument intended to reflect the agreement of the parties is a mutual mistake and is contrary to the real intention and agreement of the parties. *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

The evidence is clear and convincing that the parties intended LeRoy and Dee Ann Pedersen to be mortgagors and that their names were excluded from the grantor clause of the 1983 mortgage through a scrivener's error.

Looking at the 1983 mortgage, four individuals signed the mortgage, although only two of the four were listed as mortgagors in the grantor clause. Furthermore, the signatures of LeRoy and Dee Ann Pedersen were acknowledged. The

description of the land to be covered included parcels of land that everyone admits stood of record in the names of LeRoy and Dee Ann Pedersen—Tract 3 and part (c) of Tract 4. LeRoy and Dee Ann Pedersen were aware that the 1983 mortgage, like the 1981 mortgage previously executed, covered property they owned. In fact, in the 1981 mortgage Dee Ann had the Bank exclude from the mortgage Tract X *because that land was not being farmed by Walter.*

Lanning testified that the Bank intended by obtaining the signatures of LeRoy and Dee Ann Pedersen to have them as mortgagors and that the Bank required the signatures before extending additional credit to Walter and Elsie Pedersen in their farming operation.

Dee Ann Pedersen testified that she and LeRoy Pedersen signed the 1983 mortgage because Walter Pedersen called as he did in 1981. In 1981 she and LeRoy Pedersen signed the mortgage because Walter Pedersen called when he needed them to sign before he could start his spring farming. Dee Ann Pedersen did testify that she was told by Lanning that it would be the same as in 1981 and that she and LeRoy would not be obligated on the debt. Although Dee Ann Pedersen testified that she did not know the legal effect of signing the mortgage, she did admit that she understood that the purpose was for Walter and Elsie Pedersen to obtain financing.

There simply was no other reason for LeRoy and Dee Ann Pedersen to sign the mortgage other than to be mortgagors. Even if Lanning did tell LeRoy and Dee Ann Pedersen that they would not be obligated on the debt of Walter and Elsie Pedersen, that would not change the status of LeRoy and Dee Ann Pedersen as mortgagors. An individual need not be personally obligated for the debt of another in order to mortgage his or her property as security for the debt of another. See *Columbus Land, Loan & Bldg. Assn. v. Wolken*, 146 Neb. 684, 21 N.W.2d 418 (1946).

Since the discrepancy between the grantor clause and the signatures may be corrected by reformation, the issue as to ambiguity and parol evidence raised by the parties need not be addressed.

As reformation is granted to include LeRoy and Dee Ann

Pedersen as mortgagors, Tract 3 and part (c) of Tract 4 will be covered by the 1983 mortgage. Thus, the remaining issue to be resolved is the priority of the Bank's lien on these parcels of land.

The Bank contends that the conveyances, mortgages, and assignments of mortgages among the Pedersen family occurred and were recorded in 1976 through 1978, and therefore the provisions of Neb. Rev. Stat. §§ 36-401 and 36-403 (Reissue 1978), as those statutes existed prior to their repeal in 1980, are applicable to this case, as are this court's pre-1980 interpretations of those statutes. The Bank's conclusion is that conveyances to relatives which fall within §§ 36-401 and 36-403 are presumptively null and void as to preexisting creditors if the intent or object or effect of the conveyances is to hinder, delay, or defraud a preexisting creditor's recovery of its debt. Although we do not agree that the conveyances were fraudulent, it is not necessary for us to discuss that issue, as will be apparent.

As has been set out in some detail, there was a series of mortgage loans made by the Bank to Walter and Elsie Pedersen, beginning with the loan in 1975. A second loan was made in 1976. Then in 1979, Walter and Elsie Pedersen, without informing the Bank that they had conveyed some of the land covered in the earlier mortgages, gave the Bank a mortgage covering the same property as that covered in the 1975 and 1976 mortgages. On the day that the 1979 loan was made, unaware that Walter and Elsie Pedersen no longer owned Tract 3 and part (c) of Tract 4 covered by the 1975 and 1976 mortgages and the new 1979 mortgage, the Bank executed a release of mortgage releasing the 1975 and 1976 mortgages.

The issue is whether Tract 3 and part (c) of Tract 4 are still subject to the 1975 and 1976 mortgages despite the release of those mortgages by the Bank in 1979.

Recently, in *Commercial Fed. S. & L. Assn. v. Grabenstein*, 231 Neb. 647, 650, 437 N.W.2d 775, 777 (1989), the following well-established rule was reiterated:

> Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts

> are practically simultaneous or parts of the same transaction, are not an extinguishment of the mortgage, but a renewal thereof, and do not give priority to an intervening lien, especially where it is done in good faith and without any intention to release the lien of the mortgage.

See, also, *Hadley v. Schow*, 146 Neb. 163, 18 N.W.2d 923 (1945).

Under Nebraska case law the intent of the parties controls, not the recorded release. *Commerce Savings Lincoln v. Robinson*, 213 Neb. 596, 331 N.W.2d 495 (1983). Where the holder of a senior mortgage discharges it of record and contemporaneously takes a new mortgage, he or she will not, in the absence of paramount equities, be held to have subordinated his or her security to an intervening lien unless the circumstances of the transaction indicate this to have been his or her intention, or such intention upon his or her part is shown by extrinsic evidence. *Larson Cement Stone Co. v. Redlim Realty Co.*, 179 Neb. 134, 137 N.W.2d 241 (1965).

As to intention:

> Ordinarily, it is presumed that one must have intended to keep alive his mortgage title, where it was essential to his security against an intervening title; and this presumption applies although the party through ignorance of such intervening title may have actually discharged the mortgage and canceled the notes, and really intended to extinguish them.

Commercial Fed. S. & L. Assn. v. Grabenstein, supra at 650, 437 N.W.2d at 777. Where an existing lien has been discharged and released by the holder and a renewal taken without knowledge of the existence of an intervening lien against the property, the mortgagee will be regarded as acting under such a mistake of fact as to entitle him or her to relief by a restoration of his or her priority if the rights of innocent parties are not involved. *Union Loan & Savings Ass'n v. Simmons*, 131 Neb. 260, 267 N.W. 449 (1936).

The elements necessary for the 1979 mortgage to assume the status of the 1975 and 1976 mortgages, i.e., good faith, ignorance of the intervening lien, and the lack of any intention

of releasing the lien of the mortgage, are satisfied in this instance. The rights of innocent parties are not involved in this case. The warranty deed from Walter and Elsie Pedersen to LeRoy Pedersen noted the encumbrance of the Bank's first mortgage. To hold that Tract 3 and part (c) of Tract 4 are still subject to the lien of the Bank prior to the intrafamily conveyances would put none of the children of Walter and Elsie Pedersen, including LeRoy Pedersen, in any worse position than they were in before.

Giving the 1979 mortgage the priority of the 1975 and 1976 mortgages, coupled with the reformation of the mortgage to include LeRoy and Dee Ann Pedersen as mortgagors, places the Bank in a position of priority as to all other liens except, of course, that of The Federal Land Bank.

The judgment of the district court is affirmed.

AFFIRMED.

JUDITH A. KUMAR, FORMERLY JUDITH A. ALLEN, APPELLEE AND CROSS-APPELLANT, V. DOUGLAS COUNTY, A POLITICAL SUBDIVISION, APPELLANT AND CROSS-APPELLEE.

JEFFERY T. ALLEN, APPELLEE AND CROSS-APPELLANT, V. DOUGLAS COUNTY, A POLITICAL SUBDIVISION, APPELLANT AND CROSS-APPELLEE.

JAMES H. ALLEN, APPELLEE AND CROSS-APPELLANT, V. DOUGLAS COUNTY, A POLITICAL SUBDIVISION, APPELLANT AND CROSS-APPELLEE.

452 N.W.2d 21

Filed February 23, 1990. Nos. 88-269, 88-270, 88-271.

1. **Motions for New Trial: Verdicts: Appeal and Error.** The standard of review of an order granting a new trial is whether the trial court abused its discretion. A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict.
2. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's factual findings in a case brought under the Political Subdivisions Tort Claims

Act will not be set aside unless such findings are clearly incorrect.

3. **Trial: Witnesses.** In a bench trial of a law action the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
4. **Trial: Negligence.** Determination of causation is, ordinarily, a matter for the trier of fact.
5. **Trial: Proximate Cause.** When there is conflicting evidence, determination of proximate cause is a question or matter for the trier of fact.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions.

Ronald L. Staskiewicz, Douglas County Attorney, and Michael W. Amdor for appellant.

Vincent P. Sutera and George A. Sutera, of Sutera & Sutera, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This appeal arises from consolidated tort actions against Douglas County, Nebraska, under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 1987). In the early morning hours of June 1, 1984, 17-year-old Jeffery Allen was driving a vehicle southbound into a curve on Douglas County Road 98 as it intersects with County Road 29. The vehicle left the road and Jeffery was thrown from the car. The car rolled over four times. Jeffery suffered, among other injuries, a compound depressed skull fracture which penetrated the suboccipital area of the brain, leaving him permanently disabled. Jeffery brought an action against Douglas County on his own behalf for his injuries, and Judith A. Kumar, his natural mother, and James H. Allen, his natural father, brought actions to recover for their expenditures, losses, and damages.

The plaintiffs contended in their petitions that the defendant was negligent in (1) failing to properly warn Jeffery of the curve in the road in County Road 98 as it approached County Road 29; (2) failing to maintain the road for those people who are unfamiliar with the curve in County Road 98 as it approaches County Road 29; (3) failing to have a traffic control and warning sign properly up and visible to warn unfamiliar drivers

of the imminent danger on said road; (4) designing County Road 98 in such a manner as to be dangerous as it intersects with County Road 29; (5) maintaining the speed limit at 55 miles per hour on the day of the accident, which speed is unsafe and dangerous for the conditions of the road as it approaches the intersection with County Road 29; and (6) having knowledge of the "curve ahead" sign on County Road 98 being down and not correcting said situation.

The defendant denied the allegations, and further alleged that Jeffery was contributorily negligent in a degree more than slight such as to bar recovery and that the sole proximate cause of the accident was the negligence of Jeffery in (1) operating his vehicle at an excessive speed under the circumstances; (2) failing to maintain an adequate and proper lookout; (3) failing to keep his motor vehicle under control at all times; (4) failing to take prompt and adequate remedial action after he became aware of his entry into the curve at said intersection; and (5) operating a motor vehicle when his ability to do so was hampered, impaired, or diminished by the influence of alcoholic beverages consumed by him prior to the accident.

On October 30, 1987, the trial court, sitting without a jury, entered its findings of fact and ruled in favor of the defendant in each of the three cases. The court made the following pertinent factual findings:

> There had been erected on Road 98 a traffic warning sign which indicated the presence of a curve in the roadway at the left, but on the night in question that sign was not in place. . . .
>
> 3. The defendant is the political subdivision which was responsible for the maintenance and the repair of County Roads 98 and 29 on June 1, 1984.
>
> 4. The "design" speed of the curve herein is approximately 40 to 42 miles per hour. That is the speed in which the curve can be safely negotiated without any problem. The "critical" speed of the curve is 59 to 65 miles per hour. That would be the maximum speed in which a car could go around the curve safely.
>
> 5. . . . The defendant was negligent in failing to have the curve sign in place prior to and at the time of this accident.

This negligence of the defendant was a proximately-contributing cause of this accident.

6. . . . "Signing" is more important to a driver than "striping" as regards warning of a curve. . . .

. . . .

8. . . . [The speed of Jeffery's automobile] was . . . faster than 55 miles per hour, and possibly in excess of 60 miles per hour. The speed limit of 55 miles per hour is the top speed for normal driving conditions. . . . Jeffrey [sic] was traveling faster than reasonable and proper under the conditions and circumstances then and there existing and was negligent in so doing. This negligence of Jeffrey [sic] was a proximately-contributing cause of this accident.

9. On County Road 98, on June 1, 1984, there were center-line markings (yellow or white or both) approaching the curve and into the curve. There was also a white line on both edges of Road 98 to show where the edge of the road was located. All of these lines would be visible by Jeffrey [sic] and within the beam of his headlights. These markings are not a substitute for signs but supplement the signs. They convey warnings or information to the driver without diverting his attention from the roadway. . . . Jeffrey [sic] was negligent in not maintaining a proper lookout for the obvious markings on the road. This negligence was a proximately-contributing cause of this accident.

10. On the night of June 1, 1984, Jeffrey [sic] had some beer to drink. Sometime after the accident, his blood alcohol content level was measured at .061. . . . As a result of the alcohol content in his blood, Jeffrey [sic] was driving the automobile at the time of this accident in an impaired condition, resulting in a slower than normal reaction time and affecting his attention span. Jeffrey [sic] was driving the automobile at the time of the accident while under the influence of alcohol to some extent. This was negligence, and this negligence was a proximately-contributing cause of this accident.

11. The negligence of Jeffrey [sic] T. Allen, when compared with that of the defendant, was more than slight

and therefore defeats his recovery. It therefore follows that the petitions of all three plaintiffs must be dismissed at the cost of each plaintiff.

The plaintiffs filed motions for new trials on November 3, 1987. The court took the motions under advisement after arguments were had on November 10, 1987.

It is at this point in the proceedings that the actions of the trial court become perplexing. On February 24, 1988, the court, in ruling on the motions for new trial, after having an opportunity to review the transcribed testimony, decided it had "come up with a couple of different conclusions on this matter . . . ." The court still concluded that there was negligence on the part of the defendant as set forth in the original orders, but stated the following new findings.

Based on the testimony of the expert witnesses for plaintiffs and defendant that if the curve sign had been up, Jeffery could have slowed down enough to safely negotiate the turn, the court concluded that Jeffery's speed under the circumstances was not a proximately contributing cause of the accident.

As to the matter of lookout, the court found that the white and yellow lines that mark the road supplement the sign, but in and of themselves are not sufficient to give warning of a curve. Therefore, if Jeffery did not keep a proper lookout for these lines, such was not a proximately contributing cause of the accident.

The court still concluded that Jeffery was driving his vehicle in an impaired condition and that this was negligence and was a proximately contributing cause of the accident, but stated that the impairment would be at a minimum or low level.

The court concluded by finding that Jeffery Allen was guilty of slight negligence when compared with the negligence of the defendant and that the negligence of the defendant as found in the prior order in comparison with Jeffery's negligence was gross.

Based on these new findings, the court then sustained the plaintiffs' motions for new trial.

On February 29, 1988, the plaintiffs each filed a "motion to require judgment on the findings." On March 24, the court determined that it had the authority to vacate the prior

judgments and enter judgments for plaintiffs. In sustaining plaintiffs' motions, the court found the granting of a new trial to be moot and entered judgment in favor of Jeffery Allen in the amount of $950,000, reduced to $807,500 by virtue of Jeffery's slight contributory negligence. The court entered judgments in favor of James Allen in the amount of $765 and in favor of Judith Kumar in the amount of $1,168.75. The defendant appeals from the awards, and the plaintiffs cross-appeal, claiming insufficient damages.

The defendant assigns 12 errors. The first nine errors go to the findings made by the trial court in its order of February 24, 1988, which therefore presents the question of whether there was sufficient evidence to support the court's findings. The final three assignments claim that the court erred in granting plaintiffs a new trial, in vacating the original judgments of October 30, 1987, and entering judgments for the plaintiffs, and in failing to account for Jeffery Allen's contributory negligence and to make a greater reduction of the judgment awarded him.

To determine the outcome of this appeal, we must first unravel the procedural tangle which began after plaintiffs filed their motions for new trial.

The standard of review of an order granting a new trial is whether the trial court abused its discretion. A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. Unless such error appears, a party who has sustained the burden and expense of trial, and who has succeeded in securing a verdict on the facts in issue, has a right to keep the benefit of that verdict. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989); *Mundt v. Northwestern Bell Tel. Co.*, 230 Neb. 192, 430 N.W.2d 530 (1988); *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983).

The district court has the authority to grant a new trial based on any of the causes found in Neb. Rev. Stat. § 25-1142 (Reissue 1989) which materially affect the substantial rights of the aggrieved party. The trial court appears to have granted the plaintiffs' motions for new trial based on the conclusion that the decisions were not sustained by sufficient evidence or were

contrary to law. We disagree.

A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect. *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989); *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988).

In a bench trial of a law action the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Ohnstad, supra.*

Determination of causation is, ordinarily, a matter for the trier of fact. *Zeller, supra.* When there is conflicting evidence, determination of proximate cause is a question or matter for the trier of fact. *Zeller, supra.*

Accordingly, under the foregoing principles of law, the court determined the facts and causation, and if there is evidence to support the trial court's original findings, then those findings and the court's original entries of judgments for the defendant cannot be clearly incorrect and an order granting a new trial based on insufficient evidence would be erroneous. Testimony from both the plaintiffs' and the defendant's expert witnesses regarding the existing warning, speed of the car, and cause of the accident, if believed, would have sufficiently supported specific findings and judgments for either plaintiffs or defendant. The original decisions of the trial court are neither contrary to law nor lacking sufficient evidence.

Therefore, there being no cause or basis under § 25-1142 to justify granting a new trial, the defendant has a right to keep the benefit of its judgments, and the trial court abused its discretion in granting plaintiffs' motions for new trial.

In considering plaintiffs' motions for new trial, the trial court reviewed the transcribed testimony which became available to the court after the original judgments for the defendant were entered. This review amounted to a new trial on the transcript where the judge reweighed the evidence and, changing his mind, recited new factual findings in granting plaintiffs' motions. This action was prejudicial to the party that secured the initial judgments.

We need not examine any other assignments of error to

resolve this case. The court's vacating of the original judgments and entry of judgments and awards for plaintiffs follow from erroneously granted motions for new trial, and our decision today renders examination of the defendant's first nine assignments of error unnecessary.

The judgments of the district court are therefore reversed, and the cause is remanded to the district court with directions to reinstate its original judgments of October 30, 1987, for the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

COUNTY OF KEITH, NEBRASKA, APPELLEE, V. NORMAN K. FULLER ET AL., APPELLEES, ADAMS BANK & TRUST, APPELLANT.

452 N.W.2d 25

Filed February 23, 1990. No. 88-300.

1. **Foreclosure: Equity.** An action to foreclose a lien is grounded in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, this 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.
3. **Mortgages: Merger.** A mortgage does not merge in the fee title when there is no identity of ownership of the mortgage and the fee title.
4. **Mortgages: Loans.** A mortgage is a mere security and has no efficacy if unaccompanied by a debt or obligation. There must be an agreement, either express or implied, on the part of the mortgagor, or someone in whose behalf the mortgage is executed, to pay to the mortgagee a sum of money either on account of a preexisting debt or present loan. Although money need not be loaned at the time the mortgage is given, there must still be an obligation at the time the mortgage is executed for future advances of funds.
5. **Mortgages: Intent: Words and Phrases.** Mortgage clauses, known as dragnet clauses, which undertake to secure subsequent debts will, in the absence of other legal prohibition, be enforced to the extent they are determined to have been within the intent of the parties.
6. **Contracts: Mortgages.** The rules governing interpretation of contracts are applicable to mortgages.
7. **Contracts.** The terms of an instrument are to be accorded their plain and

ordinary meaning as ordinary, average, or reasonable persons would understand them.

8. **Mortgages: Liens.** Where there are several joint mortgagors, a subsequent note executed by one of the mortgagors does not create a lien against the property interests of the mortgagors who are not parties to the subsequent note.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS II, Judge. Affirmed.

Neil E. Williams and Tanya L. Dillow, of McGinley, Lane, Mueller, O'Donnell & Williams, P.C., for appellant.

Firmin Q. Feltz for appellee Santero.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Adams Bank & Trust (Adams Bank) appeals a foreclosure decree wherein the Keith County District Court held that Barbara L. Santero's marriage dissolution judgment lien was viable and had priority over two mortgages wherein the bank was the mortgagee. We affirm.

On appeal, Adams Bank claims the trial court erred in failing to find that (1) Santero's judgment lien merged with the fee title to the real estate involved here, (2) it was inequitable for Santero to attempt to enforce her judgment lien after the bank had executed a release in her favor, (3) a 1973 mortgage in its favor is a valid lien against the property here involved, and (4) a 1984 note in the favor of the bank was secured by mortgages executed and delivered to the bank in 1974 and 1977.

An action to foreclose a lien is grounded in equity. *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 749, 448 N.W.2d 123 (1989). In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, when credible evidence is in conflict on a material issue of fact, this 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. *Id.*

On June 28, 1973, Barbara L. Fuller, now known as Barbara L. Santero, and her then husband, Norman K. Fuller, executed

and delivered their $100,000 real estate mortgage to Keith County Bank & Trust Company, which later merged with Adams Bank & Trust. The mortgage described:

> All of Block Forty-two (42), Aufdengarten's First Addition to Ogallala, Keith County, Nebraska, and that part of the land included within the exterior boundaries thereof which was dedicated to the public use as an alleyway in the original Dedication of Aufdengarten's First Addition to Ogallala, Nebraska, except a tract of land located in the North Half of said Block 42 described as follows: Commencing at the Northwest corner of said Block 42; thence running easterly along the North line of said Block, a distance of 250.0 feet; thence Southerly along the East line of said Block 42, a distance of 2.2 feet; thence Southwesterly along an 11,419.2' radius curve to the left, a distance of 250.3 feet; thence northerly along the West line of said Block, a distance of 9.1 feet to the point of beginning and containing 0.032 acres, more or less.

On February 4, 1974, and March 1, 1977, Barbara and Norman Fuller and Fuller Co., Inc., executed and delivered Small Business Administration promissory notes and mortgages to Keith County Bank. The 1974 note and mortgage were for $100,000, and the 1977 note and mortgage were for $30,000. The mortgages were promptly recorded after they were delivered. The two mortgages described:

> All of Block Forty-two (42), Aufdengarten's First Addition to Ogallala, Keith County, Nebraska, and that part of the land included within the exterior boundaries thereof which was dedicated to the public use as an alleyway in the original Dedication of Aufdengarten's First Addition to Ogallala, Nebraska, except a tract of land located in the NorthHalf of said Block 42 described as follows: Commencing at the Northwest corner of said Block 42; thence running easterly along the North line of said Block, a distance of 250.0 feet; thence Southerly along the East line of said Block 42, a distance of 2.2 feet; thence Southwesterly along an 11,419.2' radius curve to the left, a distance of 250.3 feet; thence northerly along

the West line of said Block, a distance of 9.1 feet to the point of beginning and containing 0.032 acres, more or less, also except lots five (5) and six (6) in said Block 42, Aufdengarten's First Addition to Ogallala, Keith County, Nebraska.

Barbara and Norman Fuller, beginning in 1972, had held Block 42, Aufdengarten's First Addition, as joint tenants with rights of survivorship and not as tenants in common. In 1974, 1976, and 1978, Barbara Fuller signed a number of personal guaranties in favor of Keith County Bank for Fuller Co. Leasing, Inc.; Fuller Co., Inc.; and Norman Fuller.

On December 7, 1979, the district court for Keith County entered a decree dissolving the marriage of Barbara and Norman Fuller. The court ordered Norman Fuller to pay Barbara Fuller the sum of $149,834.16 in accordance with a property settlement agreement, which was incorporated by reference into the dissolution decree. By joint stipulation dated December 10, 1981, this amount was increased to $164,002.66. On December 7, 1979, in consideration of $1 and the property settlement agreement, Barbara Fuller conveyed by quitclaim deed to Norman Fuller the real estate described in the 1974 and 1977 mortgages.

Under the property settlement agreement, Norman Fuller agreed to attempt to secure the removal of Barbara Fuller as signatory and/or guarantor on all promissory notes, mortgages, and loans which Barbara Fuller had signed or guaranteed. On April 11, 1980, a partial release was obtained by which Keith County Bank, except for any SBA loans existing on December 7, 1979, discharged Barbara Fuller from liability in connection with all promissory notes and personal guaranties which she had executed in favor of the bank.

Thereafter, on June 3, 1980, Norman Fuller executed and delivered a mortgage on the real estate described in the 1974 and 1977 mortgages to Keith County Bank to secure an indebtedness of $100,000. The mortgage was recorded on June 5, 1980. On December 4, 1984, Norman Fuller, as president of Fuller Co., Inc., executed and delivered to Keith County Bank a promissory note for sums not exceeding a maximum principal amount at any time outstanding of $200,000.

Due to delinquent real estate taxes, Keith County became the owner and holder of a tax sale certificate describing the following real estate:

> Lots 1, 2, 3, 4, 7, 8, 9, and 10, Block 42 of Aufdengarten's First Addition to Ogallala, Keith County, Nebraska, and that part of the land included within the exterior boundaries thereof which was dedicated to the public use as an alley way in the original dedication of Aufdengarten's First Addition to Ogallala, Nebraska, except that portion thereof conveyed to the State of Nebraska, by a warranty deed recorded in book 5, of deeds, page 639 of the records of Keith County, Nebraska and except that portion thereof conveyed to the City of Ogallala, Nebraska by deeds recorded in book 14 of the deeds, page 555 and 556 of the records of Keith County, Nebraska . . . .

On June 19, 1986, Keith County filed an action to foreclose the tax sale certificate. In its second amended cross-petition, Adams Bank, which had merged with Keith County Bank, sought to foreclose its four mortgages and asked the trial court to establish that its mortgages were first in priority. Barbara Santero filed an amended answer and cross-petitioned for foreclosure of her dissolution judgment lien. The parties stipulated that Keith County's tax lien had first priority on the proceeds of the foreclosure sale.

The evidence shows that at time of trial Norman Fuller owed to Adams Bank, including interest, $26,311.99 on the 1974 note, $9,414.53 on the 1977 note, and $52,663.64 on the 1984 note. The record also reflects that under the dissolution decree, as modified, Norman Fuller owed to Santero at the time of the foreclosure decree $89,043.50 and that $37,730 was due Keith County for real estate taxes involved in the tax foreclosure.

The foreclosure decree canceled the 1973 mortgage because there was no evidence of a note or debt securing the mortgage. The court found that Keith County's tax lien had first priority and that Adams Bank's 1974 and 1977 mortgages had second and third priorities, respectively. Santero's judgment lien was given fourth priority. The last priority was assigned to the bank's 1980 mortgage which secured the 1984 note. Along with

setting priorities, the decree reflects the amounts owed by Norman Fuller to the respective parties. No issue has been raised regarding those amounts.

Central to the resolution of this appeal is whether Santero possessed an enforceable judgment lien. Recognizing this, the bank initially argues that Santero's judgment lien was extinguished by merger. The bank first claims that at the time of the entry of the dissolution of marriage decree, Santero's judgment lien immediately attached to the real estate. The appellant further argues that at that time, Santero still possessed her interest in the fee title to the subject real estate. Relying upon Neb. Rev. Stat. § 76-274 (Reissue 1986), the bank concludes that Santero's judgment lien merged with the fee title to the real estate and that when Santero executed and delivered her quitclaim deed to Norman Fuller, the lien was released by reason of merger of the lien. Section 76-274 provides:

> Whenever an interest in the fee title to any real estate in this state and an interest in a mortgage or other lien affecting the same interest shall become vested in the same person, and such person subsequently conveys such fee title by deed, unless a contrary intent is expressed by the terms of such deed, it shall be conclusively presumed in favor of subsequent purchasers and encumbrancers for value and without notice, that such lien interest merged with the fee and was conveyed by such deed and that such lien was thereby released from fee interest so conveyed.

In *Gilcrist v. Wright*, 167 Neb. 767, 94 N.W.2d 476 (1959), William Ehlers was assigned a $5,000 mortgage. Later, the same property to which the mortgage applied was conveyed to Ehlers and his wife as joint tenants. This court held that a mortgage does not merge in the fee title when there is no identity of ownership of the mortgage and the fee title. In this case, Santero's judgment lien attached to the entire property, yet her interest in the fee title was only that of a joint tenant. Therefore, there was no identity of ownership of the lien and fee title. Consequently, no merger took place. Appellant's first assignment of error is without merit.

In its second assignment of error, Adams Bank claims that it is inequitable for Santero to attempt to enforce her judgment

lien after the bank had executed and delivered a release in her favor.

In 1984, at the time the Adams Bank granted a loan to Norman Fuller, the bank had intimate knowledge of the circumstances surrounding the ownership of and the encumbrances on the real estate involved in this action. The bank had previously taken mortgages on the property as security. After the Fullers' marriage was dissolved, pursuant to Fullers' property settlement agreement, there were negotiations for at least 4 months with Keith County Bank's agent to secure a release for Santero from her guaranties. Accordingly, the bank had notice of the Fullers' dissolved marriage, their property settlement agreement, and, inferentially, Santero's judgment lien and the lack of identity between the ownership of the judgment lien and fee title. Despite this knowledge, the bank loaned additional money to Norman Fuller in 1984. Adams Bank claims that had it known that Santero would attempt to enforce her judgment lien against the foreclosed property, it is doubtful it would have loaned money to Norman Fuller in 1984.

The short answer to this is that the release was independent of the judgment lien. Santero testified, and the bank agrees in its brief, that the release was in exchange for Santero's executing a quitclaim deed to Norman Fuller for her interest in the real estate involved in the foreclosure. There is no credible evidence that the bank's release was in consideration for Santero's relinquishing her judgment lien. Under the circumstances, there is nothing inequitable regarding the result. Appellant's second assignment of error is meritless.

The 1974 and 1977 notes provided that collateral "shall mean any . . . property or rights therein of any nature whatsoever or the proceeds thereof which may have been, are, or hereafter may be, hypothecated, directly or indirectly by the undersigned or others, in connection with, or as security for, the Indebtedness or any part thereof."

Adams Bank claims in its third assignment of error that under these provisions, the 1973 mortgage falls within the definition of "collateral." Under the bank's reasoning, there would then be a note to evidence the 1973 mortgage.

It has long been the rule in this state that a mortgage is a mere security and has no efficacy if unaccompanied by a debt or obligation. See *Columbus Land, Loan & Bldg. Assn. v. Wolken*, 146 Neb. 684, 21 N.W.2d 418 (1946). There must be an agreement, either express or implied, on the part of the mortgagor, or someone in whose behalf the mortgage is executed, to pay to the mortgagee a sum of money either on account of a preexisting debt or present loan. *Id.* Although money need not be loaned at the time the mortgage is given, there must still be an obligation at the time the mortgage is executed for future advances of funds. See, e.g., *Larson Cement Stone Co. v. Redlim Realty Co.*, 179 Neb. 134, 137 N.W.2d 241 (1965); *Creigh Sons & Co. v. Jones*, 103 Neb. 706, 173 N.W. 687 (1905). It has further been held that mortgage clauses, known as dragnet clauses, which undertake to secure subsequent debts will, in the absence of other legal prohibition, be enforced to the extent they are determined to have been within the intent of the parties. *O'Neill Production Credit Assn. v. Mitchell*, 209 Neb. 206, 307 N.W.2d 115 (1981).

This is not a case where a note is executed contemporaneously with a mortgage to secure future advances. Nor is this a case with a dragnet clause in a mortgage. Instead, the case falls squarely within the rule declared in *Wolken, supra*. The mortgage executed in 1973 indicates that there was to be an accompanying promissory note bearing even date. However, there was no such note in evidence, nor does the record reflect that any loans were made before or in connection with the 1973 mortgage. A branch president employed by Adams Bank testified that the 1973, 1974, and 1977 mortgages secured the notes executed in 1974 and 1977. Thus, there was no obligation flowing from Keith County Bank to the Fullers when the mortgage was executed in 1973. Moreover, the evidence demonstrates that the mortgages given in 1974 and 1977 were the collateral for the notes executed with those mortgages. Appellant's assignment of error is without merit.

Under the terms of the 1974 and 1977 notes, indebtedness was defined as "the indebtedness evidenced by this Note . . . whether heretofore or contemporaneously herewith or hereafter contracted." In its final assignment of error, the bank

contends that because the term "indebtedness" included indebtedness "hereafter contracted," the provision included the indebtedness contracted for on December 4, 1984. The bank seeks to have the 1984 note brought under the earlier notes' provisions so that the 1984 note is secured by the 1974 and 1977 mortgages, which were given priorities ahead of Santero's judgment lien.

In effect, the bank argues that either or both of the 1974 and 1977 mortgages secured future advances. As indicated, a mortgage may be made to secure future advances. *Larson Cement Stone Co., supra*; *O'Neill Production Credit Assn., supra*. Neither the mortgages nor other documents in the record indicate that future advances were to be secured by the mortgages. The rules governing interpretation of contracts are applicable to mortgages. See *Erickson v. Newell*, 183 Neb. 641, 163 N.W.2d 286 (1968). The terms of an instrument are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Crowley v. McCoy, ante* p. 88, 449 N.W.2d 221 (1989). Here, the 1977 mortgage states that it was given to secure the payment of a promissory note dated March 1, 1977, in the amount of $30,000. The 1974 mortgage likewise indicates that it was given to secure the note executed on the same day as the mortgage. The notes executed on the same days as the mortgages are in the same amounts as the mortgages.

There is another reason for rejecting the bank's argument. In *O'Neill Production Credit Assn., supra*, a husband and wife and the husband's parents assigned their interest in an executory land contract to a lender. An assignment of the executory land contract was treated as a mortgage by the court. The assignment contained a provision that it secured any indebtedness thereafter incurred. After the assignment was executed, the lender loaned money solely to the husband on one occasion and to the husband and wife on another occasion. The court held that with regard to the subsequent loan to the husband in which the wife was not a party, the assignment created no lien against the wife's interests in the property. In this case, the 1984 note was signed solely by Norman Fuller, as president of Fuller Co., Inc. As in *O'Neill Production Credit*

Assn., supra, since Santero did not jointly execute the 1984 note, the bank could not possess a lien against her interest in the property by virtue of the 1984 note. Therefore, it is concluded that the notes executed in 1974 and 1977 did not include the indebtedness incurred in 1984.

AFFIRMED.

SHANAHAN, J., not participating.

WHITEHEAD OIL COMPANY, A CORPORATION, AND MILTON E. WHITEHEAD, APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

451 N.W.2d 702

Filed February 23, 1990. No. 88-390.

1. **Zoning: Ordinances: Licenses and Permits.** A landowner has no vested right in the continuity of zoning in a particular area so as to preclude subsequent amendment, and a zoning regulation may be retroactively applied to deny an application for a building permit even though the permit could lawfully have issued at the time of application.
2. _____: _____: _____. A new zoning ordinance will not have retroactive effect where an applicant has substantially changed position in good-faith reliance upon the existing zoning by causing substantial construction to be made or by incurring substantial expenses related to construction.
3. **Zoning: Ordinances.** A zoning ordinance may not, without providing a reasonable plan for discontinuance, operate retroactively to deprive a property owner of previously vested rights by preventing a use to which the property was put before enactment of the prohibitory ordinance.
4. **Zoning: Ordinances: Licenses and Permits.** Where a zoning authority is guilty of misconduct or bad faith in its dealings with the applicant for a use permit in accordance with the then existing zoning regulation or arbitrarily and unreasonably adopts a new regulation in order to frustrate the applicant's plans for development rather than to promote the general welfare, the new regulation may not be applied retroactively.
5. **Summary Judgment.** Summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there exists no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed in part, and in part reversed and remanded.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellants.

William F. Austin, Lincoln City Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiffs-appellants, Whitehead Oil Company and its major stockholder, Milton E. Whitehead, raising no constitutional issues, assign error to the factual and legal analyses embodied in the district court's sustainment of defendant-appellee City of Lincoln's motion for summary judgment in this action which challenges Lincoln's denial of plaintiffs' request for the land-use permit described hereinafter. We affirm as to Milton E. Whitehead and reverse and remand for further proceedings as to Whitehead Oil.

At the time Whitehead Oil purchased the subject property, it was located in a G-1 planned commercial district. In 1979, the property was rezoned and placed in a B-2 planned neighborhood business district. Such a district permits, once Lincoln issues a land-use permit, the construction and operation of retail stores, automobile wash facilities, and service stations. Lincoln Mun. Code §§ 27.31.030 and 27.31.040 (1984).

On October 27, 1986, plaintiffs applied for a land-use permit which would allow development of the property for use as a convenience retail store, for the sale of gasoline, and for a carwash.

The Lincoln planning director recommended to the planning commission and council that the permit be denied for the reasons that the proposed use involved the improper placement of gasoline pumps and a canopy in "part of the required front yard" and the improper placement of driveways immediately adjacent to residential uses. Thereafter, plaintiffs modified the use proposal in accordance with recommendations and

comments made by the planning director, including the elimination of the proposed carwash. The planning director then recommended approval of the proposed use.

Meanwhile, in January 1987, a representative of the local neighborhood association filed an application to rezone the subject and certain other property in the vicinity, from within the B-2 district to within an O-3 office park zoning district. The neighborhood representative's change of zone application specifically notes that it was submitted "in order that no retail activity (including convenience stores) be allowed, only office space use." Neither service stations nor retail convenience stores are permitted in O-3 zoning districts. Lincoln Mun. Code §§ 27.27.020 and 27.27.030 (1985).

On January 28, 1987, the planning commission voted to delay action on plaintiffs' application for a land-use permit pending review of the neighborhood representative's request for a rezoning of the property. Lincoln concedes that the delay was "for the purpose of preventing the [plaintiffs'] use permit from being issued before action could be taken on the [neighborhood representative's] requested change of zone."

Plaintiffs protested the planning commission's delay of action on their permit application to the council, and the council, pursuant to plaintiffs' request, ordered the planning commission to forward its recommendation concerning plaintiffs' permit application. On February 18, 1987, the commission recommended approval of the plaintiffs' application.

At this point, the planning director and council delayed hearing on the planning commission's recommendation in order "to allow the change of zone [requested by the neighborhood representative] to proceed through the Planning Commission." Plaintiffs deny Lincoln's claim that after April 6, 1987, any "delay in further consideration of and action upon Plaintiffs' use permit application occurred with the affirmative concurrence of Plaintiffs' representative in such delay."

On June 1, 1987, the council adopted an ordinance rezoning the district in which the subject property is contained, as requested by the neighborhood representative, and then denied plaintiffs' permit application. The property remains vacant.

Milton Whitehead stated by affidavit that prior to June 1, 1986, Whitehead Oil spent approximately $2,000 in the creation of plans for the development of the property in accordance with the permit application, approximately $2,968.01 in the revision of such plans, and approximately $10,200 in attorney and other professional fees and expenses which were directly related to obtaining approval from Lincoln of the land-use permit application. Whitehead further asserted that he remained ready at all times since October 27, 1986, to begin construction immediately upon Lincoln's approval of the application.

We begin our analysis by noting that so far as the record reveals, Whitehead Oil is the sole owner of the property in question. Milton Whitehead's interest in the matter arises solely by virtue of his position as Whitehead Oil's majority stockholder. However, that position does not give him a legal interest in the permit application at issue, and, thus, whatever the situation may be as to Whitehead Oil, the summary judgment as to him is correct and is hereby affirmed.

Whitehead Oil's position is that because it filed its permit application before the change of zone was proposed by the neighborhood representative or adopted by Lincoln, it had acquired a vested right to use the subject property in a manner consistent with the zoning in effect at the time of the filing. Thus, it asserts that the rezoning of the district in which its property is located may not operate retroactively to require the denial of its application.

Whitehead Oil contends that, as have some other states, we adopted such a rule in *City of Milford v. Schmidt*, 175 Neb. 12, 120 N.W.2d 262 (1963). In that case, Schmidt requested a permit from the City of Milford to place a trailer home on property within the city. The city denied Schmidt's request even though at the time there existed an ordinance which permitted issuance of the permit. Schmidt nevertheless placed the trailer home on the property and began using it. The city thereafter enacted an ordinance which precluded Schmidt's use of the property for placement of a trailer home. The city then filed an action to enjoin Schmidt from continuing to maintain the trailer on his property. The trial court entered judgment for Schmidt, and the city appealed, arguing that the lower court

erred in finding Schmidt could maintain the trailer on the property without a permit from the city. We upheld the trial court's implicit determination that Schmidt's application for a permit was timely made, and the refusal to issue a permit was an abuse of discretion or an arbitrary action on the part of the city council. We further held that because the zoning ordinance which prohibited the use of Schmidt's property for placement of a trailer home did not become operative until after Schmidt had attempted to get the permit and had already placed the trailer home on his property, the subsequent zoning ordinance "could have no retroactive effect on Schmidt" to "divest Schmidt of his interests under the previous code provision." *Id.* at 19, 120 N.W.2d at 266.

The decision in *City of Milford* relies on the fact that Schmidt had established a vested interest in an allowed use prior to the adoption of the prohibitory ordinance, and concludes that Schmidt's lack of permit to establish the use should be overlooked because the permit should have been issued anyway; thus, that case is not authority for the rule Whitehead Oil espouses. Indeed, the *Milford* court did not consider whether the new ordinance was pending at the time Schmidt filed his application for the permit or at the time the city denied the application relevant to the holding.

The applicable precedent is found in *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed* 339 U.S. 960, 70 S. Ct. 1002, 94 L. Ed. 1370 (1950). Therein, Glissmann filed an application for a permit with the City of Omaha to be allowed to establish a trailer park on property he had leased within the city. Prior to seeking the permit, Glissmann spent several days clearing and grading the property for the purpose of establishing the trailer park. The city granted Glissmann the permit subject to approval by the city's building department. The building department never approved the permit because the city meanwhile granted a petition, filed by residents in the area, to reconsider its decision to grant the permit. Upon reconsideration, the city planning commission submitted to the city council a report which proposed an ordinance which would amend the existing zoning ordinances by rezoning the property into a residence district,

eliminating its use for the purpose of a trailer park. The city passed the ordinance. Nonetheless, Glissmann thereafter proceeded to establish and begin operation of the trailer park on the property. The city brought action against Glissmann to enjoin him from proceeding with the operation of the trailer park. The trial court entered judgment for the city, and Glissmann appealed, claiming that he had established a nonconforming use of the premises as a trailer park prior to the city's amendment of its zoning ordinances and that therefore he had a vested right of which the city could not deprive him.

We acknowledged that a zoning ordinance may not operate retroactively to deprive a property owner of his or her previously vested rights, that is, a use to which his or her property was put before the enactment of the ordinance. However, we also noted that "the purchase or leasing of lands with the intent to use them for a use then permissible under a zoning ordinance does not prevent the city from changing its zoning ordinance applicable thereto as such property is always held subject to the city's lawful exercise of the police power." *Id.* at 902, 39 N.W.2d at 833. We determined that

> a new ordinance operates retroactively to require a denial of an application or to nullify a permit already issued, provided that the holder of the latter has not already engaged in construction or incurred obligations directly in relation thereto, when such application or permit seeks or grants a use no longer permitted under the new ordinance.

Id. at 902-03, 39 N.W.2d at 834. We concluded that even assuming Glissmann was authorized to use the property for the operation of a trailer park under the conditional permit granted by the city, he had not established any vested right to use the property for the operation of a trailer park prior to the adoption of the ordinance which eliminated the use of the premises for that purpose.

Thus, a landowner has no vested right in the continuity of zoning in a particular area so as to preclude subsequent amendment, and a zoning regulation may be retroactively applied to deny an application for a building permit even though the permit could lawfully have issued at the time of application. Accord, *Burcam Corp. v. Planning Bd. Tp. of*

Medford, 168 N.J. Super. 508, 403 A.2d 921 (1979); *Properties, Inc. v. Board of Adjustment*, 18 N.C. App. 712, 198 S.E.2d 1 (1973); *Rockville Fuel v. Gaithersburg*, 266 Md. 117, 291 A.2d 672 (1972).

Nonetheless, a new zoning ordinance will not have retroactive effect where an applicant has substantially changed position in good-faith reliance upon the existing zoning by causing substantial construction to be made or by incurring substantial expenses related to construction. *City of Omaha v. Glissmann, supra*. See *Omaha Fish & Wildlife v. Community Refuse*, 213 Neb. 234, 329 N.W.2d 335 (1983). See, also, *County of Saunders v. Moore*, 182 Neb. 377, 155 N.W.2d 317 (1967) (the mere issuance of a permit gives no vested rights to the permittee nor does the permittee acquire a property right in the permit absent a showing substantial construction had already been undertaken); *A. C. Nelsen Enterprises, Inc. v. Cook*, 188 Neb. 184, 195 N.W.2d 759 (1972) (holding that where a certificate of occupancy has been properly obtained in accordance with zoning statutes and ordinances, it may not be arbitrarily revoked where the certificate holder has incurred substantial expenses in good-faith reliance upon such certificate). This substantial reliance exception is basically an application of the rule that a zoning ordinance may not, without providing a reasonable plan for discontinuance, operate retroactively to deprive a property owner of previously vested rights by preventing a use to which the property was put before enactment of the prohibitory ordinance. See, *Mossman v. City of Columbus, ante* p. 78, 449 N.W.2d 214 (1989); *City of Lincoln v. Bruce*, 221 Neb. 61, 375 N.W.2d 118 (1985); *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964); *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed* 339 U.S. 960, 70 S. Ct. 1002, 94 L. Ed. 1370 (1950).

However, the expenditures made by Whitehead Oil in preparing to obtain the land-use permit were, as a matter of law, neither so substantial nor of such a nature as to deprive Lincoln of the right to exercise its police power with regard to the property in question. They were made in an effort to obtain a permit which Whitehead Oil knew would not issue unless and

until it submitted plans which met with Lincoln's approval under whatever ordinance controlled the use of the property. Were the situation otherwise, a permit requirement would be useless. See, *Omaha Fish & Wildlife v. Community Refuse, supra*; *County of Saunders v. Moore, supra*.

All the same, a zoning authority may not use its powers to reward its friends or punish its enemies; thus, where a zoning authority is guilty of misconduct or bad faith in its dealings with the applicant for a use permit in accordance with the then existing zoning regulation or arbitrarily and unreasonably adopts a new regulation in order to frustrate the applicant's plans for development rather than to promote the general welfare, the new regulation may not be applied retroactively. *Commercial Prop., Inc. v. Peternel*, 418 Pa. 304, 211 A.2d 514 (1965); *Nott v. Wolff*, 18 Ill. 2d 362, 163 N.E.2d 809 (1960); *Sunset View Cemetery Assn. v. Kraintz*, 196 Cal. App. 2d 115, 16 Cal. Rptr. 317 (1961). See, also, *City of Omaha v. Glissmann, supra*; *Willingham v. City of Dearborn*, 359 Mich. 7, 101 N.W.2d 294 (1960).

Summary judgment is properly granted when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there exists no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from the material facts and that the moving party is entitled to judgment as a matter of law. *John v. OO (Infinity) S Development Co., ante* p. 190, 450 N.W.2d 199 (1990); *Wicker v. City of Ord*, 233 Neb. 705, 447 N.W.2d 628 (1989).

Whether Lincoln, by delaying action on Whitehead Oil's application until after adopting the neighborhood representative's proposal for a change of zoning, acted arbitrarily and unreasonably or in bad faith in order to prevent Whitehead Oil from acquiring a permit to operate a convenience store on its property or, rather, acted reasonably and in good faith to promote the general welfare is a question of material fact, concerning which there is a genuine issue.

Thus, it cannot be said that Lincoln is entitled to a judgment against Whitehead Oil as a matter of law, and the summary judgment against Whitehead Oil must therefore be reversed and its cause remanded for further proceedings in accordance

with this opinion.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. STEPHEN W. VAN ACKEREN, ALSO KNOWN AS STEVEN W. VAN ACKEREN, ALSO KNOWN AS FREDERICK VAN ACKEREN, APPELLANT.

451 N.W.2d 707

Filed February 23, 1990. No. 89-039.

1. **Habitual Criminals: Convictions: Sentences.** A habitual criminal who is convicted of several felonies as the result of a multicount information must be sentenced on each conviction as a habitual criminal even though the allegation with respect to his status as a habitual criminal is made with respect to only one charge.
2. **Pleas.** Where a defendant has been misinformed as to the total potential penal consequences of a guilty plea, the plea was not entered freely, intelligently, voluntarily, and understandingly.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for further proceedings.

Donald W. Kleine, of Kleine Law Office, for appellant.

Stephen W. Van Ackeren, pro se.

Robert M. Spire, Attorney General, and Yvonne E. Gates for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Defendant-appellant, Stephen W. Van Ackeren, contends the district court judge erred in accepting his pleas of guilty, and the record establishes such to be the case. We therefore reverse the judgment below and remand the cause for further proceedings.

Van Ackeren was originally charged with three substantive

felony offenses: burglary, possession of a firearm by a felon, and the use of a firearm to commit a felony. He was also, in connection with each of those three substantive offenses, separately alleged to be a habitual criminal.

In exchange for Van Ackeren's pleas of guilty to burglary, to being a habitual criminal in connection with that charge, and to using a firearm to commit a felony, the State agreed not to pursue other charges and dismissed the possession of a firearm by a felon charge, as well as the habitual criminal allegations made in connection with that possession charge and the charge of using a firearm to commit a felony.

The district court then sentenced Van Ackeren to imprisonment for a period of not less than 18 nor more than 25 years for the crime of burglary as enhanced by his status as a habitual criminal and to a consecutive period of imprisonment for not less than 20 months nor more than 5 years for the use of a firearm to commit a felony.

The use of a firearm sentence overlooks that in *State v. Rolling*, 218 Neb. 51, 352 N.W.2d 175 (1984), we held that a habitual criminal who is convicted of several felonies as the result of a multicount information must be sentenced on each conviction as a habitual criminal even though the allegation with respect to his status as a habitual criminal is made with respect to only one charge. Thus, inasmuch as Van Ackeren is a habitual criminal, the sentence imposed for the use of a firearm charge does not conform with the requirements of Neb. Rev. Stat. § 29-2221 (Reissue 1989), which mandates that for a habitual criminal, the sentence imposed not be less than 10 years.

What is of crucial importance to this case is that the district court judge not only imposed an illegal sentence on the use of a firearm conviction, but failed to properly advise Van Ackeren concerning the penalty consequence of such a conviction. Since Van Ackeren was unaware of the total potential penal consequences of the plea agreement, his pleas of guilty cannot be said to have been entered freely, intelligently, voluntarily, and understandingly. See, *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986); *State v. McMahon*, 213 Neb. 897, 331 N.W.2d 818 (1983); *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971).

Accordingly, he must be permitted to withdraw his pleas to all the charges.

The judgment below is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BITUMINOUS CASUALTY CORPORATION, APPELLANT AND CROSS-APPELLEE, V. THEODORE C. DEYLE, APPELLEE AND CROSS-APPELLANT.

451 N.W.2d 910

Filed February 23, 1990. No. 89-426.

1. **Workers' Compensation.** Generally, pursuant to Neb. Rev. Stat. § 48-120 (Reissue 1988), an employee may be reimbursed for nursing care in the employee's home or at a nursing home, when such care is necessitated by a work-related injury, so long as the cost of the care is fair and reasonable.
2. **Workers' Compensation: Proof.** An employee has the burden to prove compensability of a claim against an employer under the Nebraska Workers' Compensation Act.
3. **Trial: Proof: Evidence.** Prima facie proof is evidence sufficient to submit an issue to the fact finder and precludes a directed verdict in a jury trial, or dismissal for a failure of proof in a bench trial or case tried without a jury, on an issue in the proceedings.
4. _____: _____: _____. As the result of prima facie proof on an issue, an adversary has the burden of producing evidence to the contrary or risks an adverse finding on the issue for which there is prima facie proof.
5. **Workers' Compensation: Evidence: Proof.** When an employee presents evidence of medical expenses resulting from a work-related injury, the employee has presented prima facie proof of fairness and reasonableness for the expenses, while the employer has the burden of producing evidence, or going forward with evidence, that the expenses incurred are not fair and reasonable charges.
6. **Courts: Words and Phrases.** A court which is required by law to keep a permanent and written memorialization of determinations made in proceedings brought to obtain a judicial resolution of a question is a "court of record."
7. **Workers' Compensation: Words and Phrases: Declaratory Judgments.** The Nebraska Workers' Compensation Court is a "court of record" and, as such, has the authority to enter a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985).

8. **Workers' Compensation: Words and Phrases.** "Compensation," used in Neb. Rev. Stat. § 48-125(1) (Reissue 1988) in reference to additional sums for waiting time, an attorney fee, and interest, means periodic disability or indemnity benefits payable on account of the employee's work-related injury or death.
9. **Workers' Compensation: Judgments: Interest.** The Nebraska Workers' Compensation Court has no authority to determine issues relating to postjudgment interest.

Appeal from the Nebraska Workers' Compensation Court. Affirmed as modified.

William M. Lamson, Jr., and Patricia A. Zieg, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Daniel L. Lindstrom and Jeffrey H. Jacobsen, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Bituminous Casualty Corporation (Bituminous) appeals from an order of the Nebraska Workers' Compensation Court, which, on rehearing, directed Bituminous to pay $56,412.05 in nursing expenses for Theodore C. Deyle. Deyle cross-appeals and contends that the Workers' Compensation Court erred in failing to award him an additional sum for waiting time, an attorney fee, and interest.

STANDARD OF REVIEW

" 'Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. [Citations omitted.] In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. [Citations omitted.] Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of

> the facts for that of the Worker's Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. [Citations omitted.] As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony.' "

Osborne v. Buck's Moving & Storage, 232 Neb. 752, 752-53, 441 N.W.2d 906, 906-07 (1989). See, *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). See, also, Neb. Rev. Stat. § 48-185 (Reissue 1988).

BITUMINOUS I

On August 4, 1984, Deyle, employed as president of the Deyle Construction Company, sustained a severe back and spinal injury. When a dispute arose over the compensability of Deyle's claim for workers' compensation, Bituminous, the insurer for Deyle's employer, filed an action in the Workers' Compensation Court to determine liability on Deyle's claim. On December 30, 1985, the Workers' Compensation Court entered its "Award on Rehearing" and ordered Bituminous to pay disability benefits to Deyle and pay Deyle's medical expenses of $61,229.67. Bituminous appealed.

In *Bituminous Casualty Corp. v. Deyle*, 225 Neb. 82, 402 N.W.2d 859 (1987) (*Bituminous I*), issued on March 27, 1987, we concluded that Deyle was not entitled to disability benefits. Consequently, in *Bituminous I* we held that the Workers' Compensation Court's "judgment is in error and must be reversed" concerning the award of disability benefits, but that "[t]he judgment of the three-judge panel of the Workers' Compensation Court is affirmed except as modified" regarding the appellate disallowance of disability benefits. 225 Neb. at 91, 402 N.W.2d at 865-66. Thus, as the result of *Bituminous I*, the initial award of $61,229.67 for Deyle's medical expenses remained intact.

AFTER *BITUMINOUS I*

On September 3, 1987, Bituminous paid part of Deyle's medical expenses ordered to be paid under the initial award

modified in *Bituminous I.* When Bituminous failed to pay the balance of the medical expenses, Deyle filed his petition in the Workers' Compensation Court to recover the remaining and unpaid medical expenses pursuant to the initial award and additional medical expenses which he had incurred after the initial award.

Pretrial Order.

As the result of a pretrial conference before rehearing in the Workers' Compensation Court, the pretrial order specified that among the issues were whether Deyle's nursing care and expenses were fair and reasonable; whether certain medical expenses were the result of his back injury; and whether Deyle was "entitled to receive additional sums for waiting time, attorney fees, and interest . . . ." As we expressed in *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 684, 380 N.W.2d 268, 273 (1986):

> Pretrial conferences are conducted to simplify and narrow issues presented in a case. [Citation omitted.] Issues specified at a pretrial conference control the course of an action and, unless altered by the court, constitute the issues on which the case is tried. [Citation omitted.] Generally, issues delineated in an unaltered pretrial order supplant the issues raised in the pleadings. [Citation omitted.]

Before the rehearing, Bituminous paid the balance of the medical expenses in compliance with the initial award modified in *Bituminous I.*

Evidence of Medical Expenses.

Deyle is unmarried. After the compensable 1984 back injury, Deyle's right leg was amputated below the knee. Even prior to the amputation, Deyle had experienced difficulty in moving about, but at times he was somewhat ambulatory with a "walker." With the exception of hospital confinement for approximately 1 month in 1987, for 12 days in early April 1988, and for 7 weeks from late April until June 21, 1988, all Deyle's care in question was received in his home in Kearney, Nebraska.

Deyle's physician, Dr. Robert C. Rosenlof, expressed a medical preference that any of his patients with a back injury

such as that sustained by Deyle receive inhome care whenever the circumstances allow. Deyle's medical problems from the 1984 accident included severe and chronic pain in his legs and back, recurrent urinary tract infections, and loss of neuromuscular control on account of the "cord injury," which resulted in difficulties with his bowels, bladder, and prostate.

According to Dr. Rosenlof, Deyle was "not able to be up and around." Consequently, Deyle's condition involved protracted bed rest during which he was unable to move himself within his bed. Extended bed rest required that someone check Deyle's body for "ulcers" and assist him in moving from the bed into the walker and, later, from the walker into the bed. As Dr. Rosenlof observed, even with a walker, Deyle's ambulation required "considerable assistance." The instability in Deyle's back makes use of a prosthesis doubtful. Deyle requires assistance in setting up equipment for his bowel movement and catheterization, and in monitoring his blood pressure in view of his hypertension. As a result of limited locomotion, Deyle cannot prepare his meals or bathe himself. Dr. Rosenlof felt that someone would have to be with Deyle in case of an urgent need for some form of assistance during the night. For that reason, Dr. Rosenlof prescribed inhome nursing care around-the-clock for Deyle.

The personnel hired by Deyle to render inhome nursing care included a nurse's aide who stayed at Deyle's home and provided care from 5 p.m. until 8 a.m. for a monthly salary of $1,000. Deyle also hired a certified care staff member (CSM), who had more training than a nurse's aide, to take care of him from 8 a.m. to 5 p.m. on weekdays and paid the CSM $5 per hour. A licensed practical nurse, whom Deyle paid $3.50 per hour, came to Deyle's home and worked Saturdays and Sundays from 8 a.m. to 5 p.m. Deyle employed other personnel on an "as needed" basis when one of the regular nursing employees was unavailable.

Karma Dorn, a representative of the area agency on aging, which had assisted Deyle in finding nursing personnel, testified that Deyle was paying the "going rate" for his inhome nursing care. Dorn also testified that the rates for similar personnel obtainable through the private duty services pool at the Good

Samaritan Hospital in Kearney were $7.25 per hour for a nurse's aide and $10.35 for an LPN. Although Good Samaritan's pool did not include a CSM, Dorn stated that a CSM in the Kearney area was paid $5.55 as a starting hourly wage in 1986.

For the inhome nursing care, Deyle paid $56,412.05 as follows: For the last three quarters of 1986, $15,388.04; for 1987, $23,184.96; and for the first three quarters of 1988, $17,839.05. According to our interpolative computations, Deyle paid a daily rate of $55.96 for his nursing care in 1986, $63.52 in 1987, and $65.11 in 1988.

Deyle was confined to a hospital for 35 of 92 days during the third quarter of 1987. During his hospital confinement, Deyle continued paying a nurse's aide $3,000 for the quarter notwithstanding his absence from home. Also, during the second quarter of 1988, Deyle was hospitalized for 66 of the 91 days during the quarter, but continued to pay a nurse's aide $3,000 for the quarter despite his hospital confinement. Evidence failed to suggest that continued payment during Deyle's hospitalization was a necessary arrangement to assure the availability of nursing personnel on Deyle's dismissal from the hospital.

Bituminous introduced testimony from two representatives of Kearney area nursing homes which provide nursing care similar to that received at Deyle's home. Harry Carlsen of St. John's Nursing Home testified that had Deyle been at St. John's, he would have been charged a daily rate of approximately $45 in 1986 and $48 in 1987 and a rate of $51.40 in 1988. Linda Chandler of St. Luke's Good Samaritan Village testified that the daily rates for a patient of Deyle's needs were $43.50 in 1986, $50.50 in 1987, and $48.20 in 1988. No evidence indicated that nursing home facilities were available when Deyle received his inhome nursing care.

DECISION OF WORKERS' COMPENSATION COURT

The Workers' Compensation Court determined that Deyle did require inhome nursing care as a result of his August 1984 injury and that Bituminous must reimburse Deyle for such care. See Neb. Rev. Stat. § 48-120 (Reissue 1988) (employer's liability

for employee's medical expenses). The court also found that the expenses for the inhome nursing care rendered to Deyle were fair and reasonable. Therefore, the court ordered Bituminous to pay $56,412.05 for the inhome nursing expenses which Deyle had incurred.

Further, the Workers' Compensation Court concluded that Neb. Rev. Stat. § 48-125 (Reissue 1988)

> is limited to compensation payable under the provisions of the Nebraska Workers' Compensation Act and does not apply to delinquent payment of a medical or hospital expense. Section 48-125 addresses "compensation" as the amount payable periodically in accordance with the methods of payments of wages of the employee at the time of the injury (emphasis supplied). The Court does not feel that the word "compensation" includes medical expenses, but is limited to payment of compensation for disability.

On that basis, the court refused to assess any sum for Bituminous' delay in satisfying the initial award, which had been affirmed as modified in *Bituminous I*, and refused to award an attorney fee or assess interest under § 48-125. Also, the court made no provision for postjudgment interest on the initial award (*Bituminous I*).

ASSIGNMENTS OF ERROR

Bituminous appeals and assigns two errors, claiming that (1) Deyle's inhome nursing expenses are not recoverable medical expenses and (2) even if the rendered services are medical in nature, the expenses are not fair and reasonable charges for the services rendered.

Deyle cross-appeals and contends that he is entitled to sums for Bituminous' delay in satisfying the initial award, an attorney fee, and interest for delayed payment of the initial award, all authorized by § 48-125, and that he is entitled to postjudgment interest on the initial but modified award (*Bituminous I*).

INHOME NURSING CARE EXPENSES

Section 48-120 provides:

> The employer shall be liable for all reasonable medical, surgical, and hospital services . . . not to exceed the regular

> charge made for such service in similar cases. . . .
>
> . . . .
>
> The Nebraska Workers' Compensation Court shall have the authority to determine the necessity, character, and sufficiency of any medical services furnished or to be furnished. . . .

Generally, pursuant to § 48-120, an employee may be reimbursed for nursing care in the employee's home or at a nursing home, when such care is necessitated by a work-related injury, so long as the cost of the care is fair and reasonable. *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978). See, also, *S & S LP Gas Co. v. Ramsey*, 201 Neb. 751, 272 N.W.2d 47 (1978).

Bituminous "submits that Deyle is not entitled to compensation for services which include simply being present in the household, ordinary housekeeping tasks, cleaning, preparation of meals, washing and mending of clothes." Brief for appellant at 12.

Bituminous bases its argument on *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr.*, 228 Neb. 38, 45, 421 N.W.2d 25, 30 (1988), in which we stated that "[o]rdinary, noncompensable housekeeping tasks include cleaning, preparation of meals, and washing and mending clothes. Compensable tasks include serving meals in bed, bathing and dressing, administering medication, and assisting with sanitary functions."

The substance of Bituminous' argument, as we interpret the argument, is that Bituminous is not liable for services received by Deyle which might have been rendered by nonnursing personnel.

Consistent with *Currier*, charges for services by the nursing personnel hired by Deyle are compensable under § 48-120 notwithstanding that the services could have been performed by nonnursing personnel. In *S & S LP Gas Co. v. Ramsey, supra* at 752, 272 N.W.2d at 47, this court recognized the compensability of nursing care expenses incurred by a claimant for whom it was "not essential that the [nursing] assistance . . . be furnished by a doctor, nurse, or other medical person."

Bituminous also argues that Deyle should not be reimbursed

for expenses attributable to the nursing personnel's "simply being present in the household." Brief for appellant at 12. However, as we stated in *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr., supra* at 45-46, 421 N.W.2d at 30, "a person rendering necessary medical services on an 'as-needed' basis need not render the services during each moment of compensated time but, rather, must be available to perform the needed services during the times when needed."

Bituminous further argues that the charges for Deyle's nursing care are not fair and reasonable and, thus, are unrecoverable under § 48-120, which provides that the medical expenses recoverable pursuant to the Workers' Compensation Act must not "exceed the regular charge made for such service in similar cases."

As Bituminous correctly points out, an employee has the burden to prove compensability of a claim against an employer under the Nebraska Workers' Compensation Act. *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987).

However, we cannot justifiably ignore the longstanding rule established for nearly 70 years in Nebraska: "Where the evidence shows that certain hospital and nurse expenses have been incurred by the injured employee, a prima facie case is made out, and in the absence of any showing that the expenses so incurred were unreasonable, such proof will be held to be sufficient." *Gourley v. City of Grand Island*, 168 Neb. 538, 546, 96 N.W.2d 309, 314 (1959). See, also, *Schoenrock v. School Dist. of Nebraska City*, 179 Neb. 621, 139 N.W.2d 547 (1966); *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959); *Crable v. Great Western Sugar Co.*, 166 Neb. 795, 90 N.W.2d 805 (1958); *Gilmore v. State*, 146 Neb. 647, 20 N.W.2d 918 (1945); *Nosky v. Farmers Union Cooperative Ass'n*, 109 Neb. 489, 191 N.W. 846 (1922).

As we recently recognized in *State v. Kipf, ante* p. 227, 450 N.W.2d 397 (1990), prima facie proof is evidence sufficient to submit an issue to the fact finder and precludes a directed verdict in a jury trial, or dismissal for a failure of proof in a bench trial or case tried without a jury, on an issue in the

proceedings. See *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Consequently, as the result of prima facie proof on an issue, an adversary has the burden of producing evidence to the contrary or risks an adverse finding on the issue for which there is prima facie proof. See *Speas v. Bank*, 188 N.C. 524, 530, 125 S.E. 398, 401 (1924): "[W]hen such prima facie case is made out, the duty of going forward with evidence in reply, if the opposing party would not hazard the chance of an adverse verdict, is shifted or rather cast upon the opposite side." See, also, 9 J. Wigmore, Evidence in Trials at Common Law § 2487 (J. Chadbourn rev. 1981). Therefore, when an employee presents evidence of medical expenses resulting from a work-related injury, the employee has presented prima facie proof of fairness and reasonableness for the expenses, while the employer has the burden of producing evidence, or going forward with evidence, that the expenses incurred are not fair and reasonable charges. See, *Gourley v. City of Grand Island, supra*; *Schoenrock v. School Dist. of Nebraska City, supra*; *Pavel v. Hughes Brothers, Inc., supra*; *Crable v. Great Western Sugar Co., supra*; *Gilmore v. State, supra*; *Nosky v. Farmers Union Cooperative Ass'n, supra.*

Deyle presented evidence that Dr. Rosenlof prescribed 24-hour-a-day care for Deyle and that inhome care was the preferred method of treatment for serious back and spinal injuries such as those sustained by Deyle as the result of his 1984 work-related injury. There was also evidence that Deyle was paying the "going rate" for his inhome care. Thus, Deyle has made a sufficient showing for the compensation court's conclusion that Deyle incurred the inhome nursing expenses as a result of his 1984 compensable injury. Evidence supports the finding that Deyle needs 24-hour assistance every day, even if the nursing personnel in attendance are not performing services which are medical in nature each moment of the entire 24 hours everyday. Deyle's evidence concerning nursing expenses is sufficient proof that the charges for the inhome care are fair and reasonable.

Bituminous also contends that some of Deyle's expenses for nursing care are unnecessary because Deyle was hospitalized during part of the period when he paid for inhome nursing care.

The third quarter of 1987 consisted of 92 days, of which Deyle was hospitalized 35 days, or 38 percent of the period. Expenses for a nurse's aide during the third quarter of 1987 were $3,000. Similarly, in the second quarter of 1988, which consisted of 91 days, Deyle was hospitalized for 66 days, or 73 percent of 1988's second quarter, for which Deyle paid $3,000 regarding care by a nurse's aide. Although nursing personnel required in a patient's home on an as needed basis need not perform medically related tasks during each moment of their presence in the patient's home, it does seem somewhat plausible, and we conclude, that Bituminous should not have to reimburse Deyle for the expenses pertaining to care by a nurse's aide while Deyle was absent from his home during his hospital confinement. Consequently, we determine that the Workers' Compensation Court's order that Bituminous reimburse Deyle for $56,412.05 is clearly incorrect. Utilizing the percentages based on the periods of Deyle's hospitalization when he continued paying for care by a nurse's aide, the allowable nursing expenses for the third quarter of 1987 are reduced by $1,140 ($3,000 times 38 percent), and the allowable nursing expenses for the second quarter of 1988 are reduced by $2,190 ($3,000 times 73 percent), which results in an overall reduction of $3,330 ($1,140 plus $2,190) concerning the recoverable medical expenses for the nursing care received by Deyle. Thus, Deyle's recoverable medical expenses, pursuant to § 48-120, are $53,082.05, not $56,412.05 as ordered by the Workers' Compensation Court. For that reason, the "Order on Rehearing" is hereby modified to require that Bituminous reimburse Deyle, or otherwise satisfy Deyle's medical expenses, in the amount of $53,082.05 as otherwise provided in the order of the Workers' Compensation Court.

DEYLE'S CROSS-APPEAL

Deyle contends that he is entitled to sums for waiting time, an attorney fee, and interest, all as provided by § 48-125, and that he is entitled to postjudgment interest. See, Neb. Rev. Stat. §§ 45-103 (interest on judgments and decrees) and 45-103.01 (Reissue 1988) (accrual of postjudgment interest from rendition of judgment).

Before addressing the merits of Deyle's cross-appeal, we first must determine whether the issues in the cross-appeal were jurisdictionally before the Workers' Compensation Court. The question is whether the Workers' Compensation Court had subject matter jurisdiction to construe its prior award, which was affirmed as modified in *Bituminous I*, and thereby declare Deyle's rights and Bituminous' liabilities under the previous award.

Although rather inartfully expressed in his petition for the action on which this appeal is based, in accordance with the pretrial order Deyle sought a declaratory judgment in the Workers' Compensation Court regarding the legal effect of the modified award in *Bituminous I*.

Declaratory Judgment in the Workers' Compensation Court.

In considering whether the Workers' Compensation Court has authority to enter a declaratory judgment, we first examine Neb. Rev. Stat. § 25-21,149 (Reissue 1985) of the Uniform Declaratory Judgments Act, which provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Thus, if the Workers' Compensation Court is a "court of record," that court has statutory authority for a declaratory judgment.

The Workers' Compensation Court is vested with judicial authority. See Neb. Const. art. V, § 1, which states: "The judicial power of the state shall be vested in a Supreme Court, district courts, county courts . . . and such other courts inferior to the Supreme Court as may be created by law." See, also, Neb. Rev. Stat. § 48-152 (Reissue 1988) (creation of Workers' Compensation Court).

The phrase "court of record," used in § 25-21,149, remains

undefined in Nebraska law, although the phrase has been used in previous decisions of this court. See, *Rohn v. Kelley*, 156 Neb. 463, 56 N.W.2d 711 (1953), *overruled on other grounds, Lambie v. Stahl*, 178 Neb. 506, 134 N.W.2d 86 (1965) (finding that the county courts are "courts of record"); *State, ex rel. City of Omaha, v. Board of County Commissioners*, 109 Neb. 35, 189 N.W. 639 (1922) (determining that "courts of record," as intended by the Legislature in 1879, meant those courts which were then known to the law).

> The old definition of a court of record given by Blackstone is "that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the record of the court and are of such high and supereminent authority that their truth is not to be called in question."

Chrisman v. Met. Life Ins. Co., 178 Tenn. 321, 325, 157 S.W.2d 831, 832-33 (1942). A "court of record" has also been defined as "being one the history of whose proceedings is perpetuated in writing. Also, it is required that some duly authorized person should record such proceedings, and when an act speaks of courts of record it speaks of courts whose proceedings are duly recorded by some authorized person or persons." *Tourtelot v. Booker*, 160 S.W. 293, 297 (Tex. Civ. App. 1913).

Thus, a court which is required by law to keep a permanent and written memorialization of determinations made in proceedings brought to obtain a judicial resolution of a question is a "court of record."

Neb. Rev. Stat. § 48-167 (Reissue 1988) of the Nebraska Workers' Compensation Act provides: "The Nebraska Workers' Compensation Court shall keep and maintain, in its office at the State Capitol, a full and true record of all proceedings, documents, or papers ordered filed, rules and regulations, and decisions or orders." Also, Neb. Rev. Stat. § 48-157 (Reissue 1988) states in relevant part:

> The clerk [of the Nebraska Workers' Compensation Court] shall, under the direction of the presiding judge, keep a full and true record of the proceedings of the compensation court and record all pleadings and other papers filed with the compensation court, and no other

> action shall be taken thereon until the same have been recorded.

Thus, we conclude that the Nebraska Workers' Compensation Court is a "court of record" and, as such, has the authority to enter a declaratory judgment pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1985).

Our inquiry, however, does not end here, for we must also determine whether Deyle's claim for additional sums for waiting time, attorney fees, and interest under § 48-125 and for postjudgment interest is an appropriate subject for declaratory judgment.

Section 25-21,150 provides:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Further, § 25-21,153 provides: "The enumeration in [§] 25-21,150 . . . does not limit or restrict the exercise of the general powers conferred in § 25-21,149, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty."

> "The remedy of declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination."

Mullendore v. Nuernberger, 230 Neb. 921, 925, 434 N.W.2d 511, 514-15 (1989) (quoting *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986)).

Obviously, an award, order, or judgment of the Workers' Compensation Court reflecting a determination whether there is liability under the Nebraska Workers' Compensation Act is

within the subject matter jurisdiction of the Workers' Compensation Court. Cf. § 25-21,149: "Courts of record within their respective jurisdictions shall have power to declare rights...."

In light of the foregoing law, both statutory and decisional, Deyle's claim for additional sums under § 48-125 presents questions of law pertaining to the Workers' Compensation Court's prior award (*Bituminous I*) and are appropriate subjects for declaratory judgment.

Since Deyle's second action in the Workers' Compensation Court raised a question of law and does not involve a request that the court vacate or modify its award, the rule expressed in *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984), namely, the Workers' Compensation Court lacks authority to vacate or modify its judgment during the term at which the court renders the judgment, is inapplicable in the present appeal. Neither does our holding in *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 401 N.W.2d 679 (1987), that the compensation court lacks power to clarify its final judgment in the same action in which the judgment was entered, have any application.

Sums Under § 48-125.

We now proceed to determine whether Deyle's cross-appeal has merit.

Section 48-125(1) in part provides:

> Except as hereinafter provided, all amounts of compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death; *Provided*, fifty percent shall be added for waiting time for all delinquent payments after thirty days' notice has been given of disability. Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the Nebraska Workers' Compensation Court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the

employee receives an award.

The balance of § 48-125(1) pertains to the allowance of an attorney fee in the event that either an employee or employer appeals from an award of the Workers' Compensation Court. Section 48-125(2) provides in part:

> When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained, computed from the date compensation was payable, as provided in section 48-119, at a rate equal to the rate of interest allowed per annum under section 45-104.01, as such rate may from time to time be adjusted by the Legislature. Interest shall apply only to those weekly compensation benefits awarded which have accrued at the time payment is made by the employer.

Referring to § 48-125, Deyle contends that he is entitled to additional sums for waiting time, an attorney fee, and interest on account of the delay in Bituminous' satisfying the award modified in *Bituminous I*. To support his contention, Deyle directs our attention to *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 783, 408 N.W.2d 280, 288 (1987), in which we held that § 48-125 authorizes a "50-percent payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation." However, *Mendoza* involved an action which an employee was compelled to file because, in the absence of a reasonable controversy about compensability of the employee's claim, the employer neglected payment of compensation in the form of disability benefits due as the result of the employee's work-related injury and disability.

Characterizing the additional sums under § 48-125 as "penalties," Bituminous urges the proposition that penalty provisions are not applicable to the late payment of medical and nursing expenses and invites us to examine *Eichholz v. Bell*, 410 So. 2d 211 (Fla. App. 1982), as authority supporting the foregoing proposition. We have studied *Eichholz*, which we set forth in its entirety:

> PER CURIAM.
>
> The order of the trial court transferring this cause to the county court is REVERSED. § 26.012(2)(a), Fla.Stat. (Supp.1980); § 34.01 Fla.Stat. (Supp.1980).
>
> MILLS, WENTWORTH and THOMPSON, JJ., concur.

Although some may feel that the concurrence in *Eichholz* captures the essence of the moment, there is something to be said about the majority's opinion in *Eichholz*. However, we find nothing persuasive in *Eichholz* to assist us in resolving the question raised by Deyle's cross-appeal.

Deyle urges us to adopt a uniform and constant meaning for "compensation" in the Nebraska Workers' Compensation Act. In *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989), referring to Nebraska statutes for a proceeding to dissolve a marriage, we observed that " '[t]o reside' and its corresponding noun *residence* are chameleon-like expressions, which take their color of meaning from the context in which they are found." *Id.* at 749, 441 N.W.2d at 904. The same may be said of *compensation* inasmuch as the word is used frequently throughout the Nebraska Workers' Compensation Act.

The meaning of "compensation" in § 48-125 is taken from the context in which the word is used in the statute. Section 48-125 provides that all "compensation payable under the Nebraska Workers' Compensation Act shall be payable periodically in accordance with the methods of payment of wages of the employee at the time of the injury or death." How an employee's recoverable medical expenses are "payable periodically in accordance with the methods of payment of wages" defies rational analysis and would necessitate the most strained and illogical interpretation or complete distortion of § 48-125 to equate "compensation" with medical expenses recoverable under the Nebraska Workers' Compensation Act. "Compensation," used in § 48-125(1) in reference to additional sums for waiting time, an attorney fee, and interest, means periodic disability or indemnity benefits payable on account of the employee's work-related injury or death. Inasmuch as Deyle's claim as a result of *Bituminous I* involved only unpaid medical expenses, Deyle is not entitled to the "fifty percent"

sum authorized by § 48-125(1). Also, the attorney fee allowable under § 48-125(1) depends on the employer's neglect to pay "compensation"—disability or indemnity benefits—"for thirty days after injury." For the same reason expressed in disallowing Deyle a sum for "waiting time," an attorney fee must also be disallowed to Deyle under § 48-125(1). Interest authorized in § 48-125(2) "shall apply only to those weekly compensation benefits awarded which have accrued at the time payment is made by the employer." Under § 48-125(2), interest clearly relates to "weekly compensation"—the periodic payment of disability or indemnity benefits under the Nebraska Workers' Compensation Act. Moreover, § 48-125(2) provides: "When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained . . . ." Therefore, interest under § 48-125(2) is precluded in Deyle's case for two reasons. First, interest under § 48-125(2) is related to "weekly compensation benefits awarded," and, second, Deyle is not entitled to an attorney fee under § 48-125(1), a prerequisite to the assessment of interest pursuant to § 48-125(2). Whether the additional sums for the dilatory situation mentioned in § 48-125 should be extended to an employer's delay in payment of any award, judgment, or order of the Workers' Compensation Court is a matter for the Legislature, not for this court, which must apply the unequivocal language of § 48-125.

The Workers' Compensation Court properly denied Deyle the additional sums authorized by § 48-125. For that reason, the order of the Workers' Compensation Court is affirmed on the issue of additional sums under § 48-125.

Postjudgment Interest.

As recently reaffirmed, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Thomas v. Omega Re-Bar, Inc., ante* p. 449, 451 N.W.2d 396 (1990).

Neb. Rev. Stat. § 48-152 (Reissue 1988) delineates the compensation court's subject matter jurisdiction by empowering it "to administer and enforce all of the provisions of the Nebraska Workers' Compensation Act, and any

amendments thereof, except such as are committed to the courts of appellate jurisdiction." Although that which is implied is as much a part of a statute as that which is expressed, *State, ex rel. Johnson, v. Consumers Public Power District*, 142 Neb. 114, 5 N.W.2d 202 (1942), it is not within the province of this court or any other tribunal to read a meaning into a statute which is not warranted by its language, *Behrens v. American Stores Packing Co., ante* p. 25, 449 N.W.2d 197 (1989). There is nothing in the pertinent language of § 48-152 which grants the compensation court subject matter jurisdiction to determine the applicability of the provisions of chapter 45 of the statutes of this state to its judgments.

Indeed, the language of § 48-152 is expressly to the contrary; it specifically limits the compensation court's subject matter jurisdiction to the administration and enforcement of the provisions of the act. No part of the act is found in chapter 45; it is contained in Neb. Rev. Stat. §§ 48-101 through 48-1,112 (Reissue 1988). Nor can it in any proper sense be implied that the compensation court's power to administer and enforce the act carries with it the power to interpret those portions of chapter 45 which deal with postjudgment interest. The applicable rule is that in construing statutes, implications will not be indulged which are necessarily contrary to and incompatible with the spirit and purpose of the enactment being construed. *City of Lincoln v. Nebraska Workmen's Compensation Court*, 133 Neb. 225, 274 N.W. 576 (1937). Section 48-152 expressly states the objective of the act is to create a court for the "efficient administration" of the act. It seems obvious that to encumber this special court of limited jurisdiction with the obligation to interpret and construe statutes which are not a part of the act is necessarily incompatible with that stated objective. Such an obligation will delay and thereby impede the administration of the act, which is designed to quickly resolve disputes concerning whether an employer owes an employee benefits under the act.

In addition, such an implication is specifically negated by § 48-188, which provides:

> Any order, award, or judgment by the Nebraska Workers' Compensation Court, or any judge thereof,

> certified to by the clerk of the compensation court or of the Supreme Court, certified to by the clerk thereof, for compensation pursuant to the Nebraska Workers' Compensation Act may, as soon as the same become conclusive upon the parties at interest, be filed with the district court of any county or counties in the State of Nebraska upon the payment of a fee of two dollars to the clerk of the district court or courts where such order, award, or judgment is so filed, whereupon such order, award, or judgment shall have the same force and effect as a judgment of such district court or courts, and all proceedings in relation thereto shall thereafter be the same as though the order, award, or judgment had been rendered in a suit duly heard and determined by such district court or courts.

We conclude, therefore, that the Nebraska Workers' Compensation Court has no authority to determine issues relating to postjudgment interest.

CONCLUSION

The judgment of the Workers' Compensation Court is affirmed, as modified in this opinion. Because Bituminous has obtained a reduction in the award of the Workers' Compensation Court, Deyle is not entitled to an attorney fee for services of his lawyer in this court. See § 48-125(1) (allowance of an attorney fee in an appeal from an award).

AFFIRMED AS MODIFIED.

WHITE, J., concurring in part, and in part dissenting.

I agree with the majority opinion, save that part which denies to the Workers' Compensation Court the authority to determine whether its judgments accrue postjudgment interest, for the reasons set forth in the dissent of Fahrnbruch, J., in *Thomas v. Omega Re-Bar, Inc., ante* p. 449, 451 N.W.2d 396 (1990), in which I joined.

FAHRNBRUCH, J., joins in this concurrence and dissent.

STATE OF NEBRASKA, APPELLEE, V. RANDALL S. WHITMORE, APPELLANT.

452 N.W.2d 31

Filed February 23, 1990. No. 89-452.

Postconviction. The Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989), requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Appeal dismissed.

Jerry L. Soucie for appellant.

Randall S. Whitmore, pro se.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ., and RONIN and COLWELL, D. JJ., Retired.

PER CURIAM.

Defendant has appealed from the May 2, 1989, order of the district court which overruled his motion for postconviction relief. We order the appeal dismissed for lack of jurisdiction.

On December 4, 1984, defendant was sentenced in cases found at Douglas County District Court docket 111, page 454, and docket 111, page 430. In the first case, the sentences were for 3 to 5 years on count I, 2 to 4 years on count II, 2 to 4 years on count III, and 2 to 4 years on count IV, the sentences on counts II, III, and IV to run concurrently with each other and consecutively to count I. In the second case, the sentence was for 1 to 3 years, to be served concurrently with the sentences imposed in the previous case.

The defendant in his motion does not allege that he is currently in custody in Nebraska serving those sentences. To the contrary, he shows his address to be "Reg. No. 11853-047, MCFP, Unit 9, Box 4000, Springfield, MO 65808." In a separate motion filed on May 2, 1989, in the office of the clerk of the district court for Douglas County, he suggests that at that time he was in the custody of the Federal Bureau of Prisons.

In *State v. Harper*, 233 Neb. 841, 842-43, 448 N.W.2d 407, 408 (1989), this court stated:

> While § 29-3001 does not expressly state that a postconviction attack on a sentence is limited to prisoners incarcerated in the State of Nebraska, we hold that the phrase "in custody under sentence," as used in the Nebraska Postconviction Act, §§ 29-3001 et seq., requires that a prisoner seeking relief under the act must be in actual custody in Nebraska under a Nebraska sentence.

The fact that a detainer may be on file with the Federal Bureau of Prisons by the State of Nebraska does not make the defendant "in actual custody in Nebraska."

The district court had no jurisdiction to entertain defendant's motion, nor does this court to hear his appeal, and it is ordered dismissed.

APPEAL DISMISSED.

ARTHUR CARTER, APPELLANT, V. WEYERHAEUSER COMPANY, APPELLEE.

452 N.W.2d 32

Filed February 23, 1990. No. 89-453.

1. **Workers' Compensation.** The question of whether an injured employee has reached maximum medical improvement is a question for the trier of fact.
2. **Workers' Compensation: Appeal and Error.** Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
3. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
4. **Workers' Compensation: Appeal and Error.** Regarding facts determined and findings made after rehearing in the Nebraska Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1988) precludes the Supreme Court's substitution of its view of facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the

compensation court.

5. **Workers' Compensation.** As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
6. _____. When a worker has reached maximum recovery, the remaining disability is permanent and such worker is no longer entitled to compensation for temporary disability.
7. **Workers' Compensation: Appeal and Error.** It has long been the policy of this court to construe the Nebraska Workers' Compensation Act liberally so that its beneficent purposes may not be thwarted by technical refinements of interpretation.
8. **Workers' Compensation.** The primary purpose of the Nebraska Workers' Compensation Act is to insure an employee against accidental injury arising out of and in the course of his employment. To accomplish this purpose, the act should be construed not to find that liability exists without the required quantum of proof, but to include within the protection of the act by liberal interpretation all injuries arising out of and in the course of employment which the act does not clearly exclude. Strict interpretation should not be resorted to in order to accomplish such exclusion.
9. _____. A plan of direct job placement, when prescribed as the only form of appropriate vocational rehabilitation for an injured employee, is vocational rehabilitation within the meaning of Neb. Rev. Stat. § 48-121(5) (Reissue 1988), therefore entitling the injured employee to temporary disability benefits.
10. **Workers' Compensation: Penalties and Forfeitures.** For the purpose of Neb. Rev. Stat. § 48-125 (Reissue 1985), and as some criteria to determine whether a reasonable controversy exists between an employer and employee, a reasonable controversy may exist: (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.
11. _____: _____. Whether a reasonable controversy exists pertinent to Neb. Rev. Stat. § 48-125 (Reissue 1985) is a question of fact.
12. **Workers' Compensation: Motions for New Trial.** The Nebraska Workers' Compensation Act does not provide for a motion for a new trial in the Nebraska Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Thomas F. Dowd, of Thomas F. Dowd & Associates, for appellant.

John F. Thomas and Geoffrey V. Pohl, of McGrath, North, Mullin & Kratz, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Arthur Carter appeals Workers' Compensation Court holdings (1) terminating his temporary total disability benefits, (2) denying him a monetary penalty for his employer's delay in paying workers' compensation benefits, and (3) denying him a new trial on a claim of newly discovered evidence. We affirm in part, reverse in part, and remand to the Workers' Compensation Court with directions.

Appellant contends that on rehearing, a three-judge panel erred (1) in finding that he reached maximum medical improvement on October 19, 1987, thereby discontinuing his entitlement to temporary total disability benefits as of such date; (2) in failing to find that he was entitled to temporary total disability benefits pursuant to Neb. Rev. Stat. § 48-121(5) (Reissue 1988) while he was undergoing vocational rehabilitation; (3) in failing to award him a waiting penalty as a result of the discontinuance of all disability benefits on and after January 10, 1988; and (4) in failing to grant him a new trial pursuant to Neb. Rev. Stat. § 25-1142 (Reissue 1989).

We first note that the rehearing in this case before the three-judge panel was held October 26, 1988, at which time live testimony and exhibits were received. At the close of the hearing, the parties waived oral argument and agreed to submit written arguments within 10 days. A posthearing deposition was taken and received in evidence on November 10, 1988. For some reason not explained in the record, the award on rehearing was not entered until April 13, 1989, more than 5 months from the date the last evidence was received by the panel.

It is uncontested that on September 13, 1986, Carter, while performing his duties as a bailer operator, injured his back in an

accident arising out of and in the course of employment with the appellee, Weyerhaeuser Company. It is also uncontested that appellant was temporarily totally disabled from the time of the September 13 injury until at least October 19, 1987. Weyerhaeuser paid temporary total disability benefits to Carter from September 14, 1986, to January 10, 1988.

With respect to his work-related injury, appellant was diagnosed by Dr. Bernard L. Kratochvil as having a lumbar strain. Treatment included medication, physical therapy, bed rest, and a caudal block.

In 1987 and 1988, appellant was offered job placement services with Mindy Stockfeld of the State of Nebraska's Division of Rehabilitation Services and by Jack Greene, a Quality Rehabilitation Services counselor who was retained by Weyerhaeuser. A plan of direct job placement with the employment goal of materials control was developed for the appellant. No program of vocational education, formal vocational training, or retraining services was developed or offered to Carter. At the time of rehearing, appellant's attempts in attaining stable employment had been unsuccessful.

The panel on rehearing found that Carter had reached maximum medical healing on October 19, 1987, the date that he was given a provisional release to return to work. The panel concluded that after October 19, Carter was not entitled to temporary total disability. Weyerhaeuser was given credit toward its obligation to pay permanent partial disability payments for the overpayment of temporary total disability benefits made to the appellant from October 20, 1987, to January 10, 1988. The panel noted that while it appeared that Carter had some earning power loss beginning October 20, there was nothing to measure that earning power loss until the deposition of Greene was taken subsequent to the rehearing. Accordingly, the panel found that a reasonable controversy existed concerning Carter's loss of earning power and that he, therefore, was not entitled to additional compensation for waiting time for the period after October 20.

The three-judge panel did not specifically address appellant's contention that he was entitled to continuing payments for temporary total disability while he was undergoing vocational

rehabilitation in the form of direct job placement.

Carter first contends the panel on rehearing erred in finding that he had reached maximum medical improvement on October 19, 1987. The question of whether an injured employee has reached maximum medical improvement is a question for the trier of fact. Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Behrens v. American Stores Packing Co.*, *ante* p. 25, 449 N.W.2d 197 (1989). In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party. *Id.* Regarding facts determined and findings made after rehearing in the Nebraska Workers' Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1988) precludes the Supreme Court's substitution of its view of facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court. As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Osborne v. Buck's Moving & Storage*, 232 Neb. 752, 441 N.W.2d 906 (1989); *Gardner v. Beatrice Foods Co.*, 231 Neb. 464, 436 N.W.2d 542 (1989).

Weyerhaeuser points to Dr. Kratochvil's deposition testimony that he did not believe appellant's condition had improved over his course of treatment. He stated, "[Carter] had gotten to the point where the medical treatment was not helping him. . . . In other words, the medication, physical therapy, caudal blocks were not of any particular value." Weyerhaeuser questioned Dr. Kratochvil as to the point at which appellant had reached maximum improvement.

> [Weyerhaeuser:] Okay. I guess — can you tell me, by looking at your records, Doctor, when he would have reached his maximum improvement, as good as he's going to get?
>
> [Dr. Kratochvil:] I don't think there was much in the way of treatment after April of '87. He saw us on several

occasions, but there was no — there was nothing different in the way of his treatment.

[Weyerhaeuser:] Okay. So, would it be a fair statement that as of April of '87 he had reached maximum improvement? I mean he was as good as he was going to get?

[Dr. Kratochvil:] I think so.

Appellant contends that he had not reached maximum medical improvement and points to Dr. Kratochvil's depositional testimony concerning treatment rendered to appellant in September 1987. Dr. Kratochvil stated, "Actually, as far as when did he reach maximum medical improvement, I'm not sure that he ever has." Dr. Kratochvil immediately went on to say, however, "But we get to a point where we say the treatment that we have rendered so far is the best we can do and from then on it's probably not going to do a lot."

Although Dr. Kratochvil stated that there were attempts made to improve Carter's condition from April 1987 to September 1988, these attempts did not make Carter's condition any better. In fact, Dr. Patrick W. Bowman, an associate of Dr. Kratochvil's, issued appellant a "provisional return to work release" effective October 19, 1987. Given these facts, we cannot say that the panel was clearly wrong in concluding that Carter had reached his maximum medical improvement on October 19. When a worker has reached maximum recovery, the remaining disability is permanent and such worker is no longer entitled to compensation for temporary disability. *Gardner v. Beatrice Foods Co., supra.*

Appellant contends, however, that even if he did reach maximum medical improvement, he is still entitled to temporary total disability payments by reason of being in vocational rehabilitation in the form of direct job placement. Section 48-121(5) provides that an "employee shall be entitled to compensation from his or her employer for temporary disability while undergoing rehabilitation." Carter contends that the plan of direct job placement instituted by the State of Nebraska's Division of Rehabilitation Services constitutes vocational rehabilitation. In support of that contention, appellant points to Neb. Rev. Stat. § 48-162.01(3) (Reissue

1988), that states in part:

> When as a result of the injury an employee is unable to perform work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to suitable employment.

From a review of the record, it is clear that appellant presented this issue to the panel. However, the panel did not specifically address appellant's contention in its award. The panel apparently concluded that a plan of direct job placement alone does not constitute vocational rehabilitation, since it terminated Carter's temporary total disability benefits.

We have not passed upon the question of whether a plan of direct job placement alone constitutes vocational rehabilitation, thus entitling a worker to temporary disability benefits. In addressing this issue, it should be remembered that it has long been the policy of this court to construe the Nebraska Workers' Compensation Act liberally so that its beneficent purposes may not be thwarted by technical refinements of interpretation. *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975). The primary purpose of the Nebraska Workers' Compensation Act is to insure an employee against accidental injury arising out of and in the course of his employment. To accomplish this purpose, the act should be construed not to find that liability exists without the required quantum of proof, but to include within the protection of the act by liberal interpretation all injuries arising out of and in the course of employment which the act does not clearly exclude. Strict interpretation should not be resorted to in order to accomplish such exclusion. *Union Packing Co. v. Klauschie*, 210 Neb. 331, 314 N.W.2d 25 (1982).

Section 48-162.01(3) provides, in pertinent part, that an employee shall be entitled to vocational rehabilitation services, including retraining and job placement. This language is in accord with the stated purpose of § 48-162.01, that being the restoration of an injured employee to gainful employment. While the statutes are open to varied interpretations, a liberal construction of § 48-162.01 compels us to conclude that a plan

of direct job placement, when prescribed as the only form of appropriate vocational rehabilitation for an injured employee, is vocational rehabilitation within the meaning of § 48-121(5), therefore entitling the injured employee to temporary disability benefits.

Weyerhaeuser relies on authority from other jurisdictions to support its contention that a plan of direct job placement alone cannot constitute vocational rehabilitation. Those authorities are not helpful because of the difference in language of the various workers' compensation statutes involved.

The rehearing panel has already found that appellant is unable to perform work for which he has previous training and experience. Because we hold that a plan of direct job placement is a form of vocational rehabilitation, it now becomes necessary for the rehearing panel to make factual findings as to whether appellant has reasonably participated in his plan of vocational rehabilitation. See, *Heironymus v. Jacobsen Transfer*, 215 Neb. 209, 337 N.W.2d 769 (1983); § 48-162.01(6). If the panel finds that appellant has not refused to participate in his plan of direct job placement without reasonable cause, he should be awarded benefits for temporary disability in accordance with § 48-121(5).

Appellant's third assignment of error contends the rehearing panel erred in failing to award him a waiting penalty pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1985) by reason of Weyerhaeuser's discontinuance of all disability benefits after January 9, 1988. The panel noted that while it appeared that Carter had some earning power loss beginning October 20, 1987, the point in time when appellant had reached maximum medical improvement, there was nothing to measure that earning power loss until the deposition of Greene was taken subsequent to the rehearing. Accordingly, the panel found that a reasonable controversy existed concerning that earning power loss, and thus, appellant was not entitled to additional compensation for waiting time for the period beginning October 20, 1987.

> [F]or the purpose of § 48-125, and as some criteria to determine whether a reasonable controversy exists between an employer and employee, a reasonable

> controversy may exist: (1) if there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.

Mendoza v. Omaha Meat Processors, 225 Neb. 771, 784-85, 408 N.W.2d 280, 288 (1987). "Whether a reasonable controversy exists pertinent to § 48-125 is a question of fact." *Mendoza, supra* at 783, 408 N.W.2d at 288.

Given the circumstances surrounding the measure of Carter's earning power loss, we cannot say the panel's conclusion that a reasonable controversy existed was clearly wrong. We further note that the question of whether a plan of direct job placement alone constituted vocational rehabilitation is one of first impression and, in and of itself, creates a reasonable controversy concerning entitlement to workers' compensation benefits.

Appellant's final assignment of error claims that the panel erred in failing to grant him a new trial pursuant to § 25-1142.

On April 12, 1989, 5 months after rehearing, Dr. Bowman performed a lumbar diskogram on Carter. As a result of the postrehearing diskogram, Dr. Kratochvil modified appellant's diagnosis from lumbar strain to internal lumbar disk disruption. Relying on this diagnosis, appellant filed a motion for new trial or, in the alternative, modification of the award on rehearing. In his motion, appellant claims that the internal disk disruption "constitutes material evidence which could not, with reasonable diligence, have been discovered and produced at the Rehearing on October 26, 1988."

In ruling on Carter's motion, the panel stated that "to the extent the plaintiff is asking the Court to reach different findings of fact from the same evidence, such motion should be denied." The panel further stated that appellant could seek modification provided that the requisites of Neb. Rev. Stat. § 48-141 (Reissue 1988) were met, "but such modification should be heard by one judge of this Court pursuant to an application filed at a later time."

We need not address appellant's contention that the medical evidence adduced from the diskogram entitled him to a new trial. The Nebraska Workers' Compensation Act does not provide for a motion for a new trial in the Nebraska Workers' Compensation Court. We are aware that in *Battiato v. Falstaff Brewing Corp.*, 212 Neb. 474, 323 N.W.2d 105 (1982), this court implied that a motion for new trial may be proper in the Nebraska Workers' Compensation Court. The implication was dictum and is disavowed. The *Battiato* court based its conclusion on two workers' compensation cases tried in district courts, a procedure that no longer exists under Nebraska law. As the panel noted, appellant is entitled to seek modification of his award on rehearing pursuant to § 48-141, provided the statutory prerequisites for modification are met.

As Carter has failed to achieve an increase in his award in this court, he is not entitled to attorney fees as authorized in § 48-125.

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

STATE OF NEBRASKA, APPELLEE, V. CAROL HUNTER, ALSO KNOWN AS CAROL RIDGEWAY, APPELLANT.

451 N.W.2d 922

Filed February 23, 1990. No. 89-663.

1. **Courts: Judgments: Notice: Appeal and Error.** To perfect an appeal from the county court to the district court, the appealing party must, within 30 days after rendition of the judgment or making of the final order complained of, (1) file a

notice of appeal with the county court and (2) deposit with the county court clerk a docket fee in the amount of the filing fee in the district court.

2. **Affidavits: Appeal and Error.** As an alternative to depositing a docket fee, a person who is unable to pay the required fee may file an affidavit of poverty and proceed with an appeal in forma pauperis.
3. **Affidavits.** To be effective, a poverty affidavit must show on its face, by the certificate of an authorized officer before whom it is taken, evidence that it was duly sworn to by the party making the affidavit.

Appeal from the District Court for Douglas County, THEODORE L. CARLSON, Judge, on appeal thereto from the County Court for Douglas County, RICHARD M. JONES, Judge. Appeal dismissed, and cause remanded with directions.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and RONIN, D.J., Retired.

FAHRNBRUCH, J.

Claiming the Douglas County Court failed to sequester the prosecution's witnesses, as mandated by Neb. Rev. Stat. § 27-615 (Reissue 1989), Carol Hunter appeals her convictions for violation of two municipal dog ordinances in Omaha.

The defendant's appeal to this court was preceded by an appeal to the district court for Douglas County, where Hunter's convictions were affirmed.

Because the defendant failed to perfect her appeal from the county court in accordance with Nebraska statutes, the district court acquired no jurisdiction to hear the case. Since the district court lacked jurisdiction, this court also lacks jurisdiction to rule on the merits of Hunter's appeal. We dismiss the defendant's appeal and remand the cause to the district court with instructions.

To perfect an appeal from the county court to the district court, the appealing party must, within 30 days after rendition of the judgment or making of the final order complained of, (1) file a notice of appeal with the county court and (2) deposit with

the county court clerk a docket fee in the amount of the filing fee in the district court. Neb. Rev. Stat. § 25-2729 (Reissue 1989). Fulfillment of these requirements vests appellate jurisdiction in the district court from the county court. *Rorick Partnership v. Haug*, 228 Neb. 364, 422 N.W.2d 365 (1988).

As an alternative to depositing a docket fee, a person who is unable to pay the required fee may file an affidavit of poverty and proceed with an appeal in forma pauperis. Neb. Rev. Stat. § 25-2301 (Reissue 1989) authorizes the commencement of an appeal without prepayment for fees and costs "by a person who makes an affidavit that he or she is unable to pay such costs or give security." See, also, *In re Interest of N.L.B.*, *ante* p. 280, 450 N.W.2d 676 (1990).

To be effective, a poverty affidavit must show on its face, by the certificate of an authorized officer before whom it is taken, evidence that it was duly sworn to by the party making the affidavit. *In re Interest of K.D.B.*, 233 Neb. 371, 445 N.W.2d 620 (1989). See, also, Neb. Rev. Stat. § 25-1241 (Reissue 1989).

The county court transcript fails to show that Hunter paid the required docket fee or, alternatively, filed a poverty affidavit with the county court within the statutorily specified time. The defendant merely filed an unnotarized letter in which she stated she could not afford the cost of pursuing an appeal to the district court.

The defendant having failed to properly perfect her appeal to the district court, neither that court nor this court could acquire jurisdiction to determine Hunter's appeal on its merits.

Accordingly, Hunter's appeal to this court is dismissed, and the cause is remanded to the district court with directions to dismiss the appeal in that court and remand the cause to the Douglas County Court to enforce its judgment.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

IN RE INTEREST OF M.L.S., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. M.L.S., APPELLANT.

452 N.W.2d 39

Filed February 23, 1990. No. 89-710.

1. **Trial: Minors: Witnesses: Appeal and Error.** The question of competency of a child witness lies within the discretion of the trial court, and that determination will not be disturbed in the absence of an abuse of discretion.
2. **Trial: Minors: Witnesses: Presumptions.** There is no age below which a child is presumed to be incompetent to testify.
3. **Trial: Minors: Witnesses.** In ruling whether a child is a competent witness, the trial court must determine whether a child is sufficiently mature to receive correct impressions by his or her senses, whether the child can recollect and narrate intelligently, and whether the child can appreciate the moral duty to tell the truth.

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Affirmed.

Robert C. Wester, Assistant Sarpy County Public Defender, for appellant.

Patrick Kelley, Sarpy County Attorney, and Mary Margaret Zerse Stevens for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Claiming that the victim was incompetent to testify against him, M.L.S., a 14-year-old male, appeals an adjudication that he was subject to a juvenile court's jurisdiction because he had committed a third degree sexual assault on a 4-year-old girl.

We affirm the Sarpy County Separate Juvenile Court's adjudication finding M.L.S. to be a child within Neb. Rev. Stat. § 43-247(1) (Reissue 1988), a juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor, and § 43-247(3)(b), a juvenile who deports himself so as to injure or endanger seriously the morals or health of himself or others. Sexual assault in the third degree is a Class I misdemeanor when the crime is committed without serious personal injury to the victim. Neb. Rev. Stat. § 28-320(1) and (3) (Reissue 1989).

In laying the foundation to demonstrate the victim's competency to testify, the State questioned the witness in regard to her full name, age, date of birth, address and city of residence, her father's name, her knowledge of truth versus falsehood, and the consequences of telling a lie. The victim recalled both her and her father's first names, but not their last name. She recalled her age and date of birth, but she was unable to recite her address or the name of the city in which she lived. The witness testified as to the difference between truth and falsehood and the consequences of lying. The victim could not identify the accused by a nickname, but did identify him by his given name.

M.L.S. moved to dismiss the victim witness as incompetent and objected to any further testimony by her. M.L.S. asserted, "I just don't think the competency's been shown — of a four-year-old to testify and know the truth and know the difference between truth and nontruth and that she's able to affirm or swear to tell the truth . . . ." Over a continuing objection, the juvenile court permitted the 4-year-old victim to recount the sexual assault upon her by M.L.S.

Upon completion of the trial, the juvenile court concluded the State had proven beyond a reasonable doubt that M.L.S. had subjected another person to sexual contact and knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his conduct, in violation of § 28-320(1)(b) and (3). M.L.S. was placed in the custody of the Department of Social Services.

M.L.S. contends that the juvenile court (1) erred as a matter of law by allowing an incompetent witness to testify and (2) abused its discretion by allowing an incompetent witness to testify.

The question of competency of a child witness lies within the discretion of the trial court, and that determination will not be disturbed in the absence of an abuse of discretion. *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988); *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984). There is no age below which a child is presumed to be incompetent to testify. In ruling whether a child is a competent witness, the trial court must determine whether a child is sufficiently mature to receive correct

impressions by his or her senses, whether the child can recollect and narrate intelligently, and whether the child can appreciate the moral duty to tell the truth. See *State v. Guy, supra.*

M.L.S. specifically complains that the witness was incompetent to testify in that she "could not recollect and intelligently narrate even the most basic data, such as; her name; her address; the name of the city in which she lived; the name of the perpetrator; or the fact that the perpetrator was living with her family." Brief for appellant at 5.

The witness recalled her first name, as well as the first name of her father. She identified M.L.S. by his given name, and she did testify that M.L.S. lived with her family. As already noted, the witness differentiated between truth and falsehood and the consequences of lying. She promised to tell the truth. In addition, the victim had no difficulty in narrating in vivid, lucid, and substantial detail the unfortunate events involving the sexual assault on her by M.L.S. Since M.L.S. only assigns as error the victim's competency to testify, there is no need for further discussion of the lurid details of the sexual assault. We cannot say that the juvenile court abused its discretion in allowing the 4-year-old victim to testify.

AFFIRMED.

SHANAHAN, J., concurring.

This court quite properly affirms the trial court's determination that the child witness in these proceedings was competent to testify. In considering the question of witness competency, the majority of this court recites that "[t]he question of competency of a child witness lies within the discretion of the trial court, and that determination will not be disturbed in the absence of an abuse of discretion," but then comments:

> In ruling whether a child is a competent witness, the trial court must determine whether a child is sufficiently mature to receive correct impressions by his or her senses, whether the child can recollect and narrate intelligently, and whether the child can appreciate the moral duty to tell the truth.

Conspicuously absent from the majority opinion is mention of the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to

27-1103 (Reissue 1989). Since the issue in this case is an evidential question relative to a witness' competency to testify, perhaps there should be some reference to the Nebraska Evidence Rules, which govern admissibility of evidence in Nebraska courts.

Neb. Evid. R. 601 states: "Every person is competent to be a witness except as otherwise provided in these rules." Regarding testimony from a nonexpert witness, Neb. Evid. R. 602 provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he [or she] has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself [or herself]. This rule is subject to the provisions of [Neb. Evid. R. 703], relating to opinion testimony by expert witnesses.

Neb. Evid. R. 104(1) prescribes: "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge . . . ."

Applying Rule 104(1), this court has held that a prima facie case of conspiracy is a preliminary question for a trial court's determination concerning admissibility of a coconspirator's acts. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Also in *Copple*, we concluded that "[w]hether a witness is qualified as an expert is a preliminary question for a trial court." 224 Neb. at 697, 401 N.W.2d at 158.

The inquiry then becomes: Under Rule 104(1), what is the nature of the preliminary question determinable by a trial court regarding admissibility of evidence? For this court, as reflected in today's decision, an appellate examination into witness competency consists of deciding whether the trial court has abused its discretion regarding requisites for admission of a child's testimony, namely, maturity in sensory perceptions, ability to recollect and recount, and appreciation for the responsibility of testifying truthfully. Given the foregoing requisites for witness competency, each of the foundational requirements for admissibility of testimony involves a factual determination. "Ay, there's the rub." What is a suitable

criterion to ascertain whether a trial court correctly determined a person's qualification to testify? The answer lies in an analysis of the judicial process involved in resolving a preliminary question about admissibility in light of Rule 104(1).

As noted in M. Graham, Handbook of Federal Evidence § 104.1 at 39 (2d ed. 1986):

> The rules of evidence are administered by the trial judge. The admissibility of evidence, the assertion of a privilege or the qualification of a witness as an expert, often depends upon the existence of a disputed factual condition. . . . Hence pursuant to [Neb. Evid. R. 104(1)] preliminary questions of fact as conditions precedent to admissibility or competency of witnesses, other than those involving relevancy conditioned on fact, [Neb. Evid. R. 104(2)], are decided solely by the court.

Also, as McCormick has observed:

> Accordingly, under the traditional view and the generally accepted principle, the trial judge decides with finality those preliminary questions of fact upon which depends the admissibility of an item of evidence that is objected to under an exclusionary rule of evidence. . . . The same practice extends to the determination of preliminary facts conditioning the application of the rules as to competency and privileges of witnesses.

McCormick on Evidence § 53 at 135-36 (E. Cleary 3d ed. 1984).

Thus, if a trial court's resolution of a preliminary question under Rule 104(1) is contradictory to or unsupported by an appropriately sufficient factual foundation, the court's disposition of the preliminary question is reached without, or in disregard of, a factual basis for admissibility and, hence, constitutes absolutely arbitrary action characterized as an "abuse of discretion."

Consequently, rather than a somewhat undefined "abuse of discretion" standard regarding a preliminary question under Rule 104(1), the correctly expressed test is the standard which this court has frequently utilized in other appellate reviews of a trial court's factual determination antecedent to admission or exclusion of evidence, such as a determination concerning constitutional admissibility of evidence obtained through a

search and seizure without a warrant or in the absence of probable cause. In those situations, we have repeatedly stated: "In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are *clearly erroneous*." (Emphasis supplied.) *State v. Abdouch*, 230 Neb. 929, 930, 434 N.W.2d 317, 319 (1989). See, also, *State v. Juhl, ante* p. 33, 449 N.W.2d 202 (1989); *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). If a question of constitutional admissibility may turn on a factual determination by a trial court, whose "findings of fact" are upheld on appeal unless such findings are "clearly erroneous," legal logic requires that the same standard, "clearly erroneous," apply to a preliminary question about admissibility determined pursuant to Rule 104(1). In other jurisdictions, courts, construing a rule of evidence which is substantially similar, if not identical, to Rule 104(1), have expressed that the standard of "clearly erroneous" applies in an appellate review of a trial court's factual determinations relative to a preliminary question of admissibility; for example, *U.S. v. Cardall*, 885 F.2d 656 (10th Cir. 1989) (admissibility of conspiratorial statements); *Alfonso v. Lund*, 783 F.2d 958 (10th Cir. 1986) (competency of physician to testify as an expert in a particular area of medical practice); *United States v. Wilson*, 798 F.2d 509 (1st Cir. 1986) (availability of the attorney-client privilege); *State v. Hussey*, 521 A.2d 278 (Me. 1987) (competency of a child witness to testify); *Compagnie des Bauxites de Guinee v. Ins. Co. of N.A.*, 721 F.2d 109 (3d Cir. 1983) (qualification of a witness to testify as an expert-engineer).

In the present appeal, the child was competent to be a witness. Nevertheless, this court should reexamine our "abuse of discretion" standard in relation to a trial court's determination under Rule 104(1) and, for the sake of a uniform rule, adopt and apply the cogent and more comprehensible standard of "clearly erroneous" in reference to a factual basis for evaluating propriety of a trial court's disposition of a Rule 104(1) preliminary question pertaining to admissibility of evidence. Without reference to a factual foundation as an objective basis for resolution of a preliminary question about

admissibility, this court, in examining an alleged "abuse of discretion" by the trial court, may itself indulge in an "abuse of discretion."

WHITE, J., joins in this concurrence.

RICK W. MIDDAGH ET AL., APPELLANTS, V. STANAL SOUND LTD., A NEBRASKA CORPORATION, AND STAN MILLER, APPELLEES.

452 N.W.2d 260

Filed March 2, 1990. No. 87-695.

1. **Landlord and Tenant: Abandonment: Intent.** Abandonment of leased premises occurs when a tenant, with the intention to terminate contractual rights to exclusive possession and control over the leased premises, voluntarily relinquishes or vacates the leased premises.
2. **Landlord and Tenant: Abandonment: Damages: Proof.** If a tenant abandons a leasehold before the expiration of the lease, the tenant has the burden to show that the landlord unreasonably failed to relet the premises and mitigate damages.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed in part, and in part reversed and remanded on the issue of damages.

William G. Dittrick and Barbara E. Person, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

No appearance for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal in a declaratory judgment action from a $38,184.13 judgment in favor of plaintiffs-appellants, Rick W. Middagh and Donnise M. Middagh, husband and wife, as lessors of a warehouse and against defendants-appellees, Stanal Sound Ltd., a Nebraska corporation, and Stan Miller as lessees. The district court found that Stanal Sound and Miller defaulted under the lease between the parties and were liable for

rent payments pursuant to the lease from the period of November 15, 1984, to June 18, 1986, the date a decree of foreclosure was entered on the subject property. The district court also granted the Middaghs an amount for real estate taxes through June 1986.

The lease at bar was effective December 15, 1979, and was to continue for a term of 10 years. The terms of the lease and the initial default of Stanal Sound and Miller were adjudicated in *Middagh v. Stanal Sound Ltd.*, 222 Neb. 54, 382 N.W.2d 303 (1986) (*Middagh I*). In *Middagh I*, this court determined that Stanal Sound and Miller defaulted as of November 15, 1982, and that Miller, as well as Stanal Sound, of which he was part owner, was liable for past due lease payments including rent, insurance, real estate taxes, and certain maintenance and for a 1-year acceleration of these lease payments pursuant to an addendum to the lease. That case determined the rights of the parties through November 15, 1984.

On April 3, 1986, the Middaghs brought this action for lease payments accruing November 15, 1984, and thereafter, plus a 1-year acceleration of lease payments pursuant to the addendum. In addition to rent, the Middaghs also requested reimbursement for unpaid taxes, insurance, and other maintenance under the lease. Stanal Sound and Miller answered, affirmatively alleging that the Middaghs breached their duty to mitigate damages. The Middaghs amended their petition in this action on January 5, 1987, updating the amount of arrearage.

On June 18, 1986, the district court for Buffalo County entered a decree of foreclosure on the subject property. The foreclosure was instituted by the lender which ultimately funded the initial lease agreement between the Middaghs and Stanal Sound and Miller. On July 7, 1986, the Middaghs requested a stay of the foreclosure for 4 1/2 months, but the record does not reflect any further action in the foreclosure. In particular, there is no record of confirmation of the sale of the subject property in the foreclosure proceedings.

The hearing in this case was held March 2, 1987. The trial court determined that Stanal Sound and Miller defaulted on lease payments accruing as of November 15, 1984. With

reference to appellees' allegation that the Middaghs failed to mitigate damages, the trial court found that the Middaghs took sufficient steps to mitigate damages. Nonetheless, the trial court concluded that the decree of foreclosure, referred to above, entered June 18, 1986, left the Middaghs with "no right to recover rental from a nonpossessory tenant from and after the date of foreclosure."

All parties moved for a new trial, and their respective motions were overruled. The Middaghs timely appealed. During the pendency of this appeal, we were advised that Stanal Sound had gone into some form of bankruptcy. In October 1989, we were advised the automatic stay of proceedings involving Stanal Sound had been lifted. The Middaghs and Stanal Sound were advised of the lifting of the stay. We have not been further advised, so this opinion is concerned only with the adjudication of rights between the Middaghs and appellee Miller. On appeal, Middaghs contend that the trial court erred (1) "in basing its decision on issues that were not tried to the court" because Miller did not raise the matter of the foreclosure as a new matter in a pleading and (2) "in basing its decision on facts not of record" because there was no record of a confirmation of sale affecting the Middaghs' right to possession of the subject property. The Middaghs also assign as error the trial court's action in holding that the Middaghs are not entitled to lease payments accruing after the date the foreclosure decree was entered. We agree with the general proposition of the third assignment of error and, for the reasons set out below, affirm the case as to the determination that Miller is liable to the Middaghs under the lease agreement. As to the trial court's finding as to mitigation of damages, we remand the cause for a recalculation of damages only.

We held in *Middagh I* that Stanal Sound and Miller were liable for the accrued lease payments and for a 1-year acceleration of the lease payments. No issue is raised on appeal concerning the Middaghs' right to an additional 1-year acceleration under the addendum, which states: "Exercise of this option by the Lessor shall not constitute a waiver of any other right set out in the Lease or of the right of the Lessor to exercise the same right during each succeeding period of twelve

(12) months."

The addendum also states that a default by Miller triggers the remedies stated in paragraph 14 of the lease in addition to the acceleration clause. Paragraph 14 states that upon default,

> LESSOR may immediately, or at any time thereafter, re-enter the premises, repossess the same . . . and dispossess the LESSEE . . . .
>
> If LESSOR shall elect to declare forfeiture under this Article, it shall be entitled to receive from LESSEE the difference in rental, if any, between the rent reserved hereunder for the unexpired portion of the term and any lesser amount which LESSOR, in the exercise of reasonable diligence, is able to procure for the unexpired term of this Lease . . . .

Upon Miller's default, the Middaghs wrote Miller on November 24, 1982, notifying him of the default, and demanding that Miller "quit the premises" if the default was not timely cured. Consequently, Miller's failure to cure the default terminated his right to possess the subject property, and the Middaghs were discharged from their covenant to protect Miller's quiet enjoyment of this property.

It is also apparent that Miller abandoned the property. As we stated in *Mason v. Schumacher*, 231 Neb. 929, 940, 439 N.W.2d 61, 68 (1989), "Abandonment of leased premises occurs when a tenant, with the intention to terminate contractual rights to exclusive possession and control over the leased premises, voluntarily relinquishes or vacates the leased premises." In asserting that the Middaghs breached the terms of the lease, Stanal Sound, by a letter authorized by Miller and dated November 8, 1982, stated an intent to vacate the premises by December 1, 1982, and did so vacate. In *Middagh I*, we held that the breach of the Middaghs on which appellees relied did not discharge appellees' liability for the lease payments. Appellees had the option of suing for damages, but instead voluntarily chose to permanently vacate the subject property. This abandonment of the premises gave the Middaghs the right to reenter the premises and terminated appellees' right to possession. See *Langemeier, Inc. v. Pendgraft*, 178 Neb. 250, 132 N.W.2d 880 (1965).

In *S.N. Mart, Ltd. v. Maurices Inc., ante* p. 343, 451 N.W.2d 259 (1990), we stated that if a tenant abandons a leasehold before the expiration of the lease, "the tenant has the burden to show that the landlord 'unreasonably failed to relet the premises and mitigate damages.' " *S.N. Mart, supra* at 346, 451 N.W.2d at 262 (quoting *Bernstein v. Seglin,* 184 Neb. 673, 171 N.W.2d 247 (1969)). Consequently, both under the lease and under the law of abandonment, the issue is whether the Middaghs exercised reasonable diligence in finding another tenant for the subject property to mitigate their damages. The trial court found that the Middaghs acted reasonably to mitigate their damages as far as their effort to sell or lease the property. We affirm that finding. Because Miller failed to submit evidence that the Middaghs lost possession of the subject property as a result of a confirmed foreclosure sale, we need not consider the effect of such an occurrence on the Middaghs' satisfaction of their duty to mitigate their damages or upon their right to accelerate the payments due. We hold that the trial court erred in holding that the decree of foreclosure by itself negated the Middaghs' right to collect lease payments from Miller.

We remand this action to the trial court to recalculate, in accord with this opinion, the payments due from Miller to the Middaghs for the period from November 15, 1984, to November 15, 1987, as prayed for by the Middaghs.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED ON THE ISSUE OF DAMAGES.

CAPORALE, J., not participating.

RICHARD J. RUSSELL AND BARBARA J. RUSSELL, APPELLANTS, V. GONZALO LUEVANO, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, TODD R. RUSSELL, THIRD-PARTY DEFENDANT, APPELLANT.

GONZALO LUEVANO, APPELLEE, V. TODD R. RUSSELL, APPELLANT.

452 N.W.2d 43

Filed March 2, 1990. No. 87-822.

1. **Courts: Motions for New Trial.** When the district court sits as an intermediate appellate court and not as a trial court, a motion for new trial is not a proper pleading.
2. **Courts: Appeal and Error.** When sitting as an appellate court, it is error for the district court to make findings of fact in a law case.
3. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
4. **Motor Vehicles: Negligence: Proximate Cause: Parties.** The purpose of the family-purpose doctrine is to provide financial responsibility for the negligence of financially irresponsible family members. The negligence of the family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's property damage. However, the owner of a family-purpose car may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the collision.
5. **Actions: Parties: Liability.** The basis of a third-party complaint must be some form of secondary or derivative liability. Without a finding of liability on the principal claim, secondary liability does not exist.
6. **Motor Vehicles: Negligence.** A driver, notwithstanding his directional right-of-way, must approach a blind intersection at such speed that he may effectively exercise an option on how to proceed as may be indicated by circumstances when he reaches a point where he can see.

Appeal from the District Court for Hall County, JOSEPH D. MARTIN, Judge, on appeal thereto from the County Court for Hall County, JAMES A. KELLY, Judge. Judgment of District Court reversed, and cause remanded with directions.

Patrick A. Brock, of Cunningham, Blackburn, Livingston, Francis, Cote, Brock & Cunningham, for appellants.

Kenneth H. Elson and Sam Grimminger for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and SPRAGUE and MULLEN, D. JJ.

PER CURIAM.

These are consolidated appeals from the district court for Hall County involving claims for property damage resulting from a two-vehicle accident. On November 18, 1985, Gonzalo Luevano, the driver-owner of one of the vehicles, sued Todd R. Russell, the driver of the other vehicle, in small claims court. Todd answered on December 27, 1985, and requested the case be transferred to county court. At the same time, Todd's parents, Richard J. and Barbara J. Russell (hereafter referred to as parents), the owners of the car driven by Todd, filed their action against Luevano in county court. Luevano answered, denying he was negligent and alleging the sole proximate cause of the accident was the negligence of the plaintiffs' driver, Todd. On April 14, 1986, Luevano joined Todd as a third-party defendant in the parents' suit. The cases were consolidated for trial. The parties stipulated that the Russell vehicle sustained $2,313.98 in damage and the Luevano vehicle sustained $1,454.96 in damage. Trial was had on liability.

Following a bench trial, the county court held the issues were the same in both actions and dismissed Luevano's petition against Todd. Then, in the parents' action, the court dismissed the parents' petition while awarding damages in the stipulated amount plus costs to Gonzalo Luevano on Luevano's third-party complaint.

On appeal, the district court, by memorandum order dated March 27, 1987, affirmed the dismissal of the parents' petition, but vacated the judgment granted on the third-party complaint. The district court then granted judgment against Todd in the stipulated amount on Luevano's petition.

After the parents' and Todd's "Motion for New Trial" in the district court was denied, a "Motion for Reconsideration" was filed. On June 25, 1987, "a new trial on appeal" was held in the district court. The district court made several "findings of fact" regarding the negligence and comparative negligence of the parties. At the conclusion of the "trial," the district court entered substantially the same order as the order of March 27. The parents and Todd appeal to this court. We reverse.

On October 17, 1985, Todd was driving a car owned by his parents. There is no question the Russell vehicle is a

family-purpose vehicle and was being used by their son in such manner at the time of the accident. Todd was involved in a collision with the Luevano vehicle at the intersection of Fourth and White Streets in Grand Island, Nebraska. Fourth Street is a two-way street running east and west, while White, which is also two-way, runs north and south. The intersection of Fourth and White is unprotected by traffic control signs. At the time of the collision, it was cloudy and raining.

Todd testified he was traveling north on White Street at approximately 25 miles per hour. Luevano was traveling west on Fourth Street, going 15 to 20 miles per hour. Two trucks were parked on the southeast corner of Fourth Street at the time of the accident. The trucks, a pickup, and a larger truck used to mount tires on farm equipment, were parked approximately 6 feet east of the intersection and were facing east. The testimony indicates houses are located south of Fourth Street on the east side of White Street. In particular, there is a house located "right up on the [southeast] corner" of Fourth and White Streets. The evidence is never further developed as to the number or exact location of the remaining houses.

According to the testimony, Todd approached the intersection at approximately 25 miles per hour. Todd first looked to the east when he was a quarter of a block from the intersection. Realizing his view was completely obstructed by the house on the southeast corner and the trucks parked on Fourth Street, he reduced his speed to 20 miles per hour. When Todd was entering the intersection, he saw the Luevano vehicle for the first time. Upon seeing Luevano, Todd applied the brakes but still collided with the rear end of the left side door of the Luevano vehicle.

Luevano testified he was going 20 miles per hour as he approached the intersection. He states he first looked to the south "[b]efore [he] got to the trucks." Looking between the trucks and house on the southeast corner, Luevano could see the southwest corner of White and Fourth Streets and saw no traffic coming. It is unclear from the testimony whether Luevano could see through a 20-foot gap between the house on the southeast corner and the parked trucks or whether he could see 20 feet of the block.

After getting by the trucks, Luevano looked again to the south and saw Todd, who was not yet in the intersection. At this time, Luevano was just entering the intersection and Todd was about 30 feet from the intersection. When Luevano saw that Todd was not going to stop, Luevano "gunned" the accelerator. Luevano testified he really did not have a chance to accelerate, as Todd hit him almost immediately. The collision occurred near the middle of the intersection.

The procedure in this case not only creates confusion as to the issues but also as to the timeliness of the appeal. A motion for new trial is not a proper pleading when the district court is acting as an intermediate appellate court and not as a trial court. *In re Conservatorship of Mosel, ante* p. 86, 449 N.W.2d 220 (1989); *Collection Bureau of Lincoln v. Loos*, 233 Neb. 30, 443 N.W.2d 605 (1989). Nevertheless, in civil cases a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered. *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981) (citing *Barney v. Platte Valley Public Power and Irrigation District*, 147 Neb. 375, 23 N.W.2d 335 (1946)); *Lyman v. Dunn*, 125 Neb. 770, 252 N.W. 197 (1934); *County of Scotts Bluff v. Bristol*, 159 Neb. 634, 68 N.W.2d 197 (1955); *Jones v. Nebraska Blue Cross Hospital Service Assn.*, 175 Neb. 101, 120 N.W.2d 557 (1963); *Urwin v. Dickerson*, 185 Neb. 86, 173 N.W.2d 874 (1970). While such an improper motion does not toll the time for appeal, it is to be considered nothing more than an invitation to the district court to consider exercising its inherent power to vacate or modify its own judgment. See *In re Estate of Weinberger, supra*. In the instant case, the district court sustained the motion for reconsideration, thereby vacating the judgment it had entered on March 27, 1987. Thus, this appeal is timely taken from the district court's new judgment.

The appellants assign as error the improper findings of fact made by the district court. The review of questions of fact from the county court to district court is controlled by Neb. Rev. Stat. § 24-541.06 (Reissue 1985), which provides in part that "the district court shall review the case for error appearing on the record made in the county court . . . ." This is also the scope

of review in this court. Neb. Rev. Stat. § 25-1911 (Reissue 1989). See, also, *Kuehl v. Diesel Power Equip. Co.*, 228 Neb. 353, 422 N.W.2d 361 (1988). It is solely within the province of the trial court in a law case to make findings of fact, and therefore we disregard any findings of fact made by the district court while sitting as an intermediate court of appeals.

The appellants assign as error the trial court's incorrect application of the family-purpose doctrine. They assert the negligence of Todd was incorrectly imputed to the parents as owners of the vehicle. Regarding questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989).

The owner of an automobile kept for family purposes is liable for injuries inflicted upon a stranger as a result of the negligent driving of one of his children, where the car is occupied by members of the family and is being used for one of the purposes for which it is kept. *Bartek v. Glasers Provisions Co., Inc.*, 160 Neb. 794, 71 N.W.2d 466 (1955). See, also, *Paprocki v. Stopak*, 213 Neb. 523, 330 N.W.2d 475 (1983).

Recently, in *Looney v. Pickering*, 232 Neb. 32, 439 N.W.2d 467 (1989), this court discussed the imputation of a family-purpose car driver's negligence to the owner of the vehicle. In *Looney*, the owners of a family-purpose automobile sued the driver of the other vehicle for damages to their automobile. The county court dismissed the parents' petition, and the district court affirmed.

In discussing the possibility that the county court incorrectly imputed the driver's negligence, this court observed that the purpose of the family-purpose doctrine is to provide financial responsibility for the negligence of financially irresponsible family members. Agreeing this purpose is not served when the owner sues for damages, this court reiterated the rule in *Paprocki v. Stopak, supra* at 525, 330 N.W.2d at 476-77, that "the negligence of the family-purpose driver is not ordinarily imputed to the family-purpose owner in an action by the owner against a third party for the owner's own injuries or property damage." (Citing *Bartek v. Glasers Provisions Co., Inc., supra.*) The *Paprocki* court went on to discuss the exception to

this rule. Under this exception, the owner of a family-purpose car may not recover from the driver of another car when the negligence of the family-purpose driver is the sole proximate cause of the accident. *Paprocki, supra* (citing *Pearson v. Schuler*, 172 Neb. 353, 109 N.W.2d 537 (1961)). This court, in *Paprocki*, held the trial court failed to find the family-purpose driver was the sole proximate cause of the collision. Concluding the trial court had instead incorrectly imputed the drivers' negligence to their parents, this court reversed.

In the current case, it is not readily apparent whether the court found Todd's negligence was the sole proximate cause of the accident or incorrectly imputed his negligence to his parents.

Where trial is to the court, a general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts. *Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc.*, 212 Neb. 16, 321 N.W.2d 64 (1982) (citing *Aurora Cooperative Elevator Co. v. Larson*, 204 Neb. 755, 285 N.W.2d 498 (1979)). In determining whether the evidence supports the findings of the trial court in an action at law when the jury has been waived, evidence must be considered in the light most favorable to the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *Preisendorf v. Mettenbrink*, 232 Neb. 558, 441 N.W.2d 203 (1989); *Norfolk Iron & Metal v. Behnke*, 230 Neb. 414, 432 N.W.2d 18 (1988).

Again the procedure in this case causes confusion, and we are required to guess as to the trial court's findings of fact. While the county court dismissed the parents' petition against Luevano, it erroneously entered judgment on Luevano's third-party claim for his damages. At this point it should be noted that confusion clearly existed regarding the disposition of a third-party action. The basis of a third party complaint must be some form of secondary or derivative liability. Without a finding of liability on the principal claim, secondary liability does not exist. " 'A third-party claim may be asserted . . . only when [the] third party's liability is in some way dependent on the outcome of the main claim or when the third party is

secondarily liable to defendant.' " *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 306, 338 N.W.2d 601, 605 (1983) (citing 6 C. Wright & A. Miller, Federal Practice and Procedure: Civil 1446 (1971)). Therefore, it was improper for the county court to render judgment on Luevano's third-party complaint, and the district court was correct in reversing the third-party award.

To correct this procedural error, the district court reversed the third-party award in the parents' action and, instead, awarded judgment against Todd on Luevano's petition. The district court then affirmed the trial court's dismissal of the parents' petition. The district court apparently concluded the trial court found Todd was the sole proximate cause of the collision and therefore did not improperly impute Todd's negligence to his parents. Assuming the trial court made such a finding, we must next consider whether the facts can sustain the conclusion that Todd's negligence was the sole proximate cause.

In *Hodgson v. Gladem*, 187 Neb. 736, 742-43, 193 N.W.2d 779, 783 (1972), this court stated:

> A car approaching an intersection is not in a favored position and entitled to proceed regardless of the circumstances merely because he is on the right of the other car. . . .
>
> . . . [A] driver approaching an unprotected intersection where he knows and can readily observe that his view is obstructed must do so at such a speed as will afford him a reasonable opportunity to make effective observations for cars approaching on the intersecting road and give him a reasonable opportunity to properly react to the situation he then observes or could observe, and where his view is completely obstructed and his speed is such that he has given himself no opportunity at all to observe and react appropriately he may, where the facts are undisputed, be found negligent as a matter of law.

The court in *Hodgson* held the plaintiff was negligent as a matter of law even though he had the directional right-of-way because he approached the intersection at such a rate of speed he could not take any effective action to avoid the accident. The fact that one of the drivers may be able to see the approaching

traffic for a short time before he enters the blind intersection does not prevent the rule in *Hodgson* from applying. In *Schenk v. Yosten*, 229 Neb. 691, 428 N.W.2d 510 (1988), this court recently rejected the argument that the *Hodgson* rule does not apply when one of the drivers can see approaching traffic at least 300 feet from the intersection. In *Schenk*, the court stated:

> The rule in Nebraska after *Hodgson* and to this day is that one who is or should be aware that his or her own view of an uncontrolled intersection is obstructed is under a duty to approach that intersection with care reasonable in those circumstances regardless of the directional right-of-way, and quite regardless of the degree to which hindsight might indicate that another driver's view of the same intersection was or was not obstructed at the same time; further, the "care reasonable in those circumstances" is, as a matter of law, that degree of care which will permit the driver to make reasonably careful observation of the obstructed section of road and, if required, to take reasonable action to prevent a collision.

Id. at 694, 428 N.W.2d at 513.

The record shows both drivers' views of the intersection were obstructed. The evidence is uncontroverted that Todd could not see to the east because his view was completely obstructed by the house on the southeast corner and the parked trucks. As Luevano approached the intersection his view south on White Street would have been obstructed by the corner house or houses. Therefore, his view was admittedly limited to what he could see through the gap between the corner house and the trucks. As Luevano got closer to the intersection, his view of the cross traffic immediately approaching the intersection from the south was completely hindered by the parked trucks. Under these circumstances, the intersection was clearly a blind one.

Luevano approached the intersection without slowing. Only when Luevano reached the intersection was he able to see Todd, who was not yet in the intersection. Although Luevano had the directional right-of-way, the evidence shows he approached at a speed that did not allow him time to make a reasonable observation of the intersection, and the vehicles collided. Luevano failed to keep a proper lookout, and in doing so he is

guilty of negligence more than slight as a matter of law. With both drivers failing to keep a proper lookout by law, the evidence cannot support the conclusion that Todd was the sole proximate cause of the accident.

We next turn to Luevano's petition against Todd. As previously stated, the district court reversed the trial court's judgment in favor of Luevano on his third-party claim in the parents' action and instead awarded the same amount to Luevano on Luevano's petition against Todd. The district court's order was based upon the conclusion that the trial court had made a finding that the negligence of Luevano was slight in comparison to Todd's negligence, or that Luevano was guilty of no negligence whatsoever. Having previously determined that Luevano is guilty of negligence more than slight as a matter of law, we reverse the judgment of the district court.

The order dismissing the parents' petition is reversed, and we remand with directions to the district court to remand to the county court with instruction to enter judgment in favor of the parents on their petition in the stipulated amount of damages in the amount of $2,313.98.

REVERSED AND REMANDED WITH DIRECTIONS.

WHEAT BELT PUBLIC POWER DISTRICT, APPELLEE, V. NEAL BATTERMAN, APPELLANT.

452 N.W.2d 49

Filed March 2, 1990. No. 88-414.

1. **Contracts: Parties: Debtors and Creditors: Liability.** The liability of one party to a contract may not be substituted for the liability of another unless the parties to the original contract agree to the discharge of the original debtor and substitution of a new one.
2. **Estoppel.** The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently

attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

3. **Contracts: Waiver: Proof.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.
4. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
5. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel on his part.
6. **Liens: Property: Debtors and Creditors.** A lien on property as security for payment of a debt is a right afforded by law to have the obligation satisfied out of a particular property, thereby providing a supplemental remedy for collection of the debt.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Robert R. Gibson, of Professional Legal Associates of Nebraska, P.C., for appellant.

Thomas M. Sonntag, of John Peetz, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Defendant, Neal Batterman, appeals from the district court's judgment in favor of plaintiff-appellee, Wheat Belt Public Power District, a municipal corporation. Batterman's assignments of error merge to claim the district court erred in holding him to the terms of certain contracts he entered into with Wheat Belt. We affirm.

It is undisputed that Batterman and Wheat Belt entered into 10 contracts between 1972 and 1979, each establishing a new account in Batterman's name, under which Batterman agreed

in his own name to pay Wheat Belt for electricity the latter agreed to provide in order to power irrigation wells located on various tracts of land Batterman then owned. Each contract save one designated Batterman as owner of the land described therein; the one designated Batterman as "customer." Each contract contains the following or similar provision: "This Contract shall become effective upon execution and shall continue in force for a primary term of five years . . . and thereafter from year to year until cancelled by written notice from the Owner to the District . . . ." None of the contracts had expired or were ever canceled, nor had any of the accounts been transferred to any other person or entity. Merle Bobo, customer service supervisor for Wheat Belt, further stated that none of the contracts had ever been amended.

In 1979, Batterman transferred the land to which the contracts pertain to Batterman & Sons, Ltd., a corporation he formed. Batterman testified that he did not notify Wheat Belt he had transferred the land to his corporation, but claimed that the transfer was common knowledge in the community and that maybe one or more members of Wheat Belt's board of directors was aware of the transfer. However, Bobo stated that he did not become aware of the transfer until the year of the trial. Batterman acknowledged that no new written contracts were drafted or entered into between his corporation and Wheat Belt and that the electricity to run the irrigation wells on the land was provided under the "same old contract."

According to Batterman, after the transfer of the land to his corporation and until 1984, the corporation paid for the electricity used with checks written on the corporate banking account. Such checks were accepted and cashed by Wheat Belt.

In 1984, Batterman was unable, for financial reasons, to farm the land in question and thus leased it to Ted Chickos. Batterman notified Wheat Belt that Chickos would be farming the land during that year and would pay for the electricity used. Bobo testified he informed Batterman that he, Batterman, would remain responsible for electricity charges accrued pursuant to the contracts. Batterman did not remember Bobo informing him that he would remain responsible for the charges, but acknowledged that Bobo never advised him Wheat

Belt would release him from his contract obligation.

During 1984, Wheat Belt provided electricity to each of the 10 accounts pursuant to the contracts between it and Batterman. Although Chickos paid the initial 1984 hookup charge, he did not pay for the electricity used during that year, and Wheat Belt billed Batterman.

Batterman first claims that the original contracts between him and Wheat Belt were modified to substitute the corporation as the owner of the land, thus making the corporation the party obligated for the 1984 electricity charges. This modification, he argues, occurred through a course of dealing between the parties. "Wheatbelt's acceptance of payments over five years from the actual owner of the land, Batterman & Sons, Ltd., denotes acceptance or acquiescence in the substitution of the new land owner for the previous owner, Neal Batterman." Brief for appellant at 6.

The applicable rule, however, is that the liability of one party to a contract may not be substituted for the liability of another unless the parties to the original contract agree to the discharge of the original debtor and substitution of a new one. As stated in *Thomas v. George*, 105 Neb. 51, 58, 181 N.W. 646, 648-49 (1921), *modifying* 105 Neb. 44, 178 N.W. 922 (1920):

> A novation will never be presumed. The complete discharge of the original debtor must be shown to have been expressly agreed upon, or must be necessarily and clearly inferred from the express terms of the agreement. An agreement, in order to result in a novation, must contain two stipulations: One, to completely extinguish an existing liability, and the other, to substitute a new one in its place. Before the original debtor will be discharged and another party substituted in his place, the burden is upon the original debtor to show, just as in proving any other contract, that such was intended, not only by him, but also by the creditor and by the party to be substituted.

See, also, *Kearney State Bank & Trust v. Scheer-Williams*, 229 Neb. 705, 428 N.W.2d 888 (1988) (a novation occurs when the existing liability of a party to an agreement is completely extinguished and a new one is substituted in its place according to the terms of a new agreement). Accord, *Chadron Energy*

Corp. v. First Nat. Bank, 221 Neb. 590, 379 N.W.2d 742 (1986); *First West Side Bank v. Herzog*, 204 Neb. 356, 282 N.W.2d 38 (1979).

Regardless of Batterman's possible intentions, the record supplies no evidence that Wheat Belt intended that the corporation be substituted in Batterman's stead as the party obligated upon the 10 contracts. The evidence instead is that the contracts between Wheat Belt and Batterman were never modified, that the contracts were never terminated, and that no new contracts were entered into between Wheat Belt and the corporation. The fact that Wheat Belt accepted payment from the corporation for electricity charges incurred by Batterman is not sufficient to show that Wheat Belt consented to the substitution of the corporation as the party obligated upon the contracts. See, *Davenport v. Dickson*, 211 Kan. 306, 507 P.2d 301 (1973) (creditor's assent to hold new debtor liable for obligation of original debtor is ineffective to constitute novation unless there is assent to give up original debtor); *D. A. Taylor Co. v. Paulson*, 552 P.2d 1274 (Utah 1976).

Any claim Batterman makes that Wheat Belt, because of its acceptance of the checks from the corporation, is estopped from denying that the corporation was substituted as the debtor on the contracts or has waived its right to payment from Batterman for the electricity used must also fail. The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. *Reifschneider v. Nebraska Methodist Hosp.*, 233 Neb. 695, 447

N.W.2d 622 (1989). Wheat Belt's acceptance of payments from the corporation was not sufficient to constitute a representation to Batterman that he was no longer obligated on the contracts.

Batterman's reliance on *Shreves v. D. R. Anderson Constructors, Inc.*, 206 Neb. 433, 293 N.W.2d 106 (1980), and *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982), to argue the contrary position is misplaced. In *Shreves*, we reiterated the rule that the parties to a construction contract which requires written change orders may avoid such provisions where their words, acts, or conduct amount to a waiver, modification, rescission, abrogation, or abandonment of the provisions, or the party claiming the benefit of the provisions is estopped to rely upon them. Here, we are not dealing with such a provision.

Neither is *Pearce*, which deals not with estoppel, but with waiver, apposite. Therein, we considered whether, in an action by an employee against his successor employer, the successor employer waived a condition precedent of "Overwrite Quota" in its commission agreement with the employee. We stated the rule that a written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right. *Jelsma v. Scottsdale Ins. Co.*, 231 Neb. 657, 437 N.W.2d 778 (1989). In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel on his part. *Id.* Again, Wheat Belt's acceptance of the payments from the corporation was not a "clear, unequivocal, and decisive action" reflecting an intent to discharge Batterman from liability on the contracts.

Batterman further asserts that if the above arguments are unavailing, then it must be concluded that Wheat Belt and his corporation entered into a new oral contract under which the corporation was obligated for the 1984 electricity charges. In this regard, Batterman urges that the obligation for the

electricity "runs with the land" because the contracts provide that the indebtedness arising under their provisions shall be considered a lien or mortgage against the land. We, however, need not, and therefore do not, concern ourselves with whether those provisions obligate a subsequent purchaser of land to pay for electricity charges incurred by a prior owner, for even if so, they do not excuse Batterman from the personal obligations arising under the other provisions of the contracts. See *Dupuy v. Western State Bank*, 221 Neb. 230, 375 N.W.2d 909 (1985) (lien on property as security for payment of debt is right afforded by law to have obligation satisfied out of particular property, thereby providing supplemental remedy for collection of debt).

Finally, Batterman claims that according to the terms of the contracts, the "owner" is the party obligated and that his corporation, not he, is the owner of the land. Batterman's premise as to the party obligated by the contracts is incorrect. Each contract, except the one in which Batterman is designated "customer," states that it is "made and entered into . . . by and between Wheatbelt Public Power District, hereinafter referred to as the District, and Neal Batterman, hereinafter referred to as the Owner." The contracts, except the one, further state in this or similar language that "the District hereby agrees to make electric energy available to the Owner and the Owner hereby agrees to purchase and does purchase, according to the terms and conditions set out below, electric energy for use on the following described premises . . . ." It is clear that Batterman is the party obligated upon the contracts. Batterman is merely designated "owner" for the sake of convenience, and, indeed, at the time of contracting, he was the owner of the subject premises. The contracts do not state that Batterman's obligation will terminate when he no longer owns the premises, nor do they state that Wheat Belt agrees to accept by novation the obligation of any new owner of the subject premises. Instead, the contracts provide that they will continue in effect "until cancelled by written notice from the Owner to the District." Batterman provided no such notice and thus remained obligated upon the contracts for the electricity provided during 1984.

The one contract which refers to Batterman as "customer" states: "The Customer will, when electric energy becomes available, purchase from the District all electric energy used on the premises described below and will pay therefore monthly at rates to be determined . . . ." Clearly, Batterman is the party obligated under this contract as well.

There being no merit to any of the arguments made in support of Batterman's summarized assignment of error, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LOUIS T. PRATT, APPELLANT.

452 N.W.2d 54

Filed March 2, 1990. No. 89-147.

1. **Right to Counsel.** When an accused asserts the right to counsel, interrogation must cease until counsel is present or the accused initiates further communications.
2. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Once a defendant has made a prima facie case of discrimination on the part of the prosecution in selection of a jury, the burden shifts to the prosecution to provide a neutral explanation for the peremptory challenges, which explanation must be related to the particular case to be tried.
3. **Constitutional Law: Juries: Discrimination: Proof.** The trial court does not need to determine if the offered explanations for peremptory challenges were reasonable, but only that they were nondiscriminatory and constitutionally permissible.
4. **Constitutional Law: Criminal Law: Equal Protection: Juries: Prosecuting Attorneys: Discrimination.** Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of his or her own race, the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.
5. **Trial: Juries: Prosecuting Attorneys: Discrimination: Appeal and Error.** The trial court's determination that there was no purposeful discrimination in the prosecutor's use of his or her peremptory challenges is a factual determination which this court will reverse only if clearly erroneous. The same rule is to be

applied in reviewing the trial court's determination as to the adequacy of the State's neutral explanation of its challenges.

6. **Prosecuting Attorneys.** Whether misconduct on the part of a prosecutor is prejudicial to the defendant depends largely on the facts of each case.
7. **Convictions: Appeal and Error.** A conviction will not be set aside unless the defendant meets his or her burden of showing that the error claimed created actual prejudice rather than merely the possibility of prejudice.
8. **Trial: Testimony: Rebuttal Evidence.** Competent testimony which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Terri M. Weeks for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Defendant has appealed from his jury convictions of second degree murder and use of a firearm to commit a felony. He was sentenced to imprisonment for 15 years on the murder conviction and a consecutive term of 2 to 4 years on the firearm charge, less time served in jail.

The defendant assigns as error (1) the trial court's order overruling his motion to suppress his statements; (2) the trial court's order overruling his motion for a mistrial after the prosecutor struck a black prospective juror from the jury panel; (3) the trial court's failure to grant his motion for mistrial when the prosecutor allegedly intentionally attempted to elicit inadmissible evidence from the defendant; and (4) the trial court's action in allowing certain rebuttal evidence which the defendant claimed was not in fact rebuttal testimony. We affirm.

On the afternoon of July 5, 1988, the defendant was riding on an Omaha Metro Area Transit bus driven by Leroy Gragg. An argument developed between the defendant and the busdriver when the defendant insisted on having a window

open and the driver was just as firm on having it closed.

Unknown to the driver, the defendant had a .45-caliber handgun in his possession. A short time after their last exchange over the open window, the defendant exited the bus and spoke some words to the driver. After the defendant got off the bus, the driver drove the bus up over the curb and onto the sidewalk, striking the defendant and knocking him to the ground. The busdriver then drove off.

An off-duty police officer who saw this incident stopped the bus a few blocks down the street. While the bus was stopped, the defendant caught up with the bus, stood in front of the bus, fired a shot through the windshield, and killed Gragg.

The defendant was taken into custody on July 6, 1988. Prior to questioning, according to the testimony of the State's witnesses, defendant was advised of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). When asked if he was willing to make a statement, the defendant responded, "I'll talk to you up to a point." Defendant did not refuse to answer questions, nor did he request a lawyer. Although he gave the police a detailed statement, he did not admit that he fired the shot that killed Gragg. Prior to trial, defendant filed a motion to suppress statements he made to the police, which motion was overruled.

During selection of the jury, the prosecutor used peremptory challenges to strike two of three black prospective jurors on the initial jury panel. Defense counsel moved for a mistrial, which motion was denied after the trial court determined that the strikes had not been racially motivated.

During the State's case in chief, a certain witness testified that she saw defendant open the window after Gragg had slammed it shut the first time. During cross-examination the defendant denied ever opening the window. The prosecutor then asked defendant, "Now, you heard Mrs. Haynes testify that she watched while you sat back there and he closed the window, you opened it, he closed it and you opened it; that's not true?" Defense counsel objected to this question as invading the province of the jury, which objection was sustained. But see Neb. Rev. Stat. § 27-704 (Reissue 1989). The prosecutor then asked whether testimony to the effect that defendant opened

the window would be mistaken, and defense counsel objected again and moved for a mistrial based on prosecutorial misconduct. The motion for mistrial was overruled.

One of the police officers who questioned defendant testified that defendant was read his rights before he was questioned. Defendant testified that the police talked to him for 15 to 20 minutes before they read him his rights. During cross-examination the prosecutor asked defendant, "Then what the detectives told us with respect to that is not true?" Defense counsel objected to the question as invading the province of the jury and moved for a mistrial again. Although the objection was sustained, the motion for mistrial was overruled.

After the defense rested, the prosecutor offered rebuttal testimony from the other officer who participated in the questioning of defendant, relating to the procedure followed in advising defendant of his rights. Defense counsel objected to the testimony as improper rebuttal, which objection was overruled.

Addressing his first assignment of error, defendant cites us to *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). *Edwards* held that when an accused asserts the right to counsel, interrogation must cease until counsel is present *or* the accused initiates further communications. In *Smith v. Illinois*, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984), the Court recognized that sometimes the request for counsel may be ambiguous or equivocal.

Defendant argues that his statement that he would talk up to a point was not an unambiguous limited request for counsel, see *Connecticut v. Barrett*, 479 U.S. 523, 107 S. Ct. 828, 93 L. Ed. 2d 920 (1987), but, rather, was an ambiguous statement. He urges this court to adopt the rule followed in several other jurisdictions regarding ambiguous or equivocal requests for counsel, i.e., that all interrogation must cease except for narrow questioning designed to clarify the request. See, *Howard v. Pung*, 862 F.2d 1348, 1350 (8th Cir. 1988) (" 'I don't think I'd better say any more—'til I have an attorney' "); *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985) (defendant said he " 'might want to talk to a lawyer' "); *United States v.*

Cherry, 733 F.2d 1124, 1127 (5th Cir. 1984) (" ' "Maybe I should talk to an attorney before I make a further statement," ' " and " 'Why should I not get an attorney?' "); *United States v. Lame*, 716 F.2d 515, 517 (8th Cir. 1983) (" 'maybe I should get a lawyer' "); *State v. Moulds*, 105 Idaho 880, 889, 673 P.2d 1074, 1083 (1983) (" 'Maybe I need an attorney' " or " 'I think I need an attorney' "); *Daniel v. State*, 644 P.2d 172, 174 (Wyo. 1982) (defendant said he would " 'probably like to have an attorney present' "); *Nash v. Estelle*, 597 F.2d 513, 516 (5th Cir. 1979) (" 'I would like to have a lawyer, but I'd rather talk to you' ").

Defendant's response in this instance, "I'll talk to you up to a point," was neither a general request for counsel nor an ambiguous or equivocal request for counsel that should have been clarified. Nothing in the response or the circumstances leading up to it justify a conclusion that defendant desired the assistance of counsel. Defendant's response does not even closely approximate ambiguous statements that have been held to have been equivocal requests for counsel.

The prosecution peremptorily struck two of the three black prospective jurors from the panel. The defendant, who was black, moved for a mistrial or, in the alternative, that some of the black venirepersons be seated.

The trial court proceeded under the ruling in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and concluded that defendant had made a prima facie case of discrimination in the selection of the jury. Having done so, the court shifted the burden to the State to provide a neutral explanation for the challenges, which explanation must be related to the particular case to be tried. See, *State v. Rowe*, 228 Neb. 663, 423 N.W.2d 782 (1988); *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988). The trial court did not need to determine if the offered explanations were reasonable, but only that they were nondiscriminatory and constitutionally permissible. *State v. Walton, supra*.

As to one black juror, General Young, the prosecutor stated that Young indicated that he was tired and did not particularly want to be there. The prosecutor felt that the juror seemed to have difficulty expressing himself or fully understanding what

was said, and the prosecutor was concerned about his ability to pay attention to the evidence. It was also the prosecutor's opinion that any feelings of resentment about being a juror might be directed toward the government, which had summoned him and which the prosecutor represented. Regarding the juror Betty Kellogg, the prosecutor explained that there were several women in the jury panel who were single and never married. He was concerned that there might be some attraction to the defendant, and he struck several single women, including Kellogg, for that reason.

There were six single, never-married females on the jury panel, four of whom were peremptorily stricken—three by the prosecutor and one by defense counsel. The prosecutor also stated that he had intended to strike a fourth single white female who was earlier stricken by the defense, and had planned to strike still another single white female, but had only one strike remaining, which he felt he needed to use to strike another prospective juror. One black juror remained on the jury, and a second black juror was picked as an alternate juror who, the brief of one of the parties indicates, participated in deliberations.

Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of his or her own race, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879), the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky, supra* at 476 U.S. at 89.

The trial court's determination that there was no purposeful discrimination in the prosecutor's use of his or her peremptory challenges is a factual determination which this court will reverse only if clearly erroneous. *State v. Venable*, 233 Neb. 309, 444 N.W.2d 907 (1989). The same rule is to be applied in reviewing the trial court's determination as to the adequacy of the State's "neutral explanation" of its challenges. *State v. Walton, supra*. The trial court's finding in this regard was not clearly erroneous.

Defendant claims prosecutorial misconduct with the questions put to defendant "Now, you heard Mrs. Haynes testify that she watched while you sat back there and he closed the window, you opened it, he closed it and you opened it; that's not true?" and "Then what the detectives told us with respect to that is not true?" Objections made by the defense were both sustained, but the motions for mistrial were overruled.

According to the defendant, if he had answered the questions, he would have been commenting on the veracity of the State's witnesses. In the context used, these questions hardly seem improper. However, assuming that they were, certainly no prejudice occurred, considering the fact that answers were not allowed. These questions fell far short of the statement made by the prosecutor in *Froding v. State*, 125 Neb. 322, 326, 250 N.W. 91, 93 (1933), during cross-examination of a defendant, " 'Babe, you are lying and you know it. . . .' " This court held that although the question was improper, the record did not disclose that it was prejudicial to the defendants.

Whether misconduct, if there was any, on the part of a prosecutor is prejudicial to the defendant depends largely on the facts of each case. *State v. Fraser*, 230 Neb. 157, 430 N.W.2d 512 (1988).

" 'A conviction will not be set aside unless the defendant meets his burden of showing that the error claimed created actual prejudice rather than merely the possibility of prejudice.' " *State v. Gregory*, 220 Neb. 778, 783, 371 N.W.2d 754, 759 (1985). As in *Gregory*, there is no showing here that the questions in and of themselves were actually prejudicial to defendant. " 'Although the prosecutor was less than artful at times, it does not appear that his conduct was meant to, or did, inflame the prejudices or excite the passions of the jury against the defendant.' " *State v. Ellis*, 208 Neb. 379, 398, 303 N.W.2d 741, 753 (1981).

As to the last claimed error, Officer Wilson testified during the State's case in chief that the defendant was informed of his rights before questioning began. On direct examination, defendant testified that the police did not read the rights form to him before they talked to him. In rebuttal the prosecutor offered the testimony of Officer Briese regarding the procedure

followed in obtaining defendant's statement. He testified that the rights form was read to defendant before he was questioned and that at no time during the interview did defendant request an attorney.

Defendant argues that Officer Briese's testimony was not proper rebuttal testimony, that it should have been offered in the State's case in chief, and that it was merely cumulative to evidence offered in the case in chief. Although this technically may be correct, nevertheless, a similar argument was rejected in *State v. Swillie*, 218 Neb. 551, 357 N.W.2d 212 (1984).

Competent testimony which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony. *State v. Gregory, supra*; *State v. Swillie, supra*.

The judgment of the district court is affirmed.

AFFIRMED.

IBP, INC., APPELLEE, V. DAVID D. AANENSON ET AL., APPELLANTS, VIRGINIA YUEILL, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

IBP, INC., APPELLEE, V. ANN ZOUKIS ET AL., APPELLANTS, VIRGINIA YUEILL, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE.

452 N.W.2d 59

Filed March 2, 1990. Nos. 89-242, 89-243.

1. **Employment Security: Labor and Labor Relations.** Neb. Rev. Stat. § 48-628(d) (Cum. Supp. 1986) disqualifies an individual from receiving benefits for any week with respect to which the Commissioner of Labor finds that his or her total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he or she is or was last employed.
2. **Employment Security: Appeal and Error.** Under Neb. Rev. Stat. § 48-640 (Cum. Supp. 1986), our review of appeals under the Employment Security Law is de novo upon the record, and we must independently determine the issues of fact involved in the findings complained of and reach an independent conclusion therefrom.

3. **Employment Security: Labor and Labor Relations: Words and Phrases.** A work stoppage exists when it is proven that there has been a substantial curtailment of work produced by a labor dispute in an employing establishment.
4. **Employment Security: Proof.** The burden of proof is on the claimants to show that they are qualified to receive benefits. If the employer has a defense to qualification, the employer must prove such defense. However, if the claimants contend that they fall within an exception to the defense, the burden is on the claimants to prove the exception.
5. **Employment Security: Labor and Labor Relations: Proof.** In determining whether the work stoppage was caused by a labor dispute, one who has been disqualified from receiving benefits under Neb. Rev. Stat. § 48-628(d) (Cum. Supp. 1986) can avoid continued disqualification if the employer fails to prove that for the week in question, the cause of the work stoppage is the labor dispute.
6. **Employment Security.** It is generally held that the Employment Security Law is to be liberally construed in order to accomplish its beneficent purposes.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Judgment in No. 89-242 affirmed. Judgment in No. 89-243 affirmed as modified.

Thomas F. Dowd and Terry L. Inserra, of Thomas F. Dowd & Associates, for appellants.

John M. Guthery, of Perry, Guthery, Haase & Gessford, P.C., for appellee IBP.

John F. Sheaff and Laureen Van Norman for appellee Yueill.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This appeal arises out of separate orders of the district court for Dakota County reversing two separate decisions of the Nebraska Appeal Tribunal. The cases were consolidated for briefing and argument in this court, and both will be considered in this opinion. In the first case, *IBP, inc. v. Aanenson*, case No. 89-242, the trial court reversed the tribunal's decision which had awarded unemployment compensation benefits to defendants-appellants, David D. Aanenson and 2,037 other claimants (hereinafter collectively referred to as lockout claimants), from December 14, 1986, through March 14, 1987, the period in which IBP locked out the employees from their place of employment. In the second case, *IBP, inc., v. Zoukis*,

case No. 89-243, the trial court similarly reversed the tribunal's award of unemployment compensation benefits to Ann Zoukis and 2,037 other claimants (hereinafter collectively referred to as strike claimants) from March 16 through July 26, 1987, the period in which the employees were on strike.

All the claimants are hourly employees of IBP at IBP's Dakota City, Nebraska, meat slaughtering and processing plant. In addition to the facility located in Dakota City, IBP owns and operates nine other beef processing plants located in Washington, Texas, Nebraska, Kansas, Minnesota, Iowa, Idaho, and Illinois. The Commissioner of Labor is a party pursuant to Neb. Rev. Stat. § 48-638 (Cum. Supp. 1986).

In case No. 89-242, the commissioner originally denied the lockout claimants' applications for benefits, based on Neb. Rev. Stat. § 48-628(d) (Cum. Supp. 1986). Subsection (d) disqualifies an individual from receiving benefits

> [f]or any week with respect to which the commissioner finds that his or her total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he or she is or was last employed . . . .

The commissioner held that the lockout and strike were labor disputes within the meaning of the section and determined with respect to case No. 89-242 that there was a stoppage of work caused by the labor dispute, and, thus, the section disqualified the lockout claimants from receiving benefits. In case No. 89-243, with respect to the strike claimants' applications for benefits, the commissioner determined that, although the strike continued through July, the work stoppage only continued to the week ending May 9, 1987, and that the strike claimants were entitled to compensation beginning May 3.

The Nebraska Appeal Tribunal, consisting of one administrative law judge, reversed the commissioner's decision in *Aanenson* with respect to the finding that a work stoppage existed. Although the tribunal agreed with the commissioner's findings that a lockout and a strike were labor disputes, the tribunal held that since IBP failed to prove that a work stoppage existed "at any time during the duration of the labor dispute," which included both the lockout period in *Aanenson*

and strike period in *Zoukis*, § 48-628(d) did not disqualify any of the claimants from receiving unemployment compensation benefits.

In June 1988, IBP filed petitions in the district court for a review of each decision. IBP contended that the tribunal erroneously determined that, at all times relevant to the decisions, there was not a stoppage of work which existed because of a labor dispute. IBP alleged that the tribunal erroneously construed work stoppage in terms of the entire operations of all of IBP's plants, when it should have limited its analysis of work stoppage solely to the operations of IBP's Dakota City plant.

The district court had before it the complete records of the foregoing administrative proceedings. Following a hearing in which additional testimony was adduced, the court made findings of fact and conclusions of law. For the purpose of determining work stoppage, the court restricted its analysis of "factory, establishment, or other premises," as that phrase is used in § 48-628(d), solely to the operations of IBP at the Dakota City plant. The court also determined, contrary to the lockout claimants' contention, that although IBP began substantial renovations while the plant was closed, that did not alter the fact that the work stoppage was caused by a labor dispute. In *Aanenson*, the court concluded that "but for the labor dispute, the employees would not have been locked out" of the plant, and "[s]ince there was 100% stoppage of work at the Dakota City plant during the time periods relevant to this appeal . . . the labor dispute, during that time period, did create a stoppage of work."

The court also denied the strike claimants' request for benefits during the strike period, upon concluding that the strike was a labor dispute and that there was a stoppage of work caused by such dispute at all times between March 16 and July 26, 1987. The lockout claimants and the strike claimants have timely appealed.

We first address the lockout claimants' appeal in case No. 89-242. In this court, the lockout claimants assign three errors, contending the district court erred (1) in restricting the meaning of "establishment" as used in § 48-628(d) to the Dakota City

plant, rather than applying it to IBP's entire operations; (2) in holding that a work stoppage existed at the Dakota City plant; and (3), assuming the existence of a work stoppage, in holding that the work stoppage was the result of a labor dispute and not of IBP's construction and renovation projects. We affirm the judgment in case No. 89-242.

Neb. Rev. Stat. § 48-640 (Reissue 1988), as amended in 1988, set out that we review appeals from the district court under the Employment Security Law in the same manner as we review appeals in civil cases generally. See Neb. Rev. Stat. § 84-918 (Supp. 1989). However, for cases filed before July 1, 1989, as was the case at bar, § 48-640 (Cum. Supp. 1986) is operative. Under that section, our review is de novo upon the record, and we must independently determine the issues of fact involved in the findings complained of and reach an independent conclusion therefrom. *George A. Hormel & Co. v. Hair*, 229 Neb. 284, 426 N.W.2d 281 (1988).

The record shows the following facts with regard to the lockout. In the fall of 1986, negotiations for a new collective bargaining agreement were underway between IBP and the employees' bargaining unit, United Food & Commercial Workers International Union, Local 222. During the negotiations, IBP stated that it would not agree to an extension of the existing contract under which the parties were currently operating in the event a new contract was not agreed to before the existing contract expired. Negotiations for a new agreement reached an impasse, and on December 13, 1986, the contract expired, leaving the parties without an agreement. On that day, IBP extended an offer to the union. That offer was immediately rejected by the union members, although the members counteroffered to continue working under the terms of the former contract. IBP rejected that offer, and on December 14, IBP instituted a lockout of employees from its Dakota City plant.

It is uncontroverted that a labor dispute existed at the Dakota City plant on December 14, 1986, when IBP ceased operations and instituted a lockout of employees from the plant. IBP does not dispute the fact that on the day after it instituted the lockout, IBP also launched substantial

construction and renovation projects at the plant.

In January 1987, IBP renewed its same offer to the union, but that offer was again rejected by the union members. Finally, on March 13, 1987, IBP simultaneously lifted the lockout and extended an offer to the union permitting the employees to return to their jobs on March 16 at the terms of IBP's newest offer. The union members refused to return to work and voted to strike. The strike began March 16, 1987. The lockout claimants seek unemployment compensation benefits from December 14, 1986, through March 14, 1987, the period in which they were locked out of the Dakota City plant.

The lockout claimants do not assign error in the district court's finding that the lockout was a labor dispute within the meaning of § 48-628(d). Regarding the first assigned error, the lockout claimants contend that IBP's facilities "are interdependent with each other and constitute a single establishment" within the meaning of § 48-628(d). Brief for appellants at 38. The lockout claimants wish us to adopt the conclusion of the tribunal that " 'factory, establishment or other premises' is not an enumeration. All of the words are generic. They refer generally to a business, enterprise or concern."

Specifically, the lockout claimants contend that all of IBP's plants are functionally interdependent and that no work stoppage occurred in view of IBP's synchronized multiplant operations. In support of their position, the lockout claimants presented the testimony and report of an economist. That evidence suggested that the levels of production at any given IBP plant are constantly adjusted in response to the cost of cattle near the various plant locations. The lockout claimants also offered the weekly slaughtering and processing reports, as well as a report filed with the Securities and Exchange Commission by Occidental Petroleum Corporation, IBP's parent company. The slaughtering and processing statistics indicated that at the time the plant in Dakota City was shut down, IBP's other plants increased production. Similarly, in the report to the Securities and Exchange Commission, Occidental stated that when the Dakota City plant ceased operations, "substantially all of the plant's production was absorbed by

other IBP plants." The lockout claimants submit that this evidence, as a whole, proves that there was a high level of synchronization within IBP's multiplant operations and that by defining the word "establishment" in terms of IBP's overall operations, the evidence would show that no work stoppage occurred during the lockout.

While the evidence presented discloses that some of IBP's other plants increased production while the Dakota City plant was shut down, and conceivably could indicate that a calculated shift in production occurred within IBP's multiplant operations to offset the loss of production in Dakota City, we are not persuaded by the lockout claimants' argument that the word "establishment," as used in the disqualification section, should be so broadly construed in the case before us as to encompass the entire multiplant operations of IBP. In defining "factory, establishment, or other premises" for the purpose of ascertaining whether a stoppage of work existed, as contemplated by § 48-628(d), the district court concluded that the words "establishment" and "premises" "are so commonly understood as units of place that further definition is superfluous." We agree. Other jurisdictions, in defining "establishment," use concepts of physical proximity and location. See, *Dunaway v. Department of Labor*, 99 Ill. 2d 417, 459 N.E.2d 1332 (1984); *Ahnne v. Dept. of Labor & Indus. Rel.*, 53 Haw. 185, 489 P.2d 1397 (1971); *Walgreen Co. v. Murphy*, 386 Ill. 32, 53 N.E.2d 390 (1944). In *Ahnne, supra*, the Hawaii Supreme Court stated: " '[E]stablishment' should be given its natural meaning. It can refer to a building or group of proximate buildings, but, generally speaking, it should not refer to locations many miles apart." 53 Haw. at 191, 489 P.2d at 1401. Under this test, "establishment" cannot be construed to include IBP's entire corporate operations spread over eight states.

Defining "establishment" in terms of a distinctly physical place is supported by our previous decisions. See, *George A. Hormel & Co. v. Hair*, 229 Neb. 284, 426 N.W.2d 281 (1988); *Magner v. Kinney*, 141 Neb. 122, 2 N.W.2d 689 (1942). While the word "establishment" has not been specifically defined by this court, our previous determinations of work stoppage

involved distinctly physical locations. For instance, in *George A. Hormel & Co., supra*, the Nebraska dispute occurred at a single meat processing plant in Nebraska. In *Magner, supra*, the dispute was concerned with the physical premises that housed a trucking company in Omaha. Furthermore, in *Magner*, the court determined that the dispositive question in that case was whether the "unemployment [was] due to a 'stoppage of work' at the place of employment where last employed." 141 Neb. at 129, 2 N.W.2d at 693.

The lockout claimants contend that we should look beyond the place of the facility to the functional integration of IBP's entire corporate operations. Under the functional integration theory, the operations of separate facilities are considered as a whole to determine whether a work stoppage exists because of a labor dispute. However, this mechanism is applied only if it is proven that the facility in which there has been a work stoppage depends upon the other facilities or divisions for the functions assigned to it. Nearly all such cases involve manufacturing where products, in various stages of production, move from plant to plant in a highly synchronized fashion. See, e.g., *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950).

The facts in this case do not fit the functional integration theory. IBP's Dakota City plant processes orders independently from other IBP plants and furnishes no product to any other IBP facility. The Dakota City plant does sometimes receive carcasses from three plants that do not have processing operations, but those carcasses are also furnished to three other IBP plants. IBP's Dakota City plant is functionally independent, and no plant depends on it to supply different components of a finished product. Functional integration analysis does not apply to this case. We find that "establishment," as used in § 48-628(d), refers solely to IBP's Dakota City plant.

The statistical evidence the lockout claimants have presented regarding IBP's multiplant operations is irrelevant to the determination concerning the second assignment of error of whether a work stoppage occurred. This court has held that a work stoppage exists when it is proven that there has been a substantial curtailment of work produced by a labor dispute in

an employing establishment. *George A. Hormel & Co., supra.* See, also, *Magner, supra.* In *Magner*, we observed that "the technical meaning of the term, 'stoppage of work,' as used in our disqualification clause, is a substantial curtailment of work in an establishment, not the cessation of work by the claimant or claimants." 141 Neb. at 128, 2 N.W.2d at 692.

The central factor relating to a work stoppage in the case at bar pertains to the production figures of the Dakota City plant. There is no question but that the plant completely ceased slaughtering and processing operations during the lockout. The only conclusion that can be derived from this evidence is that there was a 100-percent curtailment of production at the Dakota City plant while the lockout was in progress. We find that a stoppage of work occurred at the plant during the time of the lockout. The lockout claimants' second assignment of error is without merit.

In their third assignment of error, the lockout claimants contend that even if there was a stoppage of work, it was not due to the labor dispute but, instead, was the result of a predetermined plan on IBP's part to close the plant for major renovation. They contend that IBP refused to let the employees work without a contract, thus enabling the company to accomplish its construction objectives under the pretext of a labor dispute and to save the cost of increased payments to the unemployment fund because the employees would have been entitled to unemployment compensation had they simply been laid off when the plant closed for renovation.

Specifically, the lockout claimants allege that while construction was underway at the plant, IBP stalled contract negotiations by extending insincere offers which the union would only refuse and by placing a 1- to 2-day limitation on its first two offers to the union. Additionally, the lockout claimants allege that IBP did not provide a standing offer until construction was nearly complete, and suggest that IBP could not afford to extend an offer that might be accepted while the renovation was in progress, because had the union members accepted such an offer, IBP would have been forced to lay off the employees to complete construction.

IBP has acknowledged that it instituted major renovation

projects at the time of the lockout. We find, however, that the projects were contemplated well in advance of the lockout and were to be implemented regardless of the outcome of the contract negotiations. The major renovations consisted of electrical and mechanical work on a trim conveyor and on a material and handling system and installation of new Cryovac machines. Undisputed testimony shows that new Cryovac machines had been installed at every other IBP processing location without shutting down operations.

We also find that the work stoppage was not caused by the renovations. An IBP officer testified that the decision to institute a lockout was not based on the board's decision to renovate the plant. IBP testimony was submitted showing that the renovations would have been instituted regardless of the lockout. This is evidenced by the fact that IBP requested that the bids submitted for the renovation projects be in two forms. One bid was figured without project interruption, assuming no employees were at the plant. The other was based on the cost to do work on weekends and at night, around the employees' work schedules for normal operations. A contractor hired to perform some of the renovation projects testified that upon submitting bids, he was instructed to submit a proposal bearing in mind that work was to be done around production schedules. An electrical contractor hired to perform work in IBP's crane storage area testified that when the lockout began, he was directed to perform the projects in 72-hour segments, which would enable the employees to return to work as soon as possible in the event an agreement was reached.

When the negotiations reached an impasse and IBP decided to shut down the plant, it was no longer necessary for the construction workers to work around the IBP employees' schedules. IBP made a business decision to have a contingency plan ready to be implemented notwithstanding the outcome of the contract negotiations. In short, the evidence affirmatively establishes that the labor dispute, not the renovations, was the cause of the unemployment of the claimants, and we so find.

We hold that the lockout claimants are disqualified from receiving unemployment compensation, pursuant to § 48-628(d), for the period of the lockout, December 14, 1986,

through March 14, 1987. The trial court's decision in case No. 89-242 is affirmed.

In case No. 89-243, the strike claimants appeal the order of the court denying benefits for the period of the strike, from March 16 through July 26, 1987. They assign three errors, which may be consolidated into two: (1) The trial court erred in finding there was a work stoppage at IBP's Dakota City plant at any time during the strike period, and (2), in any event, the court erred in holding that IBP did not resume normal operations during the week ending May 9, 1987, as determined by the Commissioner of Labor.

We find that the strike claimants' first assignment of error is without merit. The record shows that after the strike began on March 16, 1987, there was no slaughtering at the plant until the week ending April 4, 1987. Similarly, between March 16 and April 4, 1987, a total of 10,120 units were processed, as contrasted with a normal combined production amount of approximately 55,000 units per week. It is clear that, at least during those periods, a work stoppage existed. The strike claimants' first assignment of error is without merit.

The difficulty is in determining when the work stoppage ceased. The tribunal did not reach that issue because in applying its theory, as described above in the lockout discussion, that any lost production at the Dakota City plant was made up by production at IBP's other plants, the tribunal determined there was never any work stoppage. We did not adopt this approach in determining the lockout question, and we will not adopt it in determining the strike issues.

The Commissioner of Labor, in her decision, determined that the work stoppage ceased to exist during the week ending May 9, 1987, and that if the strike claimants were otherwise eligible, they were entitled to unemployment benefits as of May 3, 1987.

The trial court, however, determined the work stoppage continued until the strike ended on July 26, 1987. Both the commissioner and the district court relied on production figures from the Dakota City plant in reaching their divergent decisions. Where they disagreed was in their determinations of what represents normal production, or, in other words, how

many head of cattle on the average were slaughtered and/or processed at the plant during any given week. IBP admits this is a difficult determination to make because of market variance. The commissioner arrived at an average based on the plant's production figures for the 4 weeks preceding the lockout. The district court declined to use the 4-week timeframe, based on testimony that the 4-week period did not accurately represent average weekly production because it contained the two lowest weeks of production for the preceding year. The district court held that the production figures for the entire year preceding the lockout were more representative of average weekly production. From December 14, 1985, to December 13, 1986, IBP's plant slaughtered and/or processed approximately 55,000 head of cattle per week. The district court compared that average with the production figures during each week of the strike. Based on these comparisons, the court found that the weekly production during the strike never exceeded 70 percent of the average. The court concluded that the decrease in production was substantial at all times during the strike.

Stoppage of work, as used in the disqualification clause, refers to a substantial curtailment of the employer's operations. In *George A. Hormel & Co. v. Hair,* 229 Neb. 284, 289, 426 N.W.2d 281, 284 (1988), we said:

> "Substantial" has been defined to mean "material," "important," "massive," or "considerable in amount." [Citation omitted.] Accordingly, it becomes difficult to fix any definitive standard by which to gauge when a stoppage of work starts or stops.
>
> In adopting this approach, its effect was to require a case-by-case review of the particular facts and circumstances unique to each case, because we adopted a fluid test to determine when a *substantial* curtailment of work commences, and we remain convinced that this commonsense approach is both logical and reasonable and is the interpretation and application under similar statutes of other jurisdictions. [Citation omitted.]

The question before us, then, is how long the plant's operations, which we have determined were substantially curtailed as of April 4, 1987 (when IBP started up its

slaughtering operations after the lockout), remained curtailed because of the strike. Section 48-628(d) requires that this be a continuing determination made on a week-by-week basis.

The burden of proof is on the claimants to show that they were qualified to receive benefits. If the employer has a defense to qualification, the employer must prove such defense. However, if the claimants contend that they fall within an exception to the defense, the burden is on the claimants to prove the exception. *A. Borchman Sons v. Carpenter*, 166 Neb. 322, 89 N.W.2d 123 (1958). The parties have stipulated that the exceptions enumerated in § 48-628(d) do not apply. If the strike claimants are otherwise qualified to receive benefits, IBP must prove disqualification under § 48-628(d).

In *Magner v. Kinney*, 141 Neb. 122, 2 N.W.2d 689 (1942), we denied the claimants benefits upon finding that the stoppage of work at the employer's business had been substantial. The employer had experienced a decrease of its total business transactions in excess of 30 percent. In the *Magner* case, the court set out other factors that entered into its determination of work stoppage, including the facts that the strikers had abandoned their employment and had proceeded to interfere with the employer's business. It appears that since *Magner*, the 30 percent figure has operated as a rigid rule for determinations as to the existence of work stoppage. This was not our intent and ignores our continued position that work stoppage must be determined by the facts and circumstances unique to each case. When facts and circumstances clearly warrant a finding as to the existence or nonexistence of work stoppage, we see no reason why that finding should change simply because the employer's operations are at 71 percent of its normal operations, rather than at 69 percent. These numbers show the difficulty that comes with blindly adhering to statistics in determining work stoppage. The issue is not that clear.

In this case, the factors that reflect whether there has been a substantial curtailment of operations are the levels of production, the number of workers employed at the plant, and the number of hours they worked while the labor dispute was in progress. The record contains figures of the plant's weekly production as divided into slaughter, processing, and extension

processing. Although we agree that actual production during the strike never exceeded 70 percent of normal, we do not agree that production figures alone are sufficient to establish a work stoppage in this case.

With respect to the number of employees working during the labor dispute, the record shows that IBP resumed operations at the plant in March 1987 and hired new workers in addition to some returning employees. Maurice McGill, IBP's executive vice president of finance and administration, testified at the court hearing that IBP was not functioning with a full work force until after the strike ended. We find that while operations continued during the strike, the foregoing indicates that operations remained substantially curtailed at the plant during the beginning week of the strike and, thus, there continued to be a work stoppage for some time after the lockout converted into a strike.

IBP concludes that since the work stoppage was originally caused by the labor dispute, the claimants should have been denied benefits until the labor dispute was over. However, other jurisdictions having similar or identical language to § 48-628(d) have recognized that work stoppage is not necessarily coterminous with the underlying labor dispute. In *Crescent Chevrolet v. Dept. of Job Serv.*, 429 N.W.2d 148 (Iowa 1988), the court recognized that work stoppage and labor dispute are independent conditions and further acknowledged that a stoppage of work may end before the resolution of the underlying labor dispute. See, also, *Inter-Island Resorts v. Akahane*, 46 Haw. 140, 377 P.2d 715 (1962), a case which dealt with the application of a disqualification statute nearly identical to Nebraska's.

IBP's interpretation disregards the language of § 48-628(d) which requires that the work stoppage exist "because of a labor dispute" and which further requires that such determination be made upon a week-by-week basis. While the labor dispute may have been the initial cause of the work stoppage, each week of unemployment is the subject of a separate determination and, thus, it is possible for the cause of the stoppage to shift to something other than the labor dispute. See, generally, *High v. Com., Unemployment Comp. Bd. of Rev.*, 505 Pa. 379, 479

A.2d 967 (1984). In other words, one who has been disqualified from receiving benefits under § 48-628(d) can avoid continued disqualification if his employer fails to prove that for each week in question, the cause of the work stoppage is the labor dispute.

In *Inter-Island Resorts, supra*, the Hawaii Supreme Court awarded striking employees benefits upon finding that the stoppage of work ceased during the strike because resumption of substantially normal operations occurred within a week after the strike began. In recognizing the policy concerns involved with awarding benefits to strikers, the Hawaii Supreme Court stated:

> "[O]n the one hand lies the charge that to allow compensation in such a case as this would be, in effect, to force employers and the state to finance a strike. On the other hand, it is claimed that to deny it would be to deny aid to those whom, among others, the Act was designed to protect (i.e., those who had participated in a labor dispute and lost — at least to the extent that others now had their jobs and their former employer's operations had been fully resumed). And that finally, a denial of compensation would seriously cripple their unquestioned right to strike. At the outset it should be made clear that this court is not concerned with any questions relative to the merits of the labor controversy itself. Our decision is not and cannot be determined by such factors. Instead it is determined by the choice that the elected legislative representatives of the people of this state have made for us. . . ."

46 Haw. at 151-52, 377 P.2d at 722 (quoting *Sakrison v. Pierce*, 66 Ariz. 162, 185 P.2d 528 (1947)).

In some jurisdictions the causal connection between a stoppage of work and a labor dispute is severed when an employer is able to hire a sufficient number of permanent workers to replace the strikers and to resume normal operations. See, *Crescent Chevrolet, supra*; *Union Starch & Refining Co. v. Dept. of Labor*, 8 Ill. App. 3d 406, 289 N.E.2d 692 (1972). While the hiring of permanent employees may be considered, we hold that the causation depends on the pertinent facts and circumstances of each case.

The strike claimants contend that IBP's decision to keep the

extension facility closed throughout the strike period is crucial to the finding that the labor dispute was not the cause of the work stoppage through the end of July. The extension facility in the IBP Dakota City plant is a division of processing which basically does the same kinds of things as the main processing plant but which happens to be a small separate unit. By May 9, 1987, the main processing facility resumed 61 percent of its production for the previous year. The slaughter facility remained substantially low in production throughout the strike. The extension facility did not resume any production until after the strike was over. We find nothing in the record to account for this. The strike claimants point out that IBP's decision to keep the extension facility closed caused the stoppage of work because, during the dispute, IBP admittedly had more than enough applicants to resume operations at its plant, including the extension facility.

If IBP had started up the extension facility at the time it started up its other operations, the plant would have resumed substantially normal operations by May 9, 1987, as shown by the following. The record indicates that the extension facility, by itself, processed on the average approximately 9,700 head of cattle per week. Had the extension facility resumed operations in late March or early April, when the other divisions were starting back up, the number of units processed at the plant would have reached 70 percent of average weekly production by May 9, 1987. In *Crescent Chevrolet v. Dept. of Job Serv.*, 429 N.W.2d 148, 152 (Iowa 1988), the Iowa Supreme Court stated: " 'It is generally agreed by the courts that a "stoppage of work" and its resultant disqualification for unemployment benefits may continue until the employer has had a reasonable time to resume normal operations . . . .' " IBP had a reasonable amount of time to regain production in the extension as of May 9, 1987, and to return to substantially normal operations in its entire Dakota City plant as of that date.

If the extension facility had resumed operations at the time the other divisions started back up, the plant would have resumed substantially normal operations as of May 9, 1987, because IBP could have been operating with close to a full work force by that date. The record shows that by May 9, 1987, there

were approximately 1,860 hourly employees working at the plant. Thereafter, this figure steadily increased. McGill testified that by May or June, the replacement employees and the returning strikers numbered approximately 2,000. There were also 20 to 40 supervisors working in processing and 10 to 15 supervisors working in slaughtering. Other testimony showed that the extension employed between 500 to 600 employees. It is clear that additional workers would have been employed had the extension facility resumed processing operations at the time the other operations were resumed. In light of the fact that there were adequate applicants, the number of employees working at the plant would have increased several hundred, nearing the original number of employees.

McGill testified that IBP "chose not to open the extension [facility] regardless of the number of applicants" it had for the positions left open by the strikers until after the strike was over. It is clear that at this point, the reason for the work stoppage was primarily a management decision to leave the extension facility idle and that the labor dispute did not create a reduced number of applicants preventing IBP from opening the facility. Admittedly, the initial cause of the work stoppage was the labor dispute, but IBP has not shown that the labor dispute continued to prevent IBP from resuming substantially normal operations.

In determining when an employer's operations return to substantially normal, the Arkansas Supreme Court, in *Monsanto Chemical Co. v. Commr. of Labor*, 229 Ark. 362, 366, 314 S.W.2d 493, 496 (1958), stated: "It is of course apparent that if a resumption of completely normal operations were required, the employer could continue the stoppage indefinitely by leaving a small department of his plant idle." Moreover, it is generally held that "the Employment Security Law is to be liberally construed in order to accomplish its beneficent purposes." *Hanlon v. Boden*, 209 Neb. 169, 174, 306 N.W.2d 858, 861 (1981). We find that the decision to keep the extension facility closed and, thus, to operate with a reduced work force at decreased production caused the work stoppage during the week ending May 9, 1987, and thereafter.

Finally, IBP contends that if we find the strike claimants were not disqualified from receiving benefits based on § 48-628(d),

they should nevertheless be disqualified under § 48-628(c) for failing, without good cause, to accept suitable work when offered to them by IBP. *George A. Hormel & Co. v. Hair*, 229 Neb. 284, 426 N.W.2d 281 (1988), is dispositive of this issue. In that case we noted that a refusal to cross a picket line is a protected activity and there had been no showing that the strike claimants were unavailable for work for any other reason.

We hold that the strike claimants are entitled to benefits for the foregoing period and thus modify the order of the district court in that regard, and determine that the strike claimants are entitled to benefits beginning May 3, 1987, to the end of the strike on July 26, 1987.

JUDGMENT IN NO. 89-242 AFFIRMED.
JUDGMENT IN NO. 89-243 AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JERRY L. ROACH, APPELLANT.

452 N.W.2d 262

Filed March 2, 1990. No. 89-472.

1. **Police Officers and Sheriffs: Arrests: Probable Cause.** A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a misdemeanor and may destroy or conceal evidence of the commission of such misdemeanor.
2. _____: _____: _____. When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
3. _____: _____: _____. Probable cause exists where facts and circumstances within an officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to warrant one of reasonable caution to believe that an offense has been or is being committed.
4. _____: _____: _____. If the facts available to the officer at the time of the arrest would warrant one of reasonable caution in the belief the action was appropriate, then probable cause exists.
5. _____: _____: _____. The key to a lawful arrest without a warrant is reasonable or probable cause to believe that a person has committed a crime.

6. _____: _____: _____. Probable cause for a warrantless arrest exists if, under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime.
7. **Arrests: Search and Seizure.** The validity of a search incident to a lawful warrantless arrest depends on the legality of the arrest itself.
8. **Arrests: Search and Seizure: Police Officers and Sheriffs: Probable Cause.** The validity of an arrest and the permissibility of a search incident thereto is premised upon the existence of probable cause, not the officer's knowledge that probable cause in fact does exist.
9. **Arrests: Search and Seizure: Probable Cause.** Where a formal arrest follows quickly on the heels of a challenged search, it is not important that the search preceded the arrest rather than vice versa as long as the fruits of the search were not necessary to support probable cause to arrest.
10. _____: _____: _____. A lawful custodial arrest creates a situation which justifies a contemporaneous search without a warrant of the person arrested and of the immediately surrounding area because of the need to remove any weapons that the arrestee might seek to use in order to resist arrest or effect his or her escape and the need to prevent the concealment or destruction of evidence.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and RONIN, D.J., Retired.

CAPORALE, J.

Following a bench trial on stipulated facts, the defendant-appellant, Jerry L. Roach, was found guilty of two misdemeanors, the attempted possession of cocaine in one instance and the attempted possession of psilocyn in the other, in violation of Neb. Rev. Stat. §§ 28-201 and 28-405 (Reissue 1989) and 28-416(3) (Cum. Supp. 1988). Although in stating his single assignment of error Roach asserts the district court erred in refusing to sustain his motion to suppress certain evidence, the real question is whether that court erred in overruling Roach's trial objections to the receipt of the challenged evidence. *State v. DiBaise*, 232 Neb. 217, 440 N.W.2d 223

(1989). We affirm.

At 2:07 on the morning of May 6, 1988, Officers Amen and Bashus were dispatched to Lois Simpson's Lincoln residence in response to her complaint that there were persons in her home using narcotics and refusing to leave as requested. Simpson was the sole renter of the premises and lived there with her two children.

Upon their arrival, Simpson met the officers at the front door, gave them permission to enter, and told them the two persons she complained about were in the basement bedroom. At some point, Simpson told the officers she did not know "for sure, but she thought they were using drugs." She also at some time informed the officers that one of the persons in the basement, Melvin Brown, was her boyfriend, and although she had asked the two to leave, she did not know "for sure if [Roach] had heard her . . . ."

In any event, after obtaining Simpson's permission to go to the basement, Amen proceeded to the closed bedroom door and pushed it open until it came up against a chair placed directly behind it. Amen then saw a man, Brown, scraping from a desk something Amen could not identify, and saw a second man, Roach, seated at the desk. Amen noted the odor of something, such as a match, having been burnt. When he asked the two to open the door, Brown said, "Just a minute, just a minute," and hesitated "somewhat." During this exchange, Amen could not see what was being done behind the door but noticed a cotton ball on the desk. After Amen entered the bedroom, he sent Brown out of the room to talk with Bashus, who had remained in the hallway.

Amen then began to question Roach. When asked what they were doing, Roach replied, "nothing," and lit a cigarette. Upon being asked for identification, Roach produced an employment document containing a photograph of himself and said he had no other identification. In response to Roach's question as to what the problem was, Amen "informed him three times that . . . SIMPSON . . . had requested them to leave and they did not leave, that they refused to do so, that they were trespassing." Roach replied that he was never told to leave, that he was just giving Brown a ride.

At that point, Amen asked Roach to put his hands against the wall and patted him down to see if he had any weapons on him. Although Amen found no weapons, he did find a wire approximately 6 inches long in Roach's left jacket pocket, which wire had a burnt end and contained some burnt substance that Amen thought to be cotton. Roach denied knowing what the substance on the wire was, denied that it was his, and denied having any drugs. Roach appeared to Amen "to be moving around quite nervous," so Amen asked him to stand still.

In the meantime, Brown had been creating a disturbance upstairs; thus, Bashus arrested Brown for trespassing, called another unit to the scene, and apparently placed Brown in a vehicle and then went to the basement to join Amen and Roach. Amen thereupon told Roach he had to leave, and Roach said he would, bending down in front of Amen and picking up a knapsack which was strapped shut and which Roach identified as his. Amen grabbed the sack and told Roach he wanted to look in it for weapons. Roach said he did not want Amen to look in the sack, attempted to pull it away from him, and resisted surrendering it. However, both Amen and Bashus told Roach that Amen was going to look in the sack before turning it over to him. At that point, Roach let go of the sack.

Upon looking in the sack, Amen discovered a brown plastic pipe with a burnt residue, leading him to think that the pipe had been used for "ingesting some type of controlled substance." Amen also found a "22, semi-automatic" in the sack. Amen then told Roach that he was under arrest "for drug parapharnalia [sic], along with a concealed weapon."

By this time another officer, Solano, had arrived at the scene, and a search of the basement bedroom was conducted. This search led to the discovery on the floor under the desk of a kitchen plate having a creamy, white-colored substance stuck to it and containing a cotton ball. Solano inspected the kitchen, found a container of ice cubes, and concluded that some "cooking operation" had been conducted in the kitchen and that the ice cubes had been used for cooling something. In addition, Amen formed the opinion Roach and Brown were attempting to smoke some controlled substance in the basement.

Having been told that "the party in my car was getting extremely nervous," Amen transported Roach to the jail, where he was again searched and "nothing else of any significance" was found, except for eight or nine $20 bills, together with several $10 and $5 bills. Amen also again searched Roach's knapsack and found a green leafy substance which Amen thought to be marijuana, a green piece of paper in which was wrapped a hard, white creamy substance, a "baggy" containing a white powdery substance, and a small glass vial.

At 2:40 a.m., after being delivered to the jail, Roach was read his *Miranda* rights, whereupon he said he did not want an attorney and would talk with Amen. Roach repeated that he had just given Brown a ride and claimed to know nothing else. He admitted that the gun found in the sack was his and produced a bill of sale for it dated in 1987, but denied knowing anything about the other items found in the sack, explaining that he always carried it with him and had had the sack in his car. He admitted Brown had something on the desk and scraped it off when Amen walked in, but denied knowing what it was. He also denied burning anything "in there."

Laboratory analyses proved the residue on the kitchen plate to be cocaine and certain of the items taken from the knapsack to contain cocaine and psilocyn, controlled substances under the provisions of § 28-405 [Schedules I(c)(14) and II(4)].

Roach claims the search of his knapsack at the Simpson residence was unlawful and that, as a consequence, all the items seized from the sack and the statements he subsequently made should have been excluded from the evidence, as the seizures and statements all flowed from the unlawful initial search.

Roach's claim is meritless if the search was within the scope of searches which may be conducted incident to a lawful arrest and if Roach's arrest was itself lawful. A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a misdemeanor and may destroy or conceal evidence of the commission of such misdemeanor. Neb. Rev. Stat. § 29-404.02(2)(c) (Reissue 1985). When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or

has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). See, also, *State v. Robinson*, 233 Neb. 729, 448 N.W.2d 386 (1989).

Probable cause exists where facts and circumstances within an officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to warrant one of reasonable caution to believe that an offense has been or is being committed. If the facts available to the officer at the time of the arrest would warrant one of reasonable caution in the belief the action was appropriate, then probable cause exists. Thus, the key to a lawful arrest without a warrant is reasonable or probable cause to believe that a person has committed a crime. *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987).

Probable cause for a warrantless arrest exists if, " 'under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime.' " *United States v. Fixen*, 780 F.2d 1434, 1436 (9th Cir. 1986); *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

The validity of a search incident to a lawful warrantless arrest depends on the legality of the arrest itself. It is not necessary that an actual formal arrest occur before a search is undertaken, as long as probable cause for arrest does exist prior to the search. The constitutional issue regarding a reasonable search as an incident to arrest depends upon the presence or absence of probable cause for that arrest, that is, whether immediately before the search an officer has probable cause to believe that the person to be searched has committed a crime. *State v. Blakely, supra.*

In the present case, Simpson summoned the police to her home and informed Amen and Bashus that she believed Brown and Roach were using drugs. In this situation, the information which Simpson provided contained sufficient indicia of reliability to warrant the officers' further investigation into the possibility that she could be correct in her belief. See, *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988); *State v. Blakely, supra*. When the officers attempted to enter the room which

Brown and Roach occupied, a chair blocked the door, and Amen observed Brown scraping something off the desk at which Roach was seated. In addition, Roach lit a cigarette in an apparent effort to mask a preexisting burning odor, and there was evidence of something having been cooked prior to the officers' arrival. Under the totality of the circumstances presented to the officers, probable cause existed to arrest Brown and Roach for the illegal possession and use of a controlled substance before the knapsack was searched.

The record indicates that Amen in fact believed that Brown and Roach were smoking a controlled substance in the basement of Simpson's residence. However, because Amen and Bashus were at one point apparently prepared to allow Roach to leave, and because Amen, in formally arresting Roach, recited that he was arresting him "for drug parapharnalia [sic], along with a concealed weapon," it could be contended that Amen did not know he had probable cause to arrest Roach. Nevertheless, the validity of an arrest and the permissibility of a search incident thereto are premised upon the existence of probable cause, not the officer's knowledge that probable cause in fact does exist. *United States v. Moses*, 796 F.2d 281 (9th Cir. 1986), citing *Florida v. Royer*, 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). See, also, *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986).

Nor does it matter that Roach was not "formally" placed under arrest until after his knapsack was searched.

> "[W]here the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than visa [sic] versa [as long as] . . . the fruits of the search of petitioner's person were, of course, not necessary to support probable cause to arrest petitioner."

U.S. v. Tavolacci, 704 F. Supp. 246, 251 (D.D.C. 1988), quoting *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). See, also, *State v. Blakely, supra*.

Amen had probable cause to arrest Roach prior to his search of the knapsack, and such probable cause permitted the search if the search was within the permissible scope of searches

conducted incident to an arrest.

New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), discusses the permissible scope of such a search. The opinion states at 453 U.S. at 457-59:

> [T]he Court held in *Chimel v. California*, 395 U. S. 752, that a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area. Such searches have long been considered valid because of the need "to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape" and the need to prevent the concealment or destruction of evidence. *Id.*, at 763.
>
> The Court's opinion in *Chimel* emphasized the principle that, as the Court had said in *Terry v. Ohio*, 392 U. S. 1, 19, "[t]he scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Quoted in *Chimel v. California, supra*, at 762. Thus while the Court in *Chimel* found "ample justification" for a search of "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence," the Court found "no comparable justification . . . for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." 395 U. S., at 763.
>
> Although the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases. . . .
>
> . . . .
>
> So it was that, in *United States v. Robinson*, 414 U.S. 218, the Court hewed to a straightforward rule, easily applied, and predictably enforced: "[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.*, at 235. In so holding, the

> Court rejected the suggestion that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *Ibid.*

The *Belton* decision then held that police officers making a lawful arrest of an occupant of an automobile could examine the passenger compartment of that automobile and that such officers could also examine the contents of any containers found within the passenger compartment.

The Court stated at 453 U.S. at 461:

> Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. Thus, while the Court in *Chimel* held that the police could not search all the drawers in an arrestee's house simply because the police had arrested him at home, the Court noted that drawers within an arrestee's reach could be searched because of the danger their contents might pose to the police. 395 U. S., at 763.
>
> . . . "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." [*United States v. Robinson*,] 414 U.S., at 235.

Because *Belton* involved the search of the passenger compartment of an automobile, it could be argued that the warrantless search of a container (such as a knapsack) incident to a lawful arrest is limited to cases in which the "automobile exception" is applied. However, a closer review of *Belton* reveals that such an argument is not valid.

It is true that the first paragraph of *Belton* states the

following: "When the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile in which he was riding? That is the question at issue in the present case." *New York v. Belton,* 453 U.S. 454, 455, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). But despite this opening paragraph, it must be noted that in *Belton,* the Court allowed the search of the zipped pocket of the arrestee's leather jacket. The arrestee was not wearing the jacket, and the passengers had gotten out of the vehicle. The Court stated at 453 U.S. at 462-63:

> The jacket was located inside the passenger compartment of the car in which the respondent had been a passenger just before he was arrested. The jacket was thus within the area which we have concluded was "within the arrestee's immediate control" within the meaning of the *Chimel* case. The search of the jacket, therefore, was a search incident to a lawful custodial arrest, and it did not violate the Fourth and Fourteenth Amendments.

The opinion states at 453 U.S. at 462-63 n.6: "Because of this disposition of the case, there is no need here to consider whether the search and seizure were permissible under the so-called 'automobile exception.' *Chambers v. Maroney,* 399 U. S. 42; *Carroll v. United States,* 267 U. S. 132."

In addition, numerous decisions from various federal courts have relied upon *Belton* to permit warrantless searches of containers incident to a lawful arrest in situations where the "automobile exception" was entirely inapplicable. See, e.g., *United States v. Porter*, 738 F.2d 622 (4th Cir. 1984), *cert. denied* 469 U.S. 983, 105 S. Ct. 389, 83 L. Ed. 2d 323 (warrantless search of a carry-on bag at an airport); *United States v. Litman*, 739 F.2d 137 (4th Cir. 1984) (warrantless search of a shoulder bag in a hotel room); *United States v. Fleming*, 677 F.2d 602 (7th Cir. 1982) (warrantless search of a paper bag in the immediate area of the defendant upheld despite the fact that at the time of the search defendant was handcuffed); *United States v. Herrera*, 810 F.2d 989 (10th Cir. 1987) (warrantless search of a briefcase carried by arrestee); *U.S. v. Tavolacci*, 704 F. Supp. 246 (D.D.C. 1988) (warrantless

search of luggage at a railway station).

Other decisions, although not relying specifically upon *Belton*, have also permitted warrantless searches of personal baggage incident to a lawful arrest. See, e.g., *U.S. v. Andersson*, 813 F.2d 1450 (9th Cir. 1987) (warrantless search of a suitcase in a hotel room).

In addition, the U.S. Court of Appeals for the Eighth Circuit has relied upon *Belton* and *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), to permit the warrantless search of personal baggage. E.g., *United States v. Garcia*, 785 F.2d 214 (8th Cir. 1986), *cert. denied*, *Barker v. United States*, 475 U.S. 1143, 106 S. Ct. 1797, 90 L. Ed. 2d 342; *U.S. v. Valiant*, 873 F.2d 205 (8th Cir. 1989), *cert. denied* ____ U.S. ____, 110 S. Ct. 117, 107 L. Ed. 2d 78 (each involved a search of the passenger compartment of an automobile and a briefcase which was found inside).

Accordingly, Amen's search of the knapsack did not violate Roach's protection against unreasonable searches and seizures, and the district court properly overruled Roach's trial objections to the receipt of the evidence obtained by that search.

AFFIRMED.

MICHAEL G. HELMS, APPELLANT AND CROSS-APPELLEE, V. CONSTANCE J. HELMS, APPELLEE AND CROSS-APPELLANT.

452 N.W.2d 269

Filed March 2, 1990. No. 89-775.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

David L. Herzog for appellant.

Jon S. Okun, of Wintroub, Rinden, Okun and Sens, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

In this dissolution of marriage case, petitioner husband appeals from the trial court's awarding of alimony and child support, claiming both are excessive, and further appeals from the awarding of sole custody of the children to the respondent wife. The respondent wife cross-appeals regarding the division of property.

The ultimate test in determining the appropriateness of the awards of alimony, child custody, and child support is reasonableness as determined by the facts in each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion. See, *Ensrud v. Ensrud, ante* p. 377, 451 N.W.2d 270 (1990); *Hallan v. Hallan,* 233 Neb. 261, 444 N.W.2d 896 (1989); *Murrell v. Murrell,* 232 Neb. 247, 440 N.W.2d 237 (1989).

We have reviewed the record de novo as we are required to do, and we have determined that the trial court did not abuse its discretion with regard to any of the matters of which complaint is made. *Hallan v. Hallan, supra.* The decree of the district court is affirmed. Appellant is ordered to pay $1,000 to appellee to apply to her attorney fees.

AFFIRMED.

CAPORALE, J., not participating.

MARVIN CREWDSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF DAN L. CREWDSON, APPELLEE, V. BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT.

452 N.W.2d 270

Filed March 9, 1990. No. 87-296.

1. **Appeal and Error.** In reviewing a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, which is entitled to every reasonable inference deducible from the

evidence. A civil verdict will not be disturbed unless clearly wrong.

2. **Directed Verdict: Appeal and Error.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. In reviewing a directed verdict, the party against whom a motion for a direction of liability is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
3. **Motor Vehicles: Railroads.** A motorist approaching a railroad crossing has a duty to look and listen at a time and place where looking and listening will be effective to prevent an accident. Such motorist also has a duty to stop where a reasonably prudent person would have considered a stop necessary under the circumstances.
4. **Motor Vehicles: Railroads: Negligence: Trial.** If there is a reasonable excuse for not seeing an approaching train, such as an obstruction preventing one from seeing the train or a distraction diverting the attention, the question whether conduct in traversing a railroad crossing is reasonable is a matter for the jury.
5. **Motor Vehicles: Railroads: Liability.** If a railroad crossing is unusually dangerous because the view of the motorist is so obstructed as to require that he place himself in a position of peril dangerously near the tracks before he has a view of the oncoming train, the railroad company will be held liable, unless it can show that it took unusual precautions, such as reducing the speed of the train or increasing its warnings and providing signaling devices, etc. The theory of this doctrine is that the railroad may not rely upon the duty of the motorist to stop and look, if the physical circumstances are such that stopping and looking will do the motorist no good.
6. **Evidence: Trial: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
7. _____: _____: _____. To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence.
8. **Expert Witnesses: Appeal and Error.** The admission or exclusion of expert testimony is within the discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, an abuse of discretion must be shown.
9. **Jury Instructions.** It is the duty of a trial court to instruct the jury only on issues which are pled and find support in the evidence.
10. **Jury Instructions: Appeal and Error.** Instructions must be read together, and if taken as a whole they correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error upon which a reversal on appeal may be based.
11. **Jury Instructions: Railroads.** A jury instruction is warranted where there is evidence that a railroad crossing is rendered more than ordinarily hazardous and dangerous by the conditions surrounding the same and that the ordinary signals

may be ineffective to warn travelers of the approach of a train.

12. **Verdicts: Appeal and Error.** A verdict may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
13. **Verdicts.** If a verdict shocks the conscience, it necessarily follows that the verdict was the result of passion, prejudice, mistake, or some other means not apparent in the record.
14. **Wrongful Death: Damages.** In an action for the wrongful death of a child of majority age, damages may be recovered for loss of contributions that might reasonably be expected to be made by that child, and for the loss of society, comfort, and companionship of the child.
15. _____: _____. Regarding the wrongful death of a child, nothing can be allowed on account of mental suffering or bereavement or as a solace on account of such death.
16. **Damages: Remittitur.** Unless a court can rationally ascertain the extent of an excessive verdict, a remittitur cannot properly be required. A remittitur would amount only to a substitution of the judgment of the court for that of the jury.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed in part, and in part reversed and remanded for a new trial on the issue of damages.

Richard A. Knudsen, Steven D. O'Brien, and Thomas L. Beam, of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Vard R. Johnson, of Broom, Johnson, Fahey & Clarkson; Peter J. Hoagland; and Toney J. Redman for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Burlington Northern Railroad Company (BN) appeals a $510,000 verdict awarded by a Lancaster County jury for the wrongful death of Dan L. Crewdson.

We affirm the jury's finding of liability on the part of BN, find the verdict excessive, and remand the cause for a new trial on damages only.

Twenty-one-year-old Dan Crewdson was killed instantly about 6:30 a.m. January 30, 1984, when the car he was driving in a southerly direction on a rural road was hit broadside by an eastbound BN freight train at a railroad crossing near his home.

Marvin Crewdson, the decedent's personal representative

and father, filed a wrongful death action against BN, alleging that the railroad was negligent. The jury found that BN was negligent, and its damage award was to compensate for the expense of Dan Crewdson's funeral and burial and pecuniary loss to his next of kin by reason of Crewdson's death.

BN assigns 10 errors, which may be summarized as that the trial court erred: (1) in failing to sustain BN's motions for a directed verdict and for judgment notwithstanding the verdict, based upon the insufficiency of evidence and alleged contributory negligence of the decedent; (2) in three evidentiary rulings; (3) in its instructions to the jury; and (4) in not vacating the damages award as excessive.

In reviewing a civil case, this court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, which is entitled to every reasonable inference deducible from the evidence. A civil verdict will not be disturbed unless clearly wrong. *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989); *Fisher Corp. v. Consolidated Freightways*, 230 Neb. 832, 434 N.W.2d 17 (1989).

Taking the view most favorable to the plaintiff, a jury could find by a preponderance of the evidence the following:

At the time Dan Crewdson was killed, it was cold and dark. The accident occurred at a grade crossing consisting of a two-lane gravel road running north and south which was intersected by four sets of railroad tracks running east and west. The crossing was not protected by warning lights or gates. The crossbuck warning sign north of the crossing had been broken for a number of years.

The Crewdson family home was located about 1,000 feet north of the railroad crossing. Dan Crewdson, who lived with his parents, used the crossing several times a day. On the morning of the collision, Crewdson and his fiancee, Jody Jones, left the Crewdson home about the same time, but in separate vehicles. Jones left first, and was traveling 5 to 10 seconds in front of the decedent.

At the time of the collision, a 1 1/4-mile-long coal train, headed east, was parked about 17 feet west of the crossing on the second track Crewdson needed to cross. As Crewdson

attempted to cross the third track, his vehicle was struck by an eastbound Portland Birmingham Freight (PBF) traveling 55 m.p.h. The decedent's vehicle was assumed by plaintiff's expert to be traveling at about 5 m.p.h.

Jones, who safely crossed the tracks in front of Crewdson, testified she thought her fiance was using his car's heater fan and was listening to the radio at the time of the collision. It is undisputed that the PBF began sounding its whistle one quarter of a mile from the crossing.

BN first assigns as error the trial court's failure to sustain its motions for a directed verdict at the close of the plaintiff's case and at the close of all the evidence and its motion for judgment notwithstanding the verdict.

A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. In reviewing a directed verdict, the party against whom a motion for a direction of liability is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

From the evidence, the jury could, and obviously did, find that BN was negligent in one or more of the following particulars: in failing to (1) provide adequate warning at an extrahazardous crossing when a parked coal train obstructed Dan Crewdson's view of an approaching train, (2) follow its own rule of not allowing a train to stand within 200 feet of a public crossing; (3) adequately flag the crossing; (4) keep an adequate lookout for motor vehicles approaching the crossing; (5) provide adequate warning with the locomotive whistle; and (6) provide flashing signals, gates, or other signals to adequately protect approaching motorists.

DECEDENT'S ALLEGED CONTRIBUTORY NEGLIGENCE

BN claims its motions for a directed verdict should have been

sustained because Dan Crewdson was contributorily negligent as a matter of law in a degree more than slight and sufficient to bar recovery. The appellant argues that Crewdson had a duty to look and listen for the train and to keep his car under such control that he could stop to avoid a collision. The railroad claims that the parked coal train is not evidence of negligence, but that it heightened Crewdson's duty because his vision was obstructed. Because Crewdson did not stop to avoid the collision, and because he was using his car's heater fan and radio, BN asserts that Crewdson was sufficiently contributorily negligent to bar plaintiff's recovery as a matter of law.

A motorist approaching a railroad crossing has a duty to look and listen at a time and place where looking and listening will be effective to prevent an accident. Such motorist also has a duty to stop where a reasonably prudent person would have considered a stop necessary under the circumstances. See *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988). See, also, Neb. Rev. Stat. § 39-655 (Reissue 1988); *Neusbaum v. Chicago & N. W. Ry. Co.*, 162 Neb. 754, 77 N.W.2d 299 (1956); *Crabtree v. Missouri P. R. Co.*, 86 Neb. 33, 124 N.W. 932 (1910).

Failure to observe these rules may be evidence of negligence; however, it is not contributory negligence as a matter of law. If there is a reasonable excuse for not seeing an approaching train, such as an obstruction preventing one from seeing the train or a distraction diverting the attention, the question whether conduct in traversing a railroad crossing is reasonable is a matter for the jury. *Anderson v. Union Pacific RR. Co., supra.*

In *Anderson v. Union Pacific RR. Co., supra*, the plaintiffs' semitrailer truck was damaged when struck by a train at a public crossing containing three sets of railroad tracks. Seventeen empty hopper cars had been parked 218 feet east of the crossing. The plaintiffs alleged that the location of these empty cars created a dangerous and hazardous railroad crossing. Union Pacific claimed that the plaintiffs' agent was contributorily negligent because of his failure to comply with the above-stated duties to look, listen, and stop.

In determining contributory negligence, this court

considered the "dangerous trap doctrine," citing the Louisiana appellate court with approval:

> " '[I]f a [railroad] crossing is unusually dangerous because the view of the motorist is so obstructed as to require that he place himself in a position of peril dangerously near the tracks, before he has a view of the oncoming train, the railroad company will be held liable, unless it can show that it took unusual precautions, such as reducing the speed of the train, or increasing its warnings and providing signaling devices, etc. The theory of this doctrine is that the railroad may not rely upon the duty of the motorist to stop and look, if the physical circumstances are such that stopping and looking will do the motorist no good.' "

Anderson, supra at 330, 426 N.W.2d at 523, citing *Bertrand v. Missouri Pacific Railroad Company*, 160 So. 2d 19 (La. App. 1964).

Resolving controverted facts most favorably to the plaintiff, the evidence shows that the coal train was parked 17 feet from the crossing Crewdson attempted to traverse. That train extended for 1 1/4 miles and included cars between 12 feet 5 inches and 17 feet 3 inches tall. A jury could reasonably find that Crewdson's view of the BN freight train involved in the accident was so obstructed as to require that he place himself in a position of peril before he could see the oncoming train.

The jury could further find that any alleged or proven warning by the flagman at the crossing was inadequate. The jury could also find that the flagman should have positioned himself on the north rather than the south side of the tracks on which the PBF was traveling. Whether the flagman's performance was adequate was a jury question. Under the circumstances, whether Crewdson's attempt to traverse the crossing constituted contributory negligence sufficient to bar the plaintiff's recovery was not a question of law, but was a question of fact for the jury. The trial court was correct in refusing to direct a verdict.

BN also assigns as error the trial court's failure to set aside the verdict for insufficient evidence and failure to find that Crewdson was contributorily negligent sufficient to bar

recovery as a matter of law. Those assignments of error are without merit.

EVIDENTIARY RULINGS

BN claims the trial court erred in three evidentiary rulings.

It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989).

On cross-examination, Jones was asked by BN's counsel:

> Q. You think that the condition of the road had anything to do with this accident?
>
> A. Possibly.

On redirect examination by plaintiff's counsel, Jones was asked:

> Q. . . . Jody, do you think that that condition with the parked coal train right up next to the road . . . had anything to do with this accident?
>
> . . . .
>
> [A.] If the train hadn't been there, there wouldn't have been an accident.

Jones' answer was given over objection by the railroad. BN argues that this testimony was inappropriate speculation on the part of a lay witness. The court did not abuse its discretion in permitting Jones to comment upon the factors responsible for the accident, when the railroad opened the door on cross-examination to that kind of inquiry.

BN argues that Deputy Sheriff Emanuel Bartek should not have been permitted to testify that Michael Smith, BN's flagman, was evasive in responding to the deputy's questions. The railroad made no objection to this testimony at the time it was offered at the trial. To preserve a claimed error in admission of evidence, a litigant must make a timely objection which specifies the ground of the objection to the offered evidence. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989).

The appellant failed to preserve this claimed error, and we will not consider it.

Finally, BN argues that the court erred in permitting the expert testimony of retired State Patrol Major Eugene

Morrissey as to whether the railroad's flagman performed adequately. The admission or exclusion of expert testimony is within the discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, an abuse of discretion must be shown. *Sanchez v. Derby*, 230 Neb. 782, 433 N.W.2d 523 (1989).

Morrissey was properly qualified as an expert witness. The railroad has made no showing that his testimony constituted an abuse of discretion.

The trial court did not abuse its discretion in admitting any of the complained-of testimony.

JURY INSTRUCTIONS

BN assigns as error the trial court's failure to give seven of its proposed jury instructions. The appellant also claims that three of the instructions given to the jury were erroneous. It is the duty of a trial court to instruct the jury only on issues which are pled and find support in the evidence. *Blanchette v. Keith Cty. Bank & Trust Co.*, 231 Neb. 628, 437 N.W.2d 488 (1989). Instructions must be read together, and if taken as a whole they correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error upon which a reversal on appeal may be based. *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989).

The railroad first complains on appeal that portions of instruction No. 2, given to the jury, are in error. Although BN objected to one portion of instruction No. 2 at the instruction conference, it did not object to those portions of which it now complains. Under the circumstances, objections to those portions of the instruction not raised at the instruction conference have been waived. See *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987).

Instruction No. 9 is also challenged by the appellant. That instruction states:

> If you find by a preponderance of the evidence that the crossing was peculiarly or unusually hazardous and that the railroad company knew or should have known, in the exercise of ordinary care, that the crossing was more than ordinarily dangerous, then in that event the railroad

company has the duty to provide active warning signals such as an adequate flagman, gates or electric signals.

In determining whether the crossing was more than ordinarily dangerous so as to require additional crossing protection, you may take into consideration whether the ordinary statutory crossbuck signs were sufficient as a warning to travelers about to make use of the crossing, and whether the warning devices maintained on the train, such as the whistle, were adequate to properly warn travelers of danger. You may also consider the approaches to the crossing, the condition of the approaches, the obstructions, if any, to the view of the crossing to a traveler approaching the intersection, the amount of traffic using the crossing and all other relevant facts and circumstances which, in the exercise of ordinary care, would require active warning signals such as an adequate flaging [sic], gates or electric signals.

The railroad argues that this instruction is an erroneous statement of the law because it permits the jury to consider "all other relevant facts and circumstances." According to the appellant, the instruction also improperly allows the jury to consider the adequacy of the train's whistle even though it conforms to federal law. Appellant's contention that the whistle conforms to federal law is not supported by the evidence.

Furthermore, the instruction does correctly state the law pertaining to railroad crossings which are more than ordinarily hazardous. In *McQuin v. Missouri P. R. Corporation*, 122 Neb. 423, 240 N.W. 515 (1932), this court discussed crossings that are more than ordinarily hazardous or dangerous. A jury instruction is warranted where "there is evidence that such crossing is rendered more than ordinarily hazardous and dangerous *by the conditions surrounding the same*, and that the ordinary signals may be ineffective to warn travelers of the approach of a train." (Emphasis supplied.) *Id.* at 435-36, 240 N.W. at 521. Any "condition" affecting the danger of a crossing may be considered by a jury in determining whether the crossing is extrahazardous. See, also, *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988).

There is evidence in the record from which a jury could find by a preponderance of the evidence that the crossing at which Crewdson was killed was more than ordinarily dangerous. Instruction No. 9 is a correct statement of the law and is supported by the evidence.

The last instruction with which BN takes issue is instruction No. 11. The appellant argues that this instruction is erroneous because it fails to include the obligations of a motorist approaching a railroad crossing. Instructions Nos. 12, 13, 14, 15, 17, 18, and 19 set out a motorist's duties in ample detail.

When read as a whole, the court's instructions to the jury are a correct statement of the law, are not misleading, and adequately cover the issues. There is no error in the instructions given to the jury.

BN also complains that seven of its proposed instructions were not given to the jury. The railroad's proposed instruction No. 5 represents the rule that negligence must be proven and that the burden of proof is on the party asserting negligence. The court's instruction No. 2 adequately stated this proposition of law.

Proposed instruction No. 9 states the duties of the motorist and railroad company at a crossing. As stated above, the duties of both parties are covered in other instructions given by the court.

Instruction No. 14 proposed by the railroad gives the motorist an increased duty to listen where his or her view of a crossing is obstructed. The proposed instruction, as written, is not a correct statement of the law. See *Anderson v. Union Pacific RR. Co., supra.*

BN's proposed instruction No. 15 would have told the jury that railroad employees in charge of a train are entitled to rely upon the motorist's duty to stop and need only exercise ordinary care. There is no evidence that the crew of the PBF which struck Crewdson's car saw the vehicle prior to the collision. Moreover, if the jury found the crossing to be unusually dangerous because of the parked coal train, the railroad was not entitled to rely upon the motorist's duty to stop. See *Anderson v. Union Pacific RR. Co., supra.*

The railroad's proposed instruction No. 16 would have

charged the jury that the coal train's standing on the track does not constitute negligence but, rather, imposes a higher duty upon the motorist. This is not a correct statement of the law. See *Anderson v. Union Pacific RR. Co., supra.*

BN's proposed instruction No. 17 was intended to inform the jury that "[t]he mere negative testimony of a witness that he did not see the flagman does not overcome positive testimony that the flagman was positioned on the crossing." BN points to the following testimony of Jody Jones:

> Q. And did you see that man any more as you went on across?
>
> A. No, I looked back to the road.
>
> Q. He left your vision?
>
> A. Yes.
>
> Q. You never did see him again?
>
> A. No.

BN argues that its proposed instruction No. 17 was "critical to the Railroad's case because all of the positive testimony was that Mike Smith was flagging the crossing as Decedent attempted to cross. Appellee attempted to rebut this evidence through Jody Jones . . . ." Brief for appellant at 38. BN's argument is meritless for two reasons: (1) It was BN that elicited the testimony of Jones of which the defendant complains; and (2) the above testimony is neutral, not negative, and clearly does not support the giving of BN's proposed instruction No. 17.

The railroad complains that proposed instruction No. 18 was not given. That instruction is a statement of a motorist's duty when approaching a railroad crossing and is covered by the instructions given.

The trial court did not err in failing to give BN's proposed instructions.

DAMAGES

BN's last assigned error claims the trial court erred in failing to vacate the damages award. Plaintiff was awarded $1,135,770, reduced to its present value of $510,000. BN argues that this award is the result of passion or prejudice. Neb. Rev. Stat. § 25-1142 (Reissue 1985) requires a court to vacate an award of damages appearing to have been given under the

influence of passion or prejudice.

A verdict may be set aside as excessive when, and not unless, it is so exorbitant as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984). This court has held similarly in cases where inadequacy of the verdict is alleged. See, e.g., *Merten v. Pedersen*, 199 Neb. 34, 255 N.W.2d 869 (1977) (asserting that a jury verdict will not be set aside on appeal as inadequate unless it is so clearly wrong and unreasonable as to indicate passion, prejudice, or mistake). We have also suggested that passion or prejudice is shown when the verdict shocks the conscience. See, *Woitalewicz v. Wyatt*, 229 Neb. 626, 631, 428 N.W.2d 216, 219 (1988) (stating that "[t]here is nothing to indicate that the award by the jury is the result of either passion or prejudice, nor does the verdict shock the conscience"); *Steinauer v. Sarpy County*, 217 Neb. 830, 841, 353 N.W.2d 715, 723 (1984) (explaining that "[t]o be sure, at some point the verdict may shock the conscience and, therefore, obviously be excessive").

Based upon the foregoing, we hold that a verdict may be set aside as excessive or inadequate when, and not unless, it is so excessive or inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. If a verdict shocks the conscience, it necessarily follows that the verdict was the result of passion, prejudice, mistake, or some other means not apparent in the record. A number of other jurisdictions have adopted this rule. See, *Henninger v. Southern Pacific Co.*, 250 Cal. App. 2d 872, 59 Cal. Rptr. 76 (1967); *Spicer v. Armco Steel Corporation*, 68 Ohio Op. 2d 314, 322 N.E.2d 279 (1974) (involving Ohio rule of civil procedure substantially identical to § 25-1142); *J.V. Harrison Truck Lines, Inc. v. Larson*, 663 S.W.2d 37 (Tex. App. 1983); *Philip Morris Incorporated v. Emerson*, 235 Va. 380, 368 S.E.2d 268 (1988); *Carlson v. BMW Indus. Service, Inc.*, 744 P.2d 1383 (Wyo. 1987).

Regarding the wrongful death of a spouse, this court has held that "[n]othing can be allowed on account of mental suffering or bereavement or as a solace on account of such death." *Ensor v. Compton*, 110 Neb. 522, 524, 194 N.W. 458, 459 (1923). This

same rule was applied to the wrongful death of a child of majority age in *Garvin v. Coover*, 202 Neb. 582, 276 N.W.2d 225 (1979).

Before *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973), the sole measure of damages for the wrongful death of a child, other than loss of services during minority, was the loss of contributions that might reasonably be expected to be made after reaching majority. In *Selders, supra*, we first held that the parents of a child whose death was wrongfully caused could recover damages for loss of society, comfort, and companionship of the child. These elements of damages were upheld in *Garvin v. Coover, supra*. In *Garvin*, quoting *Ensor v. Compton, supra*, we admonished, " 'This change, while significant, does not provide a wide open door to all sorts of claims for damages. The loss under the statute is still a pecuniary loss.' " *Garvin, supra* at 585, 276 N.W.2d at 227. We reiterated in *Garvin* that in determining damages in a wrongful death case, " '*[n]othing can be allowed on account of mental suffering or bereavement or as a solace on account of such death*. Only such damages can be recovered as are shown by the evidence to have a monetary value.' " (Emphasis supplied.) *Id.*

The evidence reflects that Dan Crewdson was 21 years old at the time of his death. Though he was living at home at that time, there is no evidence that the decedent, who was gainfully employed, contributed money to his living expenses at his parents' home. He had obtained a high school education. The plaintiff claimed that the decedent's income from full-time employment and from two part-time jobs was $12,000 per year. Although W-2 income tax forms for prior years reflect a maximum of $481 per year from part-time employment, his tax return for 1983 showed no income from any part-time employment. The 1983 income tax return declares a $9,954 gross income from employment.

The decedent also worked part time fixing cars with his father. His father testified that in 1983 his son earned $800 from this part-time work. The decedent's 1983 tax return does not reveal any income from that source. The father testified he paid the income tax on the earnings and gave the decedent the money.

The record reflects that Dan Crewdson's chores around his parents' home consisted of exercising, feeding, and watering the family's two dogs; snow removal; mowing the grass; taking out the garbage; and maintaining a windbreak of 200 trees. His father testified that the decedent helped around the house by doing what needed to be done. Dan Crewdson's parents expected him to provide help to them if they needed it in their later years. The record is vague as to the extent of the help the parents would have received in their later years had the decedent lived. The decedent was engaged to be married after his fiancee graduated from college. She graduated in May 1986. Inferentially, the couple, when married, would establish their own home and any work the decedent did around his parents' home would be considerably diminished.

We conclude that in view of the evidence, the jury verdict in regard to the amount of damages shocks the conscience. The record reflects that Dan Crewdson was an emancipated adult. He did not contribute monetarily to his family. The services he provided his parents would be reduced since he would be marrying in the near future and, by inference, establishing his own residence. Since the award of damages shocks the conscience, it must necessarily be inferred that the jury acted out of passion, prejudice, mistake, or some other means not apparent on the record. After reviewing the damages award as provided by § 25-1142, we find that in this case it is clearly excessive. Unless a court can rationally ascertain the extent of an excessive verdict, a remittitur cannot properly be required. A remittitur would amount only to a substitution of the judgment of the court for that of the jury. *Main v. Sorgenfrei*, 174 Neb. 523, 118 N.W.2d 648 (1962). Although the award is clearly excessive, we are unable to determine the extent of the excess.

The judgment as to damages only is reversed and the cause remanded for new trial only on that issue. The jury's finding on liability has determined that the decedent was not guilty of contributory negligence more than slight, if any. We direct that the jury should be instructed that if it find that the decedent was guilty of contributory negligence, such shall be considered by it only in mitigation of damages and in proportion to the amount of contributory negligence which it may attribute to the

decedent. See, Neb. Rev. Stat. § 25-21,185 (Reissue 1985); NJI2d 2.02A; *Scofield v. Haskell*, 180 Neb. 324, 142 N.W.2d 597 (1966); *Caster v. Moeller*, 176 Neb. 446, 126 N.W.2d 485 (1964).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

BOSLAUGH, J., concurring.

I concur fully in the finding in the opinion of the court that, as a matter of law, the award of damages in this case was clearly excessive and that the judgment must be reversed and the cause remanded.

In my opinion it is a very close question as to whether the cause should be remanded with directions to dismiss the petition because the evidence established that the negligence of the plaintiff's decedent, Dan L. Crewdson, was more than slight as a matter of law.

The record shows that the plaintiff's decedent was guilty of substantial negligence which was directly contributory to the accident.

Crewdson lived near the crossing and was very familiar with it and knew of its dangerous nature and the high volume of railroad traffic. Jody Jones, who successfully (rather than "safely") crossed just ahead of Crewdson, testified that she heard the train whistle and saw the glare of its headlight as she approached the crossing. The physical facts were such that her automobile had to be brightly illuminated by the headlight of the approaching eastbound train as she was on the crossing in front of Crewdson, and the headlight should have been apparent to him if he exercised only the slightest of care.

As the opinion points out, all of the positive testimony was that the flagman, Michael Smith, was in position in front of Crewdson and flagging the crossing with a lighted lantern when Crewdson approached the crossing. It seems to me that the circumstances in this case are so different from the facts in *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988), that the *Anderson* case has but little application here.

But if it be conceded that the comparison of Crewdson's

negligence to that of the defendant was a question for the jury, it was, and on remand will be, the duty of the jury under Neb. Rev. Stat. § 25-21,185 (Reissue 1989) to diminish or mitigate the damages to be recovered by the plaintiff in proportion to the amount of contributory negligence attributable to the plaintiff's decedent. To me, it is clear on this record that the jury made no allowance for the negligence of the plaintiff's decedent in fixing the amount of the damages it awarded.

HASTINGS, C.J., joins in this concurrence.

SHANAHAN, J., dissenting.

This court correctly affirms the judgment concerning liability for the death of Dan L. Crewdson, but incorrectly sets aside the verdict for damages.

In rationalization for vacating the damages verdict, the majority, envisioning a predetermined relationship between Dan Crewdson and his parents after Dan's marriage to Jody Jones, foretells: "Inferentially, the couple [Jody and Dan], when married, would establish their own home and any work the decedent did around his parents' home would be considerably diminished," and "[t]he services he provided his parents would be reduced since he would be marrying in the near future and, by inference, establishing his own residence."

However, nothing in Dan's conduct remotely indicates that after his prospective marriage, Dan's relationship with his parents would have been any different regarding the services he was rendering for his parents and the help he was providing. Eventual diminution of the relationship between the Crewdsons, which the majority characterizes as an inference, but which is more properly classified as prognostication or indulgence in an unwarranted assumption, is assuredly disregard for "Honor thy father and thy mother," a mandate which contains no exemptive contingency "until thou art married." As the majority perceives the situation, wedding bells for Dan Crewdson would have been the death knell for his filial assistance to Dorothy and Marvin Crewdson, his parents.

The evidence clearly establishes that Dan and Marvin worked closely in a part-time auto repair business, which produced approximately $3,600 annually before Dan's death.

That repair business was cut in half by Dan's death. Dan was also helpful around his parents' home—removing snow, taking care of the yard, maintaining a 200-tree windbreak, making household repairs, and doing any other task his father was unable to perform. According to Dorothy Crewdson, undoubtedly Dan would have supplied a helping hand in any of his parents' needs. More simply expressed by Marvin Crewdson, if there was any household chore to be done, Dan "would be there," while Dorothy Crewdson observed that if she had any problem, Dan would be "[r]ight by my side." Without question, the past was a sign of the future between Dan and his parents.

In *Garvin v. Coover*, 202 Neb. 582, 586, 276 N.W.2d 225, 227 (1979), referring to the question of damages in a wrongful death action, this court noted, "It is virtually impossible to 'color match' cases in attempting to decide a given issue," and then stated:

> [D]amages in any wrongful death case are incapable of computation and are largely a matter for the jury. In Selders v. Armentrout [192 Neb. 291, 220 N.W.2d 222 (1974)], this court said: "The amount which should be awarded in any wrongful death case is incapable of computation and is largely a matter for the jury. As stated in Dorsey v. Yost, 151 Neb. 66, 36 N. W. 2d 574, 14 A. L. R. 2d 544: 'The amount to which a parent is entitled cannot be accurately determined because of the numerous contingencies involved. The amount being very problematical, it is peculiarly for the jury to determine, after hearing all the evidence bearing upon the situation, including the parent's position in life, the physical and mental condition of the child, his surroundings and prospects, and any other matter that sheds light upon the subject. Members of juries generally have children of their own and have information as to the pecuniary value of children's services and the expense involved in their care and education. A jury is peculiarly fitted to determine the loss sustained by a parent in such a case. At best, the verdict can only be an approximation as no yardstick exists by which the correct answer can be found with

exactness.' . . ."

Garvin at 586-87, 276 N.W.2d at 227.

As one commentator has observed:

> The action for wrongful death is sui generis. Because of the difficulty in placing a monetary value on the human life, and the speculative or, more accurately, the nonmathematically calculable—nature of damages, where recoverable, for mental anguish or loss of love and affection, the measurement of such damages is left to the jury. The jury is not bound by any fixed or precise mathematical rules in estimating the amount of damages. It possesses discretion, and it is given wide latitude to exercise its sound judgment and good sense, aided by proper instructions from the court.

2 S. Speiser, Recovery for Wrongful Death § 9:2 at 3-4 (2d ed. 1975).

As a consequence of Dan Crewdson's death and the evidence of his relationship with his parents, the loss to Dorothy and Marvin Crewdson was a matter for measure by the jury, not by this court. Since there is no objective justification for setting aside the verdict for damages, the district court's judgment should have been affirmed in all respects.

GRANT, J., joins in this dissent.

SOLVEIG A. SLOSS, APPELLEE, V. PIERCE T. SLOSS, APPELLANT.
452 N.W.2d 516

Filed March 9, 1990. No. 87-1067.

Modification of Decree: Alimony: Appeal and Error. In dissolution of marriage cases, actions for modification of alimony will, on appeal, be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where evidence is in conflict, the Supreme Court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of facts rather than another.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

Paul E. Galter, of Bauer, Galter & O'Brien, for appellant.

Pamela J. Vuchetich for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Respondent husband, Pierce T. Sloss, appeals from the order of the district court denying his application to modify the decree of dissolution's alimony provisions. Appellant assigns error to the trial court in failing to find that there had been a material change in circumstances and in failing to modify appellant's alimony obligation. We affirm.

We affirmed the trial court's denial of a similar application in a prior appeal by appellant, and we refer to that opinion for the facts of this case up to 1981. See *Sloss v. Sloss*, 212 Neb. 610, 324 N.W.2d 663 (1982).

In the present case, appellant claims that the passage of the Tax Equity and Fiscal Responsibility Act (TEFRA) in late 1983 dramatically reduced his income beginning in 1984. From 1981 through 1983, appellant's total income averaged $212,583 per year. From 1984 through 1986, appellant's total income averaged $60,826. There is no further evidence in the record, other than appellant's testimony, that TEFRA was the cause of appellant's reduction in income. Appellant claims that he has suffered a severe reduction in assets and that his personal living expenses have tripled since the divorce in 1974.

Upon the passage of TEFRA, however, appellant formed a professional corporation, Associated Physicians Services, P.C., in which appellant is sole stockholder and president. Appellant testified generally as to the assets, liabilities, revenues, and expenses of the corporation, but the record is not completely clear as to some aspects of the corporation. In particular, it is unexplained as to the disposition of the fairly substantial amount of retained earnings.

The situation of Solveig A. Sloss, the appellee wife herein, appears to be generally unchanged from the earlier modification action, except that she claims that her assets have declined greatly since 1980. She has made numerous efforts to

secure employment, but has been ultimately unsuccessful. At the time of trial, appellee was contemplating looking for a job as an apartment resident manager.

In dissolution of marriage cases, actions for modification of alimony will, on appeal, be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where evidence is in conflict, the Supreme Court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of facts rather than another. *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985); *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985). See, also, *Kelly v. Kelly*, 220 Neb. 441, 370 N.W.2d 161 (1985).

From our de novo review of the record, we cannot say that the trial court abused its discretion in finding that the appellant has failed to establish a material change in circumstances such as to justify modification of the decree of dissolution. The judgment of the trial court is therefore affirmed.

AFFIRMED.

THOMAS R. PETERSON, APPELLEE AND CROSS-APPELLANT, V. DON PETERSON & ASSOCIATES INSURANCE AGENCY, INC., APPELLANT AND CROSS-APPELLEE.

452 N.W.2d 517

Filed March 9, 1990. No. 88-020.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law.
2. _____. A party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. Thereafter, the burden of producing contrary evidence shifts to the party opposing the motion.
3. **Appeal and Error.** Ordinarily, this court will dispose of a case on appeal on the theory on which it was presented in the trial court.
4. **Attorney Fees.** Attorney fees are allowed against a party who has defended a

civil action by alleging a defense which is determined to be frivolous.

5. **Attorney Fees: Words and Phrases.** The term "frivolous," as used in Neb. Rev. Stat. § 25-824 (Reissue 1989), connotes an improper motive or a legal position wholly without merit.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Charles H. Wagner, of Edstrom, Bromm, Lindahl & Wagner, for appellant.

Nicholas J. Lamme, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

The defendant, Don Peterson & Associates Insurance Agency, Inc. (hereinafter referred to as the Agency), appeals from the district court's granting of partial summary judgment and subsequent summary judgment in favor of the plaintiff, Thomas R. Peterson, a former employee of the Agency, in his action for breach of a contract.

The plaintiff filed a petition in district court on July 22, 1987, for recovery of $27,000, which represented the balance due under a "Termination Agreement and Sale of Stock of [the Agency]" entered into between the parties on February 27, 1987, and for prejudgment interest. The Agency answered, alleging that its obligation to repurchase plaintiff's stock in the Agency terminated under a provision of a "Stock Redemption Agreement" between the parties, executed August 30, 1986. The stock redemption agreement relieved the defendant of payment for the stock if the plaintiff violated the covenant not to compete contained in the stock redemption agreement.

Plaintiff then filed a motion for partial summary judgment "on the issue of the enforceability of the covenant not to compete contained in the STOCK REDEMPTION AGREEMENT dated August 30, 1986, between Plaintiff and Defendant." After a hearing, the court ruled that the covenant "is unreasonable and unenforceable as a matter of law."

Plaintiff then filed a motion for summary judgment "in the principal sum of $27,000 which is the amount due on the Termination Agreement . . . together with prejudgment interest," and also filed a motion for attorney fees, alleging that the Agency's defense to payment was frivolous. The Agency then moved for leave to amend its answer to pray for "rescission of the contract" on the grounds that the court had "declared a portion of the agreement between the parties invalid," thus resulting in a failure of consideration. The Agency also sought leave "to file a Counter-Claim to request injunctive relief and for a return of proceeds already paid under the contract . . . ." The record does not show that this Agency motion was ever noticed for hearing.

On December 4, 1987, the court sustained plaintiff's motion for summary judgment upon finding that "there [was] no evidence to substantiate the Defendant's allegation that the Plaintiff violated the non-compete clause of the parties' agreement; that there is no genuine issue of material fact"; and that plaintiff was entitled to a judgment of $27,000 plus interest. The court overruled plaintiff's request for attorney fees, and the record is silent on the disposition of the Agency's motion for leave to amend.

In this court, the Agency assigns two errors, alleging that the district court erred (1) in sustaining plaintiff's motion for partial summary judgment upon finding that the covenant not to compete was unenforceable as a matter of law and (2) in sustaining plaintiff's motion for summary judgment upon finding that under the evidence presented, $27,000 was due under the termination agreement. The plaintiff has cross-appealed, assigning error in the trial court's action in failing to find that the defense was frivolous, thereby entitling the plaintiff to attorney fees under Neb. Rev. Stat. §§ 25-824 and 25-824.01 (Reissue 1989). We affirm as to the Agency's appeal and reverse as to plaintiff's cross-appeal.

The facts of this case are not in dispute. The plaintiff was employed as an insurance agent for the Agency between 1983 and 1987 and was a stockholder of the Agency. Plaintiff's "book of business," which he brought to the Agency, resulted in approximately $60,000 in commissions annually. On August

30, 1986, the parties entered into a contract entitled "Stock Redemption Agreement," which provided in part:

> In the event that a stockholder . . . leaves the employ of the company, or is terminated by the company, he shall be required to sell his stock, and the company shall be required to buy the same . . . . If the non-compete clause contained in the following paragraph hereof is violated or challenged, neither the company nor the other stockholder shall have any obligation to repurchase the stock if it has not been purchased, or to make any further payments for the stock if it has already been purchased.

The stock redemption agreement also contained a clause setting out a covenant not to compete proscribing former employees from engaging in or being concerned with

> any duties or pursuits whatever which would tend to compete either directly or indirectly with the company within a twenty-five mile radius of the city limits of Fremont, Hooper, or Wahoo, Nebraska, or any other town or city in which the company maintains at the time of termination of employment an insurance office, or with the company's established customers wherever located, for a period of three years from the time their employment by the company terminates.

At the time of the termination of plaintiff's employment, the Agency had offices in Fremont, Wahoo, Lincoln, and Elkhorn, Nebraska, and "an association with offices in Tekamah, West Point and Hooper." A substantial part of eastern Nebraska was within the description in the agreement.

On February 27, 1987, the parties executed a document entitled "Termination Agreement and Sale of Stock of Don Peterson and Associates Insurance Agency, Inc." Under that agreement, the Agency repurchased plaintiff's 20 shares of stock in the Agency corporation for the sum of $35,520, payable $5,520 down on April 1 plus $1,500 per month beginning May 1, 1987, until the sum due was fully paid. In consideration for the Agency's repurchase of stock, the agreement provided for plaintiff to place his stock in escrow with a named bank and to submit his resignation, effective February 28, 1987. This agreement also specifically provided:

"This Agreement contains the entire agreement of the parties . . . ."

The Agency made the required downpayment and the first two monthly installments, due May 1 and June 1, 1987, but stopped making payments thereafter. Although plaintiff sent the Agency a letter demanding payment and warning the Agency of plaintiff's right to invoke the acceleration remedy in the termination agreement, the Agency refused to make payment, stating that plaintiff had violated the covenant not to compete under the stock redemption agreement and that plaintiff's actions entitled the Agency to withhold payment. The Agency alleged in its answer that after plaintiff resigned, he caused some of the Agency's clients to transfer their business to Fremont State insurance, a competing agency located in the same building as plaintiff's present employer.

The record shows that after the plaintiff left his employment with the Agency, he eventually went to work for Coldwell Banker in Fremont, where he worked solely as a real estate sales associate. He had no duties or responsibilities as an insurance agent. Coldwell Banker, a real estate company, and Fremont State, an insurance agency, share a common location in Fremont, but the two operate independently in their respective fields. There is some degree of common ownership between Coldwell Banker and Fremont State, but the evidence shows they are separate corporations, with no intermingling of personnel other than the sharing of a receptionist. In a signed affidavit, the president of Fremont State, Thomas O. Patton, stated that the plaintiff had not discussed insurance matters with him while employed with Coldwell Banker. In addition, at least 10 clients who had transferred insurance from the Agency after the plaintiff resigned from employment with the Agency provided affidavits stating they had not been contacted by, solicited by, or urged by the plaintiff to move their insurance.

At the hearing on the motion for summary judgment, the depositions of the president and vice president of the Agency were submitted, as well as several affidavits in behalf of plaintiff. Insofar as evidence concerning plaintiff's alleged actions that the Agency said constituted a breach of the noncompete agreement, such evidence was virtually

nonexistent. Evidence on the Agency's behalf was of the nature of opinion evidence expressed by the Agency's president, who testified: "[T]he mere presence of [plaintiff] over there [at the building of Coldwell Banker and Fremont State] and the fact that he left, these clients left, went over there, I guess led me to believe that information was being exchanged."

The president further testified that he had observed plaintiff driving around Fremont with the manager of the Fremont State insurance agency. With regard to that incident, the president testified: "I don't know if they're making calculations or what they're doing. But, obviously they're exchanging some information when they're driving around. Ah, now, Tom — Maybe they're not. But, I assume they're there exchanging information."

In short, defendant did not present any concrete evidence as to any noncompete violations. The deposition testimony of plaintiff denied any competition in the insurance field. The affidavits filed supported that testimony.

Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there is no genuine issue as to any material fact or as to the ultimate inferences which may be drawn from the material facts, and the moving party is entitled to judgment as a matter of law. *John v. OO (Infinity) S Development Co., ante* p. 190, 450 N.W.2d 199 (1990). " '[I]n appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.' " *OO (Infinity) S Development Co., supra* at 192, 450 N.W.2d at 201.

"A party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. Thereafter, the burden of producing contrary evidence shifts to the party opposing the motion." *West Town Homeowners Assn. v. Schneider*, 231 Neb. 100, 104, 435 N.W.2d 645, 648 (1989).

Plaintiff's evidence at both the partial summary judgment hearing and the summary judgment hearing established clearly the existence of all facts necessary to enable a summary

judgment to be granted to him. The only evidence the Agency offered established that plaintiff works for a real estate agency located in the same building as another insurance company and that three or four of defendant's former clients transferred their business to that agency. Having no direct evidence in support of the defense that plaintiff violated the covenant not to compete, the Agency nevertheless contends that strong circumstantial evidence considered in the light most favorable to the Agency makes summary judgment improper. Considering the evidence submitted in a light most favorable to the Agency, no court could reasonably infer that plaintiff engaged in competition. The trial court properly found there was no evidence to support a defense that plaintiff violated a covenant not to compete.

In ruling on the plaintiff's motion for partial summary judgment, the court determined as a matter of law that the "covenant is unreasonable and unenforceable." In ruling on plaintiff's later motion for summary judgment, the trial court held there was "no evidence to substantiate the Defendant's allegation that the Plaintiff violated the non-compete clause," which the court had determined earlier was unenforceable.

We have no difficulty at all in determining that the trial court was correct in each of these holdings. Ordinarily, we will dispose of a case on appeal on the theory on which it was presented in the trial court. *Grone v. Lincoln Mut. Life Ins. Co.*, 230 Neb. 144, 430 N.W.2d 507 (1988). The Agency's defense, as above set out, is without any merit.

Nonetheless, we must expand our review because of the Agency's allegations argued under its general assignment of error that the trial court erred in granting summary judgment to plaintiff. The Agency contends that since the trial court declared the noncompete provision unenforceable, the consideration for the stock redemption agreement fails, and the Agency is entitled to rescission.

The short answer to the Agency's contention in this regard is that the Agency is talking about the wrong contract. The "Termination Agreement and Sale of Stock" was executed approximately 6 months after the stock redemption agreement. The termination agreement set out specific sums, which both parties agreed to, due for plaintiff's stock. The termination

agreement also changed the payment terms of the earlier stock agreement; provided that plaintiff place his stock in escrow with a bank; provided for the payment of plaintiff's salary and expenses through February 1987; provided that plaintiff resign as an employee, officer, and director of the Agency; and provided for certain treatment for bad debts arising out of accounts receivable. In short, plaintiff and the Agency entered into a whole new agreement about their business relations with one another, and this new agreement provided, in part: "This Agreement contains the entire agreement of the parties and no modification, amendment or change of any term or provision of this agreement shall be valid or binding unless the same is in writing...."

Plaintiff has complied with all the terms of the termination agreement. There is ample consideration, running to both parties, in connection with that agreement.

Defendant has not shown any dispute as to any material fact. The entry of summary judgment in favor of plaintiff was proper and is affirmed.

The plaintiff contends in his cross-appeal that the court erred in overruling plaintiff's motion for attorney fees pursuant to §§ 25-824 and 25-824.01. Essentially, plaintiff contends that once

> the Court sustained the Plaintiff's Motion for Partial Summary Judgment on the ground that the Plaintiff had not violated the non-competition clause and further that the non-competition clause was unreasonable and unenforceable as a matter of law, the Defendant had no legitimate defense as to Plaintiff's action for the 27,000.00.

Brief for appellee at 37. As noted above, the case really involves only a simple stock transfer sale.

Pursuant to § 25-824(2), attorney fees are allowed against a party who has defended a civil action by alleging a defense which is determined to be frivolous. The term "frivolous," as used in the section, "connotes an improper motive or a legal position wholly without merit." *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 811, 429 N.W.2d 347, 353 (1988). The Agency has not advanced any evidence or theory

constituting a defense to plaintiff's claim for payment. The Agency's defense is frivolous within the meaning of § 25-824(2).

It is clear from the record that the Agency's defense was frivolous. The termination agreement clearly provided in no uncertain terms that the termination agreement "contains the entire agreement of the parties" with respect to the sale of stock and termination of employment. Consequently, the Agency is precluded under that agreement from withholding payment for any reason not contained therein. The plaintiff is entitled to attorney fees because all of the Agency's defenses are wholly without merit.

The cause is remanded on plaintiff's cross-appeal for determination of an appropriate attorney fee for services of plaintiff's attorney in the trial court, as set out in § 25-824.01. Plaintiff is allowed the sum of $3,500 for attorney fees in this court.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LANNY RAE HENRICKSEN, APPELLANT, V. FAYLIN SHERYL HENRICKSEN, APPELLEE.

451 N.W.2d 924

Filed March 9, 1990. No. 88-104.

Appeal from the District Court for Buffalo County, DEWAYNE WOLF, Judge, upon the recommendation of the Appellate Division of the District Court, WHITEHEAD, THOMPSON, and CHEUVRONT, District Judges. Affirmed as modified.

Kent A. Schroeder, of Ross, Schroeder & Fritzler, for appellant.

Terri S. Harder, of Jacobsen, Orr, Nelson, Wright & Harder, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The court has reviewed the recommendation of the Appellate Division of the District Court and declines the recommendation of the division to overrule *Brandt v. Brandt*, 227 Neb. 325, 417 N.W.2d 339 (1988). Based otherwise on the recommendation of the Appellate Division, a review of the briefs, and a de novo review of the record, the court orders the judgment of the district court be amended at the second decretal paragraph to provide "$180.00 per month as the *petitioner's* share of child care" (emphasis supplied), rather than "Respondent's share," and to award the petitioner the First Federal savings accounts Nos. 53933-61, 53934-61, and 53935-61.

As so modified, the judgment of the district court is affirmed. The petitioner is ordered to pay the sum of $500 to the respondent to apply to her attorney fees.

AFFIRMED AS MODIFIED.

FARMLAND SERVICE CO-OP, INC., A NEBRASKA COOPERATIVE CORPORATION, APPELLANT, V. KENT PETERSON ET AL., APPELLEES.

451 N.W.2d 924

Filed March 9, 1990. No. 88-191.

Appeal from the District Court for Lincoln County, JOHN P. MURPHY, Judge, upon the recommendation of the Appellate Division of the District Court, REAGAN, ENDACOTT, and OLBERDING, District Judges. Reversed and remanded with directions.

Steve Windrum for appellant.

David T. Schroeder, of Kelly, Kelly & Schroeder, for appellee Melcher.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Having considered the record, briefs, and recommendation of the Appellate Division of the District Court, we reverse the judgment of the district court because of a clearly erroneous finding of fact and remand the cause to enter judgment confirming the sale.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissents.

RAY L. HOWARD, APPELLANT AND CROSS-APPELLEE, V. PEGGY JEAN HOWARD, APPELLEE AND CROSS-APPELLANT.

452 N.W.2d 283

Filed March 9, 1990. No. 88-266.

1. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court generally is to be affirmed.
2. _____: _____. Where evidence or rulings do not appear in the record, they cannot be considered on appeal.
3. _____: _____. In the absence of a complete bill of exceptions, the only issue on appeal is the sufficiency of the pleadings to support the judgment.
4. **Pleadings: Judgments.** A judgment must be supported by the allegations of the pleadings on which it is based.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed in part, and in part reversed.

Robert J. Hovey, P.C., of Robinson, Hovey, P.C., and Kenney, for appellant.

Thomas R. Wolff for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

This is an appeal from the order of the district court in a proceeding brought by respondent wife under Neb. Rev. Stat. § 42-358.02(3) (Reissue 1988) to determine the amount of interest due on delinquent child support. Following an order issued by the court on August 18, 1987, directing the clerk of the court to determine and certify to the court the amount of such interest, and a hearing held on November 3, 1987, the court entered its order on December 22, 1987, determining that interest on child support in the amount of $2,171.90 was due and owing. Additionally, the court determined $2,373.09 interest was due on alimony and $1,244.65 in interest was due on attorney fees.

Petitioner's assignments of error assert the district court erred (1) in rendering an order without holding a lawful hearing, (2) in its computation of interest due, (3) in awarding interest on child support when that issue was barred by the doctrine of res judicata, (4) in determining the interest due on alimony and attorney fees absent a pleading to determine the same, and (5) in finding interest due on attorney fees where such fees were taxed as costs. We affirm in part and in part reverse the judgment of the district court.

Obviously, this case arrives out of a marriage dissolution proceeding, in which a decree was filed in 1975. See *Howard v. Howard*, 196 Neb. 351, 242 N.W.2d 884 (1976).

According to the November 3, 1987, entry on the trial docket, the following proceedings were had: "Hearing on amt. due on arrearages. Parties appeared by counsel of record. Under advisement." The December 22, 1987, entry reads: "Re entry of 11/3/87; Order signed."

At the November 3, 1987, hearing, apparently neither party requested the presence of a court reporter, and thus this court is without a record of the proceedings and particularly what evidence was adduced. The complete bill of exceptions states as follows:

> CERTIFICATE
>
> This is to certify that the Bill of Exceptions was prepared under my direction and supervision by Pamela D. Remus, the Official Court Reporter, but is not certified

by her for the reason that the hearing on appeal wherein the hearing was had was held in the absence of the court reporter.

Dated this 9th day of May, 1988.

/s/Stephen A. Davis
District Judge

The transcript discloses that a lawful hearing was held. It is not clear that § 42-358.02 contemplates a hearing in the formal sense requiring the taking of evidence. If a party desires the presence of a court reporter on a hearing under these circumstances, the party must make such a request. None was made.

Therefore, the record does not reveal the method of computation of the interest due. Nor does the record provide the ruling of the district court for Sarpy County in a collateral proceeding upon which the petitioner relies as the basis of his res judicata argument.

It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court is to be affirmed. *State v. Childress*, 232 Neb. 833, 442 N.W.2d 392 (1989). Where evidence or rulings do not appear in the record, they cannot be considered on appeal. *Chalupa v. Chalupa*, 220 Neb. 704, 371 N.W.2d 706 (1985).

Accordingly, the assignments of error challenging the method of computation used to determine the accrued interest and petitioner's res judicata argument are without merit.

In the absence of a complete bill of exceptions, the only issue on appeal is the sufficiency of the pleadings to support the judgment. *Scottsbluff Typewriter Leasing v. Beverly Ent.*, 230 Neb. 699, 432 N.W.2d 844 (1988). The pleadings in this instance fully support the determination of accrued interest on child support.

Petitioner further assigns as error the sufficiency of the application to support a judgment awarding interest due on alimony and attorney fees. The application limits itself to a request for interest on child support.

As a general rule, the pleadings must support the judgment. A judgment based upon an issue not pleaded is a nullity.

Alexander v. School Dist. No. 17, 197 Neb. 251, 248 N.W.2d 335 (1976). See, also, *State ex. rel. Douglas v. Schroeder*, 212 Neb. 562, 324 N.W.2d 391 (1982). The only pleading on record is the application, which does not raise an issue as to interest due on alimony and attorney fees, and the judgment awarding interest on them must be reversed.

Having held, for the reasons stated, the award of interest on attorney fees to have been erroneous, we neither reach nor decide the issue raised by petitioner's remaining assignment of error pertaining to interest on attorney fees taxed as costs.

For the reasons stated above, we do not consider respondent's cross-appeal, which also asserts error in the computation of the amount of interest due.

The determination of interest as to child support is affirmed and as to alimony and attorney fees is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

GRANT, J., not participating.

PAUL AND MADELINE DAMMANN, APPELLANTS, V. JUDITH LITTY, DEFENDANT AND THIRD-PARTY PLAINTIFF, AND VIRGINIA GRABARKEWITZ, THIRD-PARTY DEFENDANT, APPELLEES.

452 N.W.2d 522

Filed March 9, 1990. No. 88-442.

1. **Evidence: Words and Phrases.** Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
2. **Evidence: Trial.** Whether a document is ambiguous is a question of law initially determined by the trial court.
3. **Judgments: Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.
4. **Evidence: Trial.** When a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder.
5. **Words and Phrases.** Misrepresentation is a manifestation, by word or conduct, which constitutes an assertion not in accordance with fact.
6. **Fraud: Proof.** To recover in an action for fraud based on a misrepresentation of fact, a plaintiff must prove that (1) the defendant made a representation of a

material fact; (2) the representation was false; (3) the representation, when made, was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation; (4) the representation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the representation; and (6) as the result of such reliance, the plaintiff suffered damage.

7. **Fraud: Intent: Proof.** An intent to deceive is not an indispensable element in a cause of action for fraud based on misrepresentation of a material fact.

Appeal from the District Court for Lancaster County, ROBERT R. CAMP, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court reversed and remanded with direction.

Brian R. Watkins for appellants.

Thomas P. Kenny, of Batt & Brodkey, for appellee Litty.

R. Joseph Henatsch, of Katskee & Henatsch, for appellee Grabarkewitz.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Paul and Madeline Dammann appeal from the judgment of the district court for Lancaster County, which vacated a judgment for $6,714.90 obtained by Dammanns in a county court bench trial on their claim for misrepresentation in the purchase of a residence from Judith Litty. The district court ordered dismissal of Dammanns' action. Also, the district court vacated the judgment for Litty against Virginia Grabarkewitz in a third-party action. See Neb. Rev. Stat. § 25-331 (Reissue 1989) (third-party action).

In an effort to sell her residence in early January 1985, Judith Litty listed the property with Virginia Grabarkewitz, a licensed real estate agent who was generally familiar with the real estate market where Litty's house was located.

At the time Litty and Grabarkewitz entered into the listing agreement for the sale of Litty's house, Grabarkewitz did a "market analysis" for the property, measured every room in Litty's house, and elicited information from Litty regarding special characteristics of the property. The house had a full

basement, which contained a recreation room, a bedroom, and a storage room. Litty informed Grabarkewitz about water and seepage problems in the basement of the house. From the time when Litty acquired the house in 1976, she had to use a "wet-vac" to frequently pump from 10 to 50 gallons of water out of the basement. As an attempt to correct the situation, Litty had outside draintile installed near the south side of the house, adjacent to the southern lot line between her house and a neighbor's. Although she was uncertain about the exact location of the draintile, according to Litty the draintile was outside and somewhere near the southeast corner of the Litty house. Litty's former husband had chipped a hole in the basement floor at the southeast corner to relieve water pressure which built up beneath the floor. When the water problem did not cease, Litty installed a sump pump in the storage room in the basement, which, according to Litty, stopped water from entering the living area in the basement. Nevertheless, water continued to seep into the basement and move into the storage room where the sump pump was located.

Litty instructed Grabarkewitz to contact Stan Litty, who was formerly Judith Litty's husband, if Grabarkewitz wanted any details about the draintile. Grabarkewitz spoke with Stan Litty, who told her that draintile was on the south side of the house and possibly some draintile was on the east side of the house near the basement. Stan Litty also told Grabarkewitz that he had made a small "channel" in the basement concrete floor to carry water which seeped through the walls to the sump pump in the basement storage room.

From her market analysis, Grabarkewitz drafted a "Highlights" sheet for Litty's house, a document prepared for distribution to a prospective purchaser, which listed general information about the sale property, such as the house's square footage, dimensions of rooms, lot size, annual real estate taxes, and the listing price for the property. The highlights sheet also contained: "The home has central air conditioning, forced air gas heat, drain tile and sump pump in the basement."

Dammanns first saw the Litty house during an open house on February 17, 1985, at which time they received a copy of the highlights sheet prepared by Grabarkewitz. Approximately 1

week later, Grabarkewitz took the Dammanns on a private tour of the house. The house was fully furnished, including a beanbag chair in the southeast corner of the basement. Inside the poorly lighted storage room were several items which prevented Dammanns' thorough inspection of the basement storage area, and various furnishings covered the basement walls. During the tour, Dammanns questioned Grabarkewitz about the condition of the basement and informed her that the home must have a dry basement because Dammanns owned considerable electronic equipment which would be located in the basement. Grabarkewitz told the Dammanns that the basement was dry and that Litty had recently installed new carpet in the basement recreation room and bedroom.

On the bases of the information in the highlights sheet, Grabarkewitz' representations, and their tours of the premises, Dammanns offered on March 10, 1985, to purchase the Litty house. Judith Litty had never met or spoke with Dammanns about their prospective purchase of Litty's house. Grabarkewitz was the only real estate agent involved in the transaction.

On the day of closing, April 25, 1985, Dammanns went to the house for a final "walk-through" with Grabarkewitz and discovered a large, damp spot at the southeast corner of the basement wall, where water had seeped through the wall and soaked the basement carpet. When Paul Dammann pulled the carpet away from the corner, revealing some water in a hole with a diameter of 5 to 6 inches, he asked Grabarkewitz about the situation. Grabarkewitz responded that the hole was "part of the drain tile system or the drain tile." Grabarkewitz stated that possibly cleaning the draintile would eliminate any problem, and suggested that $500 of the sale proceeds be placed in escrow to cover the cost of work on the draintile. Grabarkewitz telephoned Judith Litty, who agreed to the $500 escrow deposit regarding the draintile. In view of the escrow arrangement, the sale was closed.

After closing, Dammanns moved into the house and soon discovered that the basement had a very serious water problem. Water appeared at several locations on the basement walls, ran down the walls, and entered the storage room. Later,

Dammanns learned that there was no draintile in the basement.

To solve the water problem, Dammanns hired a waterproofing company, which constructed a draintile system in the basement of the house and installed three sump pumps—measures which cost $6,160. Dammanns replaced the water-damaged basement carpet valued at $554.90.

When Judith Litty refused to reimburse Dammanns for their expenses concerning the basement, Dammanns sued Litty in the county court in an action based on misrepresentation of a material fact and breach of warranty. In their petition, Dammanns specifically referred to the "advertisement" for the Litty house, that is, the statement in the highlights sheet that the house had "drain tile and sump pump in the basement," and alleged that they had relied on that representation in connection with the Litty sale.

Dammanns' evidence established that they would not have purchased the Litty house had the Dammanns "known that the representations about drain tile being in the basement were not true." Paul Dammann testified that the Dammanns relied on the representations contained in Grabarkewitz' highlights sheet. Included in Dammanns' evidence on damages was the cost of repairs for the basement, i.e., draintile construction, installation of sump pumps, and replacement of water-damaged carpet. Grabarkewitz testified that in drafting the highlights sheet for the Litty house, she did not intend to state that there was "drain tile in the basement."

As a result of the trial in the action commenced by Dammanns, the county judge found:

> (1) Ms. Grabarkewitz made material representations to [the Dammanns] that basement water problems had been resolved by the work and the fixtures installed by the Littys and further that there was an adequate drain tile system part of which at least was internal to handle or resolve the water problem; (2) that such representations were false; (3) with respect to the highlight sheet, Ms. Grabarkewitz either knew it was false when made or it was made recklessly without adequate knowledge of its truth but nonetheless, as an intentional positive assertion. With respect to the basement water problem being resolved by

> the equipment, improvements, and fixtures, Ms. Grabarkewitz knew there was still a problem which had not been completely resolved. Her statements were false. With respect to the drain tile, the representations made by Ms. Grabarkewitz to the Dammanns were false; (4) that all representations made by Ms. Grabarkewitz to the Dammanns were made with the sole purpose of persuading them to purchase the property — to rely upon the representations as the truth; (5) that the Dammanns did rely and even at the date of closing, might otherwise have not gone through with the closing had it not been for said reliance; (6) that the Dammanns sustained damages as a result of said representations and reliance.

Consequently, the county court awarded a judgment of $6,714.90 to Dammanns. Regarding Litty's third-party action against Grabarkewitz, the court awarded judgment to Litty, which corresponded with the judgment entered in favor of Dammanns.

Both Litty and Grabarkewitz appealed to the district court, which decided that "[t]he findings and conclusions of the trial court as to the proof of the representations made by the agent of the seller are not supported by the evidence, and this reviewing court is not obligated to accept said findings and conclusions." For that reason, the district court reversed both judgments of the county court and dismissed the actions.

Dammanns have appealed and contend that the district court erred in (1) making an independent finding of fact as an appellate court reviewing a decision of the county court in a law action and (2) concluding that Dammanns failed to prove their claim based on misrepresentation.

The essence of Litty's theory for this case is embodied in an excerpt from her appellate brief:

> Much was made at trial over the Highlight Sheet containing the phrase "The home has central air conditioning, forced air gas heat, drain tile and sump pump in the basement." The record shows that there was a sump pump in the basement, and drain tile on the property at the time of the sale, although the tile was not located in the basement. Mrs. Grabarkewitz testified that

> when she typed the Highlight Sheet, she did not realize the ambiguity of the phrase and did not intend to state that there was drain tile in the basement.
>
> If read favorably to the defendant, the statement is true. If read for the plaintiffs, one must remember that Mrs. Grabarkewitz testified that the location of the drain tile was not knowingly misstated. If read realistically, the statement is ambiguous and shouldn't have been relied upon.

Brief for appellee Litty at 9.

STANDARD OF REVIEW

> "On appeal of a county court's judgment rendered in a bench trial of a law action, the district court reviews the 'case for error appearing on the record made in the county court.' [Citation omitted.] A county court's factual findings in a bench trial of a law action have the effect of a verdict and will not be set aside unless such findings are clearly erroneous." *Holden v. Urban*, 224 Neb. 472, 474, 398 N.W.2d 699, 701 (1987).
>
> As appellate courts, reviewing a judgment in a bench trial of a law action in the county court, the Supreme Court and a district court do not reweigh evidence, but consider the judgment in the light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Mason v. Schumacher, 231 Neb. 929, 931, 439 N.W.2d 61, 63-64 (1989). See, also, Neb. Rev. Stat. § 25-2733(1) (Reissue 1989): "In all cases other than appeals from the Small Claims Court, the district court shall review the case for error appearing on the record made in the county court . . . ."

AMBIGUITY IN THE HIGHLIGHTS SHEET

"Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." *Knox v. Cook*, 233 Neb. 387, 391, 446 N.W.2d 1, 4 (1989). See, also, *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987).

"Whether a document is ambiguous is a question of law

initially determined by the trial court." *Knox v. Cook, supra* at 391, 446 N.W.2d at 4. See, also, *First Nat. Bank in Mitchell v. Kurtz*, 232 Neb. 254, 440 N.W.2d 432 (1989); *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987).

"Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). See, also, *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

When a court has determined that ambiguity exists in a document, an interpretative meaning for the ambiguous word, phrase, or provision in the document is a question of fact for the fact finder. *First Nat. Bank in Mitchell v. Kurtz, supra*; *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988); *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988).

We agree with Litty's observation that there is "ambiguity of the phrase" found in the highlights sheet, namely, "The home has . . . drain tile and sump pump in the basement." On one hand, the language in question is susceptible to a conjunctive interpretation that both the draintile and sump pump are located in the basement of Litty's house. However, the indicated language in the highlights sheet is susceptible to still another interpretation, namely, the subject premises include the house and draintile, wherever the draintile may be, inside or outside the house, and there is a sump pump in the basement of the house.

Consequently, the language "The home has . . . drain tile and sump pump in the basement," used in the highlights sheet prepared by Grabarkewitz for the Litty sale, is ambiguous, a legal conclusion reached by this court and implicit in the county court's eventual factual determination that Grabarkewitz had represented that "part of [the draintile system] at least was internal," or inside Litty's house. Given the ambiguity in Grabarkewitz' highlights sheet, the county court's factual determination regarding the meaning of the ambiguous language in that document is not clearly erroneous.

LIABILITY FOR MISREPRESENTATION

"Misrepresentation is a manifestation, by word or conduct, which constitutes an assertion not in accordance with fact." *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 162, 421 N.W.2d 766, 770 (1988).

> To recover in an action for fraud based on a misrepresentation of fact, a plaintiff must prove that (1) the defendant made a representation of a material fact; (2) the representation was false; (3) the representation, when made, was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation; (4) the representation was made with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the representation; and (6) as the result of such reliance, the plaintiff suffered damage.

Edwin Bender & Sons v. Ericson Livestock Comm. Co., supra at 165-66, 421 N.W.2d at 771.

An intent to deceive is not an indispensable element in a cause of action for fraud based on misrepresentation of a material fact. *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986). See, also, *Edwin Bender & Sons v. Ericson Livestock Comm. Co., supra* at 165, 421 N.W.2d at 771: "[T]he representation, when made, was known to be false *or* was made recklessly as a positive assertion without knowledge concerning the truth of the representation . . . ." (Emphasis supplied.)

Even Litty admits that no draintile system existed inside her house. The evidence conclusively established that Dammanns would not have purchased the Litty house without a draintile system. Hence, existence of a draintile system within Litty's house was material to Dammanns' purchase of the house. That Dammanns relied on Grabarkewitz' representations about the Litty house's draintile system, made in the highlights sheet and during the "walk-through," is beyond question. The county court record contains evidence sufficient to sustain the factual findings by that court. Nevertheless, the district court, in reversing Dammanns' judgment obtained in the county court, expressed: "[T]his reviewing court is not obligated to accept said findings and conclusions" of the county court. The

preceding expression does not reflect the appropriate standard of review applicable to the district court in its function as an appellate court reviewing a county court's factually supported decision in a law action. See, *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989); § 25-2733.

Because the evidence supports the factual underpinnings for the county court's decision, we must reverse the district court's judgment which vacated the county court's judgment in favor of Dammanns. However, reversal of the district court's decision concerning the county court judgment for Dammanns does not affect the judgment initially entered by the county court in Litty's third-party action against Grabarkewitz and subsequently vacated by the district court as the result of the appeals by Litty and Grabarkewitz. Regarding the third-party action authorized by § 25-331, we have stated:

> Section 25-331 authorizes a third-party action by a defendant, as a third-party plaintiff, against a person, initially not a party to the action, who is or may be liable to the initial defendant for all or part of the plaintiff's claim against the defendant. A third-party claim under § 25-331 may be asserted when a third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant. [Citation omitted.] The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff. [Citations omitted.]

Schuyler State Bank v. Cech, 228 Neb. 588, 592, 423 N.W.2d 464, 467-68 (1988). See, also, *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983).

Litty has taken no cross-appeal from the district court's action in setting aside Litty's judgment obtained against Grabarkewitz in the third-party action. Thus, correctness of the district court's action in reversing the third-party judgment and dismissing Litty's third-party petition and action is beyond the review authorized in the present appeal. See *Young Radiator Co. v. Celotex Corp.*, 881 F.2d 1408 (7th Cir. 1989) (appellate rule regarding a cross-appeal is jurisdictional; hence, reversal of a judgment against a plaintiff in the initial action does not

entitle a defendant and third-party plaintiff, in the absence of a properly filed cross-appeal, to challenge a judgment obtained by a third-party defendant in a third-party action).

Inasmuch as only Dammanns have appealed from the district court's decision, we reverse the district court's judgment which set aside the county court's judgment for Dammanns, and remand this matter to the district court with direction to reinstate and affirm the judgment obtained by Dammanns in the county court.

REVERSED AND REMANDED WITH DIRECTION.

LINDA ANN BABKA, APPELLANT, V. ALAN VLAD BABKA, APPELLEE.
452 N.W.2d 286

Filed March 9, 1990. No. 88-480.

1. **Taxation.** The dependency exemption for income tax returns is an economic benefit.
2. **Taxation: Courts: Child Custody.** State courts may exercise their equitable powers to allocate dependency exemptions to noncustodial parents.
3. **Taxation: Child Custody: Waiver.** In order for the allocation of a dependency exemption to be effective, the court must order the custodial parent to sign the declaration waiving the exemption.
4. **Taxation: Child Custody: Child Support.** The execution of the declaration allocating the dependency exemption to the noncustodial parent should be dependent on the noncustodial parent's having paid his or her child support obligations.
5. **Modification of Decree.** To justify a modification of a divorce decree, there must be a showing of a material change in the circumstances subsequent to the entry of the dissolution decree.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed as modified.

Ronald S. Depue, of McDermott, Depue & Zitterkopf, for appellant.

Patrick A. Brock, of Cunningham, Blackburn, Livingston, Francis, Cote, Brock & Cunningham, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The marriage of the parties was dissolved on May 19, 1980, by a decree which incorporated a stipulation and settlement agreement the parties had executed. The parties had agreed that custody of the minor children, Todd, born April 12, 1973, and Gina, born August 31, 1976, should be awarded to the petitioner, Linda Ann Babka, together with child support in the amount of $200 per month per child. The agreement further provided that the respondent, Alan Vlad Babka, provide and maintain all of the present medical and dental insurance on the children and be responsible for all medical and dental bills which were not covered by insurance.

The decree and agreement were silent as to who could claim the children as dependents for federal income tax purposes; however, the testimony shows the parties discussed this matter prior to entering into the settlement agreement, and the respondent entered into the agreement based on those discussions.

The respondent claimed the children as dependents on his federal income tax return for the years 1980 through 1986. In 1987, the petitioner refused to allow the respondent to claim the children as dependents and claimed them on her tax return.

On May 3, 1988, the respondent filed an application to modify the divorce decree, requesting the court to give him the right to claim the minor children as dependents on his income tax returns or, in the alternative, to reduce his child support obligations.

The petitioner's answer denied that there had been a material change in circumstances such as to justify a modification of the decree.

The trial court found and ordered that the respondent was authorized to claim the minor children as dependents for income tax purposes. The petitioner, now known as Linda Ann Jelinek, has appealed.

The primary issue on appeal is whether under I.R.C. § 152(e) (Supp. V 1987), which was amended by the Tax Reform Act of 1984 by creating a presumption that the custodial parent is entitled to income tax dependency exemptions, state courts have jurisdiction to award income tax

dependency exemptions to the noncustodial parent.

Prior to the 1985 tax year, § 152 provided that the noncustodial parent was entitled to claim a dependency exemption in any tax year when the divorce decree specifically granted the exemption to the noncustodial parent and that parent provided over $600 per child per year in support payments, or when the decree was silent as to the exemption, and the noncustodial parent paid more than $1,200 per child per year in support payments and the custodial parent could not prove he or she provided more support than the noncustodial parent. This rule caused the Internal Revenue Service to spend much time and resources in making determinations as to which parent was entitled to the dependency exemptions. H.R. Rep. No. 432, 98th Cong., 2d Sess., pt. 2, at 1498, *reprinted in* 1984 U.S. Code Cong. & Admin. News 697, 1140.

In 1984, Congress amended § 152 to provide that the custodial parent is automatically entitled to the dependency exemptions except in three instances. Under the new law, the noncustodial parent may claim the dependency exemptions (1) if a multiple-support agreement is in effect; (2) if a qualified pre-1985 instrument between the parents provides that the noncustodial parent shall be entitled to the exemptions, and that parent provides at least $600 per child per year in support; or (3) if the custodial parent signs a written declaration stating he or she will not claim the dependency exemption and the noncustodial parent attaches such written declaration to his or her tax return. § 152(e).

A qualified pre-1985 instrument is a divorce or separate maintenance decree or a written agreement which was executed before 1985. It must specifically provide that the noncustodial parent is entitled to the dependency exemption. § 152(e)(4)(B). A noncustodial parent may not claim his or her children as dependents based on a pre-1985 instrument that was silent as to who could claim the dependency exemptions. The failure to expressly cover this point does not make the instrument qualified, and a silent decree may not be modified to qualify it as a pre-1985 instrument. 33 Am. Jur. 2d *Federal Taxation* § 1147 (1989).

Regarding the reasons for the change, the legislative history

of the amendment states:

> The present rules governing the allocations of the dependency exemption are often subjective and present difficult problems of proof and substantiation. The Internal Revenue Service becomes involved in many disputes between parents who both claim the dependency exemption based on providing support over the applicable thresholds. The cost to the parties and the Government to resolve these disputes is relatively high and the Government generally has little tax revenue at stake in the outcome. The committee wishes to provide more certainty by allowing the custodial spouse the exemption unless that spouse waives his or her right to claim the exemption. Thus, dependency disputes between parents will be resolved without the involvement of the Internal Revenue Service.

H.R. Rep. No. 432, 98th Cong., 2d Sess., pt. 2, at 1498-99, *reprinted in* 1984 U.S. Code Cong. & Admin. News 697, 1140.

The amended statute is silent as to whether a state court can require a custodial parent to sign a declaration waiving the dependency exemption. "[T]his silence demonstrates Congress's surpassing indifference to how the exemption is allocated as long as the IRS doesn't have to do the allocating." *Cross v. Cross*, 363 S.E.2d 449, 457 (W. Va. App. 1987).

The division of marital property has traditionally been reserved for each state's domestic relations courts. *Motes v. Motes*, 786 P.2d 232 (Utah App. 1989). The dependency exemption for income tax returns is an economic benefit. See *Cross, supra*. Prior to Congress' amendment of the tax law, most state courts could allocate the dependency exemption. *Id.*

Since the amendment to the federal tax law, the majority of jurisdictions considering this issue have determined that state courts may exercise their equitable powers to allocate dependency exemptions to noncustodial parents. *Lincoln v. Lincoln*, 155 Ariz. 272, 746 P.2d 13 (1987); *Serrano v. Serrano*, 213 Conn. 1, 566 A.2d 413 (1989); *In re Marriage of Einhorn*, 178 Ill. App. 3d 212, 533 N.E.2d 29 (1988); *Hart v. Hart*, 774 S.W.2d 455 (Ky. App. 1989); *Wassif v. Wassif*, 77 Md. App.

750, 551 A.2d 935 (1989); *Bailey v. Bailey*, 27 Mass. App. 502, 540 N.E.2d 187 (1989); *Corey v. Corey*, 712 S.W.2d 708 (Mo. App. 1986); *Fudenberg v. Molstad*, 390 N.W.2d 19 (Minn. App. 1986); *In re Marriage of Milesnick*, 765 P.2d 751 (Mont. 1988); *Gwodz v. Gwodz*, 234 N.J. Super. 56, 560 A.2d 85 (1989); *Fleck v. Fleck*, 427 N.W.2d 355 (N.D. 1988); *Hughes v. Hughes*, 35 Ohio St. 3d 165, 518 N.E.2d 1213 (1988), *cert. denied* 488 U.S. 846, 109 S. Ct. 124, 102 L. Ed. 2d 97; *Motes v. Motes, supra*; *In re Marriage of Peacock,* 54 Wash. App. 12, 771 P.2d 767 (1989); *Cross v. Cross, supra*; *Marriage of Pergolski v. Pergolski*, 143 Wis. 2d 166, 420 N.W.2d 414 (1988). However, in order for the allocation to be effective, the court must order the custodial parent to sign the declaration waiving the dependency exemption. *Pergolski, supra.* Most jurisdictions have further required that the execution of the declaration allocating the exemption to the noncustodial parent be dependent on the noncustodial parent's having paid his or her child support obligations. See, e.g., *Lincoln, supra*; *Einhorn, supra*; *Motes, supra*; *Cross, supra.*

The basis for these decisions has been that the amendment does not expressly divest state courts of their traditional power of allocating the exemption and that Congress did not intend the amendment to achieve such a result. The amendment was intended to relieve the IRS of the burden of determining who was entitled to the exemption, not to interfere with state court prerogatives. *Serrano, supra.*

A minority of jurisdictions have decided that state courts have no authority to require the custodial parent to sign the declaration allocating the dependency exemption to the noncustodial parent. *Holley v. Holley*, 547 So. 2d 192 (Fla. App. 1989); *Lorenz v. Lorenz*, 166 Mich. App. 58, 419 N.W.2d 770 (1988); *Josey v. Josey*, 291 S.C. 26, 351 S.E.2d 891 (1986); *Brandriet v. Larsen*, 442 N.W.2d 455 (S.D. 1989); *Davis v. Fair*, 707 S.W.2d 711 (Tex. App. 1986). However, some of these jurisdictions have determined that although the state court has no authority to allocate the dependency exemptions to the noncustodial parent, it may adjust the child support obligations to reflect the loss of the benefit of the exemption. See, *Lorenz, supra*; *Sarver v. Dathe*, 439 N.W.2d 548 (S.D. 1989); *Davis,*

supra.

Since the decree cannot become a qualified pre-1985 decree by only modifying it to allow the respondent to claim the dependency exemptions, a modification stating that the decree is modified to allow the respondent to claim the dependency exemption is ineffective. The decree should be modified by ordering the petitioner to execute and deliver to the respondent a waiver allocating the dependency exemptions to the respondent for each year in which the child support payments have been paid in full. See, *Nichols v. Tedder*, 547 So. 2d 766 (Miss. 1989); *McKenzie v. Jahnke*, 432 N.W.2d 556 (N.D. 1988).

The petitioner argues that there has been no showing of a material change in circumstances to support a modification of the decree.

"To justify a modification of a divorce decree, there must be a showing of a material change in the circumstances subsequent to the entry of the dissolution decree. . . . Alteration and passage from one condition to another is essential for a material change in circumstances." *Morisch v. Morisch*, 218 Neb. 412, 413, 355 N.W.2d 784, 785-86 (1984).

Although the settlement agreement did not expressly state that the respondent would claim the children as dependents for income tax purposes, the record shows that this matter was discussed by the parties and that the respondent consented to the agreement based on this understanding. Prior to the change in the tax law, the respondent claimed the children as dependents.

The record further shows that after the tax law had been changed, the petitioner complied with the change by executing the appropriate declarations so that the respondent could have the dependency exemptions in 1985 and 1986. The petitioner testified that she did not let the respondent claim the dependency exemptions in 1987 because of the change in the tax law; however, she was aware of the change prior to 1987 because she complied with the waiver requirements by signing the required declarations in 1985 and 1986. The record shows that the petitioner claimed the children as dependents on her 1987 tax return because of a dispute over certain medical

expenses and the expenses of driver's education and swimming lessons.

The change in the federal tax law and the petitioner's unilateral action regarding the dependency exemptions was a material change in circumstances which supports a modification of the decree.

The judgment of the district court is modified to provide that the petitioner shall execute and deliver to the respondent a declaration allowing the respondent to claim the minor children as dependents for income tax purposes for each year in which the child support has been paid in full. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

ALAN P. BRAZEE, APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

452 N.W.2d 529

Filed March 9, 1990. No. 89-014.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the compensation court after rehearing shall have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given to their testimony.
3. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James D. Faimon, Assistant Lincoln City Attorney, for appellant.

Dennis P. Crawford, of Friedman Law Offices, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal by the City of Lincoln from an order of the Nebraska Workers' Compensation Court awarding the city's employee appellee, Alan P. Brazee, benefits, including compensation for medical expenses incurred and to be incurred and for a 7-percent permanent partial disability for 300 weeks.

The city initially paid some of Brazee's medical expenses pursuant to his claim for workers' compensation benefits, but then refused to continue to pay. Brazee petitioned the Nebraska Workers' Compensation Court and received an award based upon a 5-percent permanent partial disability. The city refused to accept the award and appealed. Brazee's claim was reheard by a three-judge panel of the compensation court. The panel made a finding of a 7-percent permanent partial disability and granted a corresponding award. The City of Lincoln timely appealed.

The city's three assignments of error in this court may be summarized as one: The evidence before the panel was not sufficient to support the award. We affirm.

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1988), "[t]he findings of fact made by the compensation court after rehearing shall have the same force and effect as a jury verdict in a civil case" and will not be set aside unless clearly wrong. *Behrens v. American Stores Packing Co., ante* p. 25, 449 N.W.2d 197 (1989). As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given to their testimony. *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988). "In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party." *Fees, supra* at 620, 423 N.W.2d at 486.

The record, in the light most favorable to Brazee, shows the following. On February 3, 1986, Brazee was injured while lifting a traffic barricade during the course of his employment

with the City of Lincoln. As he and another man attempted to lift the barricade, Brazee heard a "pop" in his back and felt a pain go down his left leg. He remained at work, but informed his supervisor of the injury and saw a chiropractor that evening. He continued to work with pain, but the pain caused him emotional difficulties.

The neurologist who examined and treated Brazee testified that Brazee suffered from low back and left hip pain secondary to a muscle strain and probable ligamentous stretch injury and that, to a reasonable degree of medical certainty, the injury was caused by the lifting on February 3, 1986, and as a result Brazee suffered a 7-percent permanent partial disability to the whole body. This conclusion was based upon the history given by Brazee to his doctor. There was no objective visual evidence of injury, such as from x rays, other imaging, or examination conducted on Brazee. The neurologist testified that medical diagnoses and other conclusions are commonly based upon the history given by the patient and that the information provided by Brazee in this case is consistent with the above conclusions.

The city contends that the evidence is insufficient to support the finding of the compensation court because there was no objective visual evidence of Brazee's injury, such as from x rays, other imaging, or examination. We note that the findings of the compensation court in this case comply with our rule:

> "Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury." . . .
>
> "Determination of causation is, ordinarily, a matter for the trier of fact."

(Citations omitted.) *Fees, supra* at 621, 423 N.W.2d at 486. The neurologist in this case was an expert who confirmed the causal relationship between the incident occurring when Brazee lifted a barricade on February 3, 1986, and the injury for which he seeks compensation. The expert's opinion is based upon evidence deemed credible by the compensation court. The argument of the city that the lack of visual evidence of the

injury proves the injury's nonexistence is without merit.

The judgment of the panel of the Workers' Compensation Court is affirmed. Because the appellant employer, City of Lincoln, did not reduce the amount of the worker's award on this appeal, Brazee is awarded the sum of $750 for the services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. DONALDSON III, APPELLANT.

452 N.W.2d 531

Filed March 9, 1990. No. 89-168.

1. **Trial: Words and Phrases.** Judicial abuse of discretion results when reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
2. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the Supreme Court to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
3. **Drunk Driving: Blood, Breath, and Urine Tests: Words and Phrases.** The word "urine" in Neb. Rev. Stat. § 39-669.07(4) (Supp. 1987) refers only to urine in a driver's body when the driver is operating, or is in control of, a motor vehicle.
4. **Drunk Driving: Prior Convictions.** To constitute a third-offense violation of Neb. Rev. Stat. § 39-669.07 (Supp. 1987), it is necessary only that a violator be properly convicted of two previous violations of § 39-669.07, whether the earlier convictions be called first offense or second offense.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on appeal thereto from the County Court for Lancaster County, DONALD R. GRANT, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

The defendant, James A. Donaldson III, appeals from an order of the district court for Lancaster County affirming his conviction of violation of a charge of operating or being in the "actual physical control of any motor vehicle upon a public road while under the influence of alcoholic liquor or any drug or when such person has a concentration of .10 of one gram or more by weight of alcohol per one hundred milliliters of his urine . . . ." After a trial in county court, a jury found defendant guilty. Following an enhancement hearing, the county court found defendant's conviction was his third, and defendant was sentenced to 90 days in the Lancaster County jail, he was fined $500, and his driver's license was suspended for 15 years. Defendant timely appealed to the district court and then to this court.

In this court defendant assigns six errors, which, in summary, assert the district court erred in affirming the defendant's conviction in the county court, and the county court erred (1) in receiving in evidence a specimen of defendant's urine and the results of a chemical test performed thereon, (2) in receiving in evidence records of defendant's prior convictions and in determining this was defendant's third conviction for the offense, and (3) in determining that the evidence was sufficient to support the guilty verdict for the offense of driving while intoxicated. We reverse and remand for a new trial.

The record shows that on September 8, 1987, at approximately 10:30 p.m., defendant was stopped by a Lancaster County sheriff's deputy near 26th and O Streets in Lincoln. The officer stopped defendant's vehicle after hearing the sound of squealing tires and seeing defendant's vehicle come to a stop in the middle of an intersection controlled by a red traffic signal. The officer testified that the defendant had some difficulty retrieving his license from his wallet.

The officer testified that defendant had red eyes and a moderate odor of alcohol on his breath. The officer instructed

the defendant to perform some field sobriety tests. The officer testified defendant failed to recite the alphabet in full the first time, stopping with the letter *u*, and then recited the full alphabet but repeated the letter *v* twice in that recitation. The officer testified that defendant had no difficulty in following directions to count to 10 and back. The officer did not notice any slurring of defendant's speech. Next, the officer instructed defendant to perform coordination and balance tests, and testified that, although defendant did not appear to have problems performing a finger-to-nose test, the defendant did not follow instructions. Defendant then performed a test where he stood feet together with hands to the side, tilting his head backward with eyes closed and back slightly arched. The officer testified the defendant swayed approximately 3 inches off center, which in the officer's opinion was more than normal for a sober individual. The defendant also failed to follow instructions while performing the "walk-the-line" test. The officer concluded that defendant was under the influence of alcohol, placed him under arrest, and transported him to the Lancaster County sheriff's office, where he submitted a urine sample that was tested for alcohol content.

In collecting the urine sample, the officer followed the procedure for the collection of urine for testing, as set out in 177 Neb. Admin. Code, ch. 1, § 005.02 (1986), which requires that the accused void his bladder 20 minutes prior to the time the test sample is taken. Accordingly, at 11:09 p.m., the officer directed defendant to void his bladder of urine, and that urine was discarded. At 11:42 p.m., defendant submitted a urine sample, and a later chemical test of that sample indicated that defendant's urine had a concentration of .526 grams of alcohol per 100 milliliters of his urine.

Defendant testified that he was a U.S. Navy veteran, having served 6 years with two 6-month Vietnam tours of duty. He testified that, at the time of his arrest, he suffered from various physical and emotional problems, including a vascular disease called Raynaud's disease, a posttraumatic stress disorder, a bipolar or manic-depressive disorder, and "Dismatic" disorder. He testified that he had been treated for these problems at various Veterans' Administration hospitals. He also testified

that his ability to concentrate on the officer's instructions was affected by his condition and that his red eyes stemmed from a medical condition called Reiter's syndrome. He further testified that he had numerous physical problems resulting from injuries he sustained in an auto accident. The defendant has vision and hearing impairments and was on medication at the time of the arrest. The arresting officer testified that defendant told him, before the field tests, that defendant was under a doctor's care and was taking medication.

Defendant admits that on the day he was arrested he had been drinking late in the afternoon and had a "couple . . . big gulps of whiskey" later in the evening shortly before leaving his apartment. He was stopped by the officer approximately 10 minutes later. He testified that he was not under the influence of alcohol while he was driving, but did admit that he began to feel the effects of the alcohol after he had been at the police station a short time.

Defendant's first summarized assignment of error alleges that the trial court erred in overruling defendant's objections to the admitting of the results of the chemical test performed on defendant's urine and the expert testimony regarding the results. It is within the trial court's discretion to admit or exclude evidence, and such ruling will be upheld absent an abuse of discretion. *State v. Hayden*, 233 Neb. 211, 444 N.W.2d 317 (1989). "Judicial abuse of discretion results when reasons or rulings of the trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition." *State v. Schall, ante* p. 101, 106, 449 N.W.2d 225, 229 (1989).

Defendant contends that the trial court erred in admitting the urine test results because the urine tested was not from urine that was in defendant's body at the time he was operating his vehicle and was irrelevant to the charge that defendant operated a vehicle when he had a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 100 milliliters in his urine.

Defendant was charged with violating subsection (1) or (4) of Neb. Rev. Stat. § 39-669.07 (Supp. 1987). Section 39-669.07 provides in part:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (1) While under the influence of alcoholic liquor or of any drug;
>
> (2) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood;
>
> (3) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath; or
>
> (4) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her urine.

The State contends that "[i]t is also clear from the various court decisions, and the face of the statute, that the alcohol/urine level is that amount present at the time of the test performed pursuant to methods and procedures set out by the Department of Health." Brief for appellee at 10. We first note that this statute, as amended in 1987, has not been construed by this court, nor are we directed to any court decision construing an identical statute. Nor can we say that it is clear from the face of the statute that the Legislature has forbidden a driver to operate a motor vehicle when he has a certain concentration of alcohol in his urine at a time more than an hour after he has ceased operating the vehicle.

The State maintains that the result of a chemical test performed on a urine sample submitted without following the procedure of title 177 of the Nebraska Administrative Code concerning initial voiding would only reflect " 'pooled' alcohol excretions" which provide no indication of whether the individual was under the influence of alcohol at the time he was driving. Brief for appellee at 9. With that statement we fully agree, as did the State's expert witness in this case. The difficulty is that after the 1987 amendment, the urine test is no longer used in a chemical test to determine the blood-alcohol content in a driver's "body fluid," apparently meaning blood. See *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987). The current statute has established a "per se" standard; that is, it is now a violation, whether a driver is "under the influence" or

not, for a driver to operate or be in possession of a motor vehicle when there is a certain concentration of alcohol in his urine. The introducer of the 1987 amendment told the Legislature: "[I]nstead of converting to the blood alcohol content, we're establishing . . . three separate standards for breath, urine and . . . blood." Floor Debate, L.B. 404, Transportation Committee, 90th Leg., 1st Sess. 1429 (Mar. 4, 1987). Similarly, the committee statement, in considering the amendment, contained in part: "The bill retains the present standard for tests of blood, but eliminates the necessity for converting tests of breath or urine into blood alcohol content." Committee Statement, 90th Leg., 1st Sess. (Feb. 10, 1987).

It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the Supreme Court to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there. *State v. Steele*, 224 Neb. 476, 399 N.W.2d 267 (1987).

Before the 1987 amendment, § 39-669.07 provided, in part, that it was unlawful to operate or be in actual physical control of any motor vehicle while under the influence of alcoholic liquor "or when that person has ten-hundredths of one per cent or more by weight of alcohol *in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine.*" (Emphasis supplied.) § 39-669.07 (Cum. Supp. 1986).

In 1987, § 39-669.07 was amended, in part, by changing the clause emphasized in the foregoing paragraph to read: "When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her urine." § 39-669.07(4) (Supp. 1987).

Thus, there is no longer need for a determination of the blood-alcohol content by chemical analysis. The Legislature has amended the statute to provide for a "per se" violation consisting of driving or being in control of a motor vehicle at a time when the person has a certain concentration of alcohol in his urine. Section 39-669.07(4) (Supp. 1987) has but one logical interpretation. The word "urine" as used in § 39-669.07(4) refers only to the urine that is in an accused's body when the driver is operating, or is in control of, a motor vehicle. Consequently, insofar as 177 Neb. Admin. Code, ch. 1,

§ 005.02 (1986) requires voiding of a defendant's bladder, title 177 calls for the discarding of the very urine that must be tested in order to prove a violation of the offense under the amended statute. Voiding prevents the determination of the fact which is dispositive of the statutory violation.

In the case at bar, it is uncontroverted that the urine which was in defendant's body at the time he was driving was discarded pursuant to the regulation, and the sample tested was from urine obtained 33 minutes later. That urine was not in defendant's body when he was driving. There was no testimony connecting the concentration at the time of the test back to the time of the driving.

The expert witness for the State testified, on cross-examination, as follows:

> Q. And if you void a bladder, say 20 minutes after you voided the bladder, then you take a sample hypothetically, okay?
>
> A. Yes.
>
> Q. So, we know for a fact that that urine was produced at least after the void, is that correct?
>
> A. Yes.
>
> Q. So, if the void occurred 30 minutes after someone was driving, we know that the urine that you're testing after the void was not in the body at the time of driving, don't we?
>
> A. Yes.

Determining whether this evidence is of probative value is a legal question. The expert witness who performed the test on the sample clearly stated that the sample taken was not from urine that was in the defendant's body when he was operating his vehicle. In the absence of any testimony that the level of defendant's urine at the time of the testing could be related back to determine the concentration of alcohol in defendant's urine when he was driving, any relevance of the tested sample would be substantially outweighed by the danger of unfair prejudice or confusion of issues because the jury might find that defendant was guilty of a violation of § 39-669.07(4) because of the later urine-alcohol test. See Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1989)). It was error for the court to

admit the chemical test results and expert testimony thereon.

Error in admitting or excluding evidence in a criminal trial is prejudicial unless the State proves that the error was harmless beyond a reasonable doubt. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). The error in this case was not harmless because the evidence, as admitted, indicated that defendant had a concentration of .526 of 1 gram or more by weight of alcohol per 100 milliliters of his urine at a time not relevant to a violation under subsection (4). The evidence was submitted, however, and the jury could well have found defendant guilty as charged if the jury determined that defendant was operating his automobile at a time when he had more than ten-hundredths of 1 gram by weight of alcohol per 100 milliliters of his urine. The jury also might have determined that defendant was guilty of driving while under the influence of alcohol based on the nonscientific driving "while under the influence" evidence before the jury. It is impossible to determine the basis of the jury's verdict.

The State offered no other evidence that would establish the concentration of alcohol present in the defendant's urine at the time he was driving the vehicle. Thus, there was no evidence presented at trial to support a possible jury finding that the defendant had a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 100 milliliters of his urine. Since the jury returned a general verdict of guilty, we may not rely on the rule that, in a jury-waived trial, it will be presumed that the court does not consider improper evidence. The defendant is entitled to have a jury consider his guilt or innocence of driving while under the influence of alcoholic liquor without the prejudicial, irrelevant evidence of the urine test.

In so holding, we find that defendant's third summarized assignment of error is without merit. As set out above, there was evidence which, if believed by the jury, would support a finding that defendant was guilty of driving while under the influence of alcoholic liquor.

Since the cause is remanded for a new trial in county court, it is necessary to dispose of defendant's second summarized assignment of error, that the county court erred in determining that the defendant's conviction on the instant charge

constituted his third conviction for the offense of driving while intoxicated or while a certain concentration of alcohol was in his body fluid.

In this connection, the record shows that on July 12, 1984, defendant pled guilty to an amended complaint charging that on March 23, 1984, he was operating or in actual physical control of a motor vehicle when he had ten-hundredths of 1 percent or more by weight of alcohol in his body fluid. The original charge had included the phrase "Such being a second offense." The charge was amended from second offense to first offense. On July 12, 1984, defendant was found "guilty as charged." On October 5, 1984, defendant was sentenced to 7 days in jail, fined, and ordered not to operate a motor vehicle for 6 months.

On the same day as the above-discussed plea, July 12, 1984, defendant entered a plea of guilty to an amended complaint charging that on June 2, 1984, he was guilty of the same offense. This charge originally included the allegation that the June 2 offense was a second-offense charge because on January 31, 1981, defendant had been convicted of the same charge. On July 12, 1984, the prosection asked leave to amend the charge by striking second offense. After leave was granted to so amend the complaint, defendant pled guilty "as charged." Defendant was sentenced on October 5, 1984, to the same penalty as in the case set out in the preceding paragraph. The docket entry in this case included: "Jail sentences and suspensions to run concurrently." The same county judge entered orders in each case.

The record shows, therefore, that on the same day, defendant, with counsel, pled guilty to two first-offense driving while intoxicated charges and received concurrent sentences. The question presented is whether defendant's subsequent conviction would be a second offense or, as determined by the court, a third offense.

Defendant contends that the increasing penalties for successive offenses for driving or being in possession of motor vehicles under the conditions proscribed by the statute "closely parallel the Nebraska habitual criminal statute, §29-2221 [Reissue 1989]." Brief for appellant at 30. The State contends

that the issue is controlled by *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), *overruled on other grounds*, *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). In *Orosco*, in connection with the point before us, the defendant was convicted of third-offense drunk driving and raised the defense made in this case. The court stated:

> The two prior convictions were each charged as first offenses. The defendant contends that, before a third offense charge can be made, the defendant must first have been charged, convicted, and punished as a second offender under section 39-669.07 (2), R. R. S. 1943. He cites no authority for this proposition. We do not so read the statute. We hold that to be punished as a third offender, it is necessary only that the defendant be charged and found to have been twice previously convicted of driving while under the influence of intoxicating liquor.

State v. Orosco, supra at 543, 260 N.W.2d at 310.

Similarly, we hold the trial court could properly hold, in this case, that if defendant were convicted, it could be defendant's third conviction. To constitute a third-offense violation of § 39-669.07, it is necessary only that a violator be properly convicted of two previous violations of § 39-669.07, whether the earlier convictions be called first offense or second offense.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., concurring.

As the majority points out, the Legislature has created an offense which is defined by the amount of alcohol in the urine at the time the driver is arrested or stopped on suspicion of driving a motor vehicle while intoxicated. The offense assumes a relationship between alcohol in the blood, which affects the ability to operate a motor vehicle safely, and alcohol in the urine, which affects the intellectual and motor skills of an operator not at all.

The majority points out that the process of voiding and then testing a subsequent elimination after a period of time is not consistent with the crime created by the Legislature.

This initial voiding and subsequent testing of newly created

and eliminated urine has been described as, at best, an unreliable indicator of alcohol content in the blood. The legislative test of immediate elimination and testing is of no probative value at all. The driver who, after a drinking bout, allows the passage of time sufficient to have allowed the blood to have freed itself from alcohol will, prior to elimination of the urine, have a concentration of alcohol in his urine sufficient to declare him legally drunk and, yet, be completely sober.

With the availability of blood and breath tests, the urine test for alcohol ought to be simply abandoned as unreliable, unworkable, and in many situations, totally unjust.

SHANAHAN, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. MITCHELL WHITELEY, APPELLANT.
452 N.W.2d 290

Filed March 9, 1990. No. 89-225.

1. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel under the sixth amendment to the U.S. Constitution, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
2. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, the defendant has the burden to present a record which shows counsel's deficient performance in representing the defendant.
3. **Effectiveness of Counsel.** Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.
4. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel.
5. **Motions for New Trial: Appeal and Error.** A motion for a new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed.
6. **Sentences: Appeal and Error.** A sentence within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion on the part of the sentencing judge.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Vincent M. Powers for appellant.

Robert M. Spire, Attorney General, and Elaine A. Catlin for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal by defendant, Mitchell Whiteley, from his jury convictions of burglary, under Neb. Rev. Stat. § 28-507(1) (Reissue 1989), and possession of burglary tools, under Neb. Rev. Stat. § 28-508(1) (Reissue 1989). After trial, defendant filed a pro se motion for a new trial. Among other allegations in the motion, defendant alleged that his counsel at trial provided ineffective assistance. At the hearing, defendant's counsel was allowed to withdraw, and the motion for a new trial was overruled. New counsel was appointed to represent defendant for sentencing and for any possible appeal. Defendant was subsequently sentenced to 20 months' to 5 years' imprisonment for the burglary, a Class III felony, and to 15 months' to 3 years' imprisonment for the possession of burglary tools, a Class IV felony. The sentences were ordered to run concurrently, and credit was given for 84 days served, plus all good time earned. Defendant timely appealed.

Defendant, through his appellate counsel, alleges that the trial court erred (1) in not granting defendant's motion for new trial, specifically in failing to find that the appellant received ineffective assistance of counsel; (2) in allowing the prosecutor to ask questions and the appellant to answer questions concerning the appellant's prior criminal record, in violation of Neb. Rev. Stat. §§ 27-609 and 27-404(1) (Reissue 1989); and (3) in imposing an excessive sentence. We affirm.

The record shows the following. On June 18, 1988, at 3:06 a.m., the Lincoln, Nebraska, manager of Cubs Distributing received a telephone call from Cubs' security company, which monitored the Cubs' warehouse at 3333 North 20th Street in Lincoln. The security company informed the manager that heat

and motion detectors in one zone in Cubs' warehouse had been triggered. A minute later, the manager received a second call from the security company, informing him that detectors had been triggered in another zone. He instructed the security personnel to call the police, and he drove to the warehouse, arriving at approximately 3:20 a.m. He was met there by police officers, who informed the manager that someone had been apprehended coming out of the warehouse.

Lincoln Police Officer John Donahue received a dispatch at 3:14 a.m. that a silent alarm had been triggered at Cubs' warehouse. He arrived at the warehouse 2 minutes later. He parked his cruiser southeast of the warehouse and approached a door on the east side of the warehouse. He peered through the window on the upper half of the door and saw a white male about 20 feet from the door. The officer identified this person, at trial, as the defendant. The evidence indicated that the warehouse lights were not on, but a soft drink machine light and a night-light illuminated the area inside the east door.

Officer Donahue testified that the defendant made eye contact with him and then ran, inside the warehouse, toward the northern end. Donahue pursued the defendant by running north along the outside east side of the warehouse. After running approximately 60 feet, Officer Donahue turned the northeast corner of the warehouse and observed the defendant's head, as defendant was crawling out of a hole in the north wall of the warehouse. Officer Donahue ran toward the defendant, drew his service revolver, grabbed the defendant's arm, and arrested him. This occurred just after defendant had completely emerged from the building through the hole.

The manager of Cubs testified that the hole was created in a previous burglary in December 1986, when unknown burglars had unbolted a metal panel, peeled it back, ripped through insulation, and then cut through an internal metal panel. The outer metal panel was repaired and rebolted, but the holes in the insulation and internal metal were not repaired. In reaction to the earlier burglary, Cubs installed the security system and no longer left large amounts of cash in the warehouse office file cabinets.

Officer Donahue escorted the defendant to his cruiser and

then patted him down. He discovered a screwdriver and Vise-Grips in the defendant's jacket pocket and another, larger screwdriver held against the defendant's body by the elastic around the waist of his jacket. In defendant's left front pants pocket the officer found $104 in cash and a lighter. Officer Todd Beam arrived as Officer Donahue was conducting this search.

Other officers, including a "canine unit," arrived at the warehouse to "set up a perimeter" and to search the warehouse for accomplices. None were found. When it was determined that the warehouse was secure, Officer Beam removed the defendant from the rear seat of the cruiser and conducted a more thorough, pocket by pocket, search of the defendant. Officer Beam found $8 in bills and $7.10 in coins in the defendant's right front pants pocket and also found a wallet and some keys.

Other officers, equipped with fingerprinting equipment and a camera, and the manager reentered the warehouse to collect evidence. Two file cabinets and a desk drawer were found open in the office area. All appeared damaged from being pried open, although there was testimony that one of the cabinets had been damaged during the December 1986 burglary.

The manager testified that the cabinets were locked before he left the warehouse the evening of June 17 and that $8 was missing from the bank bag which was kept in one of the file cabinets. No fingerprints were found. Officer Donahue testified that the defendant was wearing gloves when he handcuffed the defendant and identified the gloves worn by the defendant as those later found tucked under the back seat of Officer Beam's cruiser, where defendant had been placed. A "tire iron" and a flashlight were found outside, below the hole in the north wall of the warehouse. Officer Donahue testified that he saw the defendant drop the flashlight as he was being handcuffed. Several screws or bolts were also found on the ground outside of the hole.

Defendant's defense was outlined in the opening statement of defendant's trial counsel. Counsel told the jury that defendant anticipated that the police would testify that defendant was seen inside the burglarized building and arrested defendant as he was

coming out of the building. Counsel went on to say that defendant would deny everything the police said and would tell the jury about how the police harassed him and that the police had not been successful in convicting defendant, although they believed defendant had been involved in more than 100 burglaries. Counsel stated to the jury that the defense believed that the "police officers are going to come in here and deliberately, consciously lie."

Defendant maintained throughout the proceedings that the police were not telling the truth and that they framed him. He testified that on June 17, 1988, he received his paycheck in the amount of $229.80, went to the post office and mailed his wife $100, and then went to a bar at 27th and Holdrege Streets in Lincoln, where one of his friends worked as manager. Defendant testified that he had a couple of drinks and remained in the bar until 2 a.m., talking to his friend. He testified that he and his friend then went out to the parking lot of the bar and talked for about an hour about fixing up his friend's truck, which was in the parking lot. His friend corroborates the latter part of this testimony and testified that they each got into vehicles and left the parking lot at about 3 a.m.

Defendant testified that after leaving the parking lot he went to a convenience store to get a soft drink and that he then proceeded to an apartment building located immediately west of Cubs' warehouse because he had heard that there was going to be a party in apartment No. 2 of that building. The occupant of apartment No. 2 testified that she did not know defendant, that she was out of town on the weekend of June 17, 1988, and that as far as she knows there was no party in her apartment or in her apartment building during that weekend. Defendant testified that he was arrested by Officer Donahue as he was walking up to the apartment building.

As stated above, the theory of the defense was that defendant was framed because law enforcement personnel had become frustrated in their attempts to prosecute defendant legitimately. In the cross-examination of Officer Beam, the defense presented evidence in the form of a police interdepartment memorandum stating that defendant was a suspect in over a hundred burglaries, in several counties, and that in March 1987

a task force was created to investigate defendant and some of his associates. The investigation involved formal cooperation between the Nebraska State Patrol and the Lancaster County Sheriff's Department, and informal cooperation with the Lincoln Police Department.

We first discuss defendant's assignment of error concerning the trial court's failure to sustain his motion for a new trial based upon the alleged ineffectiveness of his counsel. In his pro se motion for a new trial, defendant alleged that the assistance of his attorney was ineffective for the following reasons:

> 1. He failed to appear at proceedings leading up to the Defendants [sic] trial.
>
> 2. Whenever the Defendant would file a Pro-se motion, [the defense attorney] would argue against the motion.
>
> 3. [The defense attorney] failed to call witnesses in behalf of the Defendant which could have resulted in a not guilty verdict.
>
> 4. Despite ordering him to do so, [the defense attorney] refused to call an expert witness to give expert testimony pursuant to Neb Rev Stat (Reissue 1985) 27-702. This being a professor of criminal justice who has specialized knowledge of facts relating to the case. His testimony would have resulted in a verdict of not guilty.
>
> 5. Despite The [sic] Defendant wanting [the defense attorney] to subpoena transcripts and tapes of police radio communications of the early morning hours of june [sic] 18th and the night of June 17th, 1988, [the defense attorney] failed to do so.
>
> 6. [The defense attorney] did prejudice himself against the Defendant at a meeting of the attorneys at the Bench. This occurring before the jury was brought in for voire [sic] dire process. When asked who would be conducting the trial, [the defense attorney] replied. "Idon't [sic] know who is going to handle it and I really don't care what happens to him in this case".

At the hearing on the motion for a new trial, defendant and his trial counsel were present. In view of the allegations in defendant's pro se motion, trial counsel requested and was allowed to withdraw. In the affidavit attached to the motion to

withdraw, defendant's trial counsel stated that he believed "the record will be inadequate for purposes of review by the trial court and . . . on appeal without the testimony of [defendant's counsel] being available . . . for purposes of the defendant's motion for new trial." The court asked defendant: "Do you want to take [the motion for new trial] up now . . . or do you want to wait until after you've gotten counsel appointed?" Defendant stated that he would take up the motion "now" and argued the motion personally. In so doing, defendant made general statements to the trial court indicating that his prior counsel did not care about the case and did not adequately investigate the case. Although his former defense counsel was present, defendant declined to call him as a witness.

To sustain a claim of ineffective assistance of counsel under the sixth amendment to the U.S. Constitution, "the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." *State v. Hawthorne*, 230 Neb. 343, 347, 431 N.W.2d 630, 633 (1988). See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *State v. Uwanaka*, 230 Neb. 808, 809, 433 N.W.2d 540, 541 (1989), we added: "To sustain a claim of ineffective assistance of counsel, the defendant has the burden to present a record which shows counsel's deficient performance in representing the defendant."

Defendant has not demonstrated a deficiency in counsel's performance or prejudice from the conduct of counsel in this case. Defense counsel has " 'a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' " *State v. Painter*, 229 Neb. 278, 281, 426 N.W.2d 513, 516 (1988) (quoting *Strickland, supra*). We have also stated: "The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel." *State v. Fries*, 224 Neb. 482, 485, 398 N.W.2d 702, 704 (1987). The defendant's conclusory allegations pertaining to counsel's failure to investigate and to call witnesses are insufficient to

demonstrate either deficiency or prejudice. The defendant has not made a single specific allegation as to any information available to his counsel which called for alternative conduct. For instance, there is no allegation as to the nature of any exculpatory evidence that would be presented by the witnesses not called by defense counsel or within the tapes of the radio dispatches desired by the defendant. Consequently, the defendant did not meet his burden to prove that his defense counsel's investigation was unreasonable or that failure to obtain or submit evidence prejudiced him.

The general allegations pertaining to the pro se motion are likewise insufficient. Defendant has not provided a record of any deficiency of counsel with regard to the pro se motion or prejudice caused by the alleged obstruction by defense counsel. The record supports the conclusion that all of defendant's nonfrivolous motions were granted.

As we stated in *State v. Tainter*, 218 Neb. 855, 857, 359 N.W.2d 795, 796-97 (1984),

> A motion for a new trial is addressed to the sound discretion of the trial court, and unless an abuse of discretion is shown, its determination will not be disturbed. [Citation omitted.] The asserted ground for a new trial must affect adversely the substantial rights of the defendant, and it must be shown that [the defendant] was prejudiced thereby. [Citation omitted.]

Defendant failed to demonstrate the ineffectiveness of his counsel, and we hold that the trial court did not abuse its discretion in overruling the motion for a new trial. The first assignment of error is without merit.

The second assignment of error refers to evidence elicited by the prosecution as to the nature of the defendant's past felony and misdemeanor convictions. The defendant cites *State v. Olsan*, 231 Neb. 214, 222, 436 N.W.2d 128, 134 (1989), where we stated that under Neb. Evid. R. 609, " '[w]hen a defendant testifies on his own behalf, the prosecuting attorney may question him as to his previous convictions for felony and the number thereof, but no details as to the nature of the charges or other details may be elicited or received.' " On direct examination, defendant, in response to a question whether he

had been convicted of any felonies in the past 10 years, stated that he had been convicted of two felonies, one in 1978 and one in 1979. On cross-examination the prosecution inquired into the nature of these convictions, and defendant answered that the first was for breaking and entering and the second was for burglary. There was no objection to the questions or the answers. As we stated in *Olsan, supra* at 223, 436 N.W.2d at 134-35, " '[i]f a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error.' " See, also, *State v. Chapman, ante* p. 369, 451 N.W.2d 263 (1990). In *Olsan,* we found that sufficient objection was raised to the inquiry by the prosecution at trial, and that case is distinguishable. The defendant waived his right to assert this error on appeal by failing to object at trial. In the case before us, trial counsel's failure to object might have been consistent with the defense based on police suspicion of defendant, which, defendant alleged, caused the police to attempt to frame him. In this different case, defendant put into evidence the interdepartment memorandum containing his police record, which included the same information elicited by the prosecution. It cannot be said that the State could not inquire into that record.

Defendant then argues that the trial court had a duty to assert its own objection to the prosecution's inquiries beyond the existence and number of felony convictions, and erred in not doing so. There was no such duty on the part of the trial court. The second assignment of error is without merit.

In his third assignment of error, defendant contends that the trial court was vindictive in sentencing him and that his sentences are excessive. Defendant contends that the statement by the trial court at sentencing that "[defendant] approached this whole thing, the proceedings, as if he were smarter than his counsel . . . who is an extremely capable counsel and who did an excellent job for him throughout all of the proceedings, including the trial," speaks for itself as to vindictiveness. We agree. The statement is not evidence of vindictiveness.

With reference to defendant's claim that his sentences are excessive, we have stated that "a sentence within the limits prescribed by statute will not be set aside as excessive absent an

abuse of discretion on the part of the sentencing judge." *State v. Kitt*, 231 Neb. 52, 56, 434 N.W.2d 543, 546 (1989). Defendant's presentence investigation report shows that he was placed on 5 years' probation in 1977 for burglary; was sent to prison for 1 year for burglary in 1978; and, in 1983, was again sent to prison for 1 year for theft by receiving. The sentences in this case are within prescribed statutory limits, and the trial court did not abuse its discretion in imposing the sentences. The third assignment of error is without merit. The district court's judgment is affirmed in all respects.

AFFIRMED.

DOUGLAS L. HARDY, APPELLEE, V. CINDY G. HARDY, APPELLANT, ELDON HARDY AND KAY HARDY, INTERVENORS-APPELLEES.

452 N.W.2d 296

Filed March 9, 1990. No. 89-330.

Appeal from the Separate Juvenile Court of Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Joseph Lopez Wilson, Legal Aid Society, for appellant.

James Walter Crampton for intervenors-appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is an action in which respondent, Cindy G. Hardy, appeals from an order of the separate juvenile court of Douglas County, acting as a district court, granting custody of her two minor children to the children's paternal grandparents. Child custody determinations are initially entrusted to the discretion of the trial court and will be affirmed in the absence of an abuse of that discretion. We have reviewed the trial court's judgment

de novo on the record, as we are required to do, and determine that the trial court did not abuse its discretion. Accordingly, the order of the trial court is affirmed.

AFFIRMED.

MARY M. HARWAGER, APPELLEE, V. DOUGLAS HARWAGER, APPELLANT, EARL AND HELEN HARWAGER, INTERVENORS-APPELLEES.

452 N.W.2d 296

Filed March 9, 1990. No. 89-401.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Douglas Harwager, pro se.

Donald H. Bowman and Mark J. Krieger for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Respondent husband appeals from the judgment of the district court for Lancaster County, Nebraska, which modified a decree of dissolution, and alleges that the district court abused its discretion concerning visitation rights and in denying appellant's request for a reduction of child support.

"A judgment concerning modification of a decree of dissolution of marriage is reviewed by this court de novo on the record." *Morisch v. Morisch*, 218 Neb. 412, 413, 355 N.W.2d 784, 785 (1984).

> In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is

> in conflict, the Supreme 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.

Huffman v. Huffman, 232 Neb. 742, 747-48, 441 N.W.2d 899, 903-04 (1989); *Ritter v. Ritter, ante* p. 203, 450 N.W.2d 204 (1990).

From our de novo review of the record, we find no abuse of discretion by the district court.

AFFIRMED.

IN RE APPLICATION OF ROGER SLACK AND DONALD L. SLACK, DOING BUSINESS AS SLACK TRUCK LINE. ROGER SLACK AND DONALD L. SLACK, DOING BUSINESS AS SLACK TRUCK LINE, APPELLANTS, V. SCHROETLIN TANK LINE, INC., ET AL., APPELLEES.

452 N.W.2d 538

Filed March 16, 1990. No. 88-406.

1. **Public Service Commission: Appeal and Error.** In appeals from the Public Service Commission, the Supreme Court reviews the record to determine whether the commission acted within the scope of its authority and whether the commission's order was unreasonable or arbitrary.
2. _____: _____. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.
3. **Public Service Commission: Motor Carriers.** Authority for a contract carrier will be granted if (1) the applicant is fit, willing, and able to properly perform the service of a contract carrier and to conform to statutory provisions and the requirements, rules, and regulations of the Public Service Commission, and (2) the proposed operation will be consistent with the public interest by providing the services designed to meet the distinct needs of each customer or class of customers.
4. **Public Service Commission: Motor Carriers: Proof.** The applicant has the burden to establish that its proposed service is specialized and fits the needs of the proposed contracting shipper or shippers; that it is fit, willing, and able to perform the service; and that the proposed operation will be consistent with the public interest.
5. _____: _____: _____. If the service proposed by the applicant can be

performed as well by common carriers, the application should be denied because a need for a contract carrier has not been established.

6. **Public Service Commission: Motor Carriers.** The Public Service Commission must weigh the special requirements of the shipper against the adequacy of the existing common carrier service.
7. _____: _____. In determining whether a shipper's operation constitutes private carriage or for-hire carriage, the primary factors to be considered are exclusive shipper control of the equipment and responsibility for operation of the transportation.
8. _____: _____. The mere fact that a shipper has a preference for a contract carrier or that it intends to conduct private carriage operations does not warrant the authorization of the proposed service.

Appeal from the Nebraska Public Service Commission. Affirmed.

Barry L. Hemmerling, of Jeffrey, Hahn, Hemmerling & Wade, P.C., for appellants.

Jack L. Shultz and Gregory D. Barton, of Nelson & Harding, and James E. Ryan, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

On May 28, 1987, Roger Slack and Donald L. Slack, doing business as Slack Truck Line, filed their application with the Nebraska Public Service Commission for authority to operate as a contract carrier for Scoular-Bishop, Inc., and Double Circle Co-op of Gibbon, Nebraska, to haul fertilizer and fertilizer ingredients, including anhydrous ammonia, over irregular routes between all points in Nebraska. The applicants have no authority of any kind issued by the Public Service Commission.

Protests to the application were filed by Schroetlin Tank Line, Inc., Central Transportation Co., Inc., Wynne Transport Service, Inc., Herman Bros., Inc., Fitch Trucking, Inc., Nebraska Bulk Transports, Inc., and Wheeler Transport Service, Inc. After a hearing on September 17, 1987, the commission entered its order denying the application.

The commission found that the applicants were not fit, willing, and able to properly perform the service of a contract

carrier and that the proposed operation would not be consistent with the public interest because the transportation of the subject commodities could be performed as well by common carriers as by the contract carrier service proposed. The applicants have appealed.

The record shows that in 1980 or 1981, the applicants began hauling fertilizer for Scoular pursuant to Scoular's lease of Slacks' equipment. Under the lease, the equipment was to be the sole and exclusive property of Slacks. Possession and control of the equipment was in Scoular while Scoular was using it. Slacks had possession and the right to operate the equipment for Slacks' own use when it was not being used or operated by Scoular.

Under Slacks' lease with Scoular, Slacks provided the equipment, as well as the drivers. Slacks provided workers' compensation coverage on the drivers under the lease. Slacks withheld the drivers' federal and state income taxes and made unemployment contributions on the drivers. When questioned about the control of the equipment as provided by the lease, Roger Slack admitted Scoular's control was "not really an exclusive control."

Slacks haul 50 percent of Scoular's anhydrous ammonia and 70 to 75 percent of Scoular's liquid fertilizer. About 10 percent of Scoular's fertilizer is hauled by common carriers; the remainder is hauled by rail. Slacks cannot handle all of Scoular's fertilizer that is not hauled by rail and could not under the proposed contract. Scoular uses Central Transportation, one of the protesting carriers, to haul what Slacks cannot.

Gene Carstens, the manager of Scoular's fertilizer division, testified that the fertilizer season is very short. It lasts for 3 to 5 weeks, depending on the weather. During that time, Scoular moves 20,000 to 30,000 tons of fertilizer.

Scoular has four blend plants which serve all of its other satellite plants. The blend plants operate around the clock during the peak of the fertilizer season, and trailers must be available at all hours to haul the fertilizer away because there are not sufficient storage facilities.

Slacks' drivers have keys to the plants because Scoular personnel are not available at all hours of delivery. The drivers

know where the product goes and help keep a continuous flow of the product. Carstens believes Scoular maintains its competitive edge because of the services provided by Slacks. Scoular will not give keys to other common carriers.

Scoular prefers Slacks because their operators are so familiar with its business, and there have never been problems such as spills or fertilizer being put into the wrong tank. Six years prior to trial, Scoular had these types of problems with the common carriers it used.

Scoular will continue to use Central Transportation for its portion of Scoular's business because it does a great job, but it will not use any other common carriers if Slacks' application is denied. Instead, it will haul its own product.

All of the protesting carriers have authority and equipment to haul fertilizer. The protesting carriers' witnesses testified they are not operating at capacity and that their transportation of fertilizer has decreased since 1986 because of government farm programs, customers hauling their own product, and general business slowdown. Carstens testified that Scoular's fertilizer business had declined in the past year. The protesting carriers provide the services described by Scoular and would like additional business.

In appeals from the Public Service Commission, the Supreme Court reviews the record to determine whether the commission acted within the scope of its authority and whether the commission's order was unreasonable or arbitrary. *In re Application of Koch Service*, 228 Neb. 631, 423 N.W.2d 767 (1988); *In re Application of Silvey Refrig. Carr.*, 226 Neb. 668, 414 N.W.2d 248 (1987).

> " ' " ' "Whether we agree or disagree with the decision of the commission . . . is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it. . . ." ' " ' "

In re Application of Koch Service, supra at 632-33, 423 N.W.2d at 769 (quoting *In re Application of Silvey Refrig. Carr., supra*).

Neb. Rev. Stat. § 75-311 (Reissue 1986) provides that

authority for a contract carrier will be granted if (1) the applicant is fit, willing, and able to properly perform the service of a contract carrier and to conform to statutory provisions and the requirements, rules, and regulations of the commission, and (2) the proposed operation will be consistent with the public interest by providing the services designed to meet the distinct needs of each customer or class of customers.

The applicant has the burden to establish that its proposed service is specialized and fits the needs of the proposed contracting shipper or shippers; that it is fit, willing, and able to perform the service; and that the proposed operation will be consistent with the public interest. *In re Application of Koch Service, supra.*

If the service proposed by the applicant can be performed as well by common carriers, the application should be denied because a need for a contract carrier has not been established. *In re Application of Koch Service, supra*; *In re Application of Silvey Refrig. Carr., supra*; *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 159 N.W.2d 310 (1968). Accordingly, the commission must weigh the special requirements of the shipper against the adequacy of the existing common carrier service. *In re Application of Koch Service, supra.*

In this case, the specialized needs of the shipper were night delivery, the issuance of keys to drivers, ability to reroute on short notice, and immediate availability of trucks at the plants. All of the protesting carriers testified they could provide these services. Scoular had no complaints regarding the service it received from Central Transportation and had not attempted to use any of the other protesting carriers in the past 6 years.

Other evidence to consider in determining whether the grant of contract carrier authority is consistent with the public interest is the effect on protesting carriers of a grant of the application and the effect on the shippers of a denial. *In re Application of Koch Service, supra.*

Slacks contend the commission's findings and refusal to apply the "color of authority" doctrine to their operations were erroneous. Slacks claim Scoular was the shipper of its products in this case; therefore, no authority was required for it to haul

its own products. Slacks also argue that regardless of the legality of their operations with Scoular, their application should have been granted because they had been operating under color of authority. Slacks had no authority from the commission to haul fertilizer, but claim no authority is required for a grain company (Scoular) to haul its own product. Although Slacks claim their equipment had been leased to Scoular, the lease between Scoular and Slacks was illegal because Slacks had operated for a year and a half with only $1 million coverage in liability insurance when they knew $5 million was required. Slacks applied for authority to haul fertilizer only because their insurance carrier informed Slacks that they could not increase their liability coverage from $1 million to $5 million without authority.

In the present case, the color of authority doctrine was not applicable. Slacks were operating with no authority. Furthermore, the evidence shows that the applicants were aware that authority was required to haul fertilizer and anhydrous ammonia, but did not seek authority until they were no longer able to carry on operations under the lease with Scoular. The evidence also establishes that Slacks were unwilling to conform to the applicable statutes and the commission's rules, because they operated for a year and a half without the requisite amount of liability insurance. The record supports the finding by the commission that Slacks were unfit to perform the services of a contract carrier because they had not complied with the statutes and the rules of the commission and had operated for a year and a half with less than the minimum required amount of liability insurance. The Scoular lease provided that Slacks "shall provide both liability and cargo insurance," and there is no testimony by Scoular that it provided coverage if Slacks' insurance did not cover losses. Roger Slack testified that he assumed Scoular would have been liable for any losses exceeding Slacks' coverage, but he did not know whether Scoular had any insurance on the equipment. This evidence supports the commission's finding of unfitness.

The commission found that Slacks' lease with Scoular constituted carriage for hire rather than private carriage.

In determining whether a shipper's operation constitutes

private carriage or for-hire carriage, the primary factors to be considered are exclusive shipper control of the equipment and responsibility for operation of the transportation. See *Lease of Equipment and Drivers to Private Carriers*, 132 M.C.C. 756 (1982). Roger Slack testified that Scoular's control was "not really an exclusive control" of the equipment. The terms of the lease show that it was Slacks' responsibility to "keep the Equipment in good running condition . . . pay for all maintenance, repairs, licenses and . . . provide both liability and cargo insurance." The lease also provided that Slacks were to provide the drivers. The drivers were Slacks' employees. Slacks paid the drivers' workers' compensation and unemployment contributions and withheld their state and federal income taxes. This evidence supports the commission's determination that Slacks and Scoular's lease constituted for-hire transportation services.

Scoular testified that it would transport its own product if the application were denied; however, "[t]he mere fact that a shipper has a preference for a contract carrier or that it intends to conduct private carriage operations does not warrant the authorization of the proposed service." *Brown Refrigerated Exp., Inc., Contr. Car. Applic.*, 120 M.C.C. 146, 157 (1973).

The record supports the commission's finding that a grant of contract carrier authority to the applicants would not be consistent with the public interest because the protesting carriers can provide the shipper's needed services as well as can the applicants.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDOLPH K. REEVES, APPELLANT.

453 N.W.2d 359

Filed March 16, 1990. No. 88-972.

1. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
2. _____: _____. A defendant in a postconviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution.
3. **Postconviction: Proof: Appeal and Error.** One seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly wrong.
4. **Postconviction: Effectiveness of Counsel: Proof.** When, in a postconviction motion, a defendant alleges a violation of his or her constitutional right to effective assistance of counsel, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as an attorney with ordinary training and skill in the criminal law in the area. Further, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions.
5. _____: _____: _____. A defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
6. **Constitutional Law: Criminal Law: Effectiveness of Counsel: Death Penalty.** The sixth amendment's requirement of effective assistance of counsel applies to a capital sentencing proceeding in the same manner in which it applies to the conviction phase of a criminal proceeding.
7. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact, including the credibility and weight to be given the testimony of a witness, and the trial court's findings will be upheld unless the findings are clearly erroneous.
8. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances: Other Acts.** It is constitutionally permissible to allow the sentencing judge or judges in a capital case to consider unadjudicated misconduct in determining the existence or nonexistence of a mitigating circumstance, provided the defendant is given an opportunity to rebut the charges.
9. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances: Prior Convictions.** It is constitutionally permissible to allow the sentencing judge or judges in a capital case to consider prior uncounseled convictions in determining the existence or nonexistence of a mitigating circumstance.
10. **Death Penalty: Aggravating and Mitigating Circumstances: Proof.** There is no burden of proof with regard to mitigating circumstances. The State may present

evidence which is probative of the nonexistence of a statutory or nonstatutory mitigating circumstance, while the defendant may present evidence which is probative of the existence of a statutory or nonstatutory mitigating circumstance. However, because Neb. Rev. Stat. §§ 29-2521 et seq. (Reissue 1989) do not require the State to disprove the existence of mitigating circumstances, they do place the risk of nonproduction and nonpersuasion on the defendant.

11. **Constitutional Law: Homicide: Sentences.** Neb. Rev. Stat. § 29-2520 (Reissue 1989) is not unconstitutional.
12. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances.** Neb. Rev. Stat. § 29-2523(2) (Reissue 1989) is not unconstitutional.
13. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances.** The federal Constitution does not require the sentencing judge or judges to make specific written findings with regard to nonstatutory mitigating factors.
14. **Constitutional Law: Homicide: Death Penalty: Aggravating and Mitigating Circumstances: Notice.** The specific delineation of aggravating factors in Neb. Rev. Stat. § 29-2523 (Reissue 1989) constitutes sufficient notice to a defendant who is charged with first degree murder. The State is not constitutionally required to provide the defendant with notice as to which particular aggravating circumstance or circumstances the State will rely upon in pursuing the death penalty.
15. **Death Penalty: Aggravating and Mitigating Circumstances.** Neb. Rev. Stat. § 29-2523 (Reissue 1989) exclusively lists the aggravating factors which may be relied upon in imposing the death penalty.
16. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances.** Mitigating circumstance (2)(c) of Neb. Rev. Stat. § 29-2523 (Reissue 1989), which limits mental or emotional disturbance to cases which are extreme, is not constitutionally infirm where court decisions permit consideration of any aspects of mitigation.
17. **Constitutional Law: Homicide: Indictments and Informations.** A state is not constitutionally required to prosecute capital cases by grand jury indictment only.
18. **Homicide: Intent.** No specific intention is required to constitute felony murder other than the intent to do the act which constitutes the felony during which the murder occurred.
19. _____: _____. There need not be an intent to kill in felony murder, only an intent to commit the underlying felony.
20. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances.** Aggravating circumstance (1)(b) of Neb. Rev. Stat. § 29-2523 (Reissue 1989) is not unconstitutionally vague.
21. **Constitutional Law: Supreme Court: Death Penalty: Sentences: Appeal and Error.** This court's interpretation of 1978 Neb. Laws, L.B. 711, to include in its proportionality review only those cases in which the death penalty was imposed, does not violate the separation of powers clause of Neb. Const. art. II.

22. **Postconviction.** A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.
23. **Constitutional Law: Death Penalty: Intoxication.** Imposing the death penalty on a defendant who cannot recollect the circumstances of the crime due to voluntary intoxication does not constitute cruel and unusual punishment under the eighth amendment.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

John Stevens Berry, Thomas R. Lamb, and Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, P.C., and Stanley D. Cohen and, on brief, Deborah K. Long for appellant.

Robert M. Spire, Attorney General, Harold I. Mosher, and Sharon M. Lindgren for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is an appeal from the Lancaster County District Court's denial of postconviction relief. We affirm.

The facts are set forth in this court's decision on direct appeal. See *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). In 1981, appellant was convicted of two counts of first degree murder in the 1980 deaths of Janet Mesner and Victoria Lamm. He was prosecuted under a felony murder theory, the State alleging that the deaths occurred in the commission or attempted commission of a sexual assault in the first degree. At trial appellant argued that he was not guilty of the felony murder counts because of his inability (due to voluntary ingestion of mescaline and alcohol) to form the requisite intent needed for a first degree sexual assault or an attempted first degree sexual assault. Alternatively, in the event the jury found

that he could entertain the intent to commit the sexual assault or attempted sexual assault, he pled not guilty by reason of insanity. At the conclusion of the trial the jury found appellant guilty on both counts of first degree murder.

Appellant was later sentenced by a three-judge panel to death for each conviction. The sentencing panel found with regard to the death of Victoria Lamm the existence of the aggravating circumstance described in Neb. Rev. Stat. § 29-2523(1)(b) (Reissue 1989), which reads: "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." The panel also found the existence of the aggravating circumstance stated in § 29-2523(1)(d), which reads: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." Lastly, the panel found the existence of the aggravating circumstance at § 29-2523(1)(e), which reads: "At the time the murder was committed, the offender also committed another murder."

With regard to the death of Janet Mesner, the panel found the existence of aggravating circumstances (1)(d) and (1)(e).

The panel found that no statutory mitigating circumstances existed with regard to either murder. The panel also considered nonstatutory mitigating factors proposed by appellant.

On direct appeal, this court affirmed appellant's convictions and sentences. We affirmed the panel's findings of aggravating circumstances (1)(d) and (1)(e) with regard to the death of Janet Mesner; however, with regard to the murder of Victoria Lamm, we determined that the panel erred as a matter of law in finding the existence of aggravating circumstance (1)(d), although we affirmed the panel's findings of aggravating circumstances (1)(e) and (1)(b).

We further found that the mitigating circumstance described in § 29-2523(2)(g), which reads "At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication," existed as a matter of law with respect to both murders.

Postconviction proceedings were filed pursuant to Neb. Rev.

Stat. § 29-3001 (Reissue 1989) in Lancaster County District Court. After several amendments in the motion, new counsel was appointed and further amended motions for postconviction relief were filed. The district court dismissed most of appellant's contentions but granted an evidentiary hearing on his sixth amendment claim of ineffective assistance of trial counsel. After the evidentiary hearing, the district court dismissed appellant's fourth amended motion for postconviction relief, and he appeals to this court.

"A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated." *State v. Pribil*, 227 Neb. 397, 400, 417 N.W.2d 786, 789 (1988). "Additionally, a defendant in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution." *State v. Hochstein*, 216 Neb. 515, 517, 344 N.W.2d 469, 472 (1984). One seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Harton*, 230 Neb. 167, 430 N.W.2d 313 (1988).

In his postconviction motions appellant has alleged numerous constitutional errors relating to his convictions and sentences. He has also alleged that his trial counsel were ineffective because they failed to raise, or to adequately raise, these issues on direct appeal. Although we recognize we are not obligated to do so, we have considered each of the arguments made to this court on its merits in the context of appellant's sixth amendment claim of ineffective assistance of counsel.

Appellant first argues that the district court erroneously dismissed his fourth amended motion for postconviction relief regarding trial counsel's ineffectiveness at the sentencing phase of his murder trial. On appeal to this court, appellant specifically alleged that

> his attorneys [sic], Richard Goos and Dennis Keefe, failure to review the Pre-Sentence Investigations Report (hereinafter "PSI") with him prior to his sentencing hearing, their failure to object to the receipt of Appellant's

> arrest record (Exhibit 23) set forth within the PSI, their failure to investigate and to verify his prior arrest record in Lancaster and Merrick Counties and their failure to determine actual disposition of unadjudicated charges and to identify uncounseled convictions, fails [sic] outside "the wide range of professional [sic] competent assistance of counsel."

Brief for appellant at 5.

Generally, these alleged deficiencies can be categorized as (1) a failure to investigate, review, and verify the arrest record contained in the presentence investigation (PSI) prior to the sentencing hearing, and (2) a failure to object to the admission of the arrest record into evidence during the sentencing hearing. Each will be addressed in turn.

The arrest record contained in the PSI was used to find the nonexistence, or to negate the existence, of the mitigating circumstance stated in § 29-2523(2)(a), which reads: "The offender has no significant history of prior criminal activity." Appellant contends that had trial counsel challenged individual offenses on the arrest record, the arrest record would have become so insubstantial that the sentencing panel would have found the existence of mitigating circumstance (2)(a), and therefore it is likely appellant would have received life imprisonment and not the death penalty because the aggravating and mitigating circumstances would have been balanced at two each.

When, in a postconviction motion, a defendant alleges a violation of his or her constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as an attorney with ordinary training and skill in the criminal law in the area. Further, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions. See *State v. Domingus, ante* p. 267, 450 N.W.2d 668 (1990) (quoting *State v. Meis*, 233 Neb. 355, 445 N.W.2d 610 (1989)). A defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense. *Domingus, supra.*

The sixth amendment's requirement of effective assistance of counsel applies to a capital sentencing proceeding in the same manner in which it applies to the conviction phase of a criminal proceeding. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including the credibility and weight to be given the testimony of a witness, and the trial court's findings will be upheld unless the findings are clearly erroneous. *Domingus, supra.*

Initially, we address appellant's contention that the district court erroneously limited area standards of criminal attorneys to Lancaster County. In *State v. Peery*, 223 Neb. 556, 565, 391 N.W.2d 566, 573 (1986), this court stated that "[i]n order to so establish [ineffectiveness of counsel], the evidence must show that the attorney failed to perform at least as well as an attorney with ordinary training and skill in the criminal law *practicing in the community in which the trial is held . . .*" (Emphasis supplied.) Later, in *State v. Fries*, 224 Neb. 482, 485, 398 N.W.2d 702, 704 (1987), we stated that the standard for determining ineffective assistance of counsel "imposes upon attorneys the duty to represent criminal clients in a manner consistent with *the prevailing professional standard within their community.*" (Emphasis supplied.) In the present case the district court did not err when it refused to consider testimony of Douglas County Chief Deputy Public Defender Tom Riley, who testified for appellant as to the standard of performance for assistance of counsel, because he had not participated in a trial in Lancaster County.

After a thorough review of the record, we conclude the evidence clearly indicates the district court's findings were not erroneous. With regard to the contention that counsel failed to investigate, review, and verify appellant's arrest record contained in the PSI prior to the sentencing hearing, findings 9 and 10 of the October 28, 1988, order regarding the fourth amended motion for postconviction relief state as follows:

> 9) That contrary to defendant's allegation that his counsel failed to verify the defendant's criminal activity

contained in the presentence investigation report, counsel verified defendant's record prior to receiving the investigation report and counsel was already aware of the information contained in the report. Further, upon reviewing the report's contents, counsel believed it to accurately reflect the defendant's history of criminal activity.

10) That counsel verified defendant's history of criminal activity by interviewing the defendant, the defendant's parents, Tony Lieb, Julie Gray and by reviewing the materials obtained through discovery from the Lancaster County Attorney's Office. Further, counsel investigated the more serious allegations made against the defendant which were that he had been involved in an assault committed upon Tony Lieb and an attempted sexual assault on Julie Gray.

The evidence presented at the evidentiary hearing clearly shows that counsel were fully aware of the contents of the arrest record and had investigated and verified its accuracy through various sources, including the appellant himself. Counsel knew it contained unadjudicated misconduct and uncounseled convictions and concluded the arrest record was accurate.

In *Strickland, supra*, the Court noted that in an ineffective assistance of counsel claim, "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." 466 U.S. at 690. After the defendant has done this, "[t]he court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* In the present case the evidence does not establish any predicate conduct which would then allow a court to proceed to determine if that conduct was deficient and, if it was deficient, whether it prejudiced the defense. The evidence does not establish that trial counsel failed to investigate, review, and verify appellant's arrest record contained in the PSI. The district court's findings are not erroneous.

With regard to the contention that counsel failed to object to

the admission of the arrest record into evidence during the sentencing hearing, the record clearly indicates that counsel did object to the introduction of the PSI, which included the arrest record. Apparently, appellant contends that counsel should have specifically objected to certain offenses in the arrest record.

As the Supreme Court stated in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." In making the determination of whether counsel's performance was outside the wide range of professionally competent assistance, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* "There are countless ways to provide effective assistance in any given case. Even the best criminal attorneys would not defend a particular client in the same way." 466 U.S. at 689. While it is true in the present case that trial counsel could have gone through the PSI page by page and objected on specific grounds, in light of all the circumstances counsel's performance here was not unreasonable, where counsel objected generally to the admission of the PSI, which contained the arrest record as well as other potentially damaging material. This objection preserved the issue for appeal, where it was argued. We note that at the time appellant was sentenced the admissibility of presentence reports in capital cases had not been litigated in this state. Richard Goos and Dennis Keefe, in appellant's direct appeal, were the first to litigate this issue in Nebraska. Although it is now well established that presentence reports may be considered in capital cases in this state, at the time the PSI was admitted into evidence during appellant's sentencing hearing, any objection to its admission on any grounds was a novel idea. We conclude that the representation of appellant by Goos and Keefe clearly does not fall "outside the wide range of professionally competent assistance," 466 U.S. at 690, and therefore was not deficient. Contrary to appellant's assertion at oral argument, trial counsel did not

"drop the ball." The district court did not err in dismissing appellant's fourth amended motion for postconviction relief.

Ordinarily, when a defendant fails to show that his counsel's performance was deficient, the analysis concludes. We pause to note, however, that even assuming appellant successfully proved that his counsel's performance was deficient, appellant has not shown how the outcome would have been different had counsel challenged each offense contained in the arrest record. Appellant summarily concludes in his brief that had trial counsel challenged most of the offenses on either of two grounds (inadmissible as either unadjudicated misconduct or uncounseled prior convictions), the sentencing panel could not have considered a number of offenses on the arrest record, and thus the arrest record would have been rendered so insubstantial that the panel would have found the existence of mitigating circumstance (2)(a). The argument continues that once (2)(a) was found to exist, the number of aggravating circumstances to mitigating circumstances would have balanced, and therefore it is likely appellant would have received life sentences instead of the death penalty.

Appellant's argument fails to consider whether the law would have prohibited the sentencing panel from considering unadjudicated misconduct and uncounseled prior convictions in finding the nonexistence of a statutory mitigating circumstance. *State v. Simants*, 197 Neb. 549, 568, 250 N.W.2d 881, 892 (1977), which stated that mitigating circumstance (2)(a) reads " 'prior criminal activity' and not 'prior criminal convictions,' " indicated the panel could consider the instances of unadjudicated misconduct. The evidence shows Goos was fully aware of the *Simants* holding and interpreted it to mean that unadjudicated misconduct as well as uncounseled convictions could be considered under (2)(a). The U.S. Supreme Court, which held in *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), that a defendant's prior uncounseled misdemeanor conviction could not be used under a state's enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term, has never extended its reasoning to exclude uncounseled convictions in proving aggravating or mitigating circumstances in the capital

sentencing context. Moreover, even today the Supreme Court has not clarified whether either type of evidence is admissible in capital sentencing. In our analysis below, this court, for the first time, squarely addresses the admissibility of unadjudicated misconduct and uncounseled prior convictions to prove the nonexistence of a mitigating circumstance and concludes such evidence is admissible. In short, even if trial counsel specifically objected to the admission of certain offenses because they were either uncounseled convictions or unadjudicated misconduct, the outcome would not have been different in this case because the law permits the sentencing panel to consider these offenses. Appellant has failed to show how his trial counsel's performance, assuming it was deficient, prejudiced his defense.

Appellant next argues, independent of his ineffectiveness argument, that it was constitutional error to allow certain evidence to be considered in establishing the nonexistence of mitigating circumstance (2)(a). He contends that allowing the sentencing panel to consider unadjudicated misconduct violated the 6th, 8th, and 14th amendments to the U.S. Constitution, citing *State v. Bobo*, 727 S.W.2d 945 (Tenn. 1987), *cert. denied* 484 U.S. 872, 108 S. Ct. 204, 98 L. Ed. 2d 155; *State v. Bartholomew*, 98 Wash. 2d 173, 654 P.2d 1170 (1982), *remanded* 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983), *opinion after remand* 101 Wash. 2d 631, 683 P.2d 1079 (1984); *State v. McCormick*, 272 Ind. 272, 397 N.E.2d 276 (1979); and *Cook v. State*, 369 So. 2d 1251 (Ala. 1979). He also contends that allowing the sentencing panel to consider uncounseled prior convictions, absent an affirmative showing on the record that a defendant knowingly, voluntarily, and intelligently waived the right to counsel, violated the 6th, 8th, and 14th amendments to the U.S. Constitution. We will address each contention in turn.

This court has never squarely addressed whether prior unadjudicated misconduct may be used to prove the nonexistence of mitigating circumstance (2)(a). Other jurisdictions have considered the constitutionality of allowing unadjudicated misconduct to be considered during the penalty phase of a capital case and have reached the conclusion that such evidence may be considered. In *State v. Brooks*, 541 So. 2d

801 (La. 1989), the defendant, who had been charged with two counts of murder, argued on appeal that evidence of unadjudicated crimes should not be allowed into evidence absent standards whereby the trial judge can determine the relevancy and sufficiency of the evidence. In responding to this argument, the Supreme Court of Louisiana stated:

> The question of admissibility of unadjudicated crimes has been presented to the United States Supreme Court four times within the last two years and the Court has denied certiorari in each instance. *See e.g., Sharp v. Texas*, ____ U.S. ____, 109 S.Ct. 190, 102 L.Ed.2d 159 (1988); *Miranda v. California*, ____ U.S. ____, 108 S.Ct. 2026, 100 L.Ed.2d 613 (1988); *Devier v. Kemp*, ____ U.S. ____, 108 S.Ct. 338, 98 L.Ed.2d 365 (1987); *Williams v. Lynaugh*, ____ U.S. ____, 108 S.Ct. 311, 98 L.Ed.2d 270 (1987). While we have not squarely addressed the question in our prior jurisprudence, in looking to the law in other jurisdictions, we find the states have divided in their approach to the question.
>
> Several states have held a state may not introduce evidence of unadjudicated crimes to prove a statutory aggravating factor at the sentencing phase of a capital trial. *State v. Bobo*, [citation omitted]; *State v. McCormick*, [citation omitted]; *Cook v. State*, [citation omitted]. In *State v. Bartholomew* . . . the Supreme Court of Washington said allowing a jury which had already convicted a defendant to consider evidence of prior alleged offenses was unreasonably prejudicial since such a jury was unlikely "fairly and impartially" to weigh such evidence. 683 P.2d at 1086.
>
> On the other hand, at least seven states have allowed the introduction of unadjudicated crimes at a capital sentencing hearing under a variety of circumstances. *See e.g., People v. Heishman*, 45 Cal.3d 147, 246 Cal.Rptr. 673, 753 P.2d 629 (1988); *Skipper v. State*, 257 Ga. 802, 364 S.E.2d 835 (1988); *People v. Whitehead*, 116 Ill.2d 425, 108 Ill.Dec. 376, 508 N.E.2d 687 (1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 307, 98 L.Ed.2d 266 (1987); *State v. Wagner*, 305 Or. 115, 752 P.2d 1136 (1988); *State v.*

Middleton, 295 S.C. 318, 368 S.E.2d 457 (1988); *Briddle v. State*, 742 S.W.2d 379 (Tex.Crim.App.1987); *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361 (1987).

Since we are without firm guidance from the United States Supreme Court on the issue and the states are clearly divided in their approach, we must determine which of these paths is the correct one.

541 So. 2d at 812.

The court analyzed the admissibility of other crimes in any proceeding against a defendant and then focused on the admissibility of unadjudicated crimes at the penalty phase of a capital case. The court noted that "[a]t the penalty phase, however, guilt has already been determined. While the character of a defendant is irrelevant to the determination of guilt, it is one of the factors upon which the jury must focus in determining sentence." *Id.*

The court went on to hold that evidence of unadjudicated crimes is admissible in the sentencing phase of a capital trial because "such evidence can be relevant and helpful to the jury in its determination of the appropriate sentence to be imposed once guilt has been decided." 541 So. 2d at 813.

In *Johnson v. State*, 292 Md. 405, 439 A.2d 542 (1982), the defendant argued that it was error for the trial judge at the penalty phase of a capital murder case to allow the State to read to the jury, over defendant's objection, his explicit confession to the murder of a victim for which he was under indictment but not yet convicted. He argued it was error because the statement was unrelated to any of the aggravating circumstances and rebutted nothing. The court responded:

> We do not take such a limited view of the range of information properly presentable in a death penalty case to the sentencing authority (in this case a jury), however, and begin our analysis by pointing out that evidence of criminal conduct for which a defendant has not been convicted is clearly admissible for sentencing purposes when that task is performed by a judge in a case not involving a section 413 death penalty proceeding. *Logan v. State*, 289 Md. 460, 480-87, 425 A.2d 632, 642-46 (1981); *Purnell v. State*, 241 Md. 582, 217 A.2d 298

(1965). We only a few months ago stated in *Logan v. State* that: "[i]n considering what is proper punishment, it is now well-settled in this State that a judge is not limited to reviewing past conduct whose occurrence has been judicially established, but may view 'reliable evidence of conduct which may be opprobrious although not criminal, as well as details and circumstances of criminal conduct for which the person has not been tried. . . .' [*Logan v. State, supra,* 289 Md. at 481, 425 A.2d at 643 (citations omitted).]"

There is no reason in principle why this concept of sentencing should not apply in a section 413 death penalty proceeding even though the sentencing authority can, by election of the defendant, be reposed in either judge or jury. . . . In our view, part (v) [of the Maryland death penalty statute which reads "[a]ny other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements"] in unambiguous terms authorizes the trial court to admit into evidence before the sentencing jury identical information concerning a defendant's criminal conduct as would normally be considered by the judge if he were imposing sentence in a non-death penalty case. As is true in all other criminal causes, the sentencing authority in a death penalty case should be presented with a full range of relevant information so as to fashion a particular penalty in accord with "the prevalent modern penal philosophy of individualized punishment." [Citation omitted.] The task that the sentencer must perform in this regard is thus basically no different from that carried out daily by trial judges in other types of cases.

292 Md. at 441-43, 439 A.2d at 562-63.

In *People v. Balderas*, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985), the California Supreme Court, in rejecting defendant's argument that the California death penalty statute denies him due process because it permits a jury which has already decided his guilt to consider, at the penalty stage, other violent crimes on which the defendant was neither charged nor convicted, stated:

> At least two other jurisdictions have concluded that due process precludes a "guilt" jury from hearing "other crimes" evidence at the penalty phase. (*State v. Bartholomew* (1982) 98 Wash.2d 173, 654 P.2d 1170, 1184; *State v. McCormick* (1979) 272 Ind. 272, 397 N.E.2d 276, 279-281). However, we find nothing in recent United States Supreme Court decisions to support such a conclusion. The court has often declared that states have the broadest possible range in deciding what negative aspects of the defendant's character and background are relevant to the sentencing determination. (E.g., *Estelle v. Smith* (1981) 451 U.S. 454, 472-473, 101 S.Ct. 1866, 1878, 68 L.Ed.2d 359; *Jurek v. Texas* (1976) 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 [pl. opn.], rehg. den., 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed.2d 158; *Gregg v. Georgia* (1976) 428 U.S. 153, 202-204, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 [pl.opn.], rehg. den. 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158; see also *California v. Ramos* (1983) 463 U.S. 992, 1009, and fn. 23, 103 S.Ct. 3446, 3457 fn. 23, 77 L.Ed.2d 1171; *Zant v. Stephens* (1983) 462 U.S. 862, 886-887, 103 S.Ct. 2733, 2747-2748, 77 L.Ed.2d 235.) It has never suggested that this penalty evidence must be heard by a separate jury.

41 Cal. 3d at 205, 711 P.2d at 516, 222 Cal. Rptr. at 219-20.

The court also went on to hold that

> admission of evidence of uncharged criminal violence does not impose the death penalty for a noncapital offense of which defendant was never convicted. Rather, the evidence of criminality, if proved beyond a reasonable doubt [citation omitted], is simply one factor the penalty jury is to consider in deciding the appropriate punishment for the capital offense.

41 Cal. 3d at 205-06, 711 P.2d at 516, 222 Cal. Rptr. at 220. In a footnote the court rejected *State v. Bartholomew*, 98 Wash. 2d 173, 654 P.2d 1170 (1982), *remanded* 463 U.S. 1203, 103 S. Ct. 3530, 77 L. Ed. 2d 1383 (1983), *opinion after remand* 101 Wash. 2d 631, 683 P.2d 1079 (1984):

> The Washington Supreme Court's judgment in *Bartholomew*, supra, was vacated on certiorari to the

> United States Supreme Court, and the case was remanded for reconsideration in light of *Zant* [*v. Stephens,* 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)]. (*Washington v. Bartholomew* (1984) 463 U.S. 1203, 103 S.Ct. 3530, 77 L.Ed.2d 1383.) In a subsequent opinion (*State v. Bartholomew* (1984) 101 Wash.2d 631, 683 P.2d 1079), the state court again concluded, on both state and federal grounds, that Washington's death penalty statute is invalid insofar as it permits evidence at the penalty phase of prior criminal activity for which defendant had not been convicted. The court noted that both *Zant* and [*California v.*] *Ramos* [463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983)] had quoted with approval a passage from *Gregg* [*v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976),] which suggested a bar on sentence-phase evidence which would "prejudice" the defendant. (*Gregg*, supra, 428 U.S. at pp. 203-204, 96 S.Ct. at p. 2939; see *Ramos*, supra, 463 U.S. at pp. 1009-1010, fn. 23, 103 S.Ct. at p. 3457 fn. 23; *Zant*, supra, 462 U.S. at pp. 886-887, 103 S.Ct. at pp. 2747-48.) It also cited *Gardner v. Florida* (1977) 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393, for the proposition that evidence weighing in favor of death must be extremely reliable. (See pp. 358-359, 97 S.Ct. pp. 1204-1205.) As before, we are not persuaded by the Washington court's conclusion that evidence of prior uncharged crimes at the penalty phase is "prejudicial," "unreliable," "irrelevant," or "fundamentally unfair." The penalty phase is unique, intended to place before the sentencer all evidence properly bearing on its decision under the Constitution and statutes. Prior violent criminality is obviously relevant in this regard; the reasonable doubt standard ensures reliability; and the evidence is thus not improperly prejudicial or unfair.

711 P.2d at 516 n.33, 222 Cal. Rptr. at 220 n.32.

In *State v. Lafferty*, 749 P.2d 1239 (Utah 1988), the defendant argued that the trial court erred by admitting in the penalty phase evidence of other crimes that the defendant had allegedly committed, but of which he had not yet been

convicted. He cited *State v. Bartholomew, supra*, in which the court apparently relied on the 8th and 14th amendments to the U.S. Constitution. The court stated that evidence of unadjudicated crimes is not per se inadmissible at the penalty phase of a capital case as a matter of due process:

> We decline to adopt the Washington court's holding. We agree that under *Gregg*, the federal constitutional rights of the accused to due process and to be free from cruel and unusual punishment are violated by the admission of unfairly prejudicial evidence in the penalty phase. But we do not believe that federal case law requires that evidence of the accused's violent criminal behavior be limited to prior criminal convictions. We agree with the California Supreme Court, which, in construing a statutory scheme similar to Utah's, *see State v. Tillman*, ____ P.2d at ____, 72 Utah Adv.Rep. at 33 (Durham, J., concurring and dissenting), concluded that the federal constitutional case law provides no support for such a holding. *See People v. Balderas*, 41 Cal.3d 144, 205-06, 711 P.2d 480, 516, 222 Cal.Rptr. 184, 219-20 (1985); *see also People v. Harris*, 28 Cal.3d 935, 962-63, 623 P.2d 240, 255, 171 Cal.Rptr. 679, 694 (upholding admissibility of evidence of other violent crimes, *cert. denied*, 454 U.S. 882, 102 S.Ct. 365, 70 L.Ed.2d 192 (1981). A rule prohibiting evidence of violent crimes which have not yet resulted in convictions would preclude the sentencing authority from considering important information about the accused's violent propensities and future dangerousness, factors essential to an evenhanded consideration of death penalty issues. [Citations omitted.]

749 P.2d at 1259.

The court went on to hold that the sentencer may not rely on other violent criminal activity as an aggravating factor unless it is first convinced beyond a reasonable doubt that the accused did commit the other crime. The State had the burden of proving to the sentencer beyond a reasonable doubt that the defendant actually committed the violent crime which is to be treated as an aggravating factor.

In *State v. Loyd*, 489 So. 2d 898 (La. 1986), the defendant

was convicted of murder and sentenced to death. On appeal defendant argued that a segment of the death penalty statute, which allows as mitigation that the " 'offender has no significant prior history of criminal activity,' " was unconstitutionally vague. *Id.* at 901. In support of this argument defendant cited *State v. David*, 468 So. 2d 1126 (La. 1984), which held that the aggravating circumstance that the defendant has a significant prior history of criminal activity was unconstitutionally vague. The court responded by stating:

> In so arguing, the defendant misses the point of the David holding. David sought to restrict those murderers eligible for the death sentence. The questioned aggravating circumstance was unconstitutional because its meaning was open to interpretation, thereby failing to provide a meaningful standard by which to channel the jury's sentencing discretion. By their nature, the mitigating circumstances serve this channeling function. Hence, they cannot run contrary to the rationale of David.

489 So. 2d at 901.

In *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), the defendant argued that the trial judge should have given a peremptory instruction to the jury that the defendant had no significant history of prior criminal activity. Apparently, it was defendant's contention that he should have received the benefit of this mitigating circumstance because he had only been convicted of a misdemeanor, although the State presented evidence of other unadjudicated misconduct. The court responded by stating:

> The mitigating circumstance with which we are concerned, [citation omitted], does not speak in terms of "criminal convictions," but rather in terms of "criminal activity." Thus this subsection does not necessarily restrict the jury's consideration to only prior convictions. *See State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983). The evidence reveals, as the trial court noted, that the defendant communicated threats and was convicted of that charge. The defendant's former wife testified that on several occasions defendant communicated threats and at least once committed an assault on a female. Clearly this

> constituted some evidence of criminal activity. Whether this evidence was sufficient to constitute significant history of criminal activity, thereby precluding a finding of this factor, was for the jury to decide. The assignment of error is overruled.

312 N.C. at 20-21, 320 S.E.2d at 654.

In *Gentry v. State*, 770 S.W.2d 780 (Tex. Crim. App. 1988), the defendant argued that at the penalty phase of the trial, the State, over defendant's objection, erroneously offered into evidence a penitentiary packet from the State of Georgia. Specifically, defendant argued that since the allegations of extraneous offenses in the penitentiary packet never resulted in convictions, they were inadmissible under Tex. Crim. Proc. Code Ann. art. 37.07, § 3(a) (Vernon 1981), which relates to enhancement proceedings. The court stated:

> Appellant relies on *Mullins v. State*, 492 S.W.2d 277 (Tex.Cr.App. 1973), to support his argument that evidence of extraneous offenses not resulting in conviction admitted during the penalty phase of trial result is reversible error under Article 37.07, § 3(a), supra. However, Article 37.07, supra, has no application to the instant case. While it is true that evidence of extraneous offenses not resulting in conviction, but offered for enhancement purposes is normally inadmissible under 37.07, § 3(a), supra, the rule pertaining to admission of extraneous offenses during the punishment phase in capital cases is altogether different. Capital cases fall within the purview of Article 37.071(a), V.A.C.C.P.: "Article 37.071 Procedure in capital case. (a) . . . In the proceeding, *evidence may be presented as to any matter that the court deems relevant to the sentence.* . . ." The disparity between the statute pertaining to a non-capital case, where evidence of unadjudicated prior offenses is barred, and a capital case, where prior offenses are admissible whether adjudicated or not, may at first seem incongruous. This Court had occasion to examine the legislative history behind Article 37.071(a), supra, the capital sentencing provision, as compared to Article 37.07, § 3(a), supra, upon which appellant in this case

> erroneously relies: "The very choice of the Legislature to establish a bifurcated procedure in capital cases, like the one in non-capital cases, evinces its intention to eliminate the rule of evidence that excludes proof of extraneous offenses. Had it wanted to limit proof in capital trials to adjudicated offenses, it could have provided so in Article 37.071, as it has in Article 37.07. There being nothing in Article 37.071 to require such a limitation, this Court cannot impose it. ... [B]y deliberately choosing not to abolish the other exclusionary rules of evidence, the Legislature has kept them in effect at the punishment phase of a capital trial." *Rumbaugh v. State*, 589 S.W.2d 414, 418 (Tex.Cr.App.1979).

770 S.W.2d at 792-93.

The court went on to hold:

> Absent a showing of surprise, proof of an unadjudicated, extraneous offense at the sentencing stage of a trial on a capital offense is admissible and does not deny a defendant due process and equal protection of the law. *Williams v. State*, 622 S.W.2d 116, 120 (Tex.Cr.App.1981) cert. denied 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982). See also *Morin v. State*, 682 S.W.2d 265, 269 (Tex.Cr.App.1983) (court did not err in admitting, in penalty phase of capital murder prosecution, details of defendant's prior out-of-state conviction and details of an unadjudicated robbery offense occurring out of state)....

770 S.W.2d at 793.

In *People v. Young*, 128 Ill. 2d 1, 54, 538 N.E.2d 461, 475 (1989), the court stated: "Hearsay evidence of crimes that did not result in prosecution or conviction is therefore admissible at the aggravation and mitigation phase if it meets the requirements of relevancy and reliability."

Some federal courts have also taken the position that unadjudicated misconduct is admissible in capital sentencing. In *Tucker v. Kemp*, 762 F.2d 1480, 1486-87 (11th Cir. 1985), *vacated on other grounds* 474 U.S. 1001, 106 S. Ct 517, 88 L. Ed. 2d 452, the court stated:

> The information relative to a sentencing decision is very

> broad. . . . Even though capital sentencing is more formal than non-capital sentencing, restrictions which would limit consideration of evidence at trial are not always applied to capital sentencing. . . . The breadth of sentencing information insures that the decision will be appropriately individualized.
>
> One class of information which is particularly relevant to the sentencing decision is the defendant's previous criminal activity. In addition to previous convictions, it is acceptable to consider evidence of crimes for which a defendant has been indicted but not convicted. . . . Activities for which there has been no charge filed can be considered as well. . . . In general, the relevant inquiry for information at sentencing is whether it is reliable.

(Citations omitted.)

In *Williams v. Lynaugh*, 814 F.2d 205 (5th Cir. 1987), evidence was introduced during the penalty phase of a state capital trial regarding the defendant's participation in an armed robbery. The defendant argued on federal habeas corpus that "because there was no evidence that he was either charged or convicted of the offense, such evidence lacks reliability and results in an arbitrary imposition of the death penalty in violation of the eighth and fourteenth amendments." *Id.* at 207. The court disagreed with the defendant, stating:

> We have already rejected the argument advanced by Williams in *Milton v. Procunier*, 744 F.2d 1091 (5th Cir.1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985). In *Milton* the state put evidence of unadjudicated criminal conduct before the jury during the punishment phase of a capital trial. We rejected the contention of the habeas petitioner that the admission of this evidence violated his rights under the fifth, sixth, eighth, and fourteenth amendments. *Id.* at 1093, 1097. . . . We concluded that the structure of the Texas death penalty system and the admission of unadjudicated criminal conduct during the punishment phase "in no way undermines the constitutionally mandated procedures set forth by the Supreme Court in *Jurek* [*v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed. 2d 929 (1976)], and [*Gregg v.*

Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)]." *Id.*

We emphasize that evidence of Williams' extraneous unadjudicated offense was not allowed to be introduced until the punishment phase and thus eliminates any concern that the jury used this unadjudicated offense to influence its decision in the guilt phase of the trial. The focus of the Texas capital sentencing procedure is to have all the relevant evidence before the jury when answering the special issues which determine whether the death penalty will be imposed. *Jurek*, 428 U.S. at 276, 96 S.Ct. at 2958. Acknowledging society's reservations about the use of wrongdoing not then being tried, we stated in *Milton* that these concerns "are addressed by properly applied standards of relevance and sufficiency of proof." 744 F.2d at 1097. As Justice Stevens said in *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983): "[T]he Constitution does not prohibit consideration at the sentencing phase of information not directly related to either statutory aggravating circumstances or statutory mitigating factors, as long as that information is relevant to the character of the defendant or the circumstances of the crime . . . What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." 463 U.S. at 967, 103 S.Ct. at 3433 (Stevens, J., joined by Powell, J., concurring in the judgment) (quoting in part *Zant v. Stephens*, 462 U.S. 862, 879, 103 S.Ct. 2733, 3440, 77 L.Ed.2d 235 (1983) (emphasis added by *Zant*)) (citations omitted).

814 F.2d at 207-08.

The court went on to state that evidence of unadjudicated crimes is clearly relevant to the jury's task of determining whether there is a probability that the defendant would continue to commit acts of violence. The court held that the admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the 8th and 14th amendments. It also rejected defendant's contention that allowing the

introduction of unadjudicated offenses in capital cases but not in noncapital cases violates the equal protection clause of the 14th amendment.

We agree with these jurisdictions that the sentencing authority should have before it the widest range of available facts to provide a proper penalty. The U.S. Supreme Court "has often declared that states have the broadest possible range in deciding what negative aspects of the defendant's character and background are relevant to the sentencing determination." *People v. Balderas*, 41 Cal. 3d 144, 205, 711 P.2d 480, 516, 222 Cal. Rptr. 184, 219 (1985). See, e.g., *Jurek v. Texas*, 428 U.S. 262, 276, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976) ("essential . . . that the [sentencing] jury [in a death penalty case] have before it all possible relevant information about the individual defendant whose fate it must determine"); *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) ("consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of inflicting the penalty of death").

We also agree that, "[a]s is true in all other criminal causes, the sentencing authority in a death penalty case should be presented with a full range of relevant information so as to fashion a particular penalty in accord with 'the prevalent modern penal philosophy of individualized punishment.' " *Johnson v. State*, 292 Md. 405, 443, 439 A.2d 542, 563 (1982). In Nebraska, the sentencing court in noncapital cases is allowed wide latitude in the information it considers, including consideration of unadjudicated misconduct. See, e.g., *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986); *State v. Suffredini*, 224 Neb. 220, 397 N.W.2d 51 (1986); *State v. Menard*, 199 Neb. 456, 259 N.W.2d 479 (1977); *State v. Aby*, 205 Neb. 267, 287 N.W.2d 68 (1980). See generally, Annot., 96 A.L.R.2d 768 (1964). This wide latitude should not be circumscribed in capital cases, where the need for individualized punishment is crucial because of the seriousness of the offense and gravity of possible penalties which may be imposed after conviction.

This court has held that the sentencing phase of a capital trial

is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence. See *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

It is also the clear intent of Neb. Rev. Stat. § 29-2521 (Reissue 1989) that the sentencing court have before it all evidence which is probative of a proper sentence:

> In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received.

§ 29-2521.

Convictions are not required by the unambiguous language of the death penalty statute. Section 29-2523(2)(a) states: "The offender has no significant history of prior criminal activity." "The statute reads 'prior criminal activity' and not 'prior criminal convictions.' " *State v. Simants*, 197 Neb. 549, 568, 250 N.W.2d 881, 892 (1977). "Significant history," as used in the statute, "does not refer to a slight or inconsequential history of criminal activity but rather to an important, notable, or meaningful history." *State v. Holtan*, 197 Neb. 544, 548, 250 N.W.2d 876, 880 (1977). "As to what is significant criminal activity, an average man can easily look at defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity." *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973).

Moreover, because in Nebraska capital sentencing is conducted by a single judge or a panel of three judges and not by a jury, the risk that the sentencer might be unduly prejudiced by the admission of such evidence is minimized.

In light of these considerations, we hold that it is constitutionally permissible to allow the sentencing judge or judges in a capital case to consider unadjudicated misconduct in determining the existence or nonexistence of a mitigating circumstance, provided the defendant is given an opportunity

to rebut the charges.

In the present case the sentencing panel did not err when it considered various incidents of unadjudicated misconduct in determining that mitigating circumstance (2)(a) did not exist.

Next, appellant argues that allowing the sentencing panel to consider uncounseled prior convictions, absent an affirmative showing on the record that a defendant knowingly, voluntarily, and intelligently waived the right to counsel, violated the 6th, 8th, and 14th amendments to the U.S. Constitution. Appellant relies on *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), and *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979). He also analogizes between a capital sentencing and an enhancement proceeding, relying principally on *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980).

This court has never squarely considered whether uncounseled prior convictions may be used to prove the nonexistence of mitigating circumstance (2)(a). Other jurisdictions have considered this issue. In *State v. Mattheson*, 407 So. 2d 1150 (La. 1982), the defendant contended the trial judge erred in allowing evidence of his prior convictions at the penalty phase of his capital trial. He argued that the documents introduced into evidence did not reveal whether he was represented by counsel or waived counsel. The Supreme Court of Louisiana rejected this contention:

> Nor do we find any merit in defendant's related argument that the trial judge erred in permitting introduction of the prior convictions without a showing by the state that defendant was represented by counsel or had waived same. In *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980), the United States Supreme Court recognized that while uncounseled felony convictions could not be used for certain purposes, the Court stated that it had "never suggested that an uncounseled conviction was invalid for all purposes." In the instant case, the prior convictions were used in the sentencing phase of the trial. The convictions were not being used to enhance punishment; rather, defendant's past criminal history was merely a part of the total picture

> of his "character and propensities." It did not of itself trigger added penalties. Hence, we do not consider the sentencing hearing to be one of those instances where the state is required to affirmatively show that defendant was represented by counsel or had waived same before a prior conviction may be used to show the character and propensities of the defendant.

407 So. 2d at 1164.

Later, in *State v. Jordan*, 440 So. 2d 716, 720 (La. 1983), a capital case, the Louisiana Supreme Court stated: "The defendant further argues that the state is prohibited from using prior convictions as evidence of his character for the reason those convictions are not based on proper *Boykinized* pleas. This issue is settled by our ruling in *State v. Mattheson* . . . ."

The court in *Jackson v. State*, 501 So. 2d 542 (Ala. Crim. App. 1986), citing with approval to the trial judge's findings, rejected the defendant's contention that it was improper, in determining defendant had a significant history of prior criminal activity so as to deprive her of that mitigating circumstance, to consider her prior misdemeanor convictions without proof that she had been represented by counsel or had waived counsel. Defendant argued that these misdemeanor convictions were used to enhance her punishment. The court stated:

> "Without conceding that the trial Court's use of Petitioner's prior offenses were [sic] improper [not every use of prior convictions without proof of representation is invalid. See *Lewis v. United States*, 445 U.S. 55 [100 S.Ct. 915, 63 L.Ed.2d 198] (1980) . . . . Petitioner's punishment was not enhanced by virtue of her criminal history in the sense that convictions are enhanced under the DUI and habitual offender statutes as in Petitioner's cited cases. . . .
>
> ". . . .
>
> "The finding by the Court rejected a statutory mitigating circumstance. The Court was not determining the presence of an aggravating circumstance."

501 So. 2d at 548.

In *Douglas v. Wainwright*, 521 F. Supp. 790 (M.D. Fla. 1981), *rev'd on other grounds* 714 F.2d 1532 (1983), the

defendant argued that the trial judge impermissibly examined a presentence report that contained convictions resulting from court appearances when defendant was not represented by counsel, in violation of *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). The court dismissed this claim as "clearly insubstantial" because the trial judge stated, in his findings of fact, that the report was considered " 'only in the light of its failure to reflect mitigating circumstances,' " and thus these uncounseled convictions were not used against the defendant. 521 F. Supp. at 793.

In *Buttrum v. Black*, 721 F. Supp. 1268, 1308 (N.D. Ga. 1989), the court stated: "[I]n this Circuit, it is not improper to introduce at the penalty phase of a criminal trial a prior uncounseled misdemeanor conviction where the defendant was not imprisoned."

We conclude that it is constitutionally permissible to allow the sentencing judge or judges in a capital case to consider prior uncounseled convictions in determining the existence or nonexistence of a mitigating circumstance.

In the present case the sentencing panel did not err when it considered a number of uncounseled convictions in determining that mitigating circumstance (2)(a) did not exist.

There is one remaining matter which needs clarification. In his brief, appellant contends that Nebraska law requires criminal activity in mitigating circumstance (2)(a) to be proven beyond a reasonable doubt. Appellant cites *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), as authority to support this contention: "As we have previously held, criminal activity must be proved beyond a reasonable doubt. While we concede that criminal activity may be proved, obviously the burden of proof is greater in the absence of prior convictions." *Id.* at 568, 250 N.W.2d at 892.

In context, this language was referring to criminal activity under mitigating circumstance (2)(a). While this would tend to suggest that the State has the burden to prove criminal activity under (2)(a) beyond a reasonable doubt, this court, in *State v. Moore*, 210 Neb. 457, 480, 316 N.W.2d 33, 46 (1982), stated: "The defendant's eighth assignment asserts that the State has the burden of proving beyond a reasonable doubt that no

mitigating factor exists. He cites no authority for this proposition. None seems to exist."

In *State v. Simants, supra*, this court held that aggravating circumstances must be proved beyond a reasonable doubt. However, neither the federal Constitution nor the state Constitution requires the prosecution to prove the absence of mitigating factors. See *Moore, supra*. However, this court has never determined the standard of proof required to establish the existence or nonexistence of a mitigating circumstance under § 29-2523. In *Harper v. Grammer*, 654 F. Supp. 515, 536-37 (D. Neb. 1987), the court stated:

> The Nebraska statute, § 29-2522, does not place a burden of proof upon the defendant. Evidence may be presented by both sides, the judge or judges determine whether sufficient aggravating circumstances exist to justify imposition of a sentence of death, whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances, or whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. No mention is made of any burden upon the defendant and I see no justification for reading one into the statute.

We will not assign a burden of proof with regard to mitigating factors. The State may present evidence which is probative of the nonexistence of a statutory or nonstatutory mitigating circumstance, while the defendant may present evidence which is probative of the existence of a statutory or nonstatutory mitigating circumstance. However, because Neb. Rev. Stat. §§ 29-2521 et seq. (Reissue 1989) do not require the State to disprove the existence of mitigating circumstances, they do place the *risk* of nonproduction and nonpersuasion on the defendant. See *Foster v. State*, 304 Md. 439, 499 A.2d 1236 (1985) (although Maryland's death penalty statute does not require the prosecution to disprove the existence of mitigation, it does place on the defendant the risk of nonproduction and nonpersuasion). To the extent language in *Simants* conflicts with today's holding, it is disapproved.

On direct appeal in *State v. Reeves*, 216 Neb. 206, 228, 344

N.W.2d 433, 447 (1984), we agreed with the sentencing panel that " 'defendant's prior criminal activity is significant so as not to give him the benefit of this mitigating circumstance.' " Today we reaffirm that finding.

Appellant next argues that he was deprived of his right to present evidence and obtain an instruction on diminished capacity, in violation of the 6th, 8th, and 14th amendments to the U.S. Constitution. On direct appeal we rejected this argument, stating:

> The overwhelming majority of the defendant's evidence contained in the vast record centered on defendant's lack of requisite intent due to voluntary drug and/or alcohol intoxication and defendant's insanity. Only a minute portion of the evidence touched on defendant's lack of intent due to other factors. The court is not required to give instructions where there is not sufficient evidence to prove the facts claimed. *State v. Scott*, 212 Neb. 625, 324 N.W.2d 670 (1982); *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978). The trial court did instruct the jury on defendant's theories of lack of intent due to intoxication and insanity. As stated in *State v. Bartholomew*, 212 Neb. 270, 275, 322 N.W.2d 432, 436 (1982): " 'All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.' " We find the jury was properly instructed.

State v. Reeves, supra at 218, 344 N.W.2d at 442-43.

In his brief, appellant "submits that because the issue was wrongly decided at trial and on direct appeal that it is both necessary and appropriate that the prejudicial error be corrected on post conviction." Supplemental brief for appellant at 29.

This issue was fully dealt with on direct appeal and will not be reconsidered here, especially in light of our recent decision in *State v. Ryan*, 233 Neb. 74, 105, 444 N.W.2d 610, 632 (1989), wherein we stated that "[s]uch an instruction is not required under our law."

Appellant next contends that the "Death Penalty Statutes

Fail to Establish Any Standards As To When Or If A Three-Judge Panel Shall Be Convened In Violation Of The Eighth and Fourteenth Amendments To The United States Constitution." (Emphasis omitted.) Supplemental brief for appellant at 7. Apparently, appellant contends that the death penalty statutes, specifically Neb. Rev. Stat. § 29-2520 (Reissue 1989), are constitutionally infirm because they grant the trial judge discretion in determining whether a three-judge panel will be convened in a capital sentencing.

In *State v. Ryan, supra*, we addressed this same issue. We recognized that this court has previously held the sentencing procedure provided by § 29-2520 does not violate either the Nebraska or the federal Constitution, citing *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977). We also stated, in examining Supreme Court precedent:

> This statute does grant the trial judge discretion in that he or she may opt to conduct the sentencing with or without the assistance of two additional judges. However, this discretion cannot be said to be constitutionally infirm where the U.S. Supreme Court has held that a single judge presiding at a defendant's trial may conduct and decide the sentencing phase of a capital case. [Citations omitted.]
>
> The U.S. Supreme Court has refused to select a single best method for a state to conduct capital sentencing. [Citations omitted.]

State v. Ryan, supra at 124, 444 N.W.2d at 642.

After reviewing statutes similar to § 29-2520, we went on to state that "the Nebraska Legislature has provided a sentencing method that is fair and sensitive to a capital defendant and satisfies the requirements of the U.S. and Nebraska Constitutions. The Nebraska statute ensures the death penalty will not be imposed arbitrarily or discriminatorily." *Ryan, supra* at 125, 444 N.W.2d at 643.

We reaffirm the holding in *Ryan*. Appellant's contention is without merit.

Appellant next argues that the "Death Penalty Statutes Expressly Limit the Mitigating Factors That May Be Presented By An Accused and Have Been Interpreted So As Not To Require The Sentencing Panel To State Precisely What

Non-Statutory Mitigating Factors Have Been Considered In Violation of the Eighth and Fourteenth Amendments To the United States Constitution." (Emphasis omitted.) Supplemental brief for appellant at 3.

Appellant's contention that § 29-2523(2) is unconstitutional on its face because it limits the mitigating factors which may be presented by the defendant is meritless in light of this court's holding in *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980), wherein we specifically held that § 29-2523 was to be interpreted so as to permit consideration of any mitigating factors and not just those set forth in the statute. Moreover, in the present case the record discloses that the sentencing panel considered nonstatutory mitigating factors, including those urged by appellant in his motion of June 10, 1981.

Appellant's contention that not requiring the sentencing panel to make specific findings regarding a defendant's proposed nonstatutory mitigating factors violates the 8th and 14th amendments is equally without merit. The Constitution does not require the sentencing judge or judges to make specific written findings with regard to nonstatutory mitigating factors. See, *Martin v. Maggio*, 711 F.2d 1273 (5th Cir. 1983) (8th and 14th amendments do not require the sentencing jury to list the mitigating circumstances it considered); *Coleman v. Risley*, 839 F.2d 434 (9th Cir. 1988) (due process does not require the sentencing court to specifically discuss nonstatutory mitigating evidence presented by defendant in penalty phase, even when court imposes the death penalty); *Kordenbrock v. Scroggy*, 680 F. Supp. 867 (E.D. Ky. 1988), aff'd 889 F.2d 69 (6th Cir. 1989) (jurors need not, as a matter of constitutional law, make specific findings on mitigating factors they consider at penalty phase of a capital murder case); *Andrews v. Shulsen*, 802 F.2d 1256 (10th Cir. 1986) (a jury need not make specific written findings of aggravating and mitigating circumstances for purposes of review if the sentencing mechanism is otherwise valid).

Appellant next argues that the death penalty statutes are unconstitutional because they fail to require notice of aggravating circumstances that will be relied upon in seeking the death penalty.

We reject appellant's contention. Neb. Rev. Stat. § 28-303 (Reissue 1989) provides that the two possible penalties for first degree murder are death or life imprisonment. Section 29-2523 lists the aggravating circumstances upon which the State may rely in seeking the death penalty. In the present case, the State did not attempt to prove, nor did the panel find, nonstatutory aggravating factors. The specific delineation of aggravating circumstances in § 29-2523 constitutes sufficient notice to a defendant who is charged with first degree murder. The State is not constitutionally required to provide the defendant with notice as to which particular aggravating circumstance or circumstances the State will rely upon in pursuing the death penalty. See *Clark v. Dugger*, 834 F.2d 1561 (11th Cir. 1987), where the defendant argued due process entitled him to notice of the aggravating factors on which the State would rely in seeking the death penalty. The court replied:

> It is well established under Florida law that a defendant has no right to advance notice of the aggravating circumstances on which the State will rely. [Citations omitted.] The Florida sentencing statute itself sufficiently particularized the aggravating circumstances in a capital case, listing eight specific factors. *See* Fla. Stat. § 921.141 (1975). We conclude that the trial court's failure to require a bill of particulars did not violate Clark's constitutional rights. [Citations omitted.]

834 F.2d at 1556. See, also, *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) (death penalty statute itself defines aggravating circumstances upon which the sentencer may rely; defendant need only examine the statute to receive proper notice; no 6th or 14th amendment violation); *Johnson v. Thigpen*, 623 F. Supp. 1121 (S.D. Miss. 1985) (notice not constitutionally required when death penalty statute sets forth the aggravating circumstances upon which the State may rely); *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981) (listing of aggravating factors in death penalty statute constitutes statutory notice sufficient to meet the constitutional requirement of due process); *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981) (death penalty statute sets forth aggravating circumstances which may be considered by the

jury; therefore, defendant was apprised of the aggravating circumstances that the State must prove before the death penalty could be imposed); *Houston v. State*, 593 S.W.2d 267 (Tenn. 1980) (death penalty statute sets forth aggravating factors which the State may rely on; this statutory notice is sufficient to meet the constitutional requirement of due process).

We pause here to note that there have been suggestions by appellants in previous cases that the Nebraska capital sentencing scheme has been interpreted by this court to permit proof of nonstatutory aggravating factors. See, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984). In those cases we have never squarely addressed this contention. To clarify this issue, we now specifically hold that § 29-2523 exclusively lists the aggravating factors which may be relied upon in imposing the death penalty. To the extent language in earlier cases might suggest otherwise, it is disapproved.

Appellant next contends that mitigating evidence relating to a defendant's mental state may not be constitutionally limited solely to cases of "extreme" mental or emotional disturbance under the 8th and 14th amendments to the U.S. Constitution. The sentencing panel found that mitigating factor (2)(c), which reads "The crime was committed while the offender was under the influence of extreme mental or emotional disturbance," did not exist. Appellant contends that this limitation on mitigation violates *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); and *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986).

Courts which have considered this argument, while recognizing the requirements of *Lockett* and *Eddings*, have reasoned that the limitation of "extreme" mental or emotional disturbance is not constitutionally infirm when read in conjunction with other segments of their death penalty statutes which specifically allow the sentencer to consider any other mitigating factor which might be applicable. In *People v. Silagy*, 101 Ill. 2d 147, 163-64, 461 N.E.2d 415, 423 (1984), the court stated:

> The defendant's final challenge to the statute is that the language of the mitigating factor we have just discussed, that the defendant was acting under the influence of "extreme mental or emotional disturbance," limits in an unconstitutional fashion consideration of a defendant's impaired mental state causing mental or emotional disturbance which is not "extreme." He cites *Eddings v. Oklahoma* . . . which held that a State cannot as a matter of law prohibit the consideration of any relevant mitigating evidence, and *Lockett v. Ohio* . . . which held that a death penalty statute must allow the sentencing body to consider in mitigation any aspects of the defendant's character or record, and any of the circumstances of the offense the defendant points to in mitigation. The defendant says, on the basis of those decisions, that the jury must be permitted to consider evidence of any type of mental disturbance, extreme or otherwise, in determining the existence of a mitigating factor sufficient to preclude imposition of the death penalty.
>
> The fallacy of the argument is that an accused is not limited as this defendant claims. The defendant is simply wrong in saying that the statute precludes consideration of any mental distress less than extreme. He overlooks that, while the act lists five mitigating factors, one of which is "extreme mental or emotional disturbance," the statute also provides in listing these factors: "Mitigating factors may include *but need not be limited to* the following [factors]." (Emphasis added.) Ill. Rev. Stat. 1979, ch. 38, par. 9-1(c).

In *People v. Ghent*, 43 Cal. 3d 739, 739 P.2d 1250, 239 Cal. Rptr. 82 (1987), the defendant argued that a subdivision of the death penalty statute which asked the penalty jury to consider whether the defendant acted under extreme mental or emotional disturbance during the commission of the offense limited the kinds of mitigating evidence admissible at the penalty phase by requiring an "extreme" condition, citing *Lockett, supra*. The court responded by stating:

> Another provision of the 1977 death penalty law,

> however, permitted consideration by the penalty jury of "*any* other circumstance which extenuates the gravity of the crime" (former § 190.03, subd. (j)), and we think that "catchall" provision is sufficient to permit the penalty jury to take into account a mental condition of the defendant which, though perhaps not deemed "extreme," nonetheless mitigates the seriousness of the offense.

(Emphasis in original.) 43 Cal. 3d at 776, 739 P.2d at 1274, 239 Cal. Rptr. at 106.

In *State v. Smith*, 705 P.2d 1087 (Mont. 1985), the defendant argued that by requiring "extreme" mental or emotional disturbance, the death penalty statutes by implication exclude consideration as mitigating circumstances disturbances and impairments which are less than extreme. The court rejected this argument, stating:

> The United States Supreme Court examined the mitigating circumstance requirement that the impairment must be "substantial" or that the mental or emotional disturbance be "extreme" in *Eddings v. Oklahoma*, supra, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1. The Court reasoned that the "quality" or "weight" of the mitigating evidence was not determinative of the issue, but stated the sentence may determine the weight to be given relevant mitigating evidence. However, they may not give it no weight by excluding such evidence from their consideration. *Eddings*, supra, 455 U.S. at 115, 102 S.Ct. at 877.
>
> The State submits that subsection (8) of section 46-18-304, MCA, which allows the court to consider "any other fact that exists in mitigation of sentence" resolves this issue. We agree. . . . This provision clearly allowed the District Court to consider any mental or emotional disturbance or impairment of capacity which did not rise to the level set forth in section 46-18-304(2), MCA.

705 P.2d at 1099.

Nebraska has no explicit statutory requirement that the sentencing court consider any other factor in mitigation. However, the same effect was obtained in *State v. Holtan*, 205 Neb. 314, 287 N.W.2d 671 (1980), wherein we specifically held

that § 29-2523 was to be interpreted so as to permit consideration of any mitigating factors and not just those set forth in the statute. Mitigating circumstance (2)(c), which limits mental or emotional disturbance to cases which are extreme, is not constitutionally infirm where court decision permits consideration of any aspects of mitigation. Our interpretation in *Holtan* remedies any constitutional infirmity which may have existed in § 29-2523(2)(c). It affirmatively appears in the record that the sentencing panel was conscious of the *Holtan* ruling. Appellant's contention is without merit.

Appellant next argues that the 5th amendment's requirement that capital cases be prosecuted only by grand jury indictment has been incorporated through the due process clause of the 14th amendment to be applicable to the states. This argument is without merit.

The 5th amendment's guarantee of a grand jury indictment in capital cases has never been incorporated into the 14th amendment and, hence, is not applicable to the states. *Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884), in which the Supreme Court held that the due process clause did not require a grand jury indictment in a state prosecution for a capital crime, "remains good law." *Watson v. Jago*, 558 F.2d 330, 337 (1977).

Furthermore, in *State v. Burchett*, 224 Neb. 444, 457, 399 N.W.2d 258, 267 (1986), we stated:

> This court has addressed the same or similar arguments on several occasions. In those cases we have determined that prosecutions for felonies, including murder, may be had on informations filed by the county attorney. [Citations omitted.] Further, it is clear that such a procedure violates neither the 14th amendment to the federal Constitution nor the due process clause of the Nebraska Constitution. [Citations omitted.]

This argument will not be considered further.

Appellant also contends that "Inflammatory And Prejudicial Evidence That is Not Related To The Blameworthiness Of The Particular Defendant May Not Be Admitted In A Capital Sentencing Hearing Under The Eighth Amendment To The United States Constitution." (Emphasis

omitted.) Supplemental brief for appellant at 12. Specifically, he argues that it violated the eighth amendment to admit, during the sentencing phase, a victim impact statement prepared by the probation office. The statement was admitted as part of the PSI and contained brief biographies of the two victims and statements from their parents, relatives, and friends, describing the victims and the effects the murders had on the survivors. Appellant cites *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), in support of his argument. *Booth* held that a victim impact statement which described the personal characteristics of the victims, the emotional impact on the families, and the family members' opinions and characterizations of the crimes and the defendant was improperly admitted during the sentencing phase of a capital trial because it was wholly unrelated to the blameworthiness of a particular defendant. After creating a strict rule of inadmissibility under the eighth amendment, the Court remanded for resentencing.

In the present case, appellant was convicted and sentenced in 1981, his direct appeal was decided in 1984, and his appeal from the denial of postconviction relief was briefed and argued to this court in 1989. *Booth* was decided in 1987 and gives no indication whether it should be applied retroactively; therefore, this court must determine whether *Booth* should be given retroactive application.

In *Teague v. Lane*, ____ U.S. ____, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), a noncapital case, the Court considered as a threshold question whether a defendant seeking federal collateral review of his state conviction should have a new rule of constitutional criminal procedure applied retroactively. Generally, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 109 S. Ct. at 1070. In *Teague*, the Court abandoned the three part *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), standard, because it often led to disparity in the treatment of similarly situated defendants on collateral review and on direct appeal. The Court instead followed Justice Harlan's approach to retroactivity, as discussed in *Mackey v. United States*, 401 U.S. 667, 91 S. Ct.

1160, 28 L. Ed. 2d 404 (1971), that new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to cases on collateral review. (See *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), which rejected the *Linkletter* standard and followed Justice Harlan's approach, holding that new rules must be applied retroactively to cases pending on direct review.) He believed that because of the nature of the habeas corpus writ, it was not intended as a substitute for direct review. Moreover,

> Justice Harlan argued that it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." [401 U.S.] at 689, 91 S. Ct. at 1178. As he had explained in *Desist* [*v. United States,* 394 U.S. 244, 262-63, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969) (Harlan, J., dissenting)], "the threat of habeas serves as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles. In order to perform this deterrence function, the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." [Citations omitted.]

109 S. Ct. at 1073.

The Court went on to add:

> We agree with Justice Harlan's description of the function of habeas corpus. "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." [Citation omitted.] Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review. . . .
>
> . . . .
>
> . . . Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation

> of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*." . . .
>
> . . . .
>
> . . . In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions . . . for it *continually* forces the States to marshall resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac* [456 U.S. 107, 128 n.33, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982)], "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Teague v. Lane, ____ U.S. ____, 109 S. Ct. 1060, 1073-75, 103 L. Ed. 2d 334 (1989).

The Court then adopted Justice Harlan's view of nonretroactivity for cases on collateral review, holding that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 109 S. Ct. at 1075.

There are two exceptions to the general rule of nonretroactivity. First, a new rule should be applied retroactively if it places " 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe' . . . ." *Id.* Later, in *Penry v. Lynaugh*, ____ U.S. ____, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), the Court expanded this exception to also include rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Second, a new rule should be applied retroactively if it requires the observance of " 'those procedures that . . . are "implicit in the concept of ordered liberty." ' " 109 S. Ct. at 1075. This second exception,

the Court explained, would implicate both accuracy in factfinding and fundamental fairness of the trial, and its scope would be limited "to those new procedures without which the likelihood of an accurate conviction is seriously diminished." 109 S. Ct. at 1075-76.

In *Penry v. Lynaugh, supra*, the Court held that the *Teague* test of nonretroactivity and its two exceptions apply in the capital sentencing context: "In our view, the finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity." 109 S. Ct. at 2944.

In the present case, because the appellant is before this court seeking collateral review of his convictions and sentences, it is necessary to apply the *Teague* rule that new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced. At the time appellant was sentenced, no Supreme Court precedent existed which constitutionally prohibited the introduction of victim impact statements at the sentencing phase of a capital trial. In Nebraska such statements were admissible under § 29-2521, which allows the introduction of any relevant evidence. *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), therefore, announces a "new rule" of constitutional criminal procedure.

A conviction is final where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari has lapsed. *Allen v. Hardy*, 478 U.S. 255, 106 S. Ct. 2878, 92 L. Ed. 2d 199 (1986). Appellant's convictions became final in 1984, 3 years before *Booth* was decided.

Applying the *Teague* threshold test, unless it falls within an exception, the holding in *Booth* will not be retroactively applied to appellant because his case became final before the new rule in *Booth* was announced.

The first exception is clearly inapplicable because the rule in *Booth* would not accord constitutional protection to any primary, private activity, nor does the rule prohibit a certain category of punishment for a class of defendants because of

their status or offense. The second exception is also inapplicable because the rule in *Booth*, which concerns the type of information available at a capital sentencing, implicates neither the accuracy in factfinding at the trial stage nor the fundamental fairness of the trial. Moreover, the scope of the second exception is limited to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." In short, this analysis leads us to believe that we are not required under the federal Constitution to accord the holding in *Booth* retroactive application.

We decline to apply *Booth* retroactively and will apply the law which was prevailing at the time appellant's convictions became final. The evidence admitted in the PSI which appellant now contends is objectionable was properly admitted pursuant to § 29-2521, which allows the introduction of any relevant evidence at a capital sentencing. Appellant's contention is meritless.

Appellant next contends that where the defense of insanity is presented, a jury instruction that states the appellant is conclusively presumed to intend the consequences of his act is in violation of the 6th, 8th, and 14th amendments to the U.S. Constitution. In the present case the trial court instructed the jury:

> The turpitude involved in the perpetration of or attempted perpetration of a sexual assault in the first degree takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for perpetration of or attempt to perpetrate a sexual assault in the first degree.

Appellant principally relies on *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). In *Sandstrom*, the defendant was convicted of "deliberate homicide," defined by state law as a killing which is "purposely or knowingly" committed. The trial judge had instructed the jury that the law presumes that a person intends the ordinary consequences of his voluntary acts. The Supreme Court, in its opinion, stressed that the issue of whether the homicide was committed "purposely or knowingly" was an essential element of the crime under the state's statutory scheme. The Court found the

instruction unconstitutional because if the jury understood the challenged instruction to state a conclusive presumption, it would deny the defendant the benefit of the presumption of innocence on the mental element of the crime, a procedure which would be unconstitutional under *Morissette v. United States*, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952). On the other hand, if the jury took the instruction to raise a rebuttable presumption, it would have shifted to the defendant the burden of disproving the same element, a procedure unconstitutional under *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

Appellant's reliance on *Sandstrom* is misplaced. *Sandstrom* held unconstitutional a mandatory or burden-shifting presumption that relieved the prosecution of the burden to prove beyond a reasonable doubt an element of the crime charged, in that case intent under the state's deliberate homicide statute. In the present case the jury was instructed with respect to felony murder only. In Nebraska, no specific intention is required to constitute felony murder other than the intent to do the act which constitutes the felony during which the murder occurred. *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985). There need not be an intent to kill in felony murder, only an intent to commit the underlying felony. *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982). Here, the turpitude involved in the sexual assault takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for the sexual assault. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). The State is not relieved of its burden to prove that appellant engaged in the underlying felony with the requisite mens rea. The State having proved the intent, the felony murder doctrine merely imputes the intent incident to the underlying felony to the killing, which is committed in the perpetration or attempted perpetration of any of the predicate offenses set forth in the statute. *Sandstrom* is generally inapplicable to felony murder counts. See, e.g., *State v. Sheffield*, 676 S.W.2d 542 (Tenn. 1984); *Com. v. Rawls*, 328 Pa. Super. 469, 477 A.2d 540 (1984); *People v. Dillon*, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983), and cases cited therein.

The instructions in the present case clearly instructed the jury that the State must prove beyond a reasonable doubt each and every material element and that the State must prove beyond a reasonable doubt that appellant was sane when he committed the underlying felony. The instructions did not deny the appellant the benefit of the presumption of innocence on the mental element of the underlying felony, nor did it shift to the appellant the burden of disproving this element. In returning its verdicts, the jury found the State carried its burden. There is no constitutional infirmity in the instructions.

Appellant contends aggravating circumstance (1)(d) is unconstitutionally vague and unconstitutional as applied to appellant. Section 29-2523(1)(d) reads: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." On direct appeal we determined that this aggravating circumstance, as interpreted by the decisions of this court, was not unconstitutionally vague. In *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), we stated that this aggravating circumstance describes in the disjunctive two separate circumstances which may operate in conjunction with or independently of the other. We also stated that "[t]he first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said that this circumstance is directed to the 'pitiless crime which is unnecessarily torturous to the victim' and to cases where torture, sadism, or the imposition of extreme suffering exists." *Moore, supra* at 470, 316 N.W.2d at 41. See, also, *State v. Reeves, supra*. On direct appeal, we held the first circumstance or portion of (1)(d) existed and was correctly applied with respect to the death of Janet Mesner: "Janet Mesner's murder clearly involved a horrible sexual abuse and the imposition of extreme suffering." *Reeves, supra* at 227, 344 N.W.2d at 447. However, we determined that this circumstance did not exist and therefore was incorrectly applied with regard to the death of Victoria Lamm.

The issues which appellant raises today were previously decided on direct appeal and will not be reconsidered here. We do note, however, that the U.S. Court of Appeals for the Eighth

Circuit recently held, in *Harper v. Grammer,* 895 F.2d 473 (8th Cir. 1990), that the Nebraska Supreme Court's limiting construction of the first portion of § 29-2523(1)(d) renders that segment of the statute constitutional under *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980); and *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988). Noting that the sentencing court found both portions of (1)(d) to exist, the court of appeals refused to invalidate the existence of this aggravating circumstance and upheld the imposition of the death sentences, stating:

> Assuming, without deciding, that at the time of Harper's trial the Nebraska Supreme Court had not narrowed the language of the second portion of section 29-2523(1)(d) to bring it within constitutionally acceptable contours, we agree with the trial court that the invalidity of the second portion of (1)(d) does not vitiate the efficacy of the first portion.

Harper v. Grammer, supra at 479.

Appellant also contends aggravating circumstance (1)(b) is unconstitutionally vague and unconstitutional as applied to appellant. This aggravating circumstance reads: "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." Appellant contends "apparent" is vague. We agree with the court's analysis of this circumstance in *Holtan v. Black*, No. CV84-L-393, slip op. at 20 (D. Neb. Nov. 5, 1986), that "apparent" means "readily perceptible," and therefore "the provision cannot be applied in speculative situations or where a strained construction is necessary to fulfill it." This aggravating circumstance is not constitutionally infirm. On direct appeal we determined that this circumstance existed with regard to the death of Victoria Lamm. We will not reconsider that finding here. These contentions are without merit.

Appellant next argues that any interpretation of 1978 Neb. Laws, L.B. 711, other than a literal interpretation violates the separation of powers clause of Neb. Const. art. II. In a series of cases this court determined that if read literally, L.B. 711 would

unconstitutionally encroach upon the judicial function. See, *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Moore, supra*; *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). In *Palmer, supra*, we held that the proportionality review under L.B. 711 should include only those cases in which the death penalty was imposed. " 'A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.' " *State v. Farr*, 209 Neb. 163, 166, 306 N.W.2d 854, 857 (1981). Appellant's contention is without merit.

Appellant next contends:

> For The Prosecuting Attorney To Misstate The Law During Closing By Stating That the Defendant Would Walk Out Of Court A Free Man And The Court To Then Refuse To Give A Correcting Instruction On The Consequences Of Not Guilty By Reason Of Insanity Violated Appellant's Rights Under The Sixth, Eighth, and Fourteenth Amendments To The United States Constitution.

(Emphasis omitted.) Supplemental brief for appellant at 31. Although this issue has been briefed and decided on direct appeal, appellant "submits that because the issue was wrongly decided at trial and on direct appeal that it is both necessary and appropriate that the prejudicial constitutional error be corrected on post conviction." Supplemental brief for appellant at 32. This issue was decided on direct appeal and will not be reconsidered here.

Lastly, appellant argues that the district court erred in failing to grant an evidentiary hearing on various issues. Each issue will be considered separately.

This court has previously stated:

> A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment

> against the movant, or (2) notwithstanding proper pleading of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.

State v. Von Dorn, ante, p. 93, 95, 449 N.W.2d 530, 532 (1989).

Appellant contends an evidentiary hearing should have been granted to determine if it was constitutionally permissible for the sentencing panel to, sua sponte, offer, review, and consider the PSI and bill of exceptions. He recognizes that "this issue was extensively covered in the direct appeal on this case," and "submits that this issue was wrongly decided on direct appeal." Supplemental brief for appellant at 35-36. This issue has been considered and disposed of previously. The district court did not err in failing to grant an evidentiary hearing.

He also argues: "The Trial Judge Wrongfully Participated in Directing the Pre-Sentence Investigation to Obtain Aggravating Evidence." (Emphasis omitted.) Supplemental brief for appellant at 37. Appellant has not alleged a violation of his constitutional rights with regard to this contention; therefore, it will not be considered.

Appellant next contends the 6th, 8th, and 14th amendments require that his cause be remanded to the original sentencing panel for a new evidentiary hearing when, on direct appeal, this court determined that the panel erred as a matter of law with regard to the existence of aggravating and mitigating factors. We note that this issue was argued to the U.S. Supreme Court on November 28, 1989. The Court has not yet issued its decision. See *Clemons v. Mississippi*, No. 88-6873, 58 U.S.L.W. 3379 (Dec. 12, 1989). In *State v. Ryan*, 233 Neb. 74, 144, 444 N.W.2d 610, 653 (1989), we stated:

> The balancing of aggravating and mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors. *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). Additionally, this court's automatic review of capital cases does not require it to set aside a death penalty where certain aggravating factors found to exist below are determined here to be unsupported by the

evidence. See Neb. Rev. Stat. § 29-2528 (Reissue 1985). A finding of a single aggravating circumstance on appeal may be sufficient to support a death sentence.

The district court was not required to grant an evidentiary hearing. This contention is without merit.

Appellant also argues an evidentiary hearing should have been granted to determine the extent of appellant's recollection of the murders. He argues that imposing the death penalty on a defendant who has no recollection of the crime constitutes cruel and unusual punishment prohibited by the eighth amendment. Appellant cites no authority for this proposition. We believe imposing the death penalty on a defendant who cannot recollect the circumstances of the crime due to voluntary intoxication does not constitute cruel and unusual punishment. The district court did not err in denying an evidentiary hearing.

Appellant also contends an evidentiary hearing is necessary to resolve whether the failure to disqualify the county attorney from participating in the trial violates the 6th, 8th, and 14th amendments. Prosecuting County Attorney Ron Lahners interviewed appellant shortly after the murders. Apparently, appellant's trial counsel believed his testimony would aid them in their insanity defense and called him as a witness. On direct appeal we fully examined this issue in the context of appellant's right to a fair trial and due process of law under the 14th amendment. We stated: "As a general rule a prosecutor should withdraw from a case when he testifies at trial on behalf of the State. This general rule does not apply when the defense calls the prosecutor as a witness." (Syllabus of the court.) *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). We reaffirm our reasoning and holding under an eighth amendment analysis. Moreover, we refuse to consider appellant's contention that the county attorney's participation in the trial denied appellant his right to subpoena witnesses under the 6th and 14th amendments. This contention is frivolous. Appellant himself chose to call the county attorney as a witness when others who were also present during the interview with appellant were available to testify; therefore, he was in no way prejudiced by the trial court's failure to disqualify the county attorney. The district court did not err in failing to grant an evidentiary

hearing on these issues.

Appellant argues that an evidentiary hearing is required to determine if the PSI contained statements by the appellant obtained in violation of his fifth amendment rights. Appellant contends that the record does not disclose whether appellant was advised of his fifth amendment rights before making certain statements to Larry Heckert, the adult probation officer. The statements include, inter alia, appellant's personal and family history and an account of the events the day the murders took place, and were admitted as part of the PSI. Appellant cites *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), which held that the admission of an examining psychiatrist's testimony at a capital sentencing to prove the crucial issue of defendant's future dangerousness violated the defendant's fifth amendment privilege against self-incrimination because he was not advised before the examination that he had a right to remain silent and that any statement he made could be used against him at the capital sentencing proceeding.

Appellant's contention is meritless. There is no need to grant an evidentiary hearing on this issue because the September 11, 1981, "Order Overruling Defendant's Motions," issued prior to the pronouncement of sentence, clearly indicated: "5. That the panel in arriving at its decision in this case is taking into consideration only the evidence which the panel considers to be admissible for the purpose of sentencing. 6. That the panel is taking into consideration the case of Estelle v. Smith . . . ."

Assuming these statements were obtained in violation of *Estelle*, the record clearly shows that the sentencing panel did not consider the statements. The district court did not err in denying an evidentiary hearing.

Appellant next argues that an evidentiary hearing should have been granted to determine if the PSI contained inaccurate and unreliable information and was racially biased against appellant, in violation of the 6th, 8th, and 14th amendments. We note that appellant, at the sentencing hearing, did not challenge any information contained in the PSI as inaccurate or unreliable. In any event, appellant has failed to allege any specific inaccuracies in the PSI and has also failed to allege how

he might have been prejudiced by these purported inaccuracies. Moreover, appellant's bald assertion that the PSI was racially biased against him is insufficient to demonstrate unconstitutional discrimination under the 14th amendment, or to show arbitrariness, irrationality, or capriciousness under the 8th amendment. See *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). Mere assertions, without more, do not entitle appellant to an evidentiary hearing. The PSI contains nothing suggestive of racial prejudice. The district court did not err.

Appellant next contends that an evidentiary hearing is required to determine whether the trial court interfered with appellant's development of expert testimony, in violation of the 6th, 8th, and 14th amendments. The district court, in its order of December 8, 1987, stated with regard to this contention:

> (23) Paragraph 30 of defendant's amended motion alleges that the trial court improperly injected itself to [sic] the examination of the defendant's witness and improperly interfered with the defendant's orderly presentation of psychiatric evidence. The presiding judge has the authority to exercise reasonable control over the mode of questions for the witnesses for the ascertainment of the truth (Section 27-611 R.R.S.). The trial record shows that the court merely sustained the State's objections when questions asked were too broad or compound. In chambers, the judge asked the defendant's attorney to simply ask one question at a time in order to make it more understandable for the jury. (1522:2-5) . . . .

The district court implicitly found that this contention was adequately resolved from the record. We agree. The district court properly denied an evidentiary hearing.

We have thoroughly reviewed appellant's arguments. There is no constitutional infirmity in his convictions or sentences. The order of the Lancaster County District Court dismissing appellant's motion for postconviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY PRESCOTT RUYLE, APPELLANT.

452 N.W.2d 734

Filed March 16, 1990. No. 88-1053.

1. **Rules of Evidence: Evidence.** Under Neb. Evid. R. 402, only relevant evidence is admissible, and irrelevant evidence is not admissible.
2. **Rules of Evidence: Other Acts: Intent.** Evidence of prior acts or statements showing a dispute between the defendant and a victim may be admissible on the issue of intent.
3. **Rules of Evidence: Other Acts: Time: Intent.** The admissibility of evidence concerning other conduct must be determined upon the facts of each case and no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is too remote.
4. **Evidence: Appeal and Error.** Generally, it is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
5. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2) is an inclusionary rule permitting the use of relevant evidence of other crimes, wrongs, or acts for purposes other than to prove the character of a person in order to show that such person acted in conformity with that character.
6. _____: _____. Evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
7. **Jury Instructions.** All jury instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury. The trial court, whether requested or not, must instruct the jury on the law of the case.
8. **Criminal Law: Negligence: Homicide.** A victim's contributory negligence is not a defense to homicide.
9. _____: _____: _____. A victim's contributory negligence does not relieve a defendant of criminal responsibility for homicide unless it is a supervening cause of death, that is, the sole cause of death.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Robert M. Spire, Attorney General, and Sharon M. Lindgren for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, Stanley Prescott Ruyle, was convicted of first degree felony murder pursuant to Neb. Rev. Stat. § 28-303(2) (Reissue 1989) in the arson death of Robert D. Scott on August 5, 1987, and was sentenced to life imprisonment. He has appealed and contends the district court erred (1) in allowing the State to offer evidence of his statements to Lincoln Police Officers Burkhart, McAndrew, and Ashley and to Scott Buck; (2) in allowing the State to offer evidence regarding several acts of uncharged misconduct; and (3) in failing to properly instruct the jury.

The fire that resulted in the charges against the defendant occurred in the early morning hours of August 5, 1987. The fire, which was fueled by an accelerant, was started on the back porch of an apartment rented by Scott Buck, the defendant's companion, located at 1445 1/2 D Street in Lincoln. Apparently, the setting of the fire was directed at Buck. The victim, Robert Scott, lived in another apartment in the building and died of smoke inhalation and carbon monoxide poisoning as a result of the fire.

Prior to trial, the defendant filed a motion in limine seeking to prevent the State from presenting evidence regarding statements made by him to several Lincoln police officers and to Scott Buck. In a second motion in limine, the defendant sought to exclude evidence of numerous acts of the defendant's uncharged misconduct.

The trial court's rulings on the defendant's motions in limine are not in the record. During the trial, however, the defendant renewed his objections to admission of the evidence regarding his statements and acts. In each instance, the trial court granted the defendant a continuing objection on the grounds stated in the motions in limine. The court then overruled the defendant's objections and allowed the State to introduce evidence regarding the statements and acts of the defendant. The court also conducted a hearing outside the presence of the jury and determined that the defendant's various statements to law enforcement officers were voluntarily made. The defendant has not appealed the court's findings in this regard.

Four witnesses testified, over objection, to statements the

defendant had made before the fire. In three instances, the defendant specifically threatened to burn or torch Scott Buck's apartment building, which is where the fire occurred. In the fourth statement, the defendant considered getting a gun and shooting Buck. Most of the statements were made after there had been an altercation between the defendant and Buck. Testimony regarding the defendant's past conduct, which included acts of assault, vandalism, theft, and trespassing, also was admitted at trial.

I. Defendant's Statements.

In his motion in limine filed September 8, 1988, the defendant sought to prohibit the State from presenting evidence regarding his statements to several Lincoln police officers, including Officers Burkhart, McAndrew, and Ashley, and "[s]tatements related by Scott Buck in his deposition of August 4, 1988." The deposition of Buck is not in the record. In his motion, the defendant claimed that the statements were irrelevant or, in the alternative, that their probative value was outweighed by the prejudicial effects of the statements.

In his brief, the defendant has specified the testimony complained of and contends that his prior statements were inadmissible under Neb. Evid. R. 401, 402, and 403 (Neb. Rev. Stat. §§ 27-401, 27-402, and 27-403 (Reissue 1989)).

The record shows that Scott Buck, the tenant at 1445 1/2 D Street, first met the defendant during May 1987. Buck and the defendant became involved in a homosexual relationship and had a number of arguments over sex. Buck testified that during these fights, the defendant threatened at least three times to burn down Buck's apartment.

Lincoln Police Officer James Ashley testified that he had been dispatched to 1445 1/2 D Street in the early morning hours of July 16, 1987. During that incident, the defendant refused to leave Scott Buck's apartment at 1445 1/2 D Street. After Ashley advised the defendant that he would have to leave or he would be arrested for trespassing, the defendant lost control of himself and began yelling and screaming and waving his hands about wildly. The defendant then ran from the apartment into the hallway, kicking the doors to other apartments, beating on

the other apartment doors with his fists, and continuing to yell and scream.

Ashley subsequently placed the defendant under arrest for disturbing the peace. Ashley testified that while he was attempting to arrest the defendant, the defendant turned his head, apparently back toward 1445½ D Street, and yelled that he "would be back and he would burn that fucking house down." Ashley further testified that once inside the police cruiser, the defendant "began saying that he wanted some more, he wanted some more." Then the defendant said, "I can't wait until I get out. I'm going to come back and burn that building down." The defendant continued to kick the cage in the cruiser and said that he wanted Ashley to pull his gun and shoot him, that "I can't wait till the day comes . . . that I can blow your fucking head off," and that Ashley should get at least 15 other officers at the jail because there was going to be a fight.

Lincoln Police Officer Burdette Burkhart testified that he contacted the defendant early in the afternoon of July 16, 1987, regarding an incident of vandalism to an automobile located behind the apartment at 1445½ D Street. During their conversation, the defendant became irate and began to "cuss and swear." Burkhart testified that the defendant

> made the statement that he was going to torch or burn the house. I asked him, how do you intend to do that, and he indicated with gasoline. I then asked him, I said, I don't think you should be telling me those things, you shouldn't be making comments such as that to a police officer.

The defendant then calmed down and left after receiving a citation.

Officer Burkhart testified that he contacted the defendant a short time later on the afternoon of July 16, 1987, in response to a trespassing complaint involving another residence. While Burkhart and the defendant were standing directly across the street from 1445½ D Street and Burkhart was issuing the defendant a citation for trespassing, the defendant again became irate "and again he stated that he was going to torch or burn the house." Burkhart further testified that he had a "pretty good idea" about which house the defendant was

talking about and that he told the defendant not to make statements like that because it could get him into trouble.

The final testimony complained of concerning the defendant's statements was given by Lincoln Police Officer Kirk McAndrew. McAndrew testified that at approximately 11 p.m. on August 3, 1987, he responded to a report of a fight between Buck and the defendant at the 7-Eleven store at 13th and E Streets. McAndrew arrested the defendant and transported him to the jail. Inside the jail, McAndrew put his gun in the gun locker. At this time, McAndrew testified, the defendant made a statement "to the effect that he should buy a gun and shoot Scott." McAndrew responded by saying that if the defendant did something like that, he would be arrested. McAndrew testified that the defendant paused for a few minutes and said that "he should buy a gun and shoot Scott. He put it in the form of a question. Maybe I should buy a gun and shoot Scott."

The defendant contends that the evidence regarding his statements to Buck, Ashley, Burkhart, and McAndrew was irrelevant or, in the alternative, that the probative value was outweighed by the prejudicial effects of the statements.

There is some evidence in the record to the effect that the defendant may be mentally retarded. He argues in his brief that he "is a person of limited intelligence who made threats and threw tantrums all the time" and that, given his character, statements which were made more than 2 weeks before the fire were too remote in time, and too remote in the sequence of incidents between the defendant and Scott Buck, to bear any connection to the fire which occurred on August 5, 1987. The defendant further argues that although his August 3, 1987, statement to Officer McAndrew that "[m]aybe I should buy a gun and shoot Scott" was close in time to the fire, the statement was irrelevant because it bore no relationship to the fire.

Under rule 402, only relevant evidence is admissible, and irrelevant evidence is not admissible. *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985). Rule 401 provides that "[r]elevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence." Relevant evidence may be excluded pursuant to rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

This court has recognized that evidence of prior acts or statements showing a dispute between the defendant and a victim may be admissible on the issue of intent.

In *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988), the defendant was convicted of manslaughter and using a deadly weapon to commit a felony. He claimed on appeal that evidence regarding an altercation between the defendant and the victim that occurred more than 1 year prior to the victim's death was too remote in time to be relevant and was admitted in violation of Neb. Rev. Stat. § 27-404(2) (Reissue 1989). In rejecting the defendant's contentions, this court stated:

> Unlike the situation recently presented in *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988), where the evidence of other wrongs concerned events which bore no relationship to the crimes charged, the evidence in question in the present case tends to show Rincker was involved in a long-running dispute with the victim and thus bears on the question of intent, which, because Rincker was charged with first degree murder, was an issue. Therefore, the questioned evidence was relevant.

Rincker, supra at 529, 423 N.W.2d at 439-40.

In *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985), the defendant was convicted of first degree sexual assault of a child in connection with an incident which occurred Christmas morning, 1981. The State presented evidence of numerous prior incidents involving the defendant's sexual misconduct toward the 13-year-old victim. In explaining the purpose and relevancy of the challenged evidence, this court stated:

> We intuitively conclude (1) incidents such as the subject of prosecution in this case do not frequently happen in Nebraska households, and (2) society still rejects and disbelieves such incidents as commonplace occurrences. Consequently, separated from the past, the victim's

> account of the incident in this case would appear unbelievable. If the Christmas incident were examined as an isolated episode unconnected with any background or antecedent events, incredibility engendered by the very improbability of the episode would cause the mind to boggle and recoil in disbelief. "[E]xhibited alone, many real occurrences would appear under the guise of falsehood, and truth itself would be made to lie." [Citations omitted.]
>
> When all antecedent acts and events preceding the Christmas incident are considered collectively, reasonable deduction compels probability of Craig's commission of the crime charged.

Craig, supra at 75-76, 361 N.W.2d at 212.

In *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986), the defendant was convicted of the first degree murder of his wife. During the trial, the court allowed a former wife of the defendant to testify about his attempt to choke her during an argument which occurred nearly 10 years prior to the murder. On appeal, the defendant argued that this evidence was so remote in time and dissimilar in circumstances as to be inadmissible. In rejecting his contentions, this court noted that

> the admissibility of evidence concerning other conduct must be determined upon the facts of each case and that no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote. The question of remoteness in time is largely in the sound discretion of the trial court; while remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence. As is generally true on questions concerning the admissibility of evidence, the question of whether other conduct is sufficiently similar to the offense charged is also a matter left largely to the sound discretion of the trial court.

Kern, supra at 185-86, 397 N.W.2d at 29.

The defendant further contends that even if the evidence of his statements was relevant, the testimony was "merely inflammatory," had the effect of unfairly prejudicing the jury,

and should have been excluded pursuant to rule 403.

In *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987), the defendant was convicted of second degree murder and use of a weapon to commit a felony in the shooting death of his son. In that case, the State presented evidence regarding the defendant's participation in the robbery of a Florida drug dealer in order to explain the defendant's motive for shooting his son. The defendant claimed on appeal that testimony regarding the Florida robbery was unfairly prejudicial because it showed the defendant was involved in drugs and a robbery. In examining the relevancy and the prejudicial effect of the evidence, this court said:

> As noted in *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984), most evidence offered by one party to an action is intended to be prejudicial to the opposing party; it is only unfair prejudice with which § 27-403 is concerned. According to *Lincoln Grain, supra* at 439, 345 N.W.2d at 306, "In the context of § 27-403 such prejudice means a tendency to suggest a decision on an improper basis."
>
> Probative value, on the other hand, "is a relative concept and involves a measurement of the degree to which the evidence persuades the trier of fact that a particular fact exists and the distance of that particular fact from the ultimate issue in the case." *State v. Clancy*, [224 Neb. 492, 498, 398 N.W.2d 710, 715 (1987)].
>
> The ultimate issue in this case was the defendant's guilt or innocence of the crimes charged. Proof of motive was critical to the State's case under the circumstances of the shooting....
>
> Motive is defined as that "which leads or tempts the mind to indulge in a criminal act." *State v. Coca*, 216 Neb. 76, 82, 341 N.W.2d 606, 610 (1983).

Wilson, supra at 471-72, 406 N.W.2d at 127. We concluded in *Wilson* that without evidence of the circumstances leading to the dispute between the victim and the defendant regarding the money obtained in the Florida robbery, there would have been no apparent motive for the defendant to have shot his son.

Generally, it is within the trial court's discretion to admit or

exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Wilson, supra*; *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988). The material facts in this case included (1) the identity of the person who set the fire, (2) that the fire was intentionally set and was not an accident, and (3) the motive for setting the fire. Although the victim of the fire was Robert Scott, the record shows that the defendant's action in setting the fire was directed at Scott Buck, who lived in the same building as the victim. The defendant's threats to burn or "torch" Buck's residence were relevant to the issues of identity and intent, and to show that the fire was not an accident. The defendant's statement about getting a gun and shooting Buck demonstrated the continuing dispute between the defendant and Buck and explains both the defendant's motive and the facts surrounding the fire. The trial court did not abuse its discretion in admitting evidence of the defendant's prior statements. His claims to the contrary are without merit.

II. Prior Acts.

In his second assignment of error, the defendant claims the trial court erred in allowing the State to offer evidence of several acts of uncharged misconduct, including the July 16, 1987, arrest of the defendant by Officer Ashley for disturbing the peace; the July 16, 1987, vandalism of an automobile; the July 16, 1987, trespass at 1600 C Street; the July 16, 1987, theft from Scott Buck; the August 3, 1987, assault of Buck; and defendant's arrest for disturbing the peace on August 4, 1987. He claims that this evidence was offered to show that the defendant "was an ill behaved person and not because any of the acts bore any logical relevance to the crime charged." Brief for appellant at 14. He also claims that the evidence was highly inflammatory and prejudicial to his right to a fair trial.

Officer Ashley's testimony regarding the defendant's arrest at Buck's residence for disturbing the peace in the early morning hours of July 16, 1987, has been discussed above. Buck also testified to the details of this incident.

Regarding the acts of vandalism, trespassing, and theft on July 16, 1987, Officer Burkhart testified that at about 1:10 p.m. he received a complaint from Buck's next door neighbor, Lee

Jones, about some traffic violations committed by the defendant. Burkhart stopped the defendant's car and said he wanted to talk to him about some vandalism to a car parked behind 1435 D Street, in which a radio had been thrown through the windshield. The defendant admitted to Burkhart that he was the one responsible for throwing the radio and said he was trying to throw it against the house at 1445 D Street, but missed and hit the parked car instead. Burkhart then issued the defendant a citation for vandalism. It was at this point that the defendant became irate and said he would burn the house with gasoline, as discussed above.

At about 1:20 p.m., Burkhart investigated a complaint that the defendant was trespassing at 1600 C Street. Burkhart did not see the defendant at that address, but observed a broken television in the hallway on the first floor of the building. He advised the police dispatcher that he "wanted a locate for all officers put out on Stanley Ruyle" regarding the incident at 1600 C Street. A short time later, Officer Dennis Duckworth advised Burkhart that he had stopped the defendant at 15th and D Streets. Burkhart returned to 15th and D and saw Duckworth and the defendant standing near the defendant's car.

Duckworth testified that as he was patrolling in the area of 15th and D, he became aware of Burkhart's dispatch. Duckworth saw the defendant's car turn into the alley behind 1445 D Street, followed the defendant's car, and saw the defendant throw some items out of the car toward the house. Duckworth stopped the defendant and asked him what was going on. The defendant said he was throwing items back that he had stolen from Buck. The defendant also told Duckworth he had items in his car that he had stolen from Buck.

Burkhart remained with the defendant's car while Duckworth and the defendant went to the alley to retrieve the items thrown from the car which belonged to Buck. The defendant then gave consent for the officers to search his car. As Duckworth searched the car, Buck arrived and identified several items found in the trunk of the defendant's car as belonging to him. Buck testified that the defendant had stolen the items because Buck would not give him sex. The defendant was handcuffed and placed under arrest for the trespassing

incident.

Buck testified that by August 3, he had moved in with the defendant but had not given up his own apartment. After he and the defendant quarreled about sex on the night of August 3, Buck went to his own apartment to be alone. When he left his apartment, Buck encountered the defendant, who knocked Buck to the ground and began pounding on his chest. Buck went to the 7-Eleven store to call the police, with the defendant "consistently tr[ying] to chase me around in his car, screaming and yelling up [sic] the top of his lungs."

Officer McAndrew testified that he was dispatched to the 7-Eleven store at 13th and E Streets at 11 p.m. on August 3, 1987, to investigate a disturbance. Buck told McAndrew that there had been an incident earlier in the evening, and Buck exhibited injuries to his chest and left leg. The defendant told the officer that he and Buck had argued about sex earlier in the evening and that the argument had continued to the 7-Eleven. McAndrew arrested the defendant for domestic assault and transported him to the jail. It was after this incident that the defendant told McAndrew that maybe he should buy a gun and shoot Buck.

Apparently, the defendant was released on bond from jail early on the morning of August 4. At approximately 6 a.m., Officer McAndrew contacted the defendant at 13th and E Streets because he had received a report of a disturbance near Scott Buck's residence. The defendant was then driving his 1973 Plymouth automobile. McAndrew arrested the defendant for disturbing the peace and placed him in the cruiser.

Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1989)), 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.

This court has held that rule 404(2)

> is an inclusionary rule permitting the use of relevant evidence of other crimes, wrongs, or acts for purposes

> other than to prove the character of a person in order to show that such person acted in conformity with that character. Thus, § 27-404(2) permits evidence of other crimes, wrongs, or acts if such is relevant for a purpose other than to show defendant's propensity or disposition to commit the crime charged. *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987); *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986). In applying § 27-404(2) we have said that evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question. *State v. Kern, supra.*

State v. Rincker, 228 Neb. 522, 529, 423 N.W.2d 434, 439 (1988). See, also, *State v. Donhauser*, 231 Neb. 114, 435 N.W.2d 186 (1989).

"Evidence of other criminal acts which involve or explain the circumstances of the crime charged, or are integral parts of an overall occurrence or transaction, may be admissible." *State v. Nielsen*, 203 Neb. 847, 851-52, 280 N.W.2d 904, 907 (1979). See, also, *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

The fire which resulted in the death of Robert Scott was set on the back porch of Scott Buck's apartment. Evidence of the long-running dispute between Buck and the defendant explained the circumstances of the crimes charged and was an integral part of the overall occurrence or transaction. This testimony tended to identify the defendant as the person who started the fire, to show that the fire was intentionally set, and to explain the defendant's motive for doing so. Under the circumstances, the trial court did not abuse its discretion in admitting evidence of the defendant's prior acts. The defendant's assignment of error is without merit.

III. Jury Instructions.

In his final assignments of error, the defendant complains that the trial court erred in refusing to give the defendant's proposed jury instruction No. 1 and in overruling defendant's objection to jury instruction No. 4 regarding the elements of the

crime of first degree murder.

The record does not show that the defendant objected to jury instruction No. 4. At the instruction conference, defense counsel offered his proposed jury instructions Nos. 1 and 2. Counsel then noted that the court's instruction No. 4 was essentially the same as the defendant's proposed instruction No. 2, "so in that regard, I would not have an objection to Instruction No. 4." The defendant's proposed jury instruction No. 2 is not in the record. The situation is similar to that in *State v. Byrd*, 231 Neb. 231, 235, 435 N.W.2d 898, 901 (1989), where the court noted: "Defendant's proposed instruction No. 3 [regarding entrapment] was nearly identical to NJI 14.34, which was given by the court, and was submitted by the defendant as an alternative to his proposed instructions Nos. 1 and 2."

The jury was instructed, pursuant to instruction No. 4:

> Under Count I of the information in this case, depending on the evidence, you may find the defendant:
>
> a. Guilty of murder in the first degree; or
>
> b. Not guilty.
>
> The material elements which the state must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the first degree are:
>
> 1. That the defendant, Stanley Prescott Ruyle, killed Robert D. Scott.
>
> 2. That the defendant did so while in the perpetraion [sic] of an arson of 1445 1/2 "D" Street.
>
> 3. That the perpetration of said arson consisted of each and every one of the following elements:
>
> a. That the defendant, Stanley Prescott Ruyle, damaged a building by starting a fire or causing an explosion.
>
> b. That the defendant did so intentionally.
>
> c. That the defendant did so knowing at the time that another person was present therein or that the circumstances were such as to render the presence of another person therein a reasonable probability.
>
> d. That the defendant did so on or about August 5,

1987, in Lancaster County, Nebraska.

Defendant's proposed instruction No. 1 provided, in part:

> Under Count [I] of the information in this case, depending on the evidence, you may find the defendant:
>
> a. Guilty of first degree murder or
>
> b. Guilty of second degree murder or
>
> c. Guilty of manslaughter, or
>
> d. Not guilty.
>
> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of first degree murder are:
>
> 1. That the defendant, Stanley Prescott Ruyle;
>
> 2. Did on or about the 5th day of August, 1987;
>
> 3. Did kill Robert D. Scott;
>
> 4. While in the perpetration of:
>
> a. Intentionally damaging a building by starting a fire;
>
> b. When another person was present in the building at the time and he knew that fact, or the circumstances were such as to render the presence of a person therein a reasonable probability; and
>
> c. That said building was located at 1445 1/2 "D" Street, Lincoln, Lancaster County, Nebraska;
>
> *5. That said fire was the proximate cause of the death of Robert D. Scott.*

(Emphasis supplied.)

The defendant's proposed instruction No. 1 was inappropriate under *State v. Hubbard*, 211 Neb. 531, 534, 319 N.W.2d 116, 118 (1982):

> Where an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in § 28-303(2), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested.

See, also, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Massey*, 218 Neb. 492, 357 N.W.2d 181 (1984).

In his brief, the defendant concedes there was evidence that the defendant started the fire which was the proximate cause of Robert Scott's death, but claims also there was evidence that Scott safely fled his burning apartment and then returned to the apartment. The defendant argues that he was, therefore, entitled to an instruction that the jury must find beyond a reasonable doubt that the arson was the proximate cause of Scott's death. The defendant then claims that although his proposed instruction No. 1 did not adequately set forth the law on proximate cause,

> the defendant's proposed jury instruction sufficiently advised the trial court that defendant was requesting an instruction on proximate cause. Because the defendant was entitled to an instruction on proximate cause and requested an instruction on proximate cause, it was the duty of the trial court to correctly instruct the jury on proximate cause.

Brief for appellant at 21.

In *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989), we said that all jury instructions, read conjunctively, must correctly state the law, adequately state the issues, and not mislead the jury. The trial court, whether requested or not, must instruct the jury on the law of the case. *Id.*

The defendant claims that the instruction which should have been given is that set forth in *State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975). In that case, the defendant was convicted of felony murder for the death of an elderly woman in the perpetration of a robbery, and defendant claimed on appeal that the victim's death was caused by improper medical treatment. The jury was instructed as follows:

> "You are instructed that to constitute a homicide committed while perpetrating or attempting to perpetrate a robbery there must be, in addition to the death of a human being, a robbery or an attempted robbery which proximately caused that death.
>
> "The proximate cause of a death is that cause which, in natural and continuous sequence, unbroken by an efficient intervening cause produces the death, and without which the result would not have occurred. It is the

efficient cause, the one that necessarily sets in operation the factors that accomplish the death.

"This does not mean that the law seeks and recognizes only one proximate cause of a death, consisting of only one factor, one act, one element or circumstance, or the conduct of only one person. To the contrary, the acts of two or more persons may work concurrently as the efficient cause of a death, and in such a case, each of the participating acts is regarded in law as a proximate cause.

"An 'efficient intervening cause' is a new and independent act, itself a proximate cause of the death, which breaks the causal connection between the original illegal act and the death."

Harris, supra at 80-81, 230 N.W.2d at 207.

The defendant's theory of the case is that the victim, Robert Scott, caused his own death by voluntarily reentering his apartment after he was safe. Under this theory, he argues, the jury could find that the act of the victim in returning to the burning building after he had successfully fled to safety was an efficient intervening cause which broke the causal connection between the original illegal act and the death of the victim.

The defendant has not cited any portion of the record which shows that the victim "got to safety and then chose to go back into his apartment," brief for appellant at 23, and there is no evidence to sustain that theory. Our review of the record satisfies us that there is no evidence to support such a claim.

There is evidence that the victim called 911 to report the fire, and the victim was found, either dead or unconscious, in his apartment with his pet cat underneath his right arm. Dr. Daniel Till testified that the victim died of smoke inhalation and carbon monoxide poisoning. He further testified that carbon monoxide poisoning may cause a gradual deterioration of one's ability to function. Dr. Till stated that carbon monoxide poisoning may cause difficulty in maintaining balance and orientation, that one's judgment may become seriously altered, and that a person may have difficulty staying mobile and lose his sense of direction due to carbon monoxide poisoning.

The only testimony which might suggest that the victim ever left his apartment, however, was given by Thomas Schutz, a

resident of the apartment building:

Q. What's the next thing you remember with regard to that evening?

A. The next thing I remember, someone was knocking, pounding on my door, yelling, "Fire, fire." At that point I thought maybe it was a practical joke. I'm a fairly heavy sleeper. I got up. You know when somebody yells, "Fire, fire," you probably — you at least should investigate, so I did and —

Q. Do you know who that was that hollered, "Fire, fire"?

A. I thought it was Bob Scott at that point.

Q. Why did you think it was Bob Scott?

A. Well, because I heard him yell — after that I heard him say, yes, I know. I heard him talking and I heard him scream and fall.

Q. Okay. But at this precise time, you aren't sure who it was —

A. No.

Q. — would that be a fair statement?

A. Yes, it would be.

Schutz further testified that after he heard the pounding on his door, he dressed and tried to make a telephone call. It was at this time that Schutz heard a "wild maniacal sort of a scream and then a big thud . . . like somebody falling." These sounds came from the victim's apartment.

On cross-examination, Schutz testified:

Q. And you were awakened by a pounding, is that right?

A. And someone yelling, "Fire."

Q. Okay. So you actually recall hearing, "Fire"?

A. Yes.

Q. Did you recognize the voice at that time?

A. At that time, it sounded like Bob Scott because I heard his voice shortly after that, too.

Q. Okay. So in your mind, you thought it was Bob Scott.

A. Yes.

Q. Is that right?

A. Yes.

Q. And you've indicated also that you had heard a scream.

A. Yes.

Q. Is that right? And a thud?

A. Someone falling.

Q. Is that right? Did you hear anything else?

A. The night of the fire. There was a — after someone yelled the, "Fire, fire," there was a knocking on the door, I heard someone say, "Yeah, I know —

Q. Okay.

A. — there's a fire." Now, I don't know whether that was Marlon Pals in the room in the apartment east of me or if it was Bob.

Scott Buck testified that the first thing he did as he left his apartment after discovering the fire was to knock on Schutz' door because Schutz was a sound sleeper. Buck spoke in a very loud voice, telling Schutz to get out because "the place is going down."

Lee Jones testified that he saw the victim looking for his cat in the alley on August 4 at 11 p.m., but that Robert Scott was "noticeably absent" from the crowd of people watching the fire.

No witness testified to seeing the victim alive outside the apartment building after the fire started.

Since there is no evidence that the victim ever "got to safety and then chose to go back into his apartment," creating an alleged efficient intervening cause of death, the defendant's claims amount to no more than an assertion that the victim was negligent in failing to prevent his own death. A victim's contributory negligence, however, is not a defense to homicide.

For example, in *State v. Leech*, 54 Wash. App. 597, 775 P.2d 463 (1989), *review granted* 113 Wash. 2d 1027, 784 P.2d 531, the defendant was convicted of first degree felony murder stemming from an arson fire. He appealed, contending that the victim firefighter's own negligence in failing to use his breathing apparatus, rather than the arson, caused the victim's death. The Court of Appeals of Washington found that the facts of the case amply supported a finding that the defendant's arson fire

proximately caused the victim's death.

> "[I]t is not necessary that defendant's act should have been the sole cause of the harm[;] . . . a contributory cause is sufficient." (Italics omitted.) [Citations omitted.] Here, the arson was *at least* a contributory cause of Earhart's death. But for the arson fire, Earhart would not have been exposed to the poisonous fumes that ultimately killed him.
>
> Moreover, a victim's contributory negligence does not relieve a defendant of criminal responsibility for homicide unless it is a supervening cause of death, that is, the *sole* cause of death. *State v. Judge*, 100 Wash.2d 706, 718, 675 P.2d 219 (1984) . . . . Earhart's alleged negligence in failing to use his breathing apparatus properly did not intervene in the chain of causation in such a way as to become the sole cause of his death. Earhart's failure to use his breathing apparatus would not have resulted in his death if Leech had not set the arson fire. Thus, Leech's conduct in setting the fire proximately caused Earhart's death.

(Emphasis in original.) *Leech, supra* at 600-01, 775 P.2d at 465.

In *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989), the defendant was convicted of felony motor vehicle homicide. On appeal, he claimed that he should have been allowed to present evidence of the police department's policies on the pursuit of motor vehicles in order to show that an Omaha police officer's conduct contributed to the victim's death. The defendant further claimed that evidence of the officer's contributory negligence was material to whether the defendant's actions were a proximate cause of death. We held that the defendant's conduct was the proximate cause of the victim's death and that the officer's conduct was irrelevant. *Id.* In sustaining the trial court's exclusion of the evidence, we stated:

> Proximate cause has been defined by this court as "a moving or effective cause or fault which, in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the death and without which the death would not have occurred." *State v. Sommers*, 201 Neb. 809, 811-12, 272 N.W.2d 367, 369 (1978). " 'It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the death. . . .' "

State v. Lytle, 194 Neb. 353, 358, 231 N.W.2d 681, 685 (1975); *State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975).

William, supra at 88, 435 N.W.2d at 177. See, also, *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

We further stated:

> The case of *State v. Rotella*, 196 Neb. 741, 246 N.W.2d 74 (1976), is somewhat analogous to the present case. There, the defendant, who allegedly was driving on the wrong side of the road when he collided with the deceased's car, was convicted of motor vehicle homicide. On appeal, he complained of the trial court's refusal to allow him to present evidence that the deceased had a quantity of amphetamines in his system sufficient to impair his decisionmaking ability. The trial court determined this evidence to be irrelevant.
>
> This court defined the issue thus: "Essentially what defendant is seeking to prove is contributory negligence on the part of the deceased. However, contributory negligence is not a defense to a charge of motor vehicle homicide. *The issue is whether defendant's violation of law was a contributing factor to the death.*" (Emphasis supplied.) *Id.* at 743, 246 N.W.2d at 76. The court then cited from other decisions holding that negligence or unlawful acts by another will not absolve the defendant. " 'When one drives a motor vehicle in violation of law pertaining to the operation of such vehicles on the public highway, and, in so doing, as a result of the violation of law, causes death to another, he is guilty of manslaughter, and neither contributory negligence of deceased nor the driver of the car in which deceased was riding when killed, can be invoked to relieve the former of criminal responsibility.' " *Id.* at 744, 246 N.W.2d at 76, citing *Vaca v. State*, 150 Neb. 516, 34 N.W.2d 873 (1948). " 'In criminal cases prosecuted under the motor vehicle homicide act, the negligence or unlawful acts of another driver which proximately contributed to the death, as distinguished from an independent intervening cause thereof, [are] not a defense if the evidence is sufficient to

> sustain a conclusion beyond a reasonable doubt that the defendant's negligence or unlawful acts were also a proximate cause of the death of another.' " *Rotella, supra* at 744, 246 N.W.2d at 76, citing *Hoffman v. State*, 162 Neb. 806, 77 N.W.2d 592 (1956).

William, supra at 89-90, 435 N.W.2d at 177-78.

In the present case, the defendant's intentional setting of the fire was a contributing factor to the victim's death. The victim died of smoke inhalation and carbon monoxide poisoning, from smoke he inhaled which came from the fire that the defendant intentionally set. But for the fire, the victim's death would not have occurred. Even if there were evidence in the record to support the defendant's theory that the victim should have been able to escape from the burning building, the victim's contributory negligence would not relieve the defendant from criminal responsibility for the homicide unless it was a supervening cause of death, that is, the sole cause of the death. *State v. Leech*, 54 Wash. App. 597, 775 P.2d 463 (1989).

The jury was properly instructed that in order to find the defendant guilty of murder in the first degree, the State had to have proved, beyond a reasonable doubt, that "the defendant, Stanley Prescott Ruyle, killed Robert D. Scott," and that "the defendant did so while in the perpetraion [sic] of an arson of 1445 1/2 'D' Street." The jury was then instructed as to the elements of the crime of arson. In this case, there was no issue concerning intervening cause. The defendant's assignments of error are without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RODNEY L. BRIDGE, APPELLANT.

452 N.W.2d 542

Filed March 16, 1990. No. 89-458.

1. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** Neb. Rev. Stat. § 29-829 (Reissue 1989) authorizes a police officer to stop in a public place any person that he or she reasonably suspects has committed, is committing, or is about to commit a crime and to ask that person's name, address, and an explanation of his or her actions. For the detention to be lawful and justifiable, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.
2. **Criminal Law: Investigative Stops: Probable Cause.** An investigatory stop must be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity.
3. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** The factual basis for an investigatory stop need not be the officer's personal observations alone, but may arise from information provided by another person.
4. **Investigative Stops: Probable Cause.** When the information providing the factual basis for an investigatory stop is furnished by another person, it must contain sufficient indicia of reliability.
5. **Eyewitnesses: Presumptions.** A detailed eyewitness report of a crime by an informant provides its own indicia of reliability because a citizen informant who has personally observed the commission of a crime is presumed to be reliable.
6. **Police Officers and Sheriffs: Investigative Stops: Eyewitnesses: Probable Cause.** The reliability of an informant varies from an anonymous telephone tipster to a known citizen's face-to-face meeting with police officers. The vehicle description varies from minimal to very detailed. The reported location of the vehicle varies from pinpoint accuracy to a general direction of travel. The observation of traffic violations ranges from none to several. The shorter the timelag, the more likely the investigatory stop is valid.
7. **Police Officers and Sheriffs: Investigative Stops.** The purpose of an investigative stop is to clarify ambiguous situations. Even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, police must be permitted to act before their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.
8. _____: _____. The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact legal or illegal—to enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.

Appeal from the District Court for Dawes County, PAUL D. EMPSON, Judge, on appeal thereto from the County Court for Dawes County, JAMES T. HANSEN, Judge. Judgment of District Court affirmed.

David E. Veath for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, Rodney L. Bridge, was convicted of second-offense driving while under the influence of alcoholic liquor and was sentenced to probation for 1 year, including 48 hours in jail, inpatient treatment at the Veterans' Administration hospital, outpatient counseling, attendance at Alcoholics Anonymous for 3 months, a $500 fine, and court costs. Upon appeal to the district court the judgment was affirmed.

The case was tried to the county court without a jury on stipulated facts. The issue upon appeal is whether the defendant's arrest was illegal and the evidence obtained as a result of the arrest should have been suppressed.

The record shows that on March 4, 1988, Chadron Police Officer Tad Appleby received a communication from Special Services Officer Eaton that Eaton had smelled alcohol on the defendant's breath and was concerned that the defendant was driving while intoxicated. Eaton described the defendant and his vehicle and gave Appleby the defendant's license plate number. Eaton had encountered the defendant at the police station after he had called the defendant to tell him to get his dog out of the pound. Eaton had seen the defendant get into his car and drive off.

Appleby drove to the pound to find the defendant. He saw the defendant drive into the lot at the pound and followed him there. Appleby waited for the defendant to come out of the pound and put his dog in the car before questioning the defendant.

After the defendant put his dog in the car, Appleby asked the

defendant for his name and driver's license. Appleby could smell alcohol on the defendant, so he asked the defendant to perform some field sobriety tests. As a result of these tests Appleby determined that the defendant was under the influence of alcohol and arrested him.

After the defendant was read the postarrest form for implied consent, he agreed to take a urine test. The test showed the defendant had a blood alcohol content of .284.

The defendant contends that Appleby's investigatory stop was unconstitutional and that his motion to suppress the results of his urine test should have been sustained.

The conduct of Officer Appleby must be tested by the prohibition of U.S. Const. amend. IV against unreasonable searches and seizures. Neb. Rev. Stat. § 29-829 (Reissue 1989) authorizes a police officer to stop in a public place any person that he or she reasonably suspects has committed, is committing, or is about to commit a crime and to ask that person's name, address, and an explanation of his or her actions. For the detention to be lawful and justifiable, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

"An investigatory stop must be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity." *State v. Ege*, 227 Neb. 824, 826, 420 N.W.2d 305, 308 (1988) (citing *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)). The factual basis for the stop need not be the officer's personal observations alone, but may arise from information provided by another person. *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972); *State v. Ege, supra*. When the information providing the factual basis for the stop is furnished by another person, it must contain sufficient indicia of reliability. *State v. Ege, supra*. A detailed eyewitness report of a crime by an informant provides its own indicia of reliability because a citizen informant who has personally observed the commission of a crime is presumed to be reliable. *State v. Ege, supra*.

In this case, the evidence establishes that Officer Appleby had a reasonable basis supported by sufficient facts to justify his investigatory stop of the defendant. He knew the informant, who was a fellow employee of the Chadron police. Special Services Officer Eaton described the vehicle and knew where the defendant was headed. The time interval between Eaton's report and Appleby's investigation was short. These are factors to be considered in determining whether the facts known to an officer supply a reasonable basis for an investigatory stop. *State v. Ege, supra.*

In listing the factors to be considered, this court stated in *Ege*:

> "The reliability of the informant varies from an anonymous telephone tipster to a known citizen's face-to-face meeting with police officers. The vehicle description varies from minimal to very detailed. The reported location of the vehicle varies from pinpoint accuracy to a general direction of travel. The observation of traffic violations ranges from none to several. The shorter the time lag, the more likely the stop is valid."

State v. Ege, supra at 827, 420 N.W.2d at 308 (quoting *State v. Warren*, 404 N.W.2d 895 (Minn. App. 1987)).

Although neither Eaton nor Appleby observed any erratic driving or other traffic violations by the defendant, the information provided by Eaton was sufficient to justify Appleby's stop. Because the purpose of an investigative stop "is to clarify ambiguous situations, 'even if it was equally probable that the vehicle or its occupants were innocent of any wrongdoing, police must be permitted to act *before* their reasonable belief is verified by escape or fruition of the harm it was their duty to prevent.' " (Emphasis in original.) 1 W. LaFave & J. Israel, Criminal Procedure § 3.8 at 303 (West 1984) (quoting *United States v. Holland*, 510 F.2d 453 (9th Cir. 1975)). The State's interest in preserving evidence and prevention of crime in a case such as this outweighs the defendant's fourth amendment interests. *Wibben v. N.D. State Highway Com'r*, 413 N.W.2d 329 (N.D. 1987). See, also, *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986), where a warrantless arrest was justified because the evidence of blood-alcohol content

would be destroyed without immediate action, and *State v. Longa*, 211 Neb. 356, 318 N.W.2d 733 (1982), where an investigatory stop was upheld on the basis of prevention of criminal activity.

In *People v. Willard*, 183 Cal. App. 3d Supp. 5, 228 Cal. Rptr. 895 (1986), the appellate division of the superior court held that a police officer's investigatory stop of the defendant to determine whether he was driving under the influence was legal. In that case, the police officer was driving in his cruiser when another motorist, in the lane next to him, hailed him and informed him that the car behind the motorist was being driven by a "drunk." The witness then drove off. The officer pulled behind the defendant and stopped him solely on the basis of what the driver of the other car had told him. The officer noticed no erratic driving before he pulled the defendant over. Following the stop, the officer noted the defendant had glassy eyes and the odor of alcohol. He gave the defendant field sobriety tests and then arrested the defendant for driving under the influence, following his failure of the tests.

The court determined the motorist was a reliable citizen witness because there was nothing about him that suggested that he was acting from an ulterior motive; he acted openly, exposing himself to identification; and he had been immediately exposed to the potential hazard caused by the defendant's drunk driving. *Id.* The court also determined that the officer had obtained sufficient information from the motorist to justify the stop because of the reliable statement of the motorist that the defendant's car was being driven by a "drunk" and because the officer observed the defendant driving on a public highway. *Id.* The court stated the information of a reliable citizen informant may be accepted as true in order to justify a brief detention to determine whether or not a crime has been committed, is being committed, or is about to be committed. *Id.* The court stated:

> "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct. Indeed, the principal function of his investigation is to resolve that very ambiguity and establish whether the activity is in fact

> legal or illegal—to 'enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.' "

Id. at 10, 228 Cal. Rptr. at 898 (quoting *In re Tony C.*, 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978)).

In this case, the defendant argues the sole basis of Officer Appleby's investigatory stop was Special Services Officer Eaton's report that the defendant smelled of alcohol. The defendant relies on *State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983), for the proposition that the smell of alcohol alone cannot rise to the required articulable facts which would justify Officer Appleby's investigatory stop.

In *Johnson*, this court said, "The mere odor of alcohol, standing alone, is not sufficient to justify either a lay witness or an expert rendering an opinion as to whether one is intoxicated in violation of law." *Id.* at 395, 338 N.W.2d at 772. However, that statement was made in the context of a trial for drunk driving where the defendant had been convicted of the charge, and the only evidence at trial was the arresting officer's testimony that the defendant smelled of alcohol. There was no evidence that the officer conducted any field sobriety tests or that the defendant failed to pass such tests. The defendant had been stopped for operating a motor vehicle with an improper registration. On questioning by the police officer, the defendant began yelling. It was then that the police officer arrested the defendant for driving while intoxicated because the defendant smelled of alcohol.

The defendant's reliance on *Johnson* is misplaced. In this case, the defendant was stopped on a reasonably articulated suspicion that he was driving while intoxicated. The evidence shows that Special Services Officer Eaton had smelled the odor of alcohol on the defendant, had observed him get into his car and drive, and was concerned that he was driving while intoxicated. These facts as communicated to Officer Appleby, as well as Appleby's own observation of the defendant driving, were sufficient to justify Officer Appleby's detention of the defendant in order to determine whether or not the defendant was engaged in the suspected criminal activity of driving while under the influence of alcohol.

The investigatory stop of the defendant was justified, and upon his failure to successfully perform the field sobriety tests, his arrest was legal. The judgment is affirmed.

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent. In the county court, defendant filed a motion to suppress the evidence of the test of his urine on the grounds that that evidence was obtained as the result of an unconstitutional search and seizure following an illegal arrest. The county judge granted defendant's motion to suppress. Pursuant to Neb. Rev. Stat. § 29-2317 (Reissue 1989), the State appealed the county court's order of suppression to the district court for Dawes County, where the county court order was reversed and the cause remanded to the county court "for further proceedings." On remand, the county court followed the order of the reviewing district court, denied defendant's motion for suppression without a further hearing, received the same evidence over defendant's objection, and found defendant guilty.

Our law is settled that in the appellate review of an order suppressing evidence, "the Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong." *State v. Harms*, 233 Neb. 882, 884, 449 N.W.2d 1, 3 (1989). I see no reason why a district court acting as an appellate court should apply any different rule in reviewing orders of suppression in a county court.

In reviewing the order of the county court suppressing the evidence, the district court did not give appropriate weight to the implicit findings supporting this order of the county court. I cannot see how the county court's findings could be determined to be clearly wrong. Testimony of the arresting officer shows that the only evidence furnished to the officer was that an animal control officer "had contact with Mr. Bridge and that Mr. Bridge had smelled of alcohol" and that the animal control officer "was concerned that he [defendant] might be intoxicated, and after their conversation he had seen Mr. Bridge get into the driver's side of the vehicle and drive off." The animal control officer apparently talked to defendant and saw defendant drive off, but there is not one shred of evidence that

the animal control officer told the arresting officer that defendant had slurred speech, that defendant staggered as he walked and entered the car, or that defendant's driving was anything but normal.

Similarly, the arresting officer saw the car defendant was driving "turn off of [U.S. Highway] 20 onto [U.S. Highway] 385" and saw the car "[turn] off into the vet clinic." When the officer first saw defendant, the officer was going the opposite direction and had to turn the police car around and "had to wait a little while because my car was a little forward and there was traffic and I didn't want to cause an accident." The officer drove into the clinic area and saw defendant walk either into or out of the clinic. The officer did not testify as to any erratic walking or driving, although he had ample opportunity to observe either or both. Apparently defendant operated his car without any problem in the traffic that concerned the arresting officer.

An arresting officer must have " 'a particularized and objective basis for suspecting the person stopped of criminal activity.' " *State v. Daniels*, 220 Neb. 480, 482, 370 N.W.2d 179, 181 (1985), quoted with approval in *State v. Kuil*, 231 Neb. 62, 434 N.W.2d 700 (1989). In the *Daniels* case, a police officer saw defendant's car run a stop sign, make a wide-angle turn, and then drive erratically down a road. In the *Kuil* case, the officer saw Kuil fail to stop at a stop sign; drive into a dead end area; spin his truck around, kicking up dust and gravel; and then fishtail as he drove away.

As we held in *State v. Ege*, 227 Neb. 824, 826, 420 N.W.2d 305, 307-08 (1988), quoting from *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), " 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' "

The record before us shows that the *only* fact the arresting officer or his informant articulated was that defendant had the odor of alcohol on his breath. The *only* rational inference from that fact is that defendant had had a drink or drinks. The officer and his informant had the opportunity to hear slurred speech and the opportunity to see erratic driving or walking,

and did not testify, or refer, to any such activity.

I feel the stop by the officer was illegal. I think the district court, on the appeal from county court to district court on the suppression issue, erred in determining that the findings of the trial court (the county court) were "clearly wrong" and in reversing the county court's order of suppression, and I further feel that the receiving of any evidence flowing from the illegal stop was error.

I would reverse and dismiss.

CAPORALE and SHANAHAN, JJ., join in this dissent.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, APPELLANT, V. TOUCHE ROSS & CO., APPELLEE.

452 N.W.2d 746

Filed March 23, 1990. No. 88-109.

1. **Actions: Pleadings.** A petition must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition.
2. **Demurrer: Pleadings.** A general demurrer tests substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
3. _____: _____. When ruling on a demurrer, a court is required to accept the truth of facts well pled and factual and legal inferences which may reasonably be deduced from such facts, but the court does not accept the legal or factual conclusions of the pleader. Neither can the court assume the existence of any facts not alleged, find facts in aid of the pleading, nor consider what evidence may be introduced at the trial.
4. **Demurrer: Appeal and Error.** When a demurrer is interposed stating several grounds, the court should, when sustaining the demurrer, specify the grounds upon which it is sustained; otherwise, this court is not informed in regards wherein the complaint was deficient.
5. **Actions: Negligence: Damages.** In order for actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, failure to discharge that duty, and damages proximately resulting from that undischarged duty.
6. _____: _____: _____. Negligence is actionable only when it results in damages.
7. **Actions: Pleadings.** The prayer of a petition is not part of the allegations of fact constituting the cause of action.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed in part, and in part reversed and remanded with direction.

Joseph S. Daly and William H. Selde, of Sodoro, Daly & Sodoro, for appellant.

John T. Behrendt, Jamie Stern, and David Schieferstein, of Gibson, Dunn & Crutcher, and John E. North and Thomas C. McGowan, of McGrath, North, Mullin & Kratz, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

St. Paul Fire & Marine Insurance Company (St. Paul) appeals the sustainment of a demurrer and dismissal of its lawsuit against a firm of certified public accountants, Touche Ross & Co. (Touche Ross). We affirm in part, reverse in part, and remand with direction.

In the first of two causes of action, St. Paul alleges that financial statements and work papers prepared by Touche Ross to assist Commonwealth Companies, Inc. (Commonwealth), in obtaining surety credit were inaccurate and misleading and constituted negligent misrepresentation. In its second cause of action, St. Paul alleges that Touche Ross was negligent in preparing the financial statements and work papers and in performing accounting services to Commonwealth. The appellant claims that in extending surety credit and loans to Commonwealth, it relied upon the financial statements and work papers prepared by Touche Ross.

Touche Ross filed a general demurrer alleging that St. Paul's petition failed to state facts sufficient to constitute a cause of action because (1) the petition does not allege any contractual or equivalent relationship between St. Paul and Touche Ross, and (2) under the general principles of Nebraska law, Touche Ross did not owe a duty of care in the performance of its audit work on Commonwealth's financial statements to third parties and, therefore, cannot be held liable to St. Paul for the alleged negligence.

The district court for Douglas County sustained Touche Ross' demurrer and dismissed the case, whereupon St. Paul filed a motion for a new trial, which was overruled.

St. Paul's assignments of error may be summarized as alleging that the trial court erred in (1) sustaining Touche Ross' demurrer and dismissing St. Paul's petition, (2) finding that the petition failed to state facts sufficient to constitute a cause of action for negligent misrepresentation and negligence, (3) finding that the facts as stated were insufficient to establish a duty between the parties, and (4) failing to grant St. Paul's motion for a new trial.

We need only discuss St. Paul's first assignment of error to dispose of this appeal. A petition must contain "a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition." Neb. Rev. Stat. § 25-804 (Reissue 1989). A general demurrer tests substantive legal rights of parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988). When ruling on a demurrer, a court is required to accept the truth of facts well pled and factual and legal inferences which may reasonably be deduced from such facts, but the court does not accept the legal or factual conclusions of the pleader. Neither can the court assume the existence of any facts not alleged, find facts in aid of the pleading, nor consider what evidence may be introduced at the trial. *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989); *Nebraska Natural Gas Co. v. City of Lexington*, 167 Neb. 413, 93 N.W.2d 179 (1958).

The trial court gave no reason for sustaining Touche Ross' demurrer. " ' "When a demurrer is interposed stating several grounds, the court should, when sustaining the demurrer, specify the grounds upon which it is sustained; otherwise, this court is not informed in regards wherein the complaint was deficient. . . ." ' " *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 762, 448 N.W.2d 129, 133 (1989).

In order for actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, failure to discharge that duty, and damages

proximately resulting from that undischarged duty. *First Nat. Bank of Omaha, supra.* "[N]egligence is actionable only when it results in damages." *Bittner v. Miller*, 226 Neb. 206, 212, 410 N.W.2d 478, 482 (1987).

In the first cause of action of its petition, which is based upon alleged negligent misrepresentation, and in the second cause of action, which is based upon alleged negligence, St. Paul claims that it "*will be forced* to incur losses in excess of $10,000.00." (Emphasis supplied.) Because St. Paul's petition alleges only damages which might arise in the future, it fails to state a cause of action.

The final paragraph of appellant's petition states: "WHEREFORE, Plaintiff has been damaged and prays for judgment against the Defendant in an amount exceeding $10,000.00, for its special damages plus general damages plus its costs herein expended." As to damages, the controlling facts disclosed by appellant's petition allege that St. Paul "will be forced to incur losses." The petition alleges no facts that St. Paul had suffered damages by the time the petition was filed. The language "Plaintiff has been damaged" in the final paragraph of the petition is part of St. Paul's prayer. The prayer of a petition is not part of the allegations of fact constituting a cause of action. *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984).

Because St. Paul alleged only that it would suffer damages in the future and did not allege that it had already suffered damages, this suit for negligence was filed prematurely. The trial court was correct in sustaining Touche Ross' demurrer.

If a demurrer is sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct. Neb. Rev. Stat. § 25-854 (Reissue 1989). We conclude that the trial court abused its discretion in failing to provide St. Paul an opportunity to amend its petition, and we remand this matter to the trial court with direction to give appellant leave to file an amended petition. The trial court should set a definite time period in which an amended petition may be filed. If after said amended petition is filed, the trial court sustains a demurrer and concludes that there is no reasonable possibility that St.

Paul can state a cause of action, the court need not grant appellant further leave to amend, *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984), and may then enter an order of dismissal.

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

FAHRNBRUCH, J., dissenting in part.

While I agree with the majority opinion that St. Paul Fire & Marine Company failed to properly plead a cause of action, based upon our holding in *Suzuki v. Gateway Realty*, 207 Neb. 562, 299 N.W.2d 762 (1980), I would have sustained the trial court's dismissal of the case.

In *Suzuki*, the trial court also sustained a demurrer and dismissed the case. The trial court did not refuse to grant permission to amend the petition but, rather, was silent on the matter. In concluding the trial court committed no error in failing to grant the plaintiff leave to file an amended petition, we said,

> This court has previously stated that, before error can be predicated upon the refusal of the court to permit an amendment to a petition after demurrer thereto is sustained, the record must show that, under the circumstances, the ruling of the court was an abuse of discretion....
>
> In this case, the trial court, after sustaining the demurrer to the first cause of action, did not refuse to grant permission to amend the petition, but was silent on the matter and the plaintiffs at no time requested leave to amend their petition prior to the time of filing a motion for new trial in this case....
>
> This court then can only conclude that the plaintiffs could not see any manner in which to amend their petition to allege a cause of action in negligence against Gateway and the ruling of the District Court is correct.

Id. at 565-66, 299 N.W.2d at 765-66.

Nowhere in the record does it indicate that St. Paul requested leave to amend its petition. As in *Suzuki*, it can only be concluded that, after the demurrer was sustained, St. Paul did not see any way to amend its petition to allege a cause of action

against Touche Ross.

It is noted that Neb. Rev. Stat. § 25-854 (Reissue 1989) provides that, if a demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct. This court has held on several occasions that there is no absolute right to amend a petition pursuant to § 25-854. *First Nat. Bank of Omaha v. State*, 230 Neb. 259, 430 N.W.2d 893 (1988); *Suzuki v. Gateway Realty, supra.* See, also, *Evans v. Metropolitan Utilities Dist.*, 184 Neb. 172, 166 N.W.2d 411 (1969); *Weiner v. Morgan*, 175 Neb. 656, 122 N.W.2d 871 (1963); *Coverdale & Colpitts v. Dakota County*, 144 Neb. 166, 12 N.W.2d 764 (1944). The majority veers from this longstanding principle and places an affirmative duty on a trial court to grant a party leave to file an amended petition even when, as here, the party makes no effort to amend its petition. I cannot justify placing such a burden on the trial court when it is unquestionably the burden of plaintiff's counsel.

HASTINGS, C.J., and BOSLAUGH, J., join in this dissent.

DAN HENRY, APPELLEE, V. LLOYD REEVES, APPELLANT.
452 N.W.2d 750

Filed March 23, 1990. No. 88-484.

Appeal from the District Court for Nemaha County, ROBERT T. FINN, Judge, on appeal thereto from the County Court for Nemaha County, THOMAS J. GIST, Judge. Appeal dismissed, and cause remanded with directions.

Charles D. Hahn for appellant.

Louie M. Ligouri for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Defendant has appealed from the judgment of the district court which affirmed the judgment of the county court in favor of the plaintiff. We dismiss the appeal.

The county court judgment was entered on December 22, 1987. A motion for a new trial was filed on December 31, 1987, and was overruled on January *12*, 1988. The notice of appeal was filed in county court on February *12*, 1988. This, of course, was 31 days after the entry of the final order of which complaint was made.

Neb. Rev. Stat. § 25-2729 (Reissue 1989) provides: "(1) In order to perfect an appeal from the county court, the appealing party shall within *thirty* days after the rendition of the judgment or making of the final order complained of: (a) File with the clerk of the county court a notice of appeal . . . ." (Emphasis supplied.)

In order to vest jurisdiction in the appellate court, here the district court, it is necessary that the appealing party timely file a notice of appeal and timely deposit the district court docket fee. *State v. Hunter, ante* p. 567, 451 N.W.2d 922 (1990); *Rorick Partnership v. Haug,* 228 Neb. 364, 422 N.W.2d 365 (1988); *In re Interest of L.D. et al.,* 224 Neb. 249, 398 N.W.2d 91 (1986) (referencing Neb. Rev. Stat. § 24-541.02 (Reissue 1985), now § 25-2729).

The district court not having had jurisdiction, this court is also without jurisdiction.

The appeal is ordered dismissed, and the cause is remanded to the district court with directions to dismiss the appeal from the county court.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CLINTON D. FAATZ, APPELLANT.
452 N.W.2d 751

Filed March 23, 1990. No. 88-946.

1. **Jury Instructions: Evidence: Lesser-Included Offenses.** When a defendant requests the trial court to submit a lesser-included offense in the instructions, the trial court must submit all included offenses as to which the evidence is sufficient to support a verdict.
2. **Jury Instructions: Evidence: Proof.** The trial court is not required to give a jury instruction where there is insufficient evidence to prove the facts claimed.
3. **Jury Instructions: Evidence: Lesser-Included Offenses.** It is not prejudicial error to fail to instruct upon a lesser-included offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.
4. _____: _____: _____. Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense.

Appeal from the District Court for Boyd County: EDWARD E. HANNON, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is an appeal from a jury verdict of guilty in the Boyd County District Court. We affirm.

At approximately 10:30 p.m. on April 24, 1988, defendant knocked on the victim's front door, asking to use the phone because his car had broken down. The victim, an 80-year-old widow, allowed the defendant into her home. The defendant, who appeared to be intoxicated, used the phone in the kitchen, then returned to the front room. After making conversation for several minutes, the defendant grabbed and sexually assaulted the victim. The victim then ran outside and yelled for help, but defendant caught her and held his hand over her mouth. Defendant fled when he saw headlights from an approaching vehicle. The victim ran back to her house, where she telephoned her son for help. He arrived shortly thereafter and took her to

the hospital.

Defendant returned to his pickup, which was stranded in a ditch near the victim's home. The Boyd County sheriff later discovered defendant asleep in the pickup and arrested him. The next day, defendant gave both an oral and a written statement to the sheriff and a State Patrol investigator.

Defendant was subsequently charged with first degree sexual assault. The case was tried to a jury. Both the victim and the defendant testified. The oral statement and the written statement were received into evidence. The State did not introduce the results of the "rape kit" or a doctor's report. Near the end of the trial, defendant requested the jury be instructed on third degree sexual assault and attempted first degree sexual assault. This request was refused, and the jury was instructed only on first degree sexual assault. The jury returned a guilty verdict, and defendant now appeals.

On appeal, defendant's sole assigned error is the trial court's refusal to instruct the jury on the offenses of third degree sexual assault and attempted first degree sexual assault.

This court has previously stated that when a defendant requests the trial court to submit a lesser-included offense in the instructions, the trial court must submit all included offenses as to which the evidence is sufficient to support a verdict. *State v. Martin*, 232 Neb. 385, 440 N.W.2d 676 (1989). The trial court is not required to give a jury instruction where there is insufficient evidence to prove the facts claimed. *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989). Generally, it is not prejudicial error to not instruct upon a lesser-included offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989). When a defendant is charged with first degree sexual assault under Neb. Rev. Stat. § 28-319 (Reissue 1989), "[t]he issue is not whether the defendant had sexual intercourse with the victim; rather, the issue is whether the defendant achieved even the slightest penetration." *State v. Martin, supra* at 395, 440 N.W.2d at 684.

In the present case, the victim unequivocally testified that defendant achieved penetration. In his written statement, defendant recounted his version of the assault:

> Then alittle [sic] while later I just started getting obnoctious [sic] and rude towards [the victim]. After a little while I stood up and helped picked [sic] [the victim] up off of the couch and then layed [sic] [the victim] down on the floor. I don't remember if I took down [the victim's] pants or my pants first then proceeded to have sex. [The victim] said My God Man your [sic] crazy and after I tried to get it in [the victim] said you can't even keep it hard. After a little while I got up, pulled up my pants and left [the victim's] house.

Defendant was also asked at trial whether the State Patrol investigator questioned him about having sex with the victim. Defendant replied:

> A. Yeah, he asked me, he said, "Do you think that you had sex with [the victim]," or something like that, and I said, "I don't know." I said, "I don't know, I could have." I said, "I don't know."
>
> Q. But you never did tell him that you did have?
>
> A. No, I didn't know.

No evidence was introduced which contradicted the victim's testimony that the defendant achieved penetration. The defendant merely testified that he did not know if he penetrated the victim. This evidence does not contradict the victim's testimony in regard to the element of penetration. Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. *State v. Martin, supra*; *State v. Narcisse, supra*. The trial court did not err in refusing to give jury instructions on the lesser-included offenses of third degree sexual assault and attempted first degree sexual assault. The jury's verdict is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. GEORGE G. RHODES, RESPONDENT.

453 N.W.2d 73

Filed March 23, 1990. No. 89-142.

1. **Disciplinary Proceedings: Due Process.** Although a lawyer is entitled to due process of law in a disciplinary proceeding, technicalities cannot be invoked to defeat charges where there is evidence showing that the conduct alleged against the attorney is ethically wrong.
2. **Disciplinary Proceedings.** The Supreme Court may institute disciplinary proceedings on its own and has the inherent authority to direct the filing of disciplinary charges notwithstanding the action or inaction of the Committee on Inquiry.
3. **Disciplinary Proceedings: Jurisdiction.** Even if formal charges are filed with the Disciplinary Review Board after the time provided in Neb. Ct. R. of Discipline 9(H)(3)(h) (rev. 1989), the delay is not jurisdictional and the rule does not require dismissal of the formal charges.
4. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Disciplinary Proceedings: Proof: Appeal and Error.** In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence.
6. **Disciplinary Proceedings.** In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
7. **Prosecuting Attorneys: Conflict of Interest.** It is improper for prosecutors to participate in cases which involve personal friends or relatives.
8. **Prosecuting Attorneys: Conflict of Interest: Affidavits.** An affidavit alleging that the defendant and prosecuting attorney and their families had been close personal friends, that the defendant and prosecuting attorney had had business and political relations in the past, and that it would be difficult for the prosecuting attorney to conduct a trial is a sufficient showing to warrant appointment of a special prosecuting attorney.
9. **Prosecuting Attorneys: Conflict of Interest.** Courts around the country recognize two policy considerations underlying the disqualification of prosecuting attorneys for a conflict of interest. The first policy served by the rule is fairness to the accused. The second policy served is the preservation of public confidence in the impartiality and integrity of the criminal justice system.
10. _____: _____. United States courts have consistently held that the appearance of impropriety is sufficient to justify disqualification of a prosecuting attorney.
11. **Public Officers and Employees: Attorneys at Law.** The conduct of a

government attorney is required to be more circumspect than that of a private lawyer because improper conduct on the part of such an attorney reflects upon the entire system of justice in terms of public trust.

12. **Disciplinary Proceedings.** The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his or her present or future fitness to continue in the practice of law.
13. _____. The purpose of a disciplinary proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether the attorney should be permitted to continue to practice law.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, for relator.

William M. Connolly, of Conway, Connolly and Pauley, P.C., for respondent.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is a disciplinary proceeding against the respondent, George G. Rhodes, who was admitted to the practice of law in Nebraska on April 8, 1977.

Formal charges against the respondent were filed in this court on February 24, 1989. The respondent's answer was filed on March 13, 1989. The allegations in the formal charges center around the propriety of the respondent's conduct in prosecuting Daniel T. Speer and the respondent's behavior toward Bradley Roth, an attorney who was appointed special prosecutor for some of the Speer prosecutions.

The respondent was charged with having violated his oath of office as an attorney at law, as provided by Neb. Rev. Stat. § 7-104 (Reissue 1987), and the following provisions of the Code of Professional Responsibility:

> DR 1-102 Misconduct.
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> (5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

. . . .

DR 2-110 Withdrawal from Employment.

. . . .

(B) Mandatory withdrawal.

A lawyer representing a client . . . shall withdraw from employment . . . if:

. . . .

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

. . . .

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

. . . .

DR 5-105 Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of his client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105 (C).

. . . .

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense,

> delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

In his answer, the respondent generally denied the substantive allegations contained in the formal charges. The respondent further alleged that this court does not have jurisdiction over this matter because the hearing panel of the Committee on Inquiry did not transmit formal charges to the Disciplinary Review Board within 45 days, as required by Neb. Ct. R. of Discipline 9(H)(3)(h) (rev. 1989). In this case, the respondent alleges the formal charges were transmitted 53 days after the committee hearing.

We held in *State ex rel. NSBA v. Kirshen*, 232 Neb. 445, 441 N.W.2d 161 (1989), that a lawyer is entitled to due process of law in a disciplinary proceeding. However, technicalities cannot be invoked to defeat charges where there is evidence showing that the conduct alleged against the attorney is ethically wrong. *State ex rel. Nebraska State Bar Assn. v. Jensen*, 171 Neb. 1, 105 N.W.2d 459 (1960), *cert. denied* 365 U.S. 870, 81 S. Ct. 905, 5 L. Ed. 2d 860 (1961); *State ex rel. Nebraska State Bar Assn. v. Leonard*, 212 Neb. 379, 322 N.W.2d 794 (1982).

Pursuant to Neb. Ct. R. of Discipline 10(B) (rev. 1989), this court may institute disciplinary proceedings on its own and has the inherent authority to direct the filing of disciplinary charges notwithstanding the action or inaction of the Committee on Inquiry. Even if formal charges are filed with the Disciplinary Review Board after the time provided in rule 9(H)(3)(h), the delay is not jurisdictional, and the rule does not require dismissal of the formal charges. We further note that the respondent has made no showing that he was prejudiced in any way by the alleged delay in the filing of the formal charges. The respondent's contention is without merit.

A referee was appointed on March 24, 1989, and the matter was heard on July 12 and 13, 1989. The report of the referee was filed in this court on August 15, 1989. The referee found that the respondent had violated the provisions of DR 1-102, DR 2-110, DR 5-101, and DR 7-102 and recommended that the respondent be suspended from the practice of law for a period

of 5 years. Exceptions to the referee's report were filed by the respondent on August 25, 1989.

STANDARD OF REVIEW

A proceeding to discipline an attorney is a trial de novo on the record, in which the Supreme Court reaches a conclusion independent of the findings of the referee, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), *cert. denied* 488 U.S. 802, 109 S. Ct. 31, 102 L. Ed. 2d 10 (1988); *State ex rel. NSBA v. Kirshen, supra.* See, also, *State ex rel. NSBA v. Cohen*, 231 Neb. 405, 436 N.W.2d 202 (1989); *State ex rel. NSBA v. Neumeister, ante* p. 47, 449 N.W.2d 17 (1989). In its de novo review of the record in a disciplinary proceeding against an attorney, and to sustain a particular complaint against an attorney, the Supreme Court must find that the complaint has been established by clear and convincing evidence. *State ex rel. NSBA v. Douglas, supra*; *State ex rel. NSBA v. Kirshen, supra.* In a disciplinary proceeding against an attorney, the basic issues are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. NSBA v. Douglas, supra*; *State ex rel. NSBA v. Kirshen, supra.*

FACTS

The record shows that the respondent is the present Custer County Attorney. He was appointed to that office on August 5, 1980, and was elected in 1982 and 1986 to 4-year terms.

In the fall of 1985, Rhodes became personally acquainted with Daniel Speer. Speer was a 22-year-old Army veteran who was employed as a cook at the Tumbleweed Cafe in Broken Bow, Nebraska, where Rhodes ate meals nearly every day. Rhodes testified that he began leaving gifts for Dean Miller, another cafe employee, after the owner of the cafe, Donna Winbolt, told Rhodes that Miller was working his way through high school. A month or two later, Winbolt told Rhodes that Speer had applied for a job with the Omaha police department. Rhodes did not think Speer would get the job and began leaving

gifts for Speer in September or October 1985. These gifts included blue jeans, shirts, a cassette player, a leather jacket, cards, and concert tickets. Rhodes characterized the gifts as "basically charitable contributions" which were given to Speer on a seasonal basis.

Speer testified that in September or October 1985, he noticed that various gifts were being left in his car outside the Tumbleweed Cafe. Speer and Miller speculated that their benefactor was Rhodes. Speer testified that Miller stopped receiving gifts about a month after Speer started receiving them.

In late May and early June 1986, Speer was involved in two incidents of trespassing and vandalism at a drive-in theater near Broken Bow. A large "86" had been spray painted on the back of the theater screen. Rhodes received the police report of the incidents and spoke with Speer about his activities at the drive-in theater.

The Criminal Mischief Complaint

In late June 1986, Rhodes and Speer met in Rhodes' office to discuss the damage to the drive-in theater. Speer testified that Rhodes talked to him at the cafe and asked Speer to come to the office. Speer went to Rhodes' office the next day. During their conversation, Rhodes said, "I'm sure by now you figured I'm the one that was leaving you the gifts."

Rhodes' recollection was that when he spoke with Speer about the drive-in theater incident, Speer "admitted it." Rhodes said he would file a charge and dismiss it at the end of the summer if Speer stayed out of trouble. According to Rhodes this was a standard practice of his. The record shows that Rhodes made the same agreement with the defendant in *State v. Chris Mills*. Rhodes also suggested that Speer think about going to college. During this conversation, Rhodes also asked Speer to go to a concert in Omaha with Rhodes and Mr. and Mrs. Carl Speer. Rhodes said he would pay for the trip.

Speer's version of the conversation was that Rhodes talked about being friends with Speer's older brother, Carl Speer, who was a police captain in Broken Bow. According to Speer, Rhodes said, "Well, your brother is running for sheriff and I am

helping him run, and too many people know about this deal up at the drive-in, so if I don't file charges against you it will look bad for your brother when the election comes around." Speer testified that Rhodes said he would forget "everything else that was involved in the deal" and would charge Speer with criminal mischief. Speer also stated that Rhodes told him to ask for a continuance when the hearing date came up, that Rhodes would ask for a continuance when it came up again, and that Rhodes would drop the charge after "it kind of fades out of everybody's mind." Speer claimed that Rhodes told him he would not need an attorney because the charge was going to be dropped.

On July 3, 1986, Rhodes filed a complaint for criminal mischief in the Custer County Court against Speer (docket 38, No. 684) for the incident at the drive-in theater which occurred June 4, 1986. Rhodes testified that although other individuals were involved in the incident, he filed the charge against Speer because Speer's car had been traced. Another factor Rhodes considered was that Speer was in his twenties and was an Army veteran; the other individuals were younger and included juveniles.

The court file in the case shows that two continuances were granted at the defendant's request, concurred in by the county attorney.

Rhodes testified that some time after the criminal mischief case was filed, Rhodes told Daniel Speer that he was making contributions to Carl Speer's sheriff's campaign. Rhodes testified that he contributed $4,700 to Carl Speer's campaign. Carl Speer's campaign budget totaled $5,000. Rhodes said that when the campaign was over, he would have some money available to help Daniel Speer with college expenses, and offered to pay Daniel Speer's expenses for a year or so. Rhodes stated that the criminal mischief case had been settled as between Rhodes and Speer, but acknowledged that the case was still pending on the court docket as part of that settlement.

In early July 1986, Rhodes spoke with Speer in Rhodes' office about a report of an assault, but Speer denied any wrongdoing. During this conversation, Rhodes offered to help Speer with college expenses and asked if Speer wanted to go on a trip to Omaha.

The Omaha Trip

On July 26, 1986, Rhodes went to Omaha with Daniel Speer and Mr. and Mrs. Carl Speer to attend a concert. Rhodes drove his car and paid for the meals and the night's lodging for the entire party. Rhodes testified that he first asked Carl Speer and his wife to go to the concert, but later it occurred to him that Daniel Speer might want to go. Rhodes and Daniel Speer shared a hotel room.

Daniel Speer testified that the day after they arrived in Omaha, Rhodes talked to Speer about attending college and showed Speer his own college transcripts. Rhodes apparently denied showing Speer his transcripts. According to Speer, Rhodes discussed Speer's attending Kearney State College and said he would help Speer pay his college expenses and make Speer's car payments while he was in college.

Rhodes admitted that the Omaha trip occurred while the criminal mischief case was pending and that he paid for the lodging, tickets, and transportation. Rhodes also admitted asking Speer if he wanted to go to college.

On July 27, Rhodes asked Speer if he wanted to go to the world's fair in Vancouver, British Columbia. Rhodes offered to pay for the trip and said that the only money Speer would have to take was in case he wanted to buy souvenirs for himself or friends. On July 30, Speer came to Rhodes' office and said he wanted to go to Vancouver. Rhodes made the airline reservations on July 30 and purchased the fair tickets a couple weeks later. Rhodes testified that he and Speer planned their travel itinerary together.

Sexual Assault Investigation

Approximately 1 week after the Omaha trip, Rhodes spoke to Speer about a sexual assault of a child. Rhodes testified that Deputy Sheriff Tom Mayo was investigating another individual, Ricky Ross, for first degree sexual assault of the victim. Mayo told Rhodes that the victim had sex with several others, including Speer. A police report dated July 26, 1986, indicates that Speer was having sex with an underage girl. Rhodes testified he mentioned this information to Speer because

> the settlement [on the criminal mischief case] was that he would stay out of trouble; and also there was another incident where there was a police report that showed [Speer had] brought a girl home at 3:30 in the morning, and I was beginning to wonder what was going on with him.

Rhodes testified that he called Speer to the office to see if he would lie about the incident and that the purpose of the meeting was to warn Speer that Rhodes had been getting these reports and to explain the concept of statutory rape to Speer.

On August 8, 1986, Rhodes saw Speer at the Tumbleweed Cafe and asked Speer to come to the county attorney's office to discuss a new police report.

Rhodes testified that on August 22, 1986, he discussed with Speer a potential prosecution involving a sexual assault allegedly perpetrated by Ricky Ross on a minor. Rhodes explained that he showed Speer the police report because Rhodes heard that Speer had also done something like that. During the conversation, Rhodes told Speer he assumed the victim's sexual relations with Speer were consensual. Speer then admitted that he had sex with the minor child.

During the August 22 conversation, in an effort to impress upon Speer the seriousness of such cases, Rhodes asked Speer if he wanted to go to the Supreme Court to see a hearing where the husband was charged with first degree sexual assault. Rhodes also wanted to show Speer the University of Nebraska campus. Speer said he would like to go.

On September 5, 1986, Speer told Rhodes he had to work on September 11, the day Rhodes was planning to go to Lincoln, but would have some time off the following Wednesday and Thursday and would like to see the university then.

The Lincoln Trip

Rhodes and Speer drove to Lincoln on September 17, 1986. Rhodes testified that the purpose of the trip was for him to go to the law library and to show Speer the University of Nebraska campus. Rhodes paid the expenses of this trip, including transportation, meals, and two nights' lodging. Rhodes also bought school clothes for Speer, including shirts, pants, and

socks, which cost approximately $160. Rhodes testified that he offered to pay Speer's college expenses because although Speer was "not what you would call a nice person," he was Carl's brother, and Rhodes felt sorry for him working at the Tumbleweed.

Speer testified that during the Lincoln trip Rhodes said it would be better if they did not mention to anybody that they were friends and going on trips because it could cause him (Rhodes) some problems. Rhodes denied telling Speer to keep their trips quiet. Speer said that Rhodes then showed him a newspaper article about an Omaha judge who got into trouble for fixing traffic tickets for his son-in-law. Rhodes testified (apparently regarding this conversation) that in the summer of 1986, he had a conversation with Speer about a judge who had gotten into trouble for trying to help his son. The purpose of the conversation was to tell Speer that he could not rely on the fact that his brother was a police captain to keep him out of trouble.

At his September 23, 1986, arraignment in the criminal mischief case, Speer appeared pro se, pled not guilty, and waived his right to counsel. Rhodes appeared as county attorney. Speer testified before the referee that he kept expecting Rhodes to postpone the hearing date, "and it was getting to the point that I was thinking . . . he's made the whole thing up so that I wouldn't get an attorney." Rhodes explained to Speer that the hearing was just to set a trial date and told Speer that all he had to do when the judge asked for a plea was say "not guilty." Then Rhodes said Speer could postpone the trial until the charge was dismissed. Speer testified that on September 23 Rhodes "vaguely hinted" at dismissing the charge.

Rhodes' testimony indicates that he told Speer to "just go up and ask the court for" a postponement. Rhodes denied discussing a scheme or plan on how to get the case continued, stating that he merely told Speer that he could ask for a continuance if the case came up before the summer ended and that he would agree to a continuance.

Rhodes and Speer left for Vancouver the following day. The record shows that the criminal mischief case against Speer was dismissed that day (September 24) because the plaintiff

"show[ed] the Court that the confession obtained from the defendant is not admissible as evidence for the reason same was induced by a promise." Rhodes testified before the referee that the case was dismissed because the arresting officer had made a promise and certain statements could have been suppressed. The police report attached to the State's motion for dismissal does state: "Suspect Speer upon learning of no charges did fully admit his part in the incident and the painting [of the drive-in theater]." Rhodes also reiterated that his original agreement with Speer was that the case would be dismissed if Speer stayed out of trouble for the summer.

The Vancouver Trip

On September 24, Rhodes and Speer flew from Omaha to Seattle, spent the night in Seattle, and drove a rental car to Vancouver. They rented a hotel room, spent two nights in Vancouver, and attended the world's fair. Speer testified that during the second night in Vancouver,

> Mr. Rhodes kept sliding in bed up next to me, and I'd move away from him. I didn't think anything about it as long as I could keep moving away from him. Then he slid up next to me and he put his arm around me. So I got up and I told him, I think the way I put it was "I'm not like that, and if you don't stay away from me I'll kick your ass." And Mr. Rhodes said, "But I thought you understood I loved you."

Speer testified that he then slept on the couch or a chair in the hotel room. Rhodes vehemently denies this incident.

Speer testified that during the Vancouver trip, he and Rhodes again discussed the alleged sexual assault of the minor child by Ricky Ross.

The record contains Rhodes' letter of September 24, 1986, informing Speer that the criminal mischief charge had been dismissed. The letter is on Rhodes' business letterhead and states only that "I have enclosed herewith, your formal notice that I have dismissed the above-referenced case." A "nolle prosequi" dated September 24, 1986, was enclosed with the letter. Rhodes testified that he gave the letter and nolle prosequi to Speer on September 24 when he picked Speer up at Speer's

house to go to Vancouver. Speer testified that Rhodes delivered the documents to him in Vancouver, saying, "I was saving this for a special occasion, but you might as well have this now." Speer stated that Rhodes then invited him on a trip to the Bahamas.

Speer and Rhodes returned from Vancouver on September 29, 1986, via Omaha. Speer claims to have been surprised and upset at the prospect of spending the night in Omaha with Rhodes. Rhodes says that he and Speer planned the trip together and that Speer planned all along to spend the night in Omaha. Rhodes testified that on the way between Omaha and Broken Bow, Speer invited Rhodes to attend the Oklahoma-Nebraska football game. Rhodes accepted and invited Speer to go with him to a law enforcement seminar or investigator's school if Rhodes did not have a trial scheduled for the day of the seminar. The record contains a tape recording of Rhodes' subsequent telephone conversation with Speer after returning from Vancouver indicating that the *Haumont* jury trial was off and that Rhodes could go to the seminar. Rhodes recalled that he also discussed Ricky Ross' preliminary hearing with Speer during the drive from Omaha to Broken Bow and that Speer admitted sexual penetration with the victim in the Ross case.

Conflict Develops Between Rhodes and Speer

Speer testified that after returning from Vancouver, their relationship changed in that Speer now tried to avoid Rhodes. Speer said he talked to Rhodes as little as possible, but that Rhodes made telephone calls to him after the Vancouver trip. Speer believed that Rhodes "kind of had me over a barrel" in that Speer was worried the criminal mischief charge would be refiled.

Around the time he and Speer returned from Vancouver, Rhodes discovered that Speer had been "secretly going out late at night" with a girl who was in grade school. Rhodes also had received information that Speer had been window peeping and had sexually assaulted several other girls. Rhodes did not have any written reports regarding two of them, but the record shows that Bradley Roth, special prosecutor, subpoenaed them in the

sexual assault case filed against Speer. Rhodes explained that Deputy Mayo had been investigating Ricky Ross in connection with a sexual assault and had talked about the victim's having had sex with a number of men, including Daniel Speer. After returning from Vancouver, Rhodes heard that Speer had been investigated by the Ansley marshal for sexually assaulting a grade school girl. Rhodes referred the latter investigation to the Custer County sheriff's office at the end of the first week in October.

Rhodes testified that Speer did not act angry with him until a week after they returned from Vancouver. He acknowledged that Speer seemed to be avoiding him, but Rhodes did not know why. When Rhodes asked Speer what was going on, Speer walked away. Rhodes then wrote Speer several notes and sent him a Mailgram asking what was going on. The notes were left in Speer's car while Speer was at work.

Exhibit 10 contains a greeting card and four letters. Exhibit 11 is a final draft of the last letter in exhibit 10. In the first letter, Rhodes refers to his hope that Speer would go to college and to the "happy times" they had together in Omaha, Lincoln, Seattle, and Vancouver. In the second letter, Rhodes refers to enclosing a shirt as a souvenir "to remember some of the fun trips that we took." Rhodes then invited Speer to go to a Billy Joel concert—"Then of course after the trip you could always go back to being mad at me if you wanted to." Rhodes' third letter refers to enclosing a book covering "the top professional law enforcement agencies such as the FBI" and states that Rhodes had a line on a job opening up if Speer decided against going to college. The fourth letter, exhibit 11, recalls "the events which occurred on the day that you stopped speaking to me," including Ricky Ross' preliminary hearing, Rhodes' leaving a Halloween card in Speer's car, and Rhodes' discussing the Vancouver trip with Donna Winbolt and Speer's mother. The letter also states:

> When I received a police report from your brother which stated that on a certain night you had been out with Misty Parker and that she had been beaten up, I did not simply jump to the conclusion that you had assualted [sic] her and file an assualt [sic] charge, but instead, I gave you an

> opportunity to explain and you had a simple explaination [sic] which cleared up the matter.

Rhodes testified that on or about October 3, he encountered Speer at the Tumbleweed Cafe. On that occasion, Rhodes observed that Speer had an "intense glare" on his face and glared at Rhodes while Rhodes ate. On another occasion in the cafe, Rhodes tried to talk to Speer, but Speer ran from the room. Rhodes concluded that Speer was upset because Rhodes had reported him to the sheriff's office in conjunction with the sexual assault investigations.

The Burglary Charge

In late November 1986, Rhodes received a police report regarding two of the sexual assault victims. On November 26, Rhodes filed a burglary charge against Speer in connection with a May 30, 1986, incident at the drive-in theater. Rhodes testified that the basis of the charge was breaking and entering the drive-in theater with the intent to commit a felony. The charge was based on the same police report which led to the earlier criminal mischief charge against Speer. The police report involves two separate incidents which occurred 5 days apart. Rhodes testified that he did not receive additional police reports about the incidents at the drive-in theater, but had done more legal research which would help him develop evidence regarding breaking and entering. Rhodes stated that after he realized Speer was a child molester, he felt that "something had to be done to get him corrected." After doing research, Rhodes realized he could offer immunity to a potential codefendant, Dusty Parker, and decided to file a burglary charge.

The burglary complaint was dismissed without prejudice on January 13, 1987. Rhodes testified that he dismissed the burglary complaint because Parker was in the military and was unavailable to testify.

Rhodes had filed charges for criminal mischief and trespass against Dusty Parker on December 29, 1986, for an incident which occurred May 21, 1986, at the drive-in theater. Rhodes testified that he filed charges against Parker after Parker boasted about having gotten away with it. Steven Stumpff was appointed special prosecutor in that case on May 16, 1988, and

dismissed the charges without prejudice on that date because Parker was in the Air Force and was a military policeman. Stumpff stated that no property was destroyed on the night Parker was at the drive-in theater and that he believed Parker had grown up.

The Felony Charges

In early December 1986, a Deputy Sanchez delivered to Rhodes the written statement of Jerod Beck, a 16-year-old, about an incident involving Speer. In his statement, Beck reported that on the night of February 28, 1986, Speer forced Beck to the ground with a 3-foot stick, threatened to dislocate Beck's shoulder, and forced Beck to accompany Speer in Speer's automobile. Rhodes' exhibits indicate that in late December, he discovered that Jerod Beck's brother, Aron Beck, intended to sue the city for an alleged civil rights violation. The basis of the suit was that Aron Beck had been detained outside the city limits by the Broken Bow police for driving while intoxicated. Aron Beck claimed he was denied equal protection of the law because no action was taken on the assault committed on Jerod by the police captain's (Carl Speer's) brother inside the city limits. Rhodes then offered to prosecute Speer for the attack on Jerod Beck rather than to prosecute Aron Beck for driving while intoxicated.

On January 12, 1987, Rhodes filed felony kidnapping and false imprisonment charges against Speer for the Jerod Beck incident. Speer testified that he was arrested and spent the night in jail. Speer appeared pro se at his bond hearing in county court the next morning. Rhodes requested that Speer be allowed a signature bond. The county judge, however, required Speer to post 10 percent of a $3,000 bond.

Speer Threatens Rhodes

Rhodes testified that Speer began threatening him in January 1987 and that Rhodes began carrying a pistol around the time the felony charges were filed. Rhodes also noted that Speer had been caught with weapons after making some of the threats. Until that time, Speer had not physically threatened Rhodes. Speer admitted that he threatened Rhodes in Vancouver, but stated that he made no other threats against

Rhodes.

Rhodes continued to frequent the Tumbleweed Cafe. Speer testified that at some point in time he became aware that Rhodes was carrying a pistol in the cafe. Speer stated that Rhodes would come into the cafe wearing a three-piece suit, stand within Speer's sight, take his jacket off, and adjust his holster. Rhodes admitted taking his pistol to the cafe. Speer also complained that Rhodes began to follow him in his automobile. Rhodes denies following Speer.

On January 23, Speer threatened to assault Rhodes, prompting Rhodes to withdraw from the Speer prosecutions.

Rhodes testified that on the Thursday preceding January 26, 1987, Speer had been following Rhodes in his car "very close." On Friday, when Rhodes was at the Tumbleweed, Speer told another cook that Rhodes looked like a fag. When Rhodes returned to the cafe later in the day, Speer pointed at him and said, "Look at him, I really had him on the run last night. Next time I'm going to beat his ass; I don't care; I'll get probation anyway; that's nothing, I've been on probation to [Probation Officer] Kawata before." Speer also said, "I'm really going to get even."

Appointment of Special Prosecutor

Rhodes approached attorney Bradley Roth on January 25, 1987, and informed Roth that he had been threatened by Speer and was going to withdraw as county attorney in the Speer prosecutions. Rhodes wanted Roth to be appointed special prosecutor in the cases. Roth testified that during this conversation, Rhodes did not indicate he had a personal relationship with Speer, but that Rhodes' fear of Speer appeared to be real.

Roth was appointed special prosecutor on January 26, 1987. Roth and Rhodes discussed the charges pending against Speer, other potential charges, and whether the charges should be plea bargained. Roth testified that Rhodes said that "I [Roth] would have no respect for him [Rhodes] if I reduced the felony charges to something lower." Rhodes then explained in detail some efforts he made to help Speer. Rhodes did acknowledge that it was within Roth's discretion to dispose of the charges filed

against Speer.

Roth dismissed the kidnapping charge without prejudice on January 27. Roth agreed that the kidnapping charge (which had been filed by Rhodes) was technically correct but felt that, being inexperienced, he might not have been able to get a conviction. Speer's attorney, Kent Schroeder, informed Roth that Speer would be willing to plead guilty to a Class I misdemeanor at the preliminary hearing on the false imprisonment charge. Roth apparently rejected this offer, and Speer was bound over to district court on the charge of first degree false imprisonment. On January 30, 1987, Roth filed an information in district court charging Speer with the first degree false imprisonment of Jerod Beck and attempt to deliver alcohol to a minor. Speer's plea in abatement was overruled on May 1, 1987.

On February 17, 1987, Roth filed a complaint charging Speer with first degree sexual assault of a child and corresponded with Rhodes about the charge. In his letter, Roth indicated he had subpoenaed two girls who were the subjects of the sheriff's investigation and asked Rhodes to "please let me know if you can think of any other witnesses I should be subpoenaing." Rhodes advised Roth that there was not enough evidence to get a conviction. After a jury trial, Speer was acquitted on this charge. Rhodes argues that Speer's acquittal "shows that I was still able to assess the cases fairly well."

Roth noticed that shortly after he was appointed special prosecutor, Rhodes began keeping weapons in his office and appeared to be genuinely afraid of Speer. Speer testified that he (Speer) owned an assortment of firearms, including a 20 gauge shotgun, a .35 Remington rifle, a .22 revolver, and possibly a .357 Magnum revolver.

On February 27, 1987, Speer attempted to buy a pistol at Gibson's Discount Center. William Linder, a clerk at Gibson's who waited on Speer, testified that Speer purchased a semiautomatic pistol with a 6-inch barrel and falsified a federal form in order to purchase the gun by stating that he was not currently charged with a felony. Linder called the police department after being advised by a coworker that felony charges were pending against Speer. The gun was then returned

to the store approximately 15 to 30 minutes after Speer purchased it.

Rhodes testified that Speer tried to purchase this weapon after threatening Rhodes. Rhodes became aware of the purchase after receiving a call from the police department about Speer's false statement to purchase a firearm. Rhodes referred the matter to Roth, but did not notify federal authorities of Speer's gun purchase. Nevertheless, Rhodes felt that Speer was dangerous because "he was pulling all these things and getting away with them." Convinced that Speer was trying to kill him, Rhodes went to Gibson's and purchased the gun himself.

Rhodes testified that on March 9, 1987, Speer threatened to slit his throat. On April 17, 1987, Rhodes saw Speer purchase 500 rounds of regular .22 ammunition and 100 rounds of hollow point ammunition at Gibson's. Cindy Cole, a clerk at Gibson's, testified that Speer was alone and paid for the ammunition in cash. Rhodes was alarmed because this ammunition would fit the gun that had been taken away from Speer. Rhodes reported the purchase to the sheriff's office. He testified to an incident at the Tumbleweed where Speer pointed at Rhodes with his hand formed like a gun. A written exhibit offered by Rhodes states that in April 1987, "Speer threaten[ed] to blow my head off with [a] firearm." At this time, the false imprisonment and sexual assault charges were pending against Speer, with Roth as special prosecutor.

Rhodes' Behavior Toward Special Prosecutor

In April or May 1987, Roth told Rhodes that he was considering reducing the false imprisonment charge against Speer to two Class I misdemeanors. Roth testified that Rhodes was not pleased and did not think it was a proper plea bargain. On May 21, 1987, Roth filed an amended information charging Speer with third degree assault. Pursuant to a plea agreement, Speer pled guilty to third degree assault, and the false imprisonment charge was dropped.

After Speer entered his guilty plea, he prepared a typewritten statement regarding the incident. Beginning at page 4 of his statement, Speer discusses the gifts given to him by Rhodes, the

Omaha trip, Rhodes' offers to pay Speer's college expenses, and the incident in Vancouver. Speer stated at page 6 that he was charged with kidnapping and false imprisonment because Rhodes "was using this incident to gain revenge against me for turning down his advances towards me."

Roth testified that after the plea agreement, his professional relationship with Rhodes became strained. Rhodes barely spoke to Roth after Speer's plea was accepted. For example, Rhodes began sending everyday correspondence to Roth by certified mail, made many objections to Roth's motions and discovery requests, would not give Roth access to police reports, and indicated there would be no more plea bargains on felony cases. The policy on plea bargaining extended to other attorneys besides Roth. Rhodes also began objecting to Roth's fees as a court-appointed attorney. Rhodes believed that Roth was charging the county excessive fees and was using work product which he was gaining as an attorney for the State and using it against the State.

Rhodes remained frightened of Speer. One day in June 1987, Rhodes observed Speer at the cafe in a "shaking rage." That evening, Rhodes wore a shoulder holster to the cafe and heard Speer yelling in the kitchen. Rhodes' food was late, so he put his feet up and read a newspaper. Speer appeared and told Rhodes to put his feet down. When Rhodes paid for his meal, he took his jacket off so Speer could see the holster. Rhodes testified, "I thought if he realized I was armed, he would be less likely to go ahead with an attack." Speer called the police. An officer came and spoke to Speer, but not to Rhodes.

The Rattlesnake Incident

Rhodes reports that he was threatened by Speer on August 12, 1987. The following day, Rhodes traveled to Lincoln to meet with an assistant attorney general about a complaint by Speer against Rhodes. When Rhodes returned from Lincoln, he was informed by Deputy Mayo that a rattlesnake had been confiscated from Speer. Rhodes noted that Speer had a set of Rhodes' car keys which he had obtained during the Omaha trip and that a week or 10 days prior to the rattlesnake incident, Rhodes discovered a mouse in the trunk of his car. Rhodes

believed that Speer intended to kill him with the rattlesnake.

Speer testified that he captured the rattlesnake at his girlfriend's house and kept it in an aquarium in his bedroom and that he did not even have the snake for a full day. Speer's mother found the snake and told Carl Speer to take it away. Carl called and asked Daniel Speer if he wanted the snake. Daniel Speer said he did not. Carl Speer then killed the snake. They cooked it and ate it. Daniel Speer stated that he did not intend to use the rattlesnake to kill Rhodes.

Deposition of Cindy Ash, September 16, 1987

The record shows that Rhodes and Roth deposed Cindy Ash in the case of *State v. Coleman*. Roth represented the defendant, Pete Coleman, also known as Rufus Two Two. During the deposition, Roth observed a 12-inch bayonet on the table with Rhodes' materials. The bayonet was covered with a sheath. Roth did not recall whether Rhodes handled the bayonet during the deposition, but testified that the bayonet was not marked as an exhibit or used in the deposition. Roth testified on cross-examination that he was not threatened or intimidated when he saw the bayonet.

David Francis, the court reporter who recorded the Ash deposition, testified that he noticed a large knife on the counsel table in the courtroom. Francis testified that when Roth entered the courtroom and asked Rhodes what the knife was for, Rhodes replied, "That's for you in case you make me mad." Francis characterized Rhodes' statement as an attempted joke. Francis further testified that Rhodes handled the knife during the deposition, holding it with the blade pointed up, and that he (Francis) became apprehensive when he realized the knife had nothing to do with the deposition.

Rhodes testified that he had a collection of antique Swedish military equipment, that he had brought the bayonet from home to put in his office, and that the bayonet was in the courtroom because he went from home directly to the courtroom. He recalled looking at the knife before the deposition, but did not recall looking at it during the deposition. Rhodes remembered Francis' commenting on the bayonet when Rhodes was looking at it while waiting for Roth.

Francis asked what the bayonet was for. As a joke, Rhodes said, "Well, it's for Brad." Rhodes eventually gave the bayonet to Carl Speer as a gift. Rhodes admitted the bayonet had nothing to do with the deposition. He thought that since he and Roth had been "going around" on Roth's claims with the county, it was a joke that Rhodes would give Roth a gift, considering the fees Roth was charging.

Deposition of Daniel Speer, September 16, 1987

The record shows that Rhodes was the prosecuting attorney in *State v. Larry L. Rush*, in the district court for Custer County. Rush was charged with possession of a burglar's tool, "criminal attempt," and criminal mischief. The defendant moved to depose Speer and others pursuant to Neb. Rev. Stat. § 29-1917 (Reissue 1985). Rhodes also moved to depose Speer because Speer had been twice imprisoned with the defendant and was "believed to be in possession of incriminating admissions" made by Rush. On September 3, 1987, the district court granted both parties' motions to depose Speer in the Rush prosecution.

The Speer deposition was taken on the afternoon of September 16 in the district courtroom in Broken Bow. At Rhodes' request, Francis and his assistant recorded this deposition on videotape. Rhodes requested that he not appear on the videotape. Francis testified that such a request was not unusual. At defense counsel's request, however, Francis' assistant turned the video camera to show Rhodes' demeanor in the courtroom. Rhodes testified that he had the deposition videotaped to deter "something" and sat at the judge's bench during the deposition because he thought Speer might pull a weapon. Rhodes also took the nameplate from his office and put it on the judge's bench. Rhodes did not believe it would help to have a sheriff in the courtroom or that there were legal grounds to have Speer searched.

Francis observed that Rhodes had changed from a light-colored summer suit and appeared that afternoon wearing dark blue trousers with a yellow stripe down each leg. Rhodes' coat was like a uniform coat, and he was wearing a white shirt and black tie. The coat had a badge on the left breast pocket and

a medal on the right. Rhodes also was wearing a gun with a long barrel. The gun originally was in a holster sitting on a chair in the courtroom. Francis testified that Rhodes later strapped the holster around his waist. Rhodes did not recall putting on the gun and holster in the courtroom. When Francis asked Rhodes what he was doing, Rhodes said that there was a court rule that any officer who wore a firearm in the courtroom must be in uniform. The weapon was a "686 Smith and Wesson stainless steel" and was loaded.

Rhodes admitted that he wore a law enforcement uniform to the deposition. He had purchased the uniform from a catalog and claims he was entitled to wear a uniform because, pursuant to the statutes, he is a coroner with the duties of a peace officer. Rhodes testified that he did not order the uniform specifically for the Speer deposition. He believed that Speer had mental problems and that Speer would try to get even with Rhodes.

Rhodes testified that he began to carry a small pocket pistol after being threatened by Speer and that Speer's deposition was originally scheduled to be held in the board of supervisors' room, where Rhodes could carry his pocket pistol. Rhodes once again noted that Speer had threatened his life several times, had been caught with weapons, and had been in the military police. Rhodes explained that he thought Speer might think twice about killing a law enforcement officer as opposed to a regular person and ordered the uniform thinking that on Halloween he would go out in uniform and make an impression on Speer that "this is a peace officer you're trying to kill." Rhodes did wear the uniform and badge on Halloween.

At this time, Rhodes usually carried a firearm because of Speer's threats. Rhodes stated that the rule of the district court was that only uniformed officers could wear sidearms in the courtroom. He decided on the spur of the moment to wear the uniform to the deposition so he would comply with the court rule regarding sidearms. The uniform arrived by United Parcel Service the same day as the Speer deposition and was delivered to the courthouse after lunch. Rhodes changed into the uniform in his office and put on a badge that had been given to him by law enforcement officers. He also wore a "mock trial group" medal.

During the deposition, Rhodes began questioning Speer about how he and Rhodes had met. Rush's attorney objected to the line of questioning on the grounds of relevancy, but Rhodes claimed the questions were foundational to show that Speer was a hostile witness. Rhodes explained to the referee that he was trying to talk Speer out of his anger and get him to cooperate at the deposition.

The record of the deposition contains approximately 40 pages of testimony elicited by Rhodes on topics including the drive-in theater incident, why Speer never went to college, the Omaha concert trip, the trip to Vancouver, conversations at the Tumbleweed Cafe, conversations regarding a sexual assault victim and Ricky Ross, the trip to Lincoln, alleged homosexual advances made by Rhodes, Rhodes' attempts to talk to Speer after the Vancouver trip, one of the sexual assault incidents, the Jerod Beck kidnapping/false imprisonment incident, the criminal charges filed by Rhodes against Speer, issues of constitutional law with respect to civil rights actions, the disposition of charges against Speer by Roth, Speer's purchase of a gun at Gibson's, and Speer's visits to a psychiatrist. Rhodes then stated to Speer during the deposition that "maybe he [Rhodes] is trying to make a point that he [Rhodes] wasn't out to lock you [Speer] up forever."

Only approximately two pages of the deposition testimony are devoted to Rhodes' questioning Speer about statements made by the defendant, Larry Rush, in the jail.

Speer testified that he appeared pro se at the deposition, but that Rush's attorney, Gary Washburn, told him not to talk to Rhodes until Washburn was present. Speer described Rhodes' attire as a blue "sports jacket" with a badge and medal and testified that Rhodes was carrying a weapon. Speer stated that he was not frightened, but was embarrassed by Rhodes' questions about their personal relationship.

Rhodes now admits the deposition in the Rush case probably was not a very good idea. He stated before the referee that he would not be dressing up in any uniforms in the future and that he only wore the uniform because he was afraid of Speer. Rush's attorney, Gary Washburn, testified at the referee's hearing that Rhodes' manner was very calm during the Speer deposition and

that the only loud or boisterous language came from Speer.

Discovery Dispute With Roth

On September 18, 1987, Roth and Rhodes were to exchange discovery items in the district courtroom pursuant to a reciprocal discovery order entered in *State v. Hunsaker*. Roth testified that when he arrived at 1 p.m., Rhodes was already in the courtroom, sitting in the front jury seat. Rhodes was wearing a suit, his coat was buttoned, and he was staring straight ahead with a "glazed" look on his face. Prior to this occasion, Roth had seen Rhodes carrying a pistol "on his side" and in a shoulder holster. Roth was concerned that Rhodes was carrying a gun. Roth asked Rhodes if he had any of the discovery materials. Rhodes pointed at items sitting on the ledge in front of him. As Roth walked over to the jury box, Rhodes pushed the items over the ledge so that two documents fell on the floor. The items consisted of a telephone directory, a letter from Rhodes, and the bill of exceptions from Hunsaker's preliminary hearing. There were no police reports. Rhodes gave Roth the telephone book so that Roth could look up the witnesses' addresses himself.

Roth testified that the judge had specifically ordered that the police reports be provided. After Roth asked for the police reports, Rhodes responded very sternly, "I'm not giving you the police reports until I get your witness list." Roth said it was his understanding that he did not request a witness list from Rhodes, so Roth did not have to provide a witness list.

Rhodes continued to refuse to provide the police reports. When Roth asked if he had anything else, Rhodes appeared to lose control. Roth testified that Rhodes "came up over the jury box very rapidly with his arms waving and made a loud noise, coming directly at me. . . . He made a loud, 'Gerr-rr-rr.' " Roth was stunned and took off and ran around the counsel table. Rhodes did not follow him, but headed toward the back of the courtroom, turned around, and said, "You chicken shit." Rhodes denies calling Roth a chicken shit. There were no other witnesses to this incident. Roth testified that he was "extremely scared" and that he left the courtroom to discuss the incident with Jeff Kawata, a probation officer. Roth returned to his

office and prepared a memo for his file about the incident.

Rhodes testified that there was a reciprocal discovery order in the *Hunsaker* case and that he and Roth had a disagreement about the defendant's witness list and the police reports. Rhodes said he became exasperated and said, "This is chicken shit." Rhodes denied sitting in the jury box and jumping over the jury box. Roth's partner was eventually ordered to give the State a witness list in the case.

Roth testified that he was concerned for his own personal safety from the time he reduced the felony charges against Speer until this incident in the courtroom. Roth and his family began to lock all their doors at home. Roth stopped working in his office at night and made sure that discovery exchanges were made in the presence of a judge. Roth stated that he considered leaving Broken Bow as the result of Rhodes' conduct.

Further Contacts With Speer

Speer continued to threaten Rhodes during the fall of 1987. During Christmas 1987, however, Rhodes gave Speer a leather jacket, several magazine subscriptions, a shirt, a movie, a book, cologne, and $50 cash. Speer estimated the value of these gifts to be $600. Rhodes gave the gifts to Carl Speer, who forwarded them to Daniel Speer. Daniel Speer never returned any of Rhodes' gifts. Rhodes also bought Carl Speer a "Colt 45 Officers Model" that cost $455. Rhodes thought that if he got Daniel Speer a Christmas present, Speer would settle down and quit trying to kill him.

On January 7, 1988, Rhodes signed up for Tae Kwon Do classes after finding out that Daniel Speer had enrolled. Rhodes did not want Speer to "get the upper hand on me, become physically superior to where he could destroy me hand-to-hand." Carl Speer and Deputy Mayo also took the classes. Rhodes continued the classes even after Daniel Speer dropped out.

In April 1988, about 1 week before Daniel Speer's birthday, Speer threatened Rhodes after Tae Kwon Do class. Speer said he was "good with a gun, with an M-16, and good with a 45." Speer threatened to shoot Rhodes and stated that when he did, it would be a kidney shot so that Rhodes would really suffer.

Rhodes testified that by this time he was not afraid of Speer anymore and decided to buy him a birthday card.

On April 14, Rhodes gave Speer a birthday card containing $50. The card depicted a cartoon character holding a can of spray paint and reminded Rhodes of what Speer had done at the drive-in theater. Rhodes said he sent the card as a way of saying, "You can't get my goat any more; I'm not afraid of you, you vandal."

Credibility of Daniel Speer

The referee concluded that "[t]here is no question but that Daniel Speer, the principal witness against Mr. Rhodes, falsified parts of his testimony and that he was impeached numerous times on cross examination by Mr. Rhodes' counsel and by the witnesses called for the purposes of impeachment."

Thomas Zimmer, a conservation officer with the Game and Parks Commission, testified that he checked Daniel Speer for a hunting license in the fall of 1984. At that time, the law required that anyone 16 years of age or older had to have a hunting license. Speer lied to Zimmer about his age, indicating that he was only 16, but then produced a driver's license that confirmed he was 21. Speer denied lying to Zimmer.

Michele Taylor, who was 18 years old, testified that on May 23, 1989, she was sunbathing on the riverbank in Pressley Park with her friend, Cathy Russell. Taylor and Russell saw Speer standing on the other side of the river. The two women then saw Speer drop his swimming suit or underwear and begin "fondling himself." Taylor testified that she did not report the incident to law enforcement because she did not want to go to court and "didn't want all the problems it would cause." Taylor further stated that she was afraid of Speer and did not want to testify against him.

Speer's testimony on cross-examination suggests the possibility that Speer is homophobic and that he was not truthful in his testimony regarding his purchases of a gun and ammunition at Gibson's, the 1984 hunting incident, the Jerod Beck assault, and the incident in Pressley Park. Speer "quit" his job at the Tumbleweed Cafe after assaulting another employee. He was fired from a job at Becton-Dickinson in Broken Bow

for lying on a timecard.

The referee found that Speer's testimony relating to the material parts of the case was corroborated by the circumstantial evidence and the reasonable inferences to be drawn from the known facts and the admissions of the respondent, Rhodes. The record supports this finding.

In summary, the evidence shows that sometime during late 1985 and early 1986, Rhodes started to develop a relationship with Daniel Speer. It began by Rhodes' presenting Speer with expensive gifts, contributing $4,700 to Carl Speer's campaign, offering to pay at least an equivalent amount for Daniel Speer's college expenses following the campaign, and offering to make Daniel Speer's car payments while he was in college. Rhodes also took Speer on trips to Omaha, Lincoln, and Vancouver, all of which Rhodes paid for. Rhodes also discussed with Speer the possibility of trips to Missouri and the Bahamas. All of the essential facts are admitted by Rhodes, although he attempted to explain them away as acts of charity. The expenditures Rhodes made during a relatively short period of time demonstrate a consistent and aggressive effort on the part of Rhodes to develop his relationship with Speer.

While Rhodes was fostering his relationship with Speer, Rhodes was also prosecuting Speer and had filed a misdemeanor criminal mischief charge against Speer in the county court for Custer County. During the various trips they took together, Rhodes discussed cases with Speer involving sexual matters involving not only Speer but also other individuals who were involved with girls in Broken Bow who were under the age of consent. The relationship between Speer and Rhodes was not the type of relationship between a prosecutor and defendant that can be tolerated in a criminal case.

Rhodes manipulated the criminal justice system against Speer, in violation of DR 7-102, while providing gifts in an effort to establish a relationship with Speer. The effort went from attempting to ingratiate himself with Speer by dismissing relatively minor charges to attempting to coerce and intimidate Speer by filing more serious charges. The conduct of the respondent after the Vancouver trip was erratic at best. Rhodes

started writing notes and letters to Speer in an effort to get Speer to talk to him, when it was clear that Speer wanted nothing to do with Rhodes. Rhodes' testimony that his motive toward Speer was charitable because Rhodes was in the habit of helping people is not convincing in view of the record and the lack of substantial evidence of any real effort by Rhodes to help anyone, except Daniel Speer and his brother Carl.

Rhodes' testimony that he was afraid of Speer did not justify Rhodes' conduct. Speer's threats may have been related to what occurred in Vancouver, rather than originating from any prosecutorial action against Speer. There is no adequate explanation why respondent did not prosecute Speer for any of the alleged threats that he made against Rhodes or for the failure to prosecute Speer for other offenses by Speer which Rhodes knew about.

Rhodes' conduct toward the special prosecutor, Roth, and Rhodes' conduct during the deposition was erratic and bizarre. The problems between Roth and Rhodes started only after Roth became active in the Speer prosecutions. Instead of completely withdrawing from those cases, Rhodes attempted to exert some influence upon Roth.

The evidence shows clearly and convincingly that Rhodes was guilty of misconduct and that he violated the provisions of DR 1-102, DR 2-110, DR 5-101, and DR 7-102.

Rhodes argues that a prosecutor is disqualified only when he is the victim in a case which he prosecutes. This argument lacks merit, and, as the relator points out, such a rule would permit prosecutors to prosecute their close friends and relatives.

In *Kennedy v. L.D.*, 430 N.W.2d 833, 837 (Minn. 1988), the Supreme Court of Minnesota stated, "It is improper for prosecutors to participate in cases which involve personal friends or relatives . . . ." See, also, *State v. Bell*, 84 Idaho 153, 370 P.2d 508 (1962), in which the court held that an affidavit of the prosecuting attorney alleging that the defendant and prosecuting attorney and their families had been close personal friends, that the defendant and prosecuting attorney had had business and political relations in the past, and that it would be difficult for the prosecuting attorney to conduct a trial was a sufficient showing to warrant appointment of a special

prosecuting attorney.

In *People v Doyle*, 159 Mich. App. 632, 636, 638, 641-44, 646, 406 N.W.2d 893, 895-99 (1987), the court said:

> The basis of defendants Doyle's, Kardos' and Reynolds' motion for disqualification of the prosecutor for conflict of interest is the personal relationship between Doyle and Dennis Lazar, Chief Assistant Genesee County Prosecutor. Doyle and Lazar are brothers-in-law; their wives are sisters. The Flushing drug investigation, supervised by the prosecutor's office, began in August, 1984, and implicated Doyle in September, 1984. Doyle married Lazar's sister-in-law around Christmas, 1984.
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> . . . .
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> The basis for defendants Walter Johnson's, Scott Johnson's and Timothy Donaldson's claim for disqualification is that the complaining witness and victim, Danny Lazar, is the brother of Dennis Lazar, Chief Assistant Prosecutor.
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> . . . .
>
> The instant cases fall into the second category, which includes situations where the prosecuting attorney has a personal interest (financial or emotional) in the litigation, or has some personal relationship (kinship, friendship or animosity) with the accused. In Michigan, the recusal of a prosecuting attorney who has a personal interest in the case is required by the Code of Professional Responsibility. Canon 9 provides that "a lawyer should avoid even the appearance of professional impropriety." DR 5-101 is arguably applicable:
>
> "DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.
>
> "(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."
>
> . . . .
>
> Courts around the country recognize two policy

considerations underlying the disqualification of prosecuting attorneys for a conflict of interest. The first policy served by the rule is fairness to the accused. It is universally recognized that a prosecutor's duty is to obtain justice, not merely to convict. . . .

The second policy served by disqualification of a prosecuting attorney for conflict of interest is the preservation of public confidence in the impartiality and integrity of the criminal justice system. *Greer, supra*, p. 268 [19 Cal. 3d 255, 561 P.2d 1164, 137 Cal. Rptr. 476 (1977)]; *Conner, supra*, p. 146 [34 Cal. 3d 441, 666 P.2d 5, 193 Cal. Rptr. 148 (1983)]; 31 ALR3d 953. American courts have consistently held that the appearance of impropriety is sufficient to justify disqualification of a prosecuting attorney. . . .

. . . .

. . . The fact that Lazar is the Chief Assistant Prosecutor and Doyle's brother-in-law creates for Lazar a conflict of interest. There is an appearance of impropriety when Lazar acts in matters concerning Doyle. His family relationship with defendant Doyle is sufficiently incompatible with the interest of the defendant, of the state and of the administration of justice generally so as to require Lazar to withdraw from Doyle's case.

Character References

Roth testified that, as of the time of the referee's hearing, he and Rhodes had gotten along professionally for approximately 1 year. Roth described Rhodes as being courteous and professional and said that Rhodes' bad conduct was out of character.

Howard Spencer, Gary Washburn, and Steven Stumpff, all practicing attorneys in Broken Bow, testified they were of the opinion that Rhodes was truthful and honest. None of these witnesses had experienced an instance where Rhodes filed criminal charges which were not based on the facts or the law. Rhodes was described as a good criminal lawyer who was well prepared and showed a good grasp of the issues.

Ronald Ruff, an attorney from North Platte whose firm

contracts to do public defender work in Custer County, testified that he became acquainted with Rhodes in late 1988. Ruff was of the opinion that Rhodes was well prepared and had a good grasp of the law. Ruff noted that Rhodes was extremely courteous and that he had not noticed any charges filed by Rhodes that were not based on the facts or the law.

Attorneys Carlos Schaper, William Steffens, and Ted Huston also testified that they were of the opinion that Rhodes was truthful, honest, courteous, professional, and competent.

The record also contains letters of endorsement from the following people: Robert Scott, Custer County supervisor; Herbert Buntemeyer, Custer County supervisor; Robert L. Leatherly, Custer County supervisor; Ronald Ruff; W.G. Arnold, D.D.S.; Grayston Cool, Custer County supervisor; Roberta Snyder, teacher; Donald Ellingson, register of deeds; Lea Dell Jones, Custer County treasurer; Eugene Schiltz, Custer County surveyor; Robert Jacobsen, mayor of Broken Bow; Edwin Scott, Custer County supervisor; L.O. Muhlbach, chief of police; Larry Hickenbottom, Custer County supervisor; Bryan Clark, pastor of Berean Fundamental Church; John Finney, former associate county judge and clerk magistrate; Marian Woodward, Custer County clerk; Leroy Schaad, Custer County assessor; Harry Duryea, Custer County highway superintendent; Max Bristol, Custer County weed control authority superintendent; and Joseph Divis, Blaine County Attorney.

DISCIPLINE TO BE IMPOSED

We find that the respondent violated the provisions of DR 1-102, DR 2-110, DR 5-101, and DR 7-102.

In *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), we said that the conduct of a government attorney is required to be more circumspect than that of a private lawyer because improper conduct on the part of such an attorney reflects upon the entire system of justice in terms of public trust.

The evidence is unrefuted that during late 1985 and early 1986, the respondent actively cultivated a friendship with Daniel Speer.

During the time respondent was fostering the relationship with Speer, he was also engaged in prosecuting him. During the various trips they took together, respondent discussed with Speer cases involving sexual matters not only involving Speer, but involving other individuals who were sexually involved with girls in Broken Bow who were under the age of consent. The relationship between Speer and the respondent was not the type of relationship that is proper between the prosecutor and the defendant in a criminal case.

The record shows by clear and convincing evidence that the respondent violated DR 5-101(A) by prosecuting Speer at a time when his professional judgment might reasonably have been affected by respondent's own personal interests and that respondent violated DR 2-110 by failing to withdraw from prosecuting Speer in the criminal mischief case. Respondent also engaged in investigating sexual assault allegations against Speer during the time he and Speer were engaged in a close personal friendship and filed burglary charges against Speer after discovering that Speer was an alleged "child molester."

The respondent's conduct toward Roth and his behavior during the Speer deposition were erratic, extraordinary, and defy propriety. The record sustains this finding, regardless of the motivation for respondent's behavior. The record shows by clear and convincing evidence that respondent violated DR 1-102 by engaging in conduct that was prejudicial to the administration of justice and adversely reflected on his fitness to practice law.

In *State ex rel. NSBA v. Rasmussen*, 232 Neb. 53, 55, 439 N.W.2d 481, 483 (1989), we said:

> The nature and extent of discipline to be imposed is determined by a consideration of the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his or her present or future fitness to continue in the practice of law.

The purpose of a disciplinary proceeding is not so much to punish an attorney as it is to determine, in the public interest, whether the attorney should be permitted to continue to

practice law. *State ex rel. NSBA v. Douglas, supra.*

It is significant that several of the respondent's peers testified that he is an able and capable attorney and has discharged his duties as county attorney well in most cases. Also significant is that respondent provided many favorable references from county officials and citizens. These references constitute a mitigating factor but do not exonerate the respondent from his misconduct.

Taking into consideration the attitude of the respondent, in light of the evidence presented and the fact that this matter involves both the respondent's ability to practice law and his ability to discharge the office of county attorney, and based upon the seriousness of the matter, we conclude that the appropriate discipline to be imposed in this case is suspension from the practice of law for a period of 3 years.

JUDGMENT OF SUSPENSION.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MOHAMED EL-TABECH, APPELLANT.

453 N.W.2d 91

Filed March 23, 1990. No. 89-389.

1. **Postconviction: Proof: Appeal and Error.** A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous.
2. **Postconviction: Effectiveness of Counsel: Proof.** When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
3. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such

deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

4. **Effectiveness of Counsel: Proof.** A convicted defendant seeking a reversal of the conviction or sentence for the reason that counsel's assistance was deficient must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
5. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact, including the credibility and weight to be given the testimony of a witness. The trial court's findings will be upheld unless they are clearly wrong.
6. **Constitutional Law: Trial: Testimony: Waiver.** The court has no duty to advise the defendant of his right to testify, nor is the court required to ensure that an on-the-record waiver has occurred.
7. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal or which were known to the defendant and counsel at the time of the trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.
8. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Alan G. Stoler for appellant.

Robert M. Spire, Attorney General, and William L. Howland for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

After a jury trial, the defendant, Mohamed El-Tabech, was convicted of murder in the first degree and use of a deadly weapon to commit a felony in the strangulation death of his wife, Lynn El-Tabech, on June 24, 1984. He was sentenced to life imprisonment for the murder and 20 years' imprisonment for the use of a deadly weapon, the sentence on the second count to run consecutively. The judgment was affirmed by this

court in *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987).

On June 23, 1988, the defendant filed a pro se "Motion to Vacate Conviction and Sentence" pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). An evidential hearing was held on February 23, 1989, on the portions of the motion which alleged the defendant's convictions were unconstitutional because he was not afforded effective assistance of counsel. The defendant claimed that his trial counsel were ineffective because they denied the defendant the right to testify in his own behalf and denied him the right to call certain witnesses, including the victim's former employer and several character witnesses. The defendant further alleged that trial counsel were ineffective in failing to adequately prepare the case for trial and in failing to move for a dismissal of the information based on speedy trial grounds.

The trial court found that counsel's decision not to put the defendant on the stand and not to call certain other witnesses was proper trial strategy; that the defendant had not shown he received ineffective assistance of counsel; and that even if the assistance was deficient, the defendant failed to show there was a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different.

The defendant has appealed and assigns as error the action of the district court in denying him postconviction relief (1) because the defendant's constitutional right to testify was violated and (2) because the defendant did not have effective representation of counsel at trial.

The standard of review for a claim of ineffective assistance of counsel is that set forth in *State v. Jones*, 231 Neb. 110, 112-13, 435 N.W.2d 650, 652 (1989):

> "A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous. [Citations omitted.] ' "When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the

> attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions." ' " . . .
>
> . . . "[T]o sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different."
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> A convicted defendant seeking a reversal of the conviction or sentence for the reason that counsel's assistance was deficient must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

See, also, *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

The record shows that the defendant was represented by Deputy Lancaster County Public Defender Scott Helvie from the time of his arraignment in June 1984 until July 1985, when the public defender's office was disqualified from the case because of a conflict of interest. During this period, Helvie and other members of the public defender's office made many contacts with the defendant, took numerous depositions, compiled many volumes of investigatory materials, and adopted a tentative trial strategy.

Kirk Naylor was appointed to represent the defendant after Helvie's office was disqualified in July 1985. Due to the complexity of the case, a second attorney, Jerry Soucie, was appointed to assist Naylor. Both Naylor and Soucie are experienced criminal defense attorneys.

The defendant first claims that Naylor and Soucie were

ineffective in failing to allow him to testify at trial despite his demands to do so, in violation of his rights under the U.S. and Nebraska Constitutions.

As to the decision not to have the defendant testify, Naylor stated that he and the defendant discussed whether the defendant should take the witness stand. The record shows that Naylor and Soucie discussed this issue at length with the defendant and even held practice sessions with the defendant. Naylor became concerned that the defense would be adversely affected by the defendant's testimony. He was of the opinion that the jury would believe the defendant was capable of murder. Naylor also thought the defendant's explosive personality and his tendency to fly into rages would be demonstrated on the witness stand and create a bad impression for the jury. Both Naylor and Soucie expressed concern that on cross-examination, unfavorable testimony would be elicited as to the defendant's background and how he had treated his wife, who was the victim. This information had been the subject of several successful objections or motions in limine.

Naylor and Soucie both stated that the decision not to testify was made by the defendant, based on their advice, and that they all were in general agreement before the trial started that he would not testify. The defendant was aware that the prosecution wanted him on the stand and according to his trial counsel agreed that it was tactically wise to keep the prosecution "in the dark" in that regard. During the trial, the defendant and counsel discussed that it was clever that the defendant had decided not to testify when the prosecution expected him to do so. Although the record of the trial does not specifically reflect that the defendant waived his right to testify, the defendant was present at every conference the defense had with the court, and it was indicated to the court that the defendant would not testify. We note that the defendant also was present during the jury instructions conference and made no comment when his attorneys proposed an instruction referring to the fact that the defendant had not testified.

In an evidentiary hearing for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact, including the credibility and weight to be

given the testimony of a witness. The trial court's findings will be upheld unless they are clearly wrong. *State v. Domingus, ante* p. 267, 450 N.W.2d 668 (1990). In this case the trial court resolved the conflicts in the evidence against the defendant and determined that counsel were not ineffective in advising the defendant not to testify.

The record also supports a finding that the defendant voluntarily made the decision not to testify. In *U.S. v. Martinez*, 883 F.2d 750, 760 (9th Cir. 1989), the court held that "the court has no duty to advise the defendant of his right to testify, nor is the court required to ensure that an on-the-record waiver has occurred." See, also, *U.S. v. Bernloehr*, 833 F.2d 749 (8th Cir. 1987).

Naylor testified that during the trial there were discussions in chambers with the defendant present "in which we informed the court that Mr. El-Tabech had determined not to testify . . . ." Naylor further testified that "during some of those conferences with the court, it was indicated to the court that he was not going to testify . . . ." Apparently, no record was made of these conferences.

The finding of the district court that "counsel's decision not to put defendant on the stand . . . was proper trial strategy" is not clearly wrong. Cf. *State v. Journey*, 207 Neb. 717, 301 N.W.2d 82 (1981) (defense counsel's advice not to testify, after discussing it with the defendant, was not ineffective where the defendant's prior criminal record could have been used against him). The defendant's first assignment of error is without merit.

The defendant further contends that trial counsel were ineffective in failing to adequately prepare the case for trial, in refusing to call certain witnesses, and in failing to move for a dismissal of the charges based on speedy trial grounds.

Although the defendant claims that his attorneys refused to discuss the case with him, did not conduct a proper investigation, and were not prepared for trial, the record shows that Naylor and Soucie spent a great deal of time conferring with the defendant, investigating, and preparing for trial. In fact, Soucie went to California to interview a prospective witness who Naylor and Soucie discovered might be able to

establish an alibi for the defendant. Soucie succeeded in persuading this witness to return to Lincoln and testify on the defendant's behalf.

The record also shows that Soucie considered filing a motion to dismiss based on speedy trial grounds, but determined that there was no basis for this relief because so many motions had been pending in the case. In any event, a motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal or which were known to the defendant and counsel at the time of the trial and which were capable of being raised, but were not raised, in the defendant's direct appeal. *State v. Bostwick*, 233 Neb. 57, 443 N.W.2d 885 (1989).

The defendant complained during the postconviction hearing that his attorneys wrongfully refused to call several persons as character witnesses. The record shows that these individuals could not have qualified as character witnesses because they did not know the defendant well enough to offer opinions as to his character. For instance, the defendant had applied for employment with the FBI and, although the application was never processed, the defendant wanted to call the FBI agent to whom he made the application. None of these proposed witnesses had any substantive information about the homicide. Counsel also noted that calling character witnesses would have "opened the floodgate" to the issue of credibility, which would have been detrimental for the defendant's case.

The defendant specifically complains that trial counsel improperly refused to call the victim's former employer, Peter Levitov, as a witness. The record shows that during the time Helvie was representing the defendant, a tentative theory was developed that they would attempt to adduce evidence of other individuals who might have had motive or opportunity to kill the victim. Apparently, the defendant believed that Levitov would somehow implicate himself in the murder if he were called to testify. Naylor and Soucie testified that the justification for the "Levitov defense" was that Levitov had made certain statements to law enforcement officers regarding aspects of the crime which were not public knowledge. These statements were to be used to draw suspicion away from the

defendant and toward Levitov. During the State's case, however, it became clear that Levitov received his information from members of the victim's family before talking to the police, and counsel then recommended abandoning a defense based on a particular suspect. Further investigation revealed that Levitov was with his wife at a Lincoln restaurant at the time of the murder. Counsel discussed this matter with the defendant, who then made the ultimate decision that Levitov would not be called.

The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves ineffective, will not, without more, sustain a finding of ineffectiveness of counsel. *State v. Jones*, 231 Neb. 110, 435 N.W.2d 650 (1989); *State v. Ellefson*, 231 Neb. 120, 435 N.W.2d 653 (1989). We determine that trial counsel's decision not to call these witnesses was proper trial strategy. Their testimony would have done nothing to assist the defendant and perhaps would have ensured his conviction. The defendant's contentions are without merit.

Despite his assertions to the contrary, the defendant failed to demonstrate that his trial attorneys failed to perform at least as well as lawyers with ordinary training and skill in the criminal law in the area. Nor did the defendant show that he was prejudiced in the defense of his case as a result of his attorneys' actions or inactions. The defendant's rights under the U.S. and Nebraska Constitutions were neither denied nor infringed so as to render his convictions void or voidable. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF M.M., C.M., AND D.M., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. C.M., APPELLANT.

452 N.W.2d 753

Filed March 23, 1990. Nos. 89-456, 89-463, 89-464.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights.** Where a parent is unable to discharge parental responsibilities because of mental deficiency, and where there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is found to be in the best interests of the child.
3. _____. When a natural parent who suffers from mental deficiency cannot be rehabilitated within a reasonable period of time, the best interests of the child require that a final disposition be made without delay.
4. _____. A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.

Appeal from the County Courts for Butler County and Seward County: ALAN G. GLESS, Judge. Affirmed.

Mark M. Sipple, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellant.

No appearance for appellee.

Mariclare Thomas, guardian ad litem for appellant.

Frank J. Skorupa, guardian ad litem for children.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is an appeal from orders of the Butler and Seward County Courts terminating appellant's parental rights. We affirm.

This is the second time this matter has been before this court. In *In re Interest of M.M., C.M., and D.M.*, 230 Neb. 388, 431 N.W.2d 611 (1988), appellant appealed orders of the Butler and

Seward County Courts terminating her parental rights. We held that the failure to appoint a guardian ad litem for the mother under Neb. Rev. Stat. § 43-292 (Reissue 1988) was plain error and reversed and remanded for further proceedings. A guardian ad litem was subsequently appointed for appellant. On January 10, 1989, the guardian ad litem for the three children again filed a petition for termination of parental rights pursuant to § 43-292(5), alleging that the mother is "unable to parent due to mental illness or mental deficiency and there are reasonable grounds to believe the conditions preventing her from parenting will continue for a prolonged and indeterminate period." After a hearing, the trial court again terminated the mother's parental rights.

We note here that each child allegedly has a different biological father. None of the alleged fathers answered or appeared. After finding that proper notice was given each father, the trial court terminated each father's parental rights. Only the mother has appealed the termination order.

Summarized, appellant contends on appeal that the trial court erred in terminating her parental rights and erred in finding that no reasonable alternative short of termination of parental rights would be in the best interests of the children.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires it to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of N.L.B., ante* p. 280, 450 N.W.2d 676 (1990).

We have reviewed the record de novo and make the following findings of material fact. Appellant is the mother of three children: D.M., a male born September 12, 1980; M.M., a male born March 7, 1983; and C.M., a female born March 29, 1986. The children are currently living with foster parents, David and Yvonne Justice.

Appellant has admitted in a responsive pleading that "she is afflicted with a bipolar disorder with psychosis; she further admits that at times she is overcome by delusional process

which is complicated by grandiose thinking . . . ." The record abundantly supports this admission. This mental illness is caused by a chemical imbalance in the brain. It is not curable, but is treatable with medication and therapy. A successful treatment program is dependent upon appellant's recognizing and accepting that she is mentally ill and that she must comply with the treatment program. The record shows, however, that appellant's acceptance of her illness is merely superficial. Dr. George Hachiya, appellant's psychiatrist, testified that once appellant starts feeling well she denies she is mentally ill and that she has a need for medication, and she abandons her treatment program, whereupon her condition again deteriorates. Throughout the long course of litigation in this matter, appellant has demonstrated a marked inability or unwillingness to maintain her treatment program or to cooperate in a structured, therapeutic environment. There is nothing in the record to suggest that appellant will at some point fully comply with any treatment program. Without therapy and medication, the likelihood of a long-term remission is slight.

The evidence also shows that without full compliance with the prescribed treatment program, appellant's mental illness prevents her from adequately parenting. Dr. Hachiya testified as to how appellant's mental illness adversely affects her ability to parent:

> Under the delusion of grandeur, she feels that she is a wealthy person. My understanding is that she is not. So therein lies a conflict. How can she provide for these kids when she is more or less, you might say, destitute? She cannot financially provide for her kids, because with the delusional system, she is not able to be gainfully employed at this time. With a delusional system, she becomes very angry towards other people who are trying to help her children. This is part and parcel of her delusions of persecution. With a delusional system, I got the feeling — she feels that she is an ideal mother. The question is, is she an ideal mother? When she is functioning under the delusional system and when she is manic, I do not think that she can function as an idealized mother.

Dr. Hachiya's testimony is supported by the testimony of

three babysitters who cared for the children while appellant had custody of the children, and by the testimony of Yvonne Justice. In sum, the babysitters testified that when appellant would arrive with the children, the children would sometimes be inappropriately dressed or be urine soaked. The children were sometimes unbathed. There was also evidence that the children, while in appellant's care, were not being properly fed. In one instance, appellant "said she had lunch in the car and all he [D.M.] had was a hot dog stuffed in his coat pocket, which was not edible. It was just a hot dog just stuffed into his coat pocket, and she said that was lunch — that he had his lunch with him." For the baby, appellant would sometimes supply bottles of rancid formula. Yvonne described C.M.'s condition when she first received her from appellant in 1986:

> She came in a basket. It was — it's like an old-fashioned laudry [sic] basket with — it's wicker and there was no padding in the basket. There was a piece of blue paper in the bottom and then there were two receiving blankets and then there was [C.M.]. The little pieces of wicker were sticking up on the bottom. It was not very comfortable. She had on a pamper that was — if I would have picked the baby up, the pamper would have fallen off. The pamper was clean. When I took the pamper off, I was by myself. There was no one else there, but [C.M.] was not very clean, and when I saw her diaper rash, to me, it was very severe. It was very red. It looked like a severe sunburn. Her skin was very rough. It covered the entire diaper area. There was — between her little folds there was feces that had not been cleaned out, and from — I have two children of my own and from experience from them I would say that a rash like that would not occur just in a few hours.

Significantly, appellant has maintained throughout the entire proceedings that she is a fit mother.

This court has previously stated that where a parent is unable to discharge parental responsibilities because of mental deficiency, and where there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, the parental rights may be terminated

when such action is found to be in the best interests of the child. *In re Interest of A.M.K.*, 227 Neb. 888, 420 N.W.2d 718 (1988).

In the present case the evidence clearly establishes that appellant, because of her mental illness, cannot discharge her parental responsibilities. The evidence also shows that her mental illness will continue for a prolonged and indefinite period.

It is equally clear that termination of appellant's parental rights is in the best interests of the children. This court has stated that when a natural parent who suffers from mental deficiency cannot be rehabilitated within a reasonable time, the best interests of the child require that a final disposition be made without delay. See *In re Interest of Farmer*, 210 Neb. 500, 315 N.W.2d 454 (1982). "A child cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity." *In re Interest of C.N.S. and A.I.S., ante* p. 406, 410, 451 N.W.2d 275, 278 (1990). In addition, Dr. Hachiya testified that "the nature and the degree of [appellant's] psychotic thought process will negatively affect the kids," because the children, who think in concrete terms due to their age, will begin to identify with and imitate appellant.

We are also convinced that no reasonable alternative short of complete termination exists. The record shows that contact with appellant, whether through visitations or otherwise, has been detrimental to the children and to those individuals who are responsible for their care. The children were placed in the Justice home at the request of the prior foster parents, Philip and Cindy Bader. Philip Bader is appellant's natural brother. The Baders asked that the children be removed from their home because "they just felt they could not deal with the family — the extended family." The extended family referred to appellant and her mother, LaVern Bader, who would make unannounced visits to see the children and blame the Baders "for a lot of the things that were happening . . . ."

While the children were at the Justice home, appellant was allowed periodic visits at various locations. These visits were difficult. D.M. suffered anxiety problems due to the sporadic and unreliable nature of the visits. Appellant was often unavailable for scheduled visits due to overseas "business"

trips, admission to the Lincoln Regional Center, or court orders. A child counselor testified that this inconsistency was detrimental to D.M., who is older and more mature than the other two children, in that "it was creating some anxiety for him because he was being torn in two different directions." He also testified that the two younger children were unaffected because strong bonding to appellant was not present.

During the visits, appellant would create unrealistic expectations in the children. For example, appellant "would tell [the children] that they were coming home soon, that she had the farm ready for them, their bedrooms were ready. She had playground equipment for them." In one instance, appellant gave D.M. a suitcase and apparently told him to put his clothes and toys in it because she was taking him away. She would also tell the children she was exceedingly wealthy and owned large amounts of real and personal property. If a supervisor was not present to intervene, the children, who were unable because of their age to discount these statements as mere manifestations of appellant's mental illness, accepted them as true. Once they developed these unrealistic expectations, the boys became unruly and difficult to control. C.M. remained unaffected.

The children's behavior and mental well-being were adversely affected by the visits. Yvonne testified that, although their behavior prior to visitations was normal, the boys experienced problems after visitations. For example, during a 7-month period when visitations ceased due to appellant's admission to the regional center, the children behaved normally. However, the boys' behavior deteriorated once visitation resumed. D.M. became depressed, experienced nightmares, and became overprotective of M.M. and C.M. M.M. became destructive and angry. Both boys would urinate on the wall in the bathroom. Yvonne testified that once the visitations ended, the aberrant behavior also stopped.

Contact with appellant has also been stressful for the foster family. Appellant would often make unscheduled visits, disrupting the Justice household. Yvonne also testified to several incidents of harassment by appellant. She testified that "[w]e've had phone calls where she [appellant] would want to talk to me and try to convince me that I should be giving the

children back to her, that what I was doing was immoral and wrong. And I tried to explain to her that my only job was to give her children a home." On another occasion appellant went to the Justice home with a letter, telling Yvonne that "the letter was an order from the judge that I was to pack the boys' suitcases and give them to her, and she was going to take them with her." In another incident, appellant went to the Justice home one evening at approximately 10:30 p.m., left a packaged birthday cake on the doorstep, then fled. Yvonne, fearing reprisals from appellant, called the police, who "treated the cake as a bomb. And — which is what I thought it was." In still another incident, appellant approached Yvonne in a doughnut shop, demanded that the children be returned to her, and stated, "I don't want trash like you raising my kids. And you give them back to me." As a result of these contacts, the foster family has grown quite apprehensive of further contact.

It is clear that the appellant's past regimen of contact has been unsuccessful and harmful to the parties involved. While we recognize that termination of parental rights should be used only as a last resort, the record clearly shows that prolonging this difficult situation by anything less than complete termination would be pointless. D.M. and M.M. have been living with the Justices continuously since November 1985. C.M. was separated from appellant 3 weeks after her birth and has lived with the Justices continuously since that time. The relationship among the three children is normal. The foster parents have two children of their own, a male and a female, who are now approximately ages 18 and 15, respectively. The Justice family appears in all respects to have furnished a stable and loving environment. All three children have bonded well with the foster family and regard the Justice children as natural siblings. Yvonne testified that they love the three children as their own. D.M. and M.M. refer to Yvonne as "mom." Yvonne testified that M.M. and D.M. have improved and are doing well scholastically and socially. C.M., having been separated from her natural mother shortly after birth, regards Yvonne as her natural mother. C.M. was baptized in the Justices' church. The Justices have indicated a willingness to adopt all three children, but fear continuing interference by appellant.

After thoroughly reviewing the lengthy record in the case, spanning a time period of approximately 6 years, we are convinced that nothing short of complete termination would be in the best interests of the children. Accordingly, the orders of the Butler and Seward County Courts terminating appellant's parental rights are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JESSE W. ROWLAND, APPELLANT.

452 N.W.2d 758

Filed March 23, 1990. No. 89-483.

1. **Rules of Evidence.** Evidence is probative if it tends in any degree to alter the probability of a material fact.
2. _____. Under Neb. Rev. Stat. § 27-403 (Reissue 1989) relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
3. **Trial: Evidence: Appeal and Error.** It is within the trial court's discretion to admit or exclude relevant evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
4. **Convictions: Appeal and Error.** A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant.
5. **Constitutional Law: Miranda Rights.** The right to remain silent, unlike the right to counsel, attaches before the institution of formal adversary proceedings.
6. **Constitutional Law: Trial.** There is a constitutional right to say nothing at all about the State's allegations, and, thus, the State may not, during its case in chief, comment upon an accused's refusal to answer a law enforcement officer's questions.
7. **Criminal Law: Trial: Evidence: Appeal and Error.** An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.
8. **Trial: Evidence: Convictions: Appeal and Error.** The improper admission of evidence constitutes harmless error where the evidence is cumulative and there is other competent evidence to support the conviction.
9. **Verdicts: Appeal and Error.** A verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
10. **Motions for New Trial: Appeal and Error.** A motion for a new trial is addressed to the discretion of the trial court, and absent an abuse of discretion, the trial

court's ruling will be upheld on appeal.

11. **Appeal and Error.** Generally, assigned errors not discussed in an appellant's brief are not considered by the Nebraska Supreme Court.
12. **Sentences: Appeal and Error.** A sentence imposed within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Robert M. Spire, Attorney General, and Denise E. Frost for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Pursuant to verdict, defendant, Jesse W. Rowland, was adjudged guilty of driving while his operator's license had been revoked under the provisions of Neb. Rev. Stat. § 39-669.07(c) (Supp. 1987), and was thus, for a period of 15 years, not privileged "to drive any motor vehicle in the State of Nebraska for any purpose . . . ." He was subsequently sentenced to imprisonment for a period of not less than 20 months nor more than 5 years. Rowland asserts, in summary, that the trial court erred in (1) receiving certain evidence, (2) refusing to strike certain other evidence, (3) overruling his motion for new trial, and (4) imposing an excessive sentence. We affirm.

At approximately 9:28 p.m. on April 4, 1988, Lancaster County Deputy Sheriff William Jarrett observed a pickup truck parked within the northbound lane of North 98th Street near Lincoln. The truck displayed no headlights and apparently displayed no taillights. Jarrett parked his sheriff's cruiser directly in front of and facing the parked truck. After radioing his location and a description of the truck to the police dispatcher, Jarrett left his cruiser and walked to the truck, where he found Rowland asleep inside and where he noticed two beer cans in the vehicle, one of which was half full. After summoning a backup unit to the scene, Jarrett woke Rowland and asked to see his operator's license and a registration for the

truck. Jarrett thereupon noticed the odor of alcohol coming from Rowland, and it appeared to Jarrett that Rowland had bloodshot eyes and "somewhat of a slurred speech."

Rowland got out of the truck and displayed his operator's license. He did not have a registration for the truck but did produce a title to the vehicle, which indicated that it had been owned by Shannon Havel. Havel had apparently signed the title to transfer the vehicle to another owner, but the name of the transferee was not specified on the title.

Jarrett testified that when he asked why Rowland was parked in the road, Rowland replied that he had run out of gas and that Havel "had left . . . walking to go get gas and she had not returned." Jarrett then asked Rowland if he had been operating the truck. When asked by the prosecuting attorney if Rowland responded to that question, Jarrett testified: "No. He was evasive with his answer." Jarrett explained:

> I had gone over the driver's license and had specifically asked whether or not Mr. Rowland was operating the vehicle. Whenever I would do so, then he would again advise that Sharon [sic] Havel was with him and that he had run out of gas and that she had left. He never would specifically answer yes or no to whether or not he was driving the vehicle.

After asking Rowland why he was parked in the road and whether he had been operating the truck, Jarrett left another deputy to stand with Rowland by the vehicle, and radioed for background information with respect to Rowland and the truck in which he was found. Jarrett learned that Rowland's operator's license had been revoked as aforesaid. Jarrett then placed Rowland under arrest for driving during a period when his license had been revoked.

After he had arrested Rowland and placed him in the sheriff's cruiser, Jarrett surveyed the area, looking for footprints around the truck in an effort to corroborate Rowland's statement that Havel had been with him and had left the vehicle to get gasoline. Although the gravel road on which the truck was parked was "somewhat muddy," Jarrett found no footprints leading away from the truck other than those of Rowland and the arresting officers.

According to Havel's testimony, Rowland had been at her house at around 6:30 or 7 p.m. on the night he was arrested. He arrived at her house alone in the truck, and a short time later he left alone in the same vehicle. Havel further testified that she had not, on the night in question, left the vehicle to get gasoline as claimed by Rowland and indeed had not on that night driven the truck while in Rowland's company.

As his first summarized assignment of error, Rowland asserts that the trial court erred in allowing the State to offer evidence that Rowland had been consuming alcohol prior to his arrest.

Anticipating Jarrett's testimony concerning the beer cans he observed in the truck and Rowland's condition, Rowland objected to this evidence before it was given. He argued that evidence he had been consuming alcohol prior to his arrest was irrelevant to whether he had been operating a motor vehicle while his operator's license had been revoked.

Neb. Rev. Stat. § 27-401 (Reissue 1989) embodies the modern view that evidence is probative if it tends in any degree to alter the probability of a material fact. *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988). See, also, *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). While under Neb. Rev. Stat. § 27-403 (Reissue 1989) "relevant . . . evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice," Rowland, as will be seen, fails to show the existence of such prejudice. Jarrett merely described the facts and circumstances surrounding Rowland's arrest, including evidence that Rowland may have been drinking and may have been intoxicated on the evening he was arrested. A juror could have concluded therefrom that it was likely Rowland in fact had been drinking and that, in an alcohol-impaired state, he would be more likely to exercise such poor judgment as to operate a vehicle notwithstanding that his operator's license had been revoked. The evidence would also help explain why Rowland may have erroneously thought that Havel had been with him in the truck and had gone to get gasoline.

It is within the trial court's discretion to admit or exclude relevant evidence, and such rulings will be upheld on appeal

absent an abuse of discretion. *State v. Ruyle, ante* p. 760, 452 N.W.2d 734 (1990); *State v. Chapman, ante* p. 369, 451 N.W.2d 263 (1990). For the reasons described earlier, it cannot be said the trial court abused its discretion by permitting Jarrett to testify with respect to evidence that Rowland had been consuming alcohol prior to his arrest.

In connection with his second summarized assignment of error, Rowland contends that the trial court erred in (1) overruling his motion to strike the testimony of Jarrett that Rowland was "evasive" when asked whether he was driving the vehicle and (2) overruling his motion to strike the testimony of Jarrett that Rowland would not answer when asked whether he was driving the vehicle.

The first aspect of this summarized assignment of error was precipitated by the following exchange:

> Q. Did you talk to Mr. Rowland?
>
> A. Yes, I did.
>
> Q. What did you say?
>
> A. I had asked Mr. Rowland if there was a problem or why, what he was doing there. He went directly into that there was another party in the vehicle, a Shannon Havel, H-a-v-e-l. He advised that they had run out of gas and Miss Havel had left and walking [sic] to go get gas and she had not returned.
>
> Q. Did you ask Mr. Rowland anything at that time?
>
> A. I asked him if he had been operating the vehicle.
>
> Q. And did Mr. Rowland respond?
>
> A. No. He was evasive with his answer.

Assuming, without deciding, that the trial court erred in overruling Rowland's motion, neither the record nor Rowland's brief contains any indication of how Rowland could have possibly been prejudiced by this evidence. A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant. *State v. Chapman, supra.* Thus, this first aspect of Rowland's second summarized assignment of error is without merit.

Despite the language of the second aspect of this summarized assignment of error, it is apparent, based upon the references to the record in his brief, that Rowland is actually asserting that

the trial court erred in allowing testimony regarding Rowland's failure to respond to a question whether his operator's license had been revoked rather than his failure to respond when asked whether he was driving.

At any rate, Jarrett testified that before placing Rowland under arrest and before he radioed for information regarding the license which Rowland had displayed, he asked Rowland whether he had been operating the truck and also asked whether his operator's license had expired. Jarrett's testimony indicates that Rowland was unresponsive to these questions. Rowland contends that evidence of his prearrest silence was not admissible at trial and that admission of such evidence violated his right against self-incrimination under the 5th and 14th amendments to the U.S. Constitution.

The State argues that Rowland's unresponsiveness to Jarrett's questions occurred prior to arrest and that under *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981), such prearrest silence is admissible. However, as Rowland argues, the rule in *Duis* is applicable when the defendant's testimony on direct examination is being impeached by the State. See, also, *State v. Wells*, 229 Neb. 89, 425 N.W.2d 338 (1988); *State v. Lofquest*, 227 Neb. 567, 418 N.W.2d 595 (1988). In this instance, the State commented on Rowland's silence in its own case in chief. In *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), the U.S. Supreme Court reversed the defendant's conviction because the State's attorney commented to the jury about the defendant's failure to testify at trial, and the trial court instructed the jury that it could take such failure to testify into consideration in determining its verdict.

In analyzing *Griffin*, the U.S. Court of Appeals, in *U.S. ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987), stated:

> While it is true that *Griffin* involved governmental use of the defendant's silence at trial, rather than when initially questioned by police, and [*United States v. Shue*, 766 F.2d 1122 (7th Cir. 1985),] rested on Due Process grounds, rather than on the right to be free from self-incrimination, we do not believe these factors make a difference. The right to remain silent, unlike the right to

> counsel, attaches before the institution of formal adversary proceedings. *Compare United States v. Gouveia*, 467 U.S. 180, 188, 104 S.Ct. 2292, 2297, 81 L.Ed.2d 146 (1984) (right to counsel under Sixth Amendment does not attach until the defendant becomes an "*accused*" within the meaning of that amendment) *with* U.S. Const.Amd. V ("No *person* shall . . . be compelled in any criminal case to be a witness against himself. . . .").. . .
>
> Thus, the case is distinguishable from the cases the state cites such as *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982) and *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980), where the government used the defendant's silence to impeach his trial testimony. After all, there is no constitutional right to commit perjury, which impeachment is designed to detect. Because of this, the *Doyle* [*v. Ohio,* 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976),] rule is predicated on the implied promise of the *Miranda* warnings. The cases which have allowed impeachment by silence rely on the fact that the defendant opens himself to impeachment by taking the stand. See *Fletcher*, 455 U.S. at 605-06, 102 S.Ct. at 1311-12; *Jenkins*, 447 U.S. at 235-36 & n. 2, 100 S.Ct. at 2127-28 & n. 2. There is, on the other hand, a constitutional right to say nothing at all about the allegations. While the presence of *Miranda* warnings might provide an additional reason for disallowing use of the defendant's silence as evidence of guilt, they are not a necessary condition to such a prohibition.
>
> In sum, we believe that the state's suggestion that use of a defendant's silence to impeach his trial testimony presents a constitutional issue, but use of his silence to imply guilt does not, is nothing short of incredible, given the language of our constitution and the interpretation it has been consistently given. Because we find the error in referring to the defendant's silence to be of constitutional magnitude, we review it under the "harmless beyond a reasonable doubt" standard.

(Emphasis in original.) Thus, it was indeed error for the trial

court to permit Jarrett to testify concerning Rowland's unresponsiveness when questioned about whether his operator's license had been revoked and whether he was driving.

An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988); *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). But it is also true that improper admission of evidence constitutes harmless error where the evidence is cumulative and there is other competent evidence to support the conviction. *State v. Chapman, ante* p. 369, 451 N.W.2d 263 (1990).

Disregarding any evidence of Rowland's unresponsiveness, Havel's testimony, combined with the other evidence concerning the facts and circumstances surrounding Rowland's arrest, provides overwhelming evidence that Rowland did operate the truck on public roads on April 4, 1988. The trial court's error in this regard was thus harmless beyond a reasonable doubt.

Rowland's third summarized assignment of error alleges that the trial court erred in overruling his motion for a new trial.

In addition to grounds which mirror some of the foregoing unmeritorious summarized assignments of error, Rowland contends in his new trial motion that the trial court erred in overruling his objection to the exhibit which documents the revocation of his operator's license. This documentation was provided by the Nebraska Department of Motor Vehicles and is admissible under the public records exception to the hearsay rule. See Neb. Rev. Stat. § 27-803(7) (Reissue 1989). Thus, Rowland's contention with respect to this issue is also without merit.

Rowland's last assertion in his new trial motion is that his conviction is not sustained by sufficient evidence. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the

evidence; such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Wyatt, ante* p. 349, 451 N.W.2d 84 (1990); *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989); *State v. Wokoma*, 233 Neb. 351, 445 N.W.2d 608 (1989). Suffice it to say that the State did present sufficient evidence to convict Rowland of driving while his operator's license was revoked.

A motion for a new trial is addressed to the discretion of the trial court, and absent an abuse of discretion, the trial court's ruling will be upheld on appeal. *Worth v. Schillereff*, 233 Neb. 628, 447 N.W.2d 480 (1989); *Lemke v. Northwestern Public Serv. Co.*, 233 Neb. 223, 444 N.W.2d 326 (1989).

Under the circumstances, it cannot be said the trial court abused its discretion by overruling Rowland's motion for a new trial.

In addition, Rowland's brief does not discuss the assignment of error relating to the new trial motion. Generally, assigned errors not discussed in an appellant's brief are not considered by this court. *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989).

As his final summarized assignment of error, Rowland contends that the trial court abused its discretion in imposing an excessive sentence.

As often noted, a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Von Busch, ante* p. 119, 449 N.W.2d 237 (1989); *State v. Schall, ante* p. 101, 449 N.W.2d 225 (1989); *State v. Rhodes*, 233 Neb. 373, 445 N.W.2d 622 (1989).

The crime for which Rowland was convicted is a Class IV felony, punishable by up to 5 years' imprisonment, a $10,000 fine, or both. The presentence report reveals that Rowland has at least five convictions for driving while intoxicated or under the influence of alcoholic beverages; that on at least one occasion Rowland was driving while his license was suspended prior to his arrest; and that when Rowland was sentenced in this case, he had pled no contest to an identical charge stemming from an arrest made subsequent to the arrest made in this case.

The record amply demonstrates that Rowland has no respect

for the rules of the road and that the sentence is not excessive.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. DANIEL G. ERLEWINE, APPELLANT.

452 N.W.2d 764

Filed March 23, 1990. No. 89-657.

1. **Court Rules: Judicial Notice.** The Supreme Court will judicially notice lower court rules filed with the Clerk of the Supreme Court.
2. **Effectiveness of Counsel: Proof.** When a defendant alleges a violation of his or her constitutional right to effective assistance of counsel, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as an attorney with ordinary training and skill in the criminal law in the area. Further, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions.
3. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or abuse of discretion.
4. **Courts: Appeal and Error.** Under the provisions of Neb. Rev. Stat. §§ 25-2733 and 25-1911 (Reissue 1989), the district court and the Nebraska Supreme Court generally shall review appeals from the county court for error appearing on the record.
5. _____: _____. The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court.

Appeal from the District Court for Douglas County, JAMES A. BUCKLEY, Judge, on appeal thereto from the County Court for Douglas County, WALTER H. CROPPER, Judge. Judgment of District Court affirmed.

Brent M. Bloom for appellant.

Robert M. Spire, Attorney General, Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is an appeal from the Douglas County District Court's order affirming defendant's convictions and sentences on various charges. We affirm.

In exchange for certain other offenses' being dismissed, defendant, on March 8, 1989, pled guilty in the Douglas County Court to four counts of operating a motor vehicle during a period of suspension, one count of providing false information, one count of driving while under the influence, one count of carrying a concealed weapon, and one count of possession of an unregistered firearm. Defendant was represented by counsel when each of these pleas was accepted. The trial court imposed the recommended total sentence of 120 days' incarceration and suspended defendant's driver's license for 545 days.

Defendant or his trial counsel subsequently filed notices of appeal. Defendant's trial counsel also filed praecipes for a transcript and bill of exceptions, but filed no statement of errors with the district court as required by the Rules of Practice for the Fourth Judicial District Court, rule No. 8 (January 1988). Because these rules are on file with the Clerk of the Supreme Court, we will take notice of them. See, *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984), *overruled on other grounds, First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985). The Douglas County District Court affirmed the convictions and sentences, but noted defendant's counsel did not appear to argue the matter.

New counsel was substituted. Defendant appeals to this court, contending his trial counsel was ineffective in failing to pursue defendant's appeal in the district court.

When a defendant alleges a violation of his or her constitutional right to effective assistance of counsel, the standard for determining the propriety of the claim is whether

the attorney, in representing the accused, performed at least as well as an attorney with ordinary training and skill in the criminal law in the area. Further, there must be a showing of how the defendant was prejudiced in the defense of his or her case as a result of the attorney's actions or inactions. See *State v. Domingus, ante* p. 267, 450 N.W.2d 668 (1990).

Assuming in the present case that trial counsel's performance in failing to pursue the district court appeal was deficient, defendant was not prejudiced by this deficiency. "In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeal, and, as such, its review is limited to an examination of the county court record for error or abuse of discretion." *State v. Sock*, 227 Neb. 646, 649, 419 N.W.2d 525, 527 (1988). Under the provisions of Neb. Rev. Stat. §§ 25-2733 and 25-1911 (Reissue 1989), the district court and the Nebraska Supreme Court generally shall review appeals from the county court for error appearing on the record. See, also, *Communications Workers of America v. Abrahamson*, 228 Neb. 335, 422 N.W.2d 547 (1988); *Kuehl v. Diesel Power Equip. Co.*, 228 Neb. 353, 422 N.W.2d 361 (1988). It is generally not necessary that errors be raised in the appeal to the district court before this court will consider those errors. *State v. Lesac*, 231 Neb. 718, 437 N.W.2d 517 (1989). Because this court will consider errors which could have been, but were not, raised in the district court, and our review is the same as the district court's review, defendant was not prejudiced by trial counsel's failure to raise and argue the alleged errors in the district court.

In order to clarify the procedure on appeal from a decision of the county court to the district court and thence to this court, we adopt the following rule of practice.

The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court. This rule shall be effective so as to apply to all county court decisions appealed to the district court after the filing date of this opinion.

In this case, we have reviewed the record for error. We have

examined defendant's convictions in light of *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), and they are not constitutionally infirm. The sentences are not excessive. Accordingly, the order of the Douglas County District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID LETSCHER, APPELLANT.
452 N.W.2d 767

Filed March 23, 1990. No. 89-684.

1. **Speedy Trial: Time.** When a defendant has commenced a period of delay due to his or her absence or unavailability, the period of time from the defendant's later availability to the next reasonably available trial date is excludable under Neb. Rev. Stat. § 29-1207 (Reissue 1989).
2. **Sentences: Appeal and Error.** A sentence imposed within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

Gerard A. Piccolo, Deputy Hall County Public Defender, for appellant.

David Letscher, pro se.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Following a jury trial, the defendant was found guilty of burglary, a violation of Neb. Rev. Stat. § 28-507 (Reissue 1989), which is a Class III felony. He was sentenced to a term of imprisonment of 1 to 2 years.

Defendant has appealed and assigns as error (1) that the trial court erred in overruling defendant's motion to dismiss or

discharge for want of a speedy trial, (2) that the trial court erred in overruling defendant's motion for a directed verdict, and (3) that the sentence was excessive. We affirm.

There was evidence to support a finding by the jury that on June 4, 1988, defendant and his brother-in-law, Kevin Simons, went into a business establishment which Simons was entitled to enter. The purpose in making such entry was to retrieve some tools belonging to Simons. However, there was also evidence received which permitted a finding that defendant and Simons forcibly removed or peeled back from the wall between a vacant part of the building and the victim's shop a piece of Sheetrock, permitting unauthorized entry into the business place occupied by Greenwalt Sandblasting. Further, there was testimony, again from Simons, that he, assisted by the defendant, then removed paint, spray guns, and an air compressor from Greenwalt's and took those items home.

An information charging burglary was filed in district court on October 3, 1988. Eventually the matter was set for trial for January 17, 1989. This was a case of double scheduling because another case was set for jury trial on that same date. In any event, prior to January 17, 1989, a plea agreement was reached and the matter was rescheduled to January 20, 1989, for disposition. However, defendant failed to appear on that date.

A bench warrant was issued for defendant's arrest, and he was in the custody of the county jail officials on January 24, 1989. On January 27, 1989, defendant appeared in district court to tender a plea of guilty to an amended charge of unlawful taking, a Class I misdemeanor. However, because the defendant would not agree that the facts supporting a guilty plea were as related by the county attorney, the court would not accept the plea.

Although the discussion among the prosecuting attorney, defense counsel, and the court was confusing, to say the least, it is evident that the State announced its intention to proceed to trial on the original felony charge, rather than on the amended information alleging a misdemeanor, which was in fact on file. However, defense counsel agreed that it was not necessary to rearraign defendant on the felony charge.

The court directed that the parties make arrangements with

the court clerk to set the case for trial to a jury. According to the testimony of Sandra Kendall, the district court bailiff, given at the hearing on defendant's motion for discharge, the first month scheduled for jury trials after January 27, 1989, was the month of April, and the first available date for trial was April 21. The case was set for trial to begin on April 21, 1989.

In the meantime, on February 14, 1989, defendant filed various motions for disclosure and discovery, which were granted on February 22, 1989. Defendant then filed a motion to discharge him or dismiss the information against him pursuant to Neb. Rev. Stat. § 29-1207 (Reissue 1989). That section requires the State to bring a defendant to trial within 6 months of the filing of the information, with certain permitted exceptions.

Included within the exceptions to the 6-month rule are delays occasioned because of the filing and time necessary for disposition of defendant's pretrial motions, delays resulting from the absence or unavailability of the defendant, and "[o]ther periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause." § 29-1207.

Following the hearing on defendant's motion for discharge, the court denied the motion and made the findings that the information was filed on October 3, 1988; the trial was to commence on April 21, 1989; and the files and records indicated that delays of 18 days were chargeable to the defendant. If this finding is correct, because 6 months from October 3, 1988, would fall on April 3, 1989, the exclusion of those 18 days of delay would bring the State within the requirements of the statute.

In computing the excepted days at 18, it is apparent that the district court excluded the 10-day period from January 17 to 27, 1989, as time requested by defendant to process his change of plea and to accommodate the time he was absent due to his nonappearance, and the 8 days between his filing of the various discovery motions and the order granting them.

However, it is not necessary for us to be that precise in counting time. The record is clear that on and after January 27, 1989, when defendant appeared in court following his

nonappearance, the next available jury was not until the month of April. Assuming that the date of April 1 was available, the full month of February (28 days) and March (31 days), as well as 4 days from January 27 to 31, would come within the permissible delays provided by § 29-1207. Obviously, a trial date of April 21 would be well within the 6-month period.

We hold that when a defendant has commenced a period of delay due to his or her absence or unavailability, the period of time from the defendant's later availability to the next reasonably available trial date is excludable under § 29-1207. See, *State v. Kriegler*, 225 Neb. 486, 406 N.W.2d 137 (1987); *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978). The defendant's motion for discharge was properly denied.

We reject defendant's claim that the testimony of Simons had insufficient probative force under the rule announced in *State v. George*, 228 Neb. 774, 424 N.W.2d 350 (1988), to support defendant's conviction. The inconsistencies of Simons' testimony are not of the same character of the prosecution witness' testimony in *George*. The inconsistencies affected the credibility of Simons, but were fully presented to the jury, which had the duty to weigh the evidence and determine his credibility.

The sentence of 1 to 2 years which the defendant received was not excessive. The penalty for a Class III felony is 1 to 20 years. A sentence imposed within statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Von Busch*, *ante* p. 119, 449 N.W.2d 237 (1989).

Defendant's "rap" sheet is three pages long. He has a history of activity evidencing a disregard for the law and the rules of society dating back to 1977, including offenses of burglary and larceny. He has been less than compliant while on probation and did not receive satisfactory discharges in three of four probation terms ordered. There was no abuse of discretion in the imposition of defendant's sentence.

In his pro se brief, defendant alleges that the charge against him was improper, as was his conviction, and that the State failed to prove certain elements of the crime charged, i.e., the location of Greenwalt's, ownership of the missing property, and damage to the building. His arguments are nothing more than

frivolous allegations against the State's witnesses, unsubstantiated by the record.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHARLES P. SCHAFER, RESPONDENT.

453 N.W.2d 389

Filed March 30, 1990. No. 87-455.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is a disciplinary proceeding. The respondent has not filed a brief in support of his exceptions to the referee's report, and the relator has moved for a judgment on the pleadings.

On March 31, 1989, the Counsel for Discipline of the Nebraska State Bar Association filed with this court a showing alleging the following facts. Respondent was admitted to the practice of law in the State of Nebraska on September 4, 1970. On July 9, 1986, this court suspended respondent from the practice of law for failure to pay annual dues pursuant to article III, § 5, of the Rules Creating, Controlling and Regulating Nebraska State Bar Association (rev. 1981). On January 22, 1988, on grounds other than failure to pay his annual dues, this court entered an order suspending respondent from practicing law for a 1-year period.

On October 25, 1988, Thomas Davis suffered an injury at a Runza Drive Inn, a business insured by State Farm Fire and Casualty Company. On November 18, respondent telephoned Kathy Krause, the owner of the Runza Drive Inn, and informed her that he was an attorney representing Davis. Krause referred respondent to Ray Thompson, her State Farm insurance agent.

On that same day, respondent contacted Thompson in regard to Davis' claim and identified himself as an attorney. On November 22, respondent, in a telephone conversation with Timothy Gillespie, a senior claim representative for State Farm, stated that he was admitted to the practice of law in Nebraska and that he served as house counsel to a business in Omaha, Nebraska. On December 7, Gillespie met with respondent and Davis in regard to Davis' claim. At this meeting, respondent indicated to Gillespie that he was appearing as attorney for Davis.

In his answer, respondent denied having represented himself as Davis' attorney and as counsel for the Omaha business. A referee was appointed. Respondent subsequently filed an amended answer admitting most of the allegations in the showing. At a later hearing, respondent offered no evidence in the matter, but did offer as evidence in mitigation a drug assessment performed at United Catholic Social Services.

In his report, the referee noted that there was no question respondent committed the acts stated in the relator's showing. The critical question, according to the referee, is "whether or not the acts described in the Showing constitute the practice of law and, if so, whether there are sufficient extenuating or mitigating circumstances to justify a recommendation of a penalty less severe than the penalty of being disbarred permanently from the practice of law."

The referee concluded that respondent's actions clearly constitute the practice of law. The referee reviewed the alcohol and drug assessment, but noted that it offered no help as to mitigation. He also stated that respondent "was not present on either of the hearing dates set herein and has offered no competent evidence throughout this entire matter to show cause why he should not be disbarred as ordered to do by the Supreme Court of the State." The referee recommended that respondent be permanently disbarred from practicing law.

Respondent filed exceptions to the referee's report, but did not file a brief within 30 days as required by Neb. Ct. R. of Discipline 10(M) (rev. 1989). The relator has moved for judgment on the pleadings.

We have reviewed the referee's report and the pleadings,

including a recent letter from St. Gabriel's Center in Omaha indicating respondent is currently enrolled in a 28-day residential program for alcohol and drug addiction. We agree with the referee's recommendation that respondent be permanently disbarred from the practice of law. Accordingly, respondent is hereby permanently disbarred from the practice of law in the State of Nebraska.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

MARIE WALKER, APPELLEE, V. MARY WALKER, APPELLANT.
453 N.W.2d 97

Filed March 30, 1990. No. 87-1044.

Appeal from the District Court for Douglas County, JAMES A. BUCKLEY, Judge, upon the recommendation of the Appellate Division of the District Court, MORAN, WOLF, and HANNON, District Judges. Reversed and remanded with directions.

Dan D. Stoller for appellant.

Thomas J. Guilfoyle, of Frost, Meyers, Guilfoyle & Westover, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Having considered the briefs and the recommendation of the Appellate Division of the District Court, and upon a de novo review of the record, we find that the proof fails to support the plaintiff's cause of action. We therefore reverse the judgment of the district court and remand the matter with directions to enter judgment in favor of the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

DAVID PERSON AND CONNIE PERSON, PARENTS AND NATURAL GUARDIANS OF MICHAEL PERSON, A MINOR, APPELLEES, AND SCHOOL DISTRICT NO. 61 OF HAMILTON COUNTY, INTERVENOR-APPELLEE, V. DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

453 N.W.2d 390

Filed March 30, 1990. No. 87-1147.

1. **Administrative Law: Pleadings: Time: Appeal and Error.** When the petition instituting proceedings for review under the Administrative Procedure Act was filed in the district court before July 1, 1989, the appeal shall be taken in the manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record.
2. **Public Assistance: Proof.** A party appealing from the denial of an application for public assistance has the burden of proving the party's entitlement to the benefits.

Appeal from the District Court for Hamilton County: WILLIAM H. NORTON, Judge. Affirmed.

Robert M. Spire, Attorney General, and Royce N. Harper for appellant.

James D. Livingston, of Cunningham, Blackburn, Livingston, Francis, Cote, Brock & Cunningham, for appellees.

John F. Recknor, of Barlow, Johnson, DeMars & Flodman, for intervenor-appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal by the Department of Social Services from a judgment entered by the district court for Hamilton County which reversed the order of the director of the Department of Social Services denying Michael Person's application for public medical assistance. We affirm the judgment of the district court.

Michael Person was a 5-year-old child at the time of his application for medical assistance and was afflicted with cerebral palsy, profound mental retardation, seizure disorder,

and spastic quadriplegia. Michael required total assistance in dressing, bathing, toileting, and eating. Michael could not speak or walk, required assistance to stand, and required physical and occupational therapy. Michael endured sleeping disturbances causing him to shout at night and had difficulty swallowing, which caused frequent choking. His medical needs included seizure medication to control grand mal and petit mal seizures, and observation and intervention for chronic ear infections.

Prior to September 11, 1986, Michael lived with his parents in Hordville, Nebraska. In the early summer of 1986, Michael's family and physician determined that Michael could no longer be cared for in the home and required 24-hour institutional care. A letter from Michael's physician dated August 29, 1986, states that Michael was increasingly difficult to handle and at times needed to be placed in a crib with a top on it to maintain him physically. Michael was frequently unable to attend school because of his chronic ear infections and consequently was not provided with necessary physical and occupational therapy. Michael's physician's letter concluded,

> It is my impression and feeling that Michael has reached the age and size to where he no longer can be adequately cared for in his home environment, there being two other smaller siblings [and] this child's needs would be best served by an institutional-type setting with 24 hour care availability.

On June 18, 1986, the Persons visited Bethphage Mission (Bethphage), an institution in Axtell, Nebraska, and Michael was placed on Bethphage's waiting list. Although not explicitly stated in the record, it appears Bethphage was certified under federal and state regulations as an intermediate care facility that provides services to the mentally retarded (ICF/MR). The Persons sought financial assistance for Michael's placement in Bethphage from the Nebraska medical assistance program, which disburses funding provided through the federal medicaid program. Neb. Rev. Stat. § 68-1021 (Reissue 1986). The Department of Social Services argues that to obtain funding from Nebraska's medical assistance program on behalf of an admittee such as Michael, Bethphage was required to comply

with the admission criteria set out in 42 C.F.R. § 442.418 (1985). That federal regulation states:

> (a) Except as provided in paragraph (c) of this section, an ICF/MR may not admit an individual as a resident unless his needs can be met and an interdisciplinary professional team has determined that admission is the best available plan for that individual.
>
> (b) The team must—
>
> (1) Conduct a comprehensive evaluation of the individual covering physical, emotional, social, and cognitive factors; and
>
> (2) Before the individual's admission—
>
> (i) Define his need for service without regard to the availability of those services; and
>
> (ii) Review all available and applicable programs of care, treatment, and training and record its findings.
>
> (c) If admission is not the best plan but the individual must be admitted nevertheless, the ICF/MR must—
>
> (1) Clearly acknowledge that the admission is inappropriate; and
>
> (2) Initiate plans to actively explore alternatives.

In addition to compliance with the federal regulation, the Department of Social Services also argues Bethphage was required to comply with the state's admission criteria which implement the federal regulation, including Nebraska Department of Social Services regulation 471 Neb. Admin. Code, ch. 12, § 12-007.03A (1982), which states:

> Best Available Plan: The ICF/MR's interdisciplinary team shall acknowledge as inappropriate admissions, clients eligible to receive services provided by other agencies and other levels of care (i.e. foster care, ICF care, Office of Mental Retardation, other non-Medicaid programs, etc.) until the ICF/MR receives verification from the other agencies/levels of care that their services are not appropriate/available for the client. The best available plan is based on the lack of appropriate and available alternatives for the client. At the preadmission evaluation, plans must be initiated to explore other alternatives on an ongoing basis.

The requirement in § 12-007.03A that the interdisciplinary team obtain verification that no other appropriate assistance is available in other levels of care apparently relates to the Department of Social Services' policy that the "best available plan" includes placement in the "least restrictive environment," which is the environment in which the applicant's "needs" can be met in the most family-like setting with the greatest exposure to the community. See 471 Neb. Admin. Code, ch. 12, § 12-001.01 (1989), which states that the purpose of the medical assistance program is to help clients attain or retain their capacity for independence or self-care in the least restrictive environment. See, also, 471 Neb. Admin. Code, ch. 12, § 12-001.03 (1982 & 1989), which defines "least restrictive environment" as the most appropriate living environment which meets the client's individual needs and enables the client to exercise more personal choice in daily activities. The Persons do not challenge the Department of Social Services' policy of limiting medical assistance to appropriate care provided in the least restrictive environment.

In an attempt to obtain the verification required by § 12-007.03A, on August 4, 1986, a caseworker from Bethphage contacted the Mid-Nebraska Mental Retardation Services, Inc. (Mid-Nebraska), and requested a statement from Mid-Nebraska that Mid-Nebraska could not serve Michael. In response, Mid-Nebraska sent personnel to interview Michael and his family at Michael's home on August 6, 1986. Mid-Nebraska concluded in a preliminary report and proposal, dated August 13, 1986, that Mid-Nebraska could serve Michael by providing either temporary in-home assistance, licensed foster care, or temporary placement in an adult group home. Various potential foster care and group home placements were further explored during the month of August, as evidenced by a refined proposal by Mid-Nebraska dated August 26, 1986. This proposal contained in a letter to Bethphage indicated licensed foster care homes were available in York and McCool Junction and indicated there was an extended family apartment with a 24-hour staff available in York.

Michael's parents, his physician, and his educational service unit, see Neb. Rev. Stat. §§ 79-2201 and 79-2201.02 (Reissue

1987), decided that the alternatives proposed by Mid-Nebraska were inadequate and placed Michael at Bethphage on September 11, 1986. In conjunction with the admission, the interdisciplinary team at Bethphage prepared a preadmission report designed to address the admission criteria in the federal and state regulations cited above. The interdisciplinary team consisted of 11 professionals specializing in different areas, including medicine, occupational therapy, nutrition, psychology, speech therapy, religious ministry, social service, special education, residence, and recreation. The team included a "qualified mental retardation professional," as defined in 471 Neb. Admin. Code, ch. 12, § 12-006.20 (1982), a Bethphage unit nurse, and the director of nursing at Bethphage. In relation to 42 C.F.R. § 442.418(b)(2)(i), the interdisciplinary team report indicated that ICF/MR placement was recommended by each discipline. In relation to 42 C.F.R. § 442.418(b)(2)(ii), the interdisciplinary team noted that none of the Mid-Nebraska proposed services were immediately available. The report indicates that the interdisciplinary team reviewed Mid-Nebraska's August 13 proposals but does not mention the August 26 letter. The report noted that Michael's family questioned whether Mid-Nebraska could satisfy Michael's needs, but failed to address the issue independently. The report stated that the interdisciplinary team would review Michael's status in 30 days and that alternative placements would be sought on an ongoing basis. The report stated, "This placement is considered temporary until such time as placement is found in a less-restrictive environment which is capable of meeting Michael's needs."

A medical review team of the Department of Social Services received Michael's application for funding through the medical assistance program sometime between October 10 and 31, 1986. The record does not provide a description of members of this particular medical review team or their qualifications. A medical review team is defined by 471 Neb. Admin. Code § 12-001.03 (1982) as a "field/central office team consisting of a registered nurse and one or more of the following: 1. Physician; 2. Registered nurse; 3. Social worker; 4. Mental retardation program consultant; and 5. Other professional

personnel as necessary."

Michael's application for medical assistance included a necessary form filled out by a second physician (not Michael's personal physician) who examined Michael. The form provided a checklist and asked the physician's professional judgment as to the type of service that Michael should have to meet his required needs. Among the alternatives presented in the checklist were in-home services and alternate living arrangements, including residential care facility, adult foster home, or domiciliary facility. The physician did not check these alternatives, but checked the category "other" and filled in "ICF/MR." In another portion of the form, the physician was asked to recommend a treatment program, and the physician responded "Bethphage program."

On October 31, 1986, the medical review team rejected Michael's application. A member of the medical review team stated that funding was denied to Michael because the review team determined that placement at Bethphage was not the best available plan, as less restrictive alternatives were appropriate and available.

The Persons appealed the determination of the medical review team to the director of the Department of Social Services, pursuant to Neb. Rev. Stat. §§ 68-1024 and 68-1016 (Reissue 1986). An administrative hearing was held before a hearing examiner, apparently designated by the director, on March 6, 1987. The adequacy and availability of the various alternatives proposed by Mid-Nebraska were discussed at the hearing. The two primary alternatives discussed were in-home services and foster home care. Although the initial foster home alternatives were not available, alternatives located in neighboring counties were available, as noted in the August 26 letter discussed above, as was an additional proposal by Mid-Nebraska on October 8, 1986, of a group home available for Michael on October 20, 1986. We note that the record reveals very little as to the nature of the care available in the foster home alternatives. Although the record does show that the extended group home provided a 24-hour supervisory staff, it also indicates that 24-hour care was to be discontinued in that alternative.

The Persons argued that the in-home services were inadequate because Michael required 24-hour care, and Mid-Nebraska only offered 48 hours of in-home assistance per week. When the executive director of Mid-Nebraska was asked whether Mid-Nebraska could provide 24-hour care in the Person home, he responded that there was no such program in place, but that Michael's needs would be met.

The Persons challenged the appropriateness of the alternative foster homes primarily on the grounds that the educational service unit was unable to find physical and occupational therapists available to adequately serve Michael at Mid-Nebraska's proposed locations. In response to this argument, a member of the medical services division of the Department of Social Services stated that it was the educational service unit's responsibility to provide physical and occupational therapy at the alternative locations, implying that the plan could not be considered as not being the best available merely because a different government entity was failing in its duty.

In regard to Michael's education and therapy generally, we also note that the record contains a November 6, 1986, report by the education service unit personnel which compared the services available to satisfy Michael's educational needs at home, at the extended group home, and at Bethphage. The report concluded:

> Michael's education program can be delivered consistently and regularly, regardless of sickness or health, only at Bethpage [sic] Mission. In either of the other cases, the educational program can only be delivered when Michael is well, and if a "back-up" plan using some different personnel could be arranged and delivered when he is sick, it would be inconsistent and irregular at best.

Although the Persons did not raise any specific medical objections to the foster home and extended group home alternatives, they challenged the basis of the medical review team's determination that Michael's medical needs could be satisfied by the Mid-Nebraska proposals, in view of the recommendation of the two physicians that Michael be treated in an institutional-type or ICF/MR setting. The hearing officer

responded that she would have to reconcile the physicians' statements with the ICF/MR's (interdisciplinary team's) statement that the placement at Bethphage was inappropriate. As noted below, the ICF/MR made no such statement.

The specific findings and recommendations of the hearing officer are not disclosed by the record. In a finding and order dated April 24, 1987, the Director of Social Services affirmed the medical review team's rejection of Michael's application because Michael's September 11, 1986, placement in Bethphage was not the "best available plan," as required by Nebraska Department of Social Services regulation, § 12-007.03A, and 42 C.F.R. § 442.418. The director determined that Michael's medical and educational needs could be satisfied in a less restrictive environment which was appropriate and available, although the director did not specify any such alternative. The director also found: "From the evidence submitted, it appears that the appellant's [Michael's] placement at Bethphage Mission was made solely for educational purposes, and that Michael Person's physical condition does not require the level of care provided at this facility." This statement evidences the Department of Social Services' position that Michael's medical needs could be met in a less restrictive environment, and therefore Michael's placement at Bethphage was necessary solely because the educational service unit was able to provide physical and occupational therapy at Bethphage, but was unable to provide the therapies at the less restrictive locations proposed by Mid-Nebraska.

The Persons appealed to the district court for Hamilton County, which reviewed the director's finding and order based upon the evidence presented at the administrative hearing. See, generally, Neb. Rev. Stat. § 84-917 (Reissue 1987). School District No. 61 of Hamilton County intervened, claiming an interest based upon its obligation to provide special education for Michael. The intervention was apparently in response to the Director of Social Services' indication that funding for Michael's admission to Bethphage was available from education funds. The district court reversed the director's determination and found, in summary, that (1) Michael's greatest need is health care of a magnitude greater than can be

provided in a home atmosphere or even a modified noninstitutional setting, (2) the director's finding that Michael's placement at Bethphage was solely for educational purposes is totally unsupported by the evidence, (3) the director's finding that Michael does not require the level of care furnished at Bethphage is totally unsupported by the evidence, (4) the alternatives presented by Mid-Nebraska were not available and had certain drawbacks which rendered the alternatives less desirable than placement at Bethphage, and (5) placement at Bethphage was the best available plan.

The Department of Social Services appeals from this ruling and contends, in summary, that the district court erred (1) in holding the record did not support the director's determination that placement of Michael in an ICF/MR was not appropriate under the medical assistance program and that the placement was for educational purposes, and (2) in holding that the less restrictive alternatives proposed by Mid-Nebraska were not proper and available.

The scope of our review is governed by Neb. Rev. Stat. § 84-918 (Cum. Supp. 1989), which states in part:

> (2) When the petition instituting proceedings for review [under the Administrative Procedure Act] was filed in the district court before July 1, 1989, the appeal shall be taken in the manner provided by law for appeals to the Supreme Court in civil cases and shall be heard de novo on the record.

Because the petition which instituted these proceedings in the district court was filed May 11, 1987, our review is de novo on the record, and we reach "a decision independent of all dispositions that have gone before." *Department of Health v. Columbia West Corp.*, 227 Neb. 836, 838, 420 N.W.2d 314, 316 (1988). As we stated in *Columbia West, supra*, we follow the legislative mandate "regardless of the incongruity of a true de novo review." *Id.* Consequently, we consider neither whether there was sufficient evidence to support the director's findings, nor whether the district court erred in its determination that there was not sufficient evidence to support the director's findings. Rather, we shall use the assignments of error as a guide to the factual issues in dispute and make an independent

factual determination based upon the record.

42 C.F.R. § 442.418(a) appears to place the responsibility for determining the best available plan for Michael upon the "interdisciplinary professional team." In addition, with reference to the state medical assistance program, the Department of Social Services regulations placed the responsibility of determining the appropriate level of care, which includes a determination of the best available plan, with a medical review team of the Department of Social Services. See 471 Neb. Admin. Code, ch. 12, § 12-002.03D(4) (1982). See, generally, current regulations, 471 Neb. Admin. Code, ch. 12, §§ 12-006.03 and 12-006.04 (1989). We note that the Department of Social Services does not argue that the verification requirement of § 12-007.03A placed the power to determine the best available plan with Mid-Nebraska or that the verification requirement affects this litigation in any manner. The Persons do not challenge the medical review team's power to have made a determination of the best available plan for Michael independent of the interdisciplinary team for the purposes of funding under the medical assistance program. Accordingly, we rely on the application and reports submitted to the medical review team, plus the additional exhibits admitted at the administrative hearing, and in our de novo review make an independent determination as to the best available plan for Michael as defined in the federal and state regulations.

A party appealing from the denial of an application for public assistance has the burden of proving the party's entitlement to the benefits. *Dobrovolny v. Dunning*, 221 Neb. 67, 375 N.W.2d 123 (1985). Therefore, the Persons were required to demonstrate by a preponderance of the evidence that Michael's placement at Bethphage was the "best available plan."

We begin by noting our frustration with the record before us. The administrative hearing, although intended to be a judicially reviewable proceeding, amounted to little more than a discussion, with each side arguing only its conclusions. The record of the administrative hearing does not identify the parties, counsel, or the witnesses' qualifications. We cannot

assess the weight to be given to the conclusory statements of witnesses without knowing their qualifications. We recognize that an administrative hearing need not be conducted in the same fashion as a courtroom jury trial, but if an administrative hearing is to be judicially reviewed (and most particularly when this court's review is de novo on the record), the procedure must be such as to establish the facts supporting the ultimate conclusions regarding the issues in the case.

Associated with the shallow record is the director's failure to inform the Persons in the hearing notice of the issues to be determined at the hearing, as required by Neb. Rev. Stat. § 84-913 (Reissue 1981). The hearing notice sent to the Persons by the Department of Social Services merely "encouraged [the Persons] to submit pertinent information."

The following is typical of the hearing:

> Mr. Livingston [Persons' attorney]: You knew about his [Michael's] disturbances?
>
> Mr. Foley: [director of Mid-Nebraska]: I was informed of them, yes.
>
> Ms. Swinton [hearing examiner]: Lu Rejda has a comment to add to that.
>
> Ms. Rejda: Mr. Livingston, this is Lu Rejda with the Department of Social Services.
>
> . . . .
>
> . . . It was my understanding that Mid Nebraska, the community based services, were not made aware of Michael Person's case and that he was residing in his parents' home and that no services had been sought prior to looking at admission to an ICF-MR facility. Therefore, they would have had no way of knowing that he was out there and needed the services. It is a requirement of state and federal regulations that...
>
> Mr. Livingston: I'd like to ask if I'm arguing with you, ma'am, or do I have a chance to question the people.
>
> Ms. Rejda: No, no. I just wanted to explain...
>
> Ms. Swinton: She just wanted to make a comment.
>
> Ms. Rejda: ...some of this Mr. Livingston, that it's a state and federal regulation before approval to an ICF-MR facility that exploration of alternative services in

> a less restrictive environment. That is also the responsibility of the ICF-MR facility to seek out and to look into these alternatives.
>
> . . . .
>
> Mr. Livingston: Would you, could you have provided 24 hour skilled nursing care around the clock?
>
> Mr. Foley: Well, you know, we're not a skilled nursing facility, Jim.
>
> Mr. Livingston: No. Thank you.
>
> Ms. Swinton: Lu has another comment.
>
> Ms. Rejda: Again this is Lu Rejda and there's no indication that Michael requires 24 hour skilled nursing care. Bethphage at Axtell or any ICF-MR facility is not required to provide 24 hours of skilled nursing care.
>
> Mr. Livingston: Does anybody else have any comments or can I continue my questions?
>
> Ms. Swinton: Mr. Livingston, this is an informal gathering. I think the people here are just trying to make, to provide all the information that is necessary in order to, to make this a fair hearing.

An administrative hearing is not an "informal gathering." It is part of a process to establish facts so that informed decisions can be made.

The record in this case does not provide adequate information with regard to how Michael's medical needs would be met by the proposed Mid-Nebraska alternatives. The most credible evidence before this court, and the only qualified expert opinions before this court, includes the opinion of Michael's physician that Michael needs 24-hour care in an institutional-type setting and the opinion of another physician who examined Michael for the medical assistance application that Michael needed the level of care provided by an ICF/MR and that recommended the Bethphage program for treatment. The medical discipline of the interdisciplinary review team also recommended ICF/MR placement for Michael. Although neither the physicians nor the interdisciplinary team explicitly addressed the potential of providing for Michael's medical needs in the less restrictive environments proposed by Mid-Nebraska, it is evident that the alternatives were

considered to some degree and rejected.

As noted above, the hearing officer believed that she needed to reconcile the physicians' statements with the statement of the interdisciplinary team that the placement at Bethphage was inappropriate. Apparently, the hearing officer drew the conclusion that the interdisciplinary team found the placement at Bethphage to be inappropriate from the interdisciplinary team's statement that the placement at Bethphage was temporary. From this statement she apparently inferred that the interdisciplinary team concluded that Michael did not require the level of care at Bethphage. This argument is adopted by the Department of Social Services in its brief, which argues that the interdisciplinary team report "states that the placement was considered temporary in nature and would terminate when a less restrictive placement was located. In other words, Bethphage acknowledged that it was not the best available plan . . . ." Brief for appellant at 7.

The conclusion that the interdisciplinary team deemed Michael's placement at Bethphage as inappropriate is not supported by the record. The interdisciplinary team's report did not explicitly state either that placement at Bethphage was inappropriate or that it was the best available plan. In view of the recommendation of the "medical discipline" in the interdisciplinary report that Michael be placed in an ICF/MR, the report's statement that the placement was temporary should be interpreted as merely stating that Michael's needs and the alternatives available will change over time and should be reevaluated from time to time. The continuous search for less restrictive alternatives is required by § 12-007.03A, and this requirement is not conditioned upon a finding of inappropriateness by the interdisciplinary team.

The only comparison of Michael's alternatives found in the record was an evaluation of the quality of the physical and occupational therapy available in each alternative. The educational service worker concluded that the highest quality of therapy could be provided at Bethphage. Moreover, a December 6, 1985, recommendation by a third physician stated, "Michael's back lying and facial anatomy [make him] more prone to ear infections but for the interest of his program

[we] need to continue to try and get a handle on his otitis's [sic] [ear inflammations] as they are interfering with his education." In summary, the record shows that Michael is physically prone to ear infections, had endured chronic ear infections for some time, and continued to endure such infections at the time of his admission to Bethphage and that such infections interfere with his education and therapy outside an institutional setting. We note that these facts would not justify characterization of Michael's placement in Bethphage as solely for educational reasons, because it was Michael's chronic ear infections, a medical condition, which interfered with the provision of consistent therapy outside an institutional setting. Thus, even if the educational service unit was able to find physical and occupational therapists to serve Michael if he were placed at one of the Mid-Nebraska alternatives, our review of the record indicates that the best placement for Michael would still be at Bethphage because of his medical problems.

Although it is clear that the Department of Social Services and Mid-Nebraska personnel believed and concluded that Michael's medical and educational needs could be satisfied in an environment "less restrictive" than Bethphage, there is no factual basis stated in the record to support their conclusions. It may well be that the hearing examiner and the director of the Department of Social Services knew the qualifications and background of each of the witnesses and, therefore, the appropriate weight to be given their evidence, but that knowledge is not in the record and cannot be the basis of our decision. Consequently, we must rely on the evidence submitted containing the opinions of the three physicians discussed above. We know of the general expert knowledge and background of practicing physicians. The credibility of the physicians' opinions was not contested at the administrative hearing other than by the contrary assertions of witnesses whose qualifications are not before us. In the absence of any reason to question the foundation of the physicians' opinions, and in the absence of the means to assess the credibility of the witnesses to the contrary, we give greater weight to the evidence from the physicians than to the witnesses at the administrative hearing in our de novo review.

We note that the Department of Social Services has, in regulations applicable subsequent to time of the application at bar, addressed the need for a greater dialogue among the medical professionals in determining the best available plan for handicapped applicants like Michael. Under current regulations it appears that the medical review team is required to notify the client's attending physician of its determination that a client's placement is inappropriate and to allow that physician to present justification for the placement before the medical review team's determination becomes final. See, 471 Neb. Admin. Code, ch. 12, §§ 12-006.08B, 12-004.05B, and 12-004.03A (1989).

In conclusion, we find that Persons proved by a preponderance of the evidence that at the time of his application, Michael's medical problems required the level of care provided at Bethphage and that Michael's placement at Bethphage was the least restrictive alternative available that could satisfy Michael's needs and therefore was the best available plan. Accordingly, we affirm the order of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN R. BUNNER, APPELLANT.
453 N.W.2d 97

Filed March 30, 1990. Nos. 89-163, 89-164.

1. **Sexual Assault: Sentences: Evidence.** In accordance with Neb. Rev. Stat. § 28-319(2) (Reissue 1989), a sentencing judge, before imposition of a sentence on a defendant convicted of first degree sexual assault, is not required to conduct an evidentiary hearing to determine whether the victim has sustained serious personal injury as a result of the sexual assault by the defendant; rather, concerning the question of personal injury to the victim, the judge shall consider information appropriately before the court in the sentencing process.
2. **Rules of Evidence: Sentences.** Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1989), are inapplicable to a sentence hearing.
3. **Sentences: Evidence.** In a sentence hearing, a court, generally, has broad

discretion concerning the source of information and the type of information to be considered.

4. **Sentences: Evidence: Presentence Reports.** A sentencing judge may consider relevant information contained in a presentence report on the defendant to determine an appropriate sentence within the statutorily authorized penalty, punishment, or disposition applicable to the crime for which the defendant has been convicted.
5. **Sentences: Due Process: Evidence.** A convicted defendant, even in a noncapital case, has a due process right to inquire into an incorrect assumption by the sentencing judge, untrue information materially affecting a prospective sentence, or other misinformation which a court may use in determining what sentence will be imposed.
6. **Sentences: Words and Phrases.** Allocution, required by Neb. Rev. Stat. § 29-2201 (Reissue 1989), provides an opportunity for the offender and defense counsel to contest or dispute a factual basis for sentence of a convicted defendant.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Douglas Veith, of Veith, P.C., Bertolini, Schroeder and Blount, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and RONIN, D.J., Retired.

SHANAHAN, J.

Steven R. Bunner appeals from sentences imposed after his convictions on two counts of first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1989), which provides: "(1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in the first degree." First degree sexual assault is a Class II felony, see § 28-319(2), punishable by a maximum penalty of 50 years' imprisonment, see Neb. Rev. Stat. § 28-105(1) (Reissue 1985). Bunner contends that a denial of due process in sentencing resulted in excessive sentences imposed on Bunner and requests that his sentences be set aside. The factual background pertaining to this appeal was presented at the hearing when Bunner entered his guilty pleas to the sexual

assault charges and at the sentence hearing for Bunner.

The first sexual assault involving Bunner occurred shortly after midnight on September 7, 1987. Bunner climbed through a partially opened window in the victim's apartment and entered her bedroom. He was wearing a hooded sweatshirt with the hood pulled over his head and was also wearing a ski mask, which covered his face except for his eyes and mouth. The victim, an adult female alone in the apartment, was sleeping in the bedroom and suddenly awakened to find Bunner at bedside, peering down at her. Bunner told the victim, "Don't scream; don't you say anything." At that point, Bunner forced the victim to remove her nightwear, remain on the bed, and submit to sexual penetration by Bunner, who sought to cover the victim's face with a pillow, since she had been screaming and crying throughout the assault. When the victim resisted the pillow maneuver, Bunner started to stuff a cloth into the victim's mouth, but then ordered the victim to lie face down on the bed. At the conclusion of the assault, Bunner prowled around the apartment and eventually crawled out through a bedroom window. The victim immediately reported the sexual assault to police, who took the victim to a nearby hospital, where a physician examined her and observed bruises and bleeding in the victim's vaginal area but no other medically noteworthy physical injuries to the victim.

The second sexual assault occurred in the early hours of July 18, 1988. Bunner saw the victim, an adult woman, enter her apartment. Shortly thereafter, Bunner approached the apartment, cut the screen on one of the apartment's windows, entered, and found the victim alone and asleep in the bedroom. The victim was suddenly awakened by Bunner's sexual penetration of her and saw that a stocking cap covered Bunner's face. After the assault, Bunner asked the frightened victim whether she wanted to see his face, to which the victim answered "no." Bunner told the victim that he would telephone her later in the day. During a physical examination at a hospital shortly after the sexual assault, the victim displayed a nervous and distraught state but no medically significant physical injuries. Bunner telephoned the victim, and, through further investigation, police were able to locate Bunner, who was later

taken into custody.

The State charged Bunner with two counts of first degree sexual assault and two counts of burglary. Pursuant to a plea agreement, Bunner entered guilty pleas to the charges of first degree sexual assault, and the burglary charges were dismissed by the State. Before accepting the guilty pleas, the district court inquired into Bunner's ability to understand the proceedings and informed Bunner concerning his constitutional rights, the effect of Bunner's waiver of rights, and the consequences of a guilty plea to the charges, including the possible penalties for conviction on the charges. After the State presented a factual basis for each of the charges against Bunner, the court inquired of Bunner's lawyer: "I assume, Mr. Veith, that you have had full access to the files of the County Attorney in this case?" Bunner's lawyer responded: "Yes, Your Honor." After Bunner stated that he understood the information imparted by the judge and waived the rights accorded a defendant, the court accepted Bunner's plea of guilty to each count of first degree sexual assault.

At the sentence hearing for Bunner, the presentence investigation report on Bunner was examined. In the course of discussion concerning the presentence report, the court asked Bunner's lawyer: "And, Mr. Veith, have you had a reasonable opportunity in point of view of time to review the content of the presentence report?" Bunner's lawyer answered: "Yes, Your Honor, I have." The court immediately inquired: "Are there any matters appearing therein which require correction or discussion?" The response from Bunner's lawyer was: "Not that I can think of, Your Honor, no." The presentence report consisted of approximately 200 pages, which included detailed police reports concerning each sexual assault to which Bunner had pled guilty, medical reports, communications from each victim, and several letters from individuals who expressed their views about the sentence to be imposed on Bunner. After allocution, which indicated no legal justification for withholding sentence on Bunner, the court sentenced Bunner to a term of not less than 10 nor more than 15 years in the Nebraska Penal and Correctional Complex on each count, which sentences are to be served consecutively.

Bunner contends that the district court committed reversible error by not conducting an evidentiary hearing, independent of or as a distinct part of a sentence hearing, to determine whether the victims sustained serious personal injuries as the result of sexual assault by Bunner. As a basis for his contention, Bunner refers to § 28-319(2), which, concerning first degree sexual assault as a Class II felony, states: "The sentencing judge shall consider whether the actor shall have caused serious personal injury to the victim in reaching his decision on the sentence." "Serious personal injury" is defined as "great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." Neb. Rev. Stat. § 28-318(4) (Reissue 1989).

Bunner asserts that the district court erred "in sentencing [Bunner] without a specific finding of extreme mental trauma or anguish or, finding such, did so on insufficient grounds in violation of the statutory requirements in Section 28-319(2)," brief for appellant at 5, and relies on *State v. Country*, 194 Neb. 570, 234 N.W.2d 593 (1975), wherein this court construed Neb. Rev. Stat. § 28-408.03 (Reissue 1975), the statutory predecessor for § 28-319(2) of the Nebraska Criminal Code enacted in 1977, and expressed:

> It seems to us that the provisions relating to the determination of punishment [i.e., whether the actor shall have caused serious personal injury to the victim] make it necessary that before a judge can, on a plea of guilty or nolo contendere, determine a sentence he must in some manner determine the fact and extent of the serious personal injury inflicted on the victim by the actor. *Probably, this determination can be made only by means of an evidentiary hearing unless serious personal injury is admitted.*

(Emphasis supplied.) 194 Neb. at 573, 234 N.W.2d at 595.

Bunner further asserts:

> Appellant was not allowed the opportunity to dispute any claims of serious personal injury, nor was Appellant afforded the opportunity to offer evidence to the contrary. . . . When the Appellant's or any other individual's liberty

> is at stake, then Appellant or any other individual should be afforded his or her due process rights as guaranteed by the Nebraska and United States Constitutions. This is especially true, in cases such as this, when the individual has not had the opportunity to dispute the prosecution's claims, offer evidence on his or her own behalf, nor admitted serious personal injury.

Brief for appellant at 9-10.

Consequently, Bunner's assignments of error and appellate argument may be synthesized and distilled as follows: Before a court can sentence a defendant who is convicted of first degree sexual assault, the sentencing court must conduct an evidentiary hearing required by § 28-319(2) and determine whether the victim has sustained serious bodily injury from the sexual assault. From the foregoing, Bunner concludes that in the absence of the prerequisite hearing pursuant to § 28-319(2), a sentence for a sexual assault conviction contravenes due process guaranteed to a defendant in the sentencing process.

Bunner's argument is premised on a twofold fallacy and, therefore, is doubly defective.

NECESSITY OF AN EVIDENTIARY HEARING

Recently, in *State v. Martin*, 232 Neb. 385, 440 N.W.2d 676 (1989), we considered an argument similar to Bunner's.

In *Martin*, the defendant was convicted of, among other offenses, three counts of first degree sexual assault and, on appeal, also relied on *State v. Country, supra*, claiming that there must be a separate hearing to determine serious personal injury before imposition of sentence on a conviction for sexual assault. However, the *Martin* court noted:

> The defendant in the *Country* case entered a plea, and there was no trial or evidentiary hearing. The record was blank regarding the details of the crime. In this case, however, the court had received detailed descriptions from the victims of the assaults and descriptions by medical and law enforcement professionals, as well as by other witnesses, as to the emotional impact on the victims. Specific victim impact statements were also contained in the presentence report. Additionally, the court had

> observed the witnesses in their testimony, and any observations of emotional trauma could validly be used in determining the extent of serious personal injury to the victims. Therefore, an additional hearing to determine serious personal injury was not necessary.
>
> This record is replete with observations by others of the mental trauma experienced by the victims immediately after the assaults. The presentence report contains letters from the victims as well as letters from members of the victims' families detailing the mental anguish and trauma suffered by the victims. The testimony of each victim was that she feared for her life and offered no resistance because of her fear.

232 Neb. at 397, 440 N.W.2d at 685.

Bunner hastens to point out that *Martin* involved a trial which led to a conviction for assault, but Bunner's convictions resulted from guilty pleas. Hence, according to Bunner, in the absence of a trial, an evidentiary hearing is required so that a sentencing court will be supplied with information necessary to determine whether a sexual assault victim has sustained serious bodily injury. However, on reading § 28-319(2), we find no requirement that before sentence is imposed on a defendant convicted of first degree sexual assault, there must be an evidentiary hearing to determine whether a sexual assault victim has sustained serious personal injury. Section 28-319(2) simply requires a sentencing judge to "consider" whether a defendant who has been convicted of first degree sexual assault inflicted serious personal injury on the sexual assault victim. For that reason, we hold that, in accordance with § 28-319(2), a sentencing judge, before imposition of a sentence on a defendant convicted of first degree sexual assault, is not required to conduct an evidentiary hearing to determine whether the victim has sustained serious personal injury as a result of the sexual assault by the defendant; rather, concerning the question of personal injury to the victim, the judge shall consider information appropriately before the court in the sentencing process. Consequently, insofar as the expression in *State v. Country*, 194 Neb. 570, 573, 234 N.W.2d 593, 595 (1975), namely, "Probably, this determination can be made

only by means of an evidentiary hearing unless serious personal injury is admitted," may be interpreted to require an evidentiary hearing relative to § 28-319(2), *Country* is disapproved. Thus, Bunner's argument is partially based on the fallacious premise that § 28-319(2) requires an evidentiary hearing before imposition of sentence on a defendant convicted of first degree sexual assault.

DUE PROCESS AT SENTENCING

Bunner next contends that, since there was no evidentiary hearing in his case to ascertain whether the victims sustained serious personal injury, the sentencing court had no information for consideration in determining the sentences to be imposed for convictions of first degree sexual assault, notwithstanding the directive in § 28-319(2) that "[t]he sentencing judge shall consider whether the actor shall have caused serious personal injury to the victim" of the sexual assault for which the defendant has been convicted. As Bunner sees the situation, there were insufficient grounds to be considered in reference to serious personal injury sustained by Bunner's victims.

Bunner's perspective of the consequences to a victim of sexual assault apparently results from a lack of understanding of, disdain for, or indifference to the nature of first degree sexual assault, formerly and commonly known as rape by force or forcible rape. As one writer has expressed regarding rape by force and what has come to be known as the rape trauma syndrome:

> In the first phase, the victim experiences disorganization in lifestyle. Emotional reactions range from fear, humiliation, and embarrassment to anger and a desire for revenge. Although fear of physical violence and death dominates the victim's feelings, self-blame is also very prominent. During this phase, when the victim feels the impact of the rape most severely, she may exhibit one of two widely divergent emotional styles. In the expressed style, feelings of fear, anger, and anxiety are manifested through crying, sobbing, smiling, restlessness, and tenseness. In the controlled style, feelings are masked by a

> calm, composed, or subdued demeanor.
>
> The second phase involves a long-term process of physical and emotional reorganization. This phase often begins about two to three weeks after the attack. Symptoms may include change in residence, travel to sources of support in other cities, nightmares, and various phobic reactions. [These reactions include fear of indoors and outdoors (depending on where the rape occurred), fear of being alone, fear of crowds, and sexual fears.] Although all victims do not experience the same symptoms in the same sequence, victims consistently experience the disorganization phase. Many victims thereafter experience mild to moderate symptoms in the reorganization process. Few victims report no symptoms.

Note, *Expert Testimony on Rape Trauma Syndrome: An Argument for Limited Admissibility*, 63 Wash. L. Rev. 1063, 1064 (1988).

Another author notes:

> Those who were attacked while alone reported fear of being alone and those who were attacked while sleeping in bed reported fear of being indoors. Others developed fear of crowds, fear of people walking behind them, or fear of the outdoors, depending on the circumstances of their assaults. . . .
>
> . . . .
>
> . . . [T]he victim experiences feelings of shock, fear, humiliation, vulnerability, powerlessness, anxiety, and disgust. . . . [W]hen she attempts to reorganize her life . . . she may continue to experience fear, nightmares about the assault, depression, avoidance responses to people and situations that take the form of phobias, changes in lifestyle, anxiety, and sexual and interpersonal dysfunctions.

Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 Minn. L. Rev. 395, 426-28 (1985).

Addressing various phases in consequences of a sexual assault with force, another commentator relates that a victim experiences the

> fear of physical injury, mutilation, and death, caused by the threat of being killed, which is inherent in most rape assaults. Other typical symptoms . . . include feelings of humiliation, degradation, guilt, shame, embarrassment, anger, and revenge, as well as mood swings and irritability caused by intrusive recollections of the incident. [Another phase] is characterized by a change in lifestyle, dreams, nightmares and other sleep disturbances, depression, and the development of fears and phobias related to the specific circumstances of the attack.

Comment, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 Am. U.L. Rev. 417, 427 (1984).

Still another author has observed: "In essence, all victims of rape react to the assault as a stressful, violent, and life-threatening experience. . . . [A] rape victim's psychological sequelae mirror those of victims of other violent crimes." Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 Va. L. Rev. 1657, 1670 (1984).

Consequently, it is all too evident that one need not be specially trained in medicine or psychology to recognize and appreciate the injury from a forceful sexual intrusion into another's body and invasion of the mind and very personality of another human being. The nature of a sexual assault through force, a crime which Bunner has admitted by his guilty pleas, furnished a basis for a judicial determination that a sexual assault victim sustained "serious personal injury" in the form of "extreme mental anguish or mental trauma." See § 28-318(4).

Regarding the type of information properly available to a sentencing court, at the outset we note that the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1989), are inapplicable to a sentence hearing. See, Neb. Evid. R. 1101(4), § 27-1101(4) (Nebraska Evidence Rules do not apply to "[p]roceedings for . . . sentencing"); *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

In *State v. Jackson*, 225 Neb. 843, 859, 408 N.W.2d 720, 731 (1987), we expressed: "In a sentence hearing, a court, generally,

has broad discretion concerning the source of information and the type of information to be considered." This court, in *State v. Porter*, 209 Neb. 722, 723-24, 310 N.W.2d 926, 927 (1981), observed: "We have gone so far as to say that the latitude allowed a sentencing judge in such instances is almost without limitation as long as it is relevant to the issue."

A sentencing judge may consider relevant information contained in a presentence report on the defendant to determine an appropriate sentence within the statutorily authorized penalty, punishment, or disposition applicable to the crime for which the defendant has been convicted. See, *State v. Goodpasture*, 215 Neb. 341, 338 N.W.2d 446 (1983); *State v. Porter, supra*; *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969).

Concerning basic fairness necessary for due process in sentencing, we have stated: "[A] convicted defendant, even in a noncapital case, has a due process right to inquire into an incorrect assumption by the sentencing judge, untrue information materially affecting a prospective sentence, or other misinformation which a court may use in determining what sentence will be imposed." *State v. Barker*, 231 Neb. 430, 435, 436 N.W.2d 520, 523 (1989).

The relevant factual information in the presentence report on Bunner and the very nature of the crime committed supplied the sentencing judge with a sufficient basis for the conclusion that Bunner's victims had sustained serious personal injury, that is, extreme mental anguish or mental trauma, as the result of sexual assault by Bunner. See § 28-318(4). Bunner did not dispute any of the information supplied to the sentencing court and has failed to indicate any incorrect or untrue information which affected the sentences imposed on Bunner.

Regarding allocution as a part of Nebraska's criminal procedure, Neb. Rev. Stat. § 29-2201 (Reissue 1989) provides: "Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be passed against him." At the time of allocution, Bunner offered no reason why sentence should not have been imposed upon him. In *State v. Barker, supra*, we said: "As one commentator

has observed: 'Today the most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence . . . .' A. Campbell, Law of Sentencing § 72 at 232 (1978)." 231 Neb. at 436, 436 N.W.2d at 524.

Thus, the balance of Bunner's argument about his sentence is based on the fallacy that the sentencing court lacked sufficient information concerning personal injury to Bunner's sexual assault victims.

"A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed." *State v. Kitt*, 232 Neb. 237, 240, 440 N.W.2d 234, 236 (1989). See, also, *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

Bunner's assignments of error are without merit. Bunner's convictions and sentences are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD E. WILLIAMS, APPELLANT.

453 N.W.2d 399

Filed March 30, 1990. No. 89-245.

1. **Postconviction: Proof: Appeal and Error.** A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous.
2. **Postconviction: Effectiveness of Counsel: Proof.** When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
3. **Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance

prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

4. **Trial: Effectiveness of Counsel.** The fact that a trial strategy adopted by defense counsel proved to be unsuccessful in that the defendant was convicted does not alone sustain a finding of ineffectiveness of counsel.
5. **Effectiveness of Counsel.** In any effectiveness of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Gregory M. Schatz, of Stave, Coffey, Swenson, Jansen, & Schatz, P.C., for appellant.

Robert M. Spire, Attorney General, and Douglas J. Peterson for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

In 1986 the defendant, Ronald E. Williams, was convicted by a jury of second degree murder and using a firearm to commit a felony. He was sentenced to 20 years on the murder conviction and to 3 years for the use of a firearm, the sentences to run consecutively. The judgment was affirmed by this court in *State v. Williams*, 226 Neb. 647, 413 N.W.2d 907 (1987).

On July 12, 1988, the defendant filed his pro se motion to vacate and set aside the judgment pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). At the evidential hearing on January 19, 1989, the defendant presented the record of his trial and his deposition, which contained 18 allegations of ineffective assistance of his trial counsel, the chief deputy Douglas County public defender.

The standard of review for a claim of ineffective assistance of counsel is set forth in *State v. Jones*, 231 Neb. 110, 112-13, 435 N.W.2d 650, 652 (1989):

> "A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed on

> appeal unless clearly erroneous. [Citations omitted.] ' "When the defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions." ' . . .
>
> ". . . '[T]o sustain a claim of ineffective assistance of counsel as a violation of the sixth amendment to the U.S. Constitution and thereby obtain reversal of a defendant's conviction, the defendant must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.'
>
> "A convicted defendant seeking a reversal of the conviction or sentence for the reason that counsel's assistance was deficient must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . ."

See, also, *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989).

Following the evidential hearing in this case, the trial court determined that as to nine of the allegations, there was clearly no issue of fact, and that they had no merit. The allegations and the court's findings were as follows:

> 1. That his counsel failed to discuss his right to file plea in abatement following his preliminary hearing. Regardless of whether counsel discussed that right, in fact, his plea of not guilty at arraignment was tendered subject to a plea in abatement which in fact was subsequently filed and was considered and overruled.

2. That counsel failed to move the court to suppress his statement and failed to advise him that he had a right to have his statement suppressed. Regardless of whether he was so advised, in fact, a motion to suppress his statement was filed, was heard and was overruled.

3. That counsel failed to move the court for suppression of physical evidence offered by the State at trial. The only physical evidence offered by the State at trial was a copy of the rights advisory form, the tape recording of defendant's statement and some photographs and charts. The rights advisory form and the tape of defendant's statement were addressed in the motion to suppress his statment [sic]. The photographs and charts would not form the subject matter of a motion to suppress such evidence.

4. That counsel advised defendant against accepting a plea bargain offer by the State. Defendant's testimony and that of [defense counsel] are not in dispute in that the only plea bargain offered by the State was an agreement to change Murder I to Murder II and to drop Count II, (use of a firearm in commission of a felony), in exchange for a guilty plea to Murder II. Upon being advised by [defense counsel] that defendant would have to admit the intentional act of killing the victim, defendant refused the offer. He would have accepted an offer to plead guilty to manslaughter, but such offer was never made by the State.

5. That counsel failed to inquire of the pathologist who performed the autopsy whether he could determine by the path of the bullet whether the victim's arms were raised or lowered at the time of the shooting. [Defense counsel] did discuss this with another pathologist and concluded that it could not be so determined.

6. That counsel failed to move the court for mistrial because certain jurors were sleeping during the course of the trial. Defendant complained of one juror in particular, but did not indicate during what portion or portions of the trial he was sleeping. Nor has he made any showing that the juror was actually sleeping rather than having his eyes shut, a common practice by jurors.

7. Counsel failed to investigate why certain jurors were

openly crying when the jury rendered its verdict. In fact, two female juiors [sic] did visibly cry when the verdict was rendered. The verdict ended a serious responsibility for the jurors. Although the evidence more than amply supported the jury's verdict, from the evidence the shooting could be well characterized as a tragedy that should never have occurred. As [defense counsel] pointed out, the evidence of defendant's background and his presentation as a witness could well have characterized him as a likeable person. [Defense counsel] polled all jurors. Under the circumstances, the reaction of the two jurors was a foreseeable human emotional reaction reflecting the finality of the discharge of their function, and nothing more.

8. That counsel failed to devote adequate time to his case because of counsel's heavy caseload at the time of defendant's trial. Defendant's testimony showed nothing more than that [defense counsel] had five to ten other cases he was handling including at least five murder cases. [Defense counsel] testified that defendant never complained to him about this and defendant does not contend that he did so. Defendant stated no specifics and otherwise makes no showing as to how counsel failed to devote adequate time to his case.

9. That counsel failed to discuss a trial strategy with him. Defendant does not state any trial strategy he claims should have been adopted. [Defense counsel] testified that he knew defendant's father, that he was in contact with defendant a day after he turned himself in. The trial strategy of self defense was obvious from the beginning, and it is incredible to think that defendant was not aware of it.

As to the remaining 10 allegations, the trial court found that the defendant was not sufficiently prejudiced by any of them even if they had any merit.

The defendant has appealed and contends the trial court erred in finding that he had not been denied effective assistance of counsel and in denying his motion for postconviction relief.

The facts relating to the original conviction are set forth in

detail in *State v. Williams*, 226 Neb. 647, 413 N.W.2d 907 (1987).

Briefly stated, the evidence showed that the defendant shot and killed Eric Holmes in the early morning hours of April 13, 1986, during a confrontation on a residential street in Omaha, Nebraska.

The defendant testified that he shot the victim in self-defense when it appeared the victim reached with his right hand into his right pocket, which appeared to have a bulge. The victim's sister testified that the victim was left-handed.

Two eyewitnesses, Steven and Judy Gregory, testified that at the time he was shot the victim's arms were extended in the air and that before the defendant shot him, the victim stated, "I don't have anything."

Although there was some evidence that the victim owned a gun, there was no clear evidence that the victim was armed at the time he was shot.

With regard to the remainder of the allegations in the defendant's motion, the trial court made the following findings:

> A. That counsel failed to interview witnesses Jack Hudson and Antonio Alexander. [Defense counsel] testified that he did interview Hudson and may have interviewed Alexander. Both parties testified as witnesses for the State. [Defense counsel] had reviewed their statements previously made and contained in the police reports. Both were thoroughly cross-examined at trial. Defendant says that [defense counsel] did not cross-examine Alexander about things he told him to ask Alexander, but defendant does not specify what things he told him to ask about.
>
> B. That counsel failed to cross-examine witnesses Steven Gregory and Judy Gregory about their wearing glasses at the time of the shooting. The allegation is accurate. Defendant testified that said witnesses wore glasses when they testified at trial. These witnesses testified that they observed the actual shooting and were carefully cross-examined by [defense counsel] regarding the matter and their ability to see what they claimed they

saw. The Gregorys had just returned from an evening out. Mr. Gregory was driving their car and had just gotten out when they heard the commotion. Not only has defendant made no showing that would suggest that the Gregorys were not wearing their glasses at that time, but the evidence just stated particularly as to Mr. Gregory, would suggest the contrary.

C. That counsel failed to cross-examine witnesses Steven Gregory and Judy Gregory regarding the lighting conditions at the scene of the shooting. [Defense counsel] did cross-examine both witnesses about the lighting conditions, emphasizing that the lighting conditions were darker than the State's exhibit photographs suggested.

D. That counsel failed to pursue the Omaha Police Department's failure to search the immediate area where defendant's [sic] body was located. After the shooting, the victim ran from the scene to a residence not far away where he was found dead sitting on the couch. One witness testified that he saw no weapon around the victim or the residence. The police officer testified on cross-examination that he saw something near the right hand of the victim on the floor but could not recall what it was.

E. That counsel failed to attempt to verify that the victim was right handed or to adequately cross-examine the victim's sister on that issue. The defendant testified that at the time of the shooting he thought the victim was reaching for something, such as, a weapon with his right hand. The victim's sister as a State's rebuttal witness testified that the victim was left handed. [Defense counsel] did not cross-examine this witness. He did not feel that it was significant and that it was "a non-issue".

F. That counsel failed to discuss photograph exhibits with the defendant as they were marked by witnesses during their testimony. The allegation is accurate although [defense counsel] did discuss and show photographs to defendant and had him point out pertinent areas shown on the photographs.

G. That counsel failed to pursue the fact that a

marijuana "joint" appears next to the victim in a photograph of victim's body taken where the body was discovered. This allegation is accurate. [Defense counsel] felt it was "a non-issue".

H. That counsel failed to investigate the ownership of a firearm by the victim prior to trial, including deposing possible witnesses to that fact. One witness did testify that the victim owned a firearm. Defendant admits that he was not aware of any witnesses who could have attested to this claim.

I. That counsel failed to pursue the removal of black jurors from the jury panel for defendant's trial. Defendant says that there were black jurors on the panel, but none were selected on the jury. He identifies only one prospective black juror. He makes no showing as to how many prospective jurors were on the panel, or who exercised any peremptory challenges of any black jurors.

. . . .

This court concludes that it may readily dispose of defendant's ineffectiveness claim on the ground of lack of sufficient prejudice. Among all of the latter set of allegations of ineffectiveness of counsel, only two merit further consideration.

One is the question of whether the victim was right or left handed. Defendant testified at trial that the victim was reaching for something with his right hand. The testimony of the victim's sister in rebuttal that the victim was left handed would tend to impeach defendant's testimony on this point and would relate overall to the issue of self-defense. However, there was no reason for [defense counsel] to anticipate such rebuttal evidence, and it would be a reasonable trial tactic not to cross-examine the witness about it, inasmuch as it could achieve nothing other than to unduly focus on a matter that could ultimately be argued as insignificant or even ignored entirely.

The other is the failure to cross-examine the Gregorys about their wearing glasses when they saw the shootings. Such examination would have been appropriate.

Defendant, however, makes no showing whatsoever that they were not wearing glasses then. In fact, considering that Steven Gregory had just driven their car in the driveway and was getting out when they heard the commotion, it is very unlikely that he would have testified that he was not wearing his glasses at that time.

The court may and does consider whether any errors would have a pervasive effect on the inferences to be drawn from the evidence. It may also consider whether they would alter the entire evidentiary picture or whether they would have had only an isolated, trivial effect. The court may also consider whether the verdict is only weakly supported by the record and therefore is more likely to have been affected by errors as opposed to one of overwhelming record support. The court must ask if the defendant has met the burden of showing that the decision reached would reasonably likely to have been in favor of defendant absent any errors made. *Strickland v. Washington,* [466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)].

Without reviewing all of the salient evidence, there is no question that the verdict against the defendant was one of "overwhelming record support." The evidence would have supported a verdict of murder in the first degree as well as the verdict actually rendered. Taking all of the allegations together, the court concludes that they would not have had a pervasive effect on the inferences to be drawn from the evidence and would not have altered the entire evidentiary picture. The court further concludes that such allegations, even assuming their accuracy, were not such as to deprive the defendant of a fair trial or to make the result unreliable.

The record fully sustains the findings of the trial court.

In this court, the defendant has set forth five reasons why he claims he was denied effective assistance of counsel: (1) His counsel failed to cross-examine the Gregorys as to whether they were wearing glasses at the time of the shooting; (2) his counsel did not pursue the failure of the police to search the immediate area where the victim's body was located; (3) his counsel failed

to question the pathologist who performed the autopsy as to whether he could determine by the path of the bullet through the victim's chest the position of the victim's arms at the time of the shooting; (4) his counsel failed to verify the victim's sister's testimony that the victim was left-handed; and (5) his counsel failed to investigate the victim's ownership of a firearm prior to the trial and to pursue at trial the possibility of the victim's ownership of a firearm.

Although the defendant's attorney did not cross-examine the Gregorys as to whether they were wearing their glasses the night of the shooting, he did question them about their ability to see and the lighting at the scene. The defendant's counsel testified that he thought that was the best method to attempt to impeach the Gregorys. He did not ask questions about their glasses because he did not think it was significant.

During the trial, two police officers involved in the investigation testified that they did not see or find a weapon during the search of the victim's apartment. The defendant's counsel testified that there was nothing that showed the victim had a weapon. He did not pursue whether there was one in the victim's apartment because he felt unless there was a weapon on the victim or next to him, it was not pertinent.

The defendant's counsel did not question the pathologist who performed the autopsy as to whether he could determine by the path of the bullet through the victim's chest whether the victim's arms were raised or lowered at the time of the shooting. The defendant's counsel testified that prior to the trial he had talked to another pathologist about this matter and that doctor informed him that the position of the victim's arms could not be determined from the path of the bullet.

The victim's sister testified as a rebuttal witness for the State, after the defendant had testified that he shot the victim in self-defense when it appeared that the victim reached into his right pocket with his right hand. The victim's sister testified that the victim was left-handed and rarely used his right hand for any activity. The defendant's attorney did not cross-examine her because he thought it was not a matter of significance.

The evidence at trial against the defendant was overwhelming. His attorney was an experienced trial lawyer

who performed as a lawyer possessing ordinary training and skill in criminal law in the area should have done. His decisions regarding cross-examination of the various witnesses in the situations described above were part of a trial strategy that proved unsuccessful. That this " 'strategy proved unsuccessful [i.e., that the defendant was convicted] does not sustain a finding of ineffectiveness of counsel.' " *State v. Ellefson*, 231 Neb. 120, 125, 435 N.W.2d 653, 657 (1989) (quoting *State v. Fries*, 224 Neb. 482, 398 N.W.2d 702 (1987)). Furthermore, the defendant has failed to establish how he was prejudiced by his attorney's decisions.

Regarding the defendant's allegation that his counsel failed to investigate the victim's ownership of a firearm prior to the trial, his counsel testified that he did not pursue that issue because there was nothing in the evidence to indicate a weapon either immediately nearby or on the person of the victim, and the defendant had no direct knowledge as to whether the victim was carrying a weapon that night or had a reputation for carrying a weapon.

"In any effectiveness of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (Syllabus of the court.) *State v. Domingus, ante* p. 267, 450 N.W.2d 668 (1990).

The defendant failed to establish that his counsel's investigating strategy showed a lack of reasonable professional judgment and that his counsel failed to perform at least as well as an attorney with ordinary training and skill in the field of criminal law in the area. Even if counsel's failure to investigate whether the victim owned a gun were error, the defendant did not demonstrate how such error prejudiced the outcome of his trial. See *Domingus, supra*.

The defendant failed to establish any basis for postconviction relief. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GREGORY B. TYRRELL, APPELLANT.

453 N.W.2d 104

Filed March 30, 1990. No. 89-366.

1. **Trial: Evidence: Police Officers and Sheriffs.** Where the connection between the lawless conduct of the police and the discovery of the challenged evidence is so attenuated as to dissipate the taint, such evidence is admissible.
2. **Motions to Suppress: Arrests: Search and Seizure: Photographs.** In the absence of evidence or a reasonably firm and detailed proffer of evidence tending to show that an accused's arrest was not only illegal but was merely a pretext for a general exploratory search, a routine "booking" photograph taken as a consequence of the arrest is not suppressible.
3. **Motions to Suppress.** In deciding whether evidence should be suppressed in any given case, a court must weigh the deterrent effect of suppression against its societal costs.
4. _____. Where little or no deterrence will result from suppression of evidence, suppression is inappropriate, for where the reason for the exclusionary rule ceases, its application also must cease.
5. **Trial: Evidence: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
6. **Trial: Identification Procedures: Evidence: Waiver: Appeal and Error.** An accused who fails to object to an in-court identification waives any error in that regard.
7. **Trial: Identification Procedures: Evidence.** Even if there have been impermissible pretrial suggestions as to an accused's identity, in-court identification may be received when it is independent of and untainted by the impermissible identification procedures.
8. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
9. **Burglary: Words and Phrases.** The opening of a closed door is a "breaking" within the definition of burglary.
10. **Presentence Reports: Appeal and Error.** An accused's failure to object to the presentence report precludes challenging the report on appeal.
11. **Criminal Law: Sentences: Presentence Reports: Presumptions: Appeal and Error.** On appeal from a criminal sentence, it is presumed that in considering a presentence report the sentencing judge considered only material which is relevant and competent.
12. **Sentences: Appeal and Error.** A sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Kristi J. Egger, Deputy Hall County Public Defender, for appellant.

Robert M. Spire, Attorney General, Jill Gradwohl Schroeder, and, on brief, Steven J. Moeller for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Pursuant to verdicts, defendant-appellant, Gregory B. Tyrrell, was adjudged guilty of first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1989), and burglary, in violation of Neb. Rev. Stat. § 28-507 (Reissue 1989). He was thereafter found not to be a mentally disordered sex offender and sentenced to imprisonment for consecutive terms of not less than 16 years 8 months nor more than 50 years for the sexual assault and not less than 6 years 8 months nor more than 20 years for the burglary. Tyrrell asserts the district court erred by (1) receiving the victim's out-of-court identification of him as her assailant, (2) receiving the victim's in-court identification of him as her assailant, (3) finding the evidence sufficient to sustain his conviction of burglary, (4) considering in its sentence determinations the suppressed out-of-court statements which Tyrrell had made to police, (5) imposing consecutive rather than concurrent sentences, and (6) otherwise imposing excessive sentences. The record sustaining none of those assigned errors, we affirm.

The victim spent the evening of Monday, September 21, 1987, alone in her Grand Island, Nebraska, apartment ironing and watching television before retiring to bed. Shortly before 3 a.m. on September 22, she awoke to the sound of rustling jeans and footsteps coming down her apartment hallway. She also saw the light from a flashlight moving down the hallway toward the bedroom where she had been sleeping. A male figure then appeared in her bedroom doorway.

The intruder shined his small, yellow pocket flashlight into the victim's eyes, whereupon she arose and moved to the foot of

her bed. She there struggled with the intruder momentarily, and the intruder, who was wearing gloves, struck the victim's face. As a result, the victim fell back on the bed, at which time the intruder got on top of her and held her down. When the victim continued to scream and fight, the intruder told her he had a gun and to shut up. Fearing that her assailant might kill her, the victim stopped screaming and struggling, and began to closely observe the intruder as he sat on top of her.

The victim testified that as part of her training as a supervisor of a chain of convenience stores, she had been taught how to react in the event of a robbery. She testified that she had also been involved in teaching such procedures and that such training teaches persons to be particularly observant of the details of a robbery and of the description of individuals perpetrating such a crime. The victim testified that she was cognizant of this training in observing the intruder as he sat on top of her on the bed.

She also testified that she has 20/20 vision but wears a single contact lens in her right eye to correct a "slight astigmatism." While she testified that she was not wearing the lens when she was assaulted, she also testified that the lens is "mainly for the prevention of headaches" and that she has no trouble seeing without it. The victim's testimony further indicated that an electric light shining through the curtain of a large bedroom window, along with the light from her assailant's flashlight, which was shining the "entire time" he was in the bedroom, provided enough light for her to observe her assailant.

While still holding her down on the bed, the assailant removed the victim's panties, the only article of clothing she was wearing at the time. Using his left hand, from which he had removed the glove, the assailant repeatedly penetrated the victim's vagina. During most of this time, the assailant kept the flashlight in his right hand and also used the right hand to hold the victim down on the bed, "[s]o the light was shining up sometimes even into his face." At times, the assailant shined the flashlight on the victim's body. The victim testified that she had a "clear vision" of her assailant's face while she was being assaulted, and specifically described the clothing which he was wearing.

After 5 to 10 minutes, the assailant stood up and ordered the victim to turn over and lie on her stomach. The victim complied, noticing by looking at her clock radio that it was exactly 3 a.m. As she lay on her stomach, she observed her assailant as he "was fumbling with the buttons trying to unfasten his pants." The victim "could see him very clearly" and "could see that he didn't have a gun in any pockets or stuffed in his jeans," so she decided to fight. She thus stood up, moved to the foot of the bed, and placed one foot on the floor and the other knee on the bed. The assailant then approached her and "stood there with his hands on [her] shoulders for a few seconds and then [she] kicked him between the legs." The assailant took about three steps back, groaned, looked at the victim, looked at the door, looked back at the victim, and ran out the bedroom door.

With the victim "screaming at the top of [her] lungs" and following him, the assailant ran out of the apartment while attempting to fasten his trousers. The victim had locked the deadbolt lock on her apartment door before retiring, but observed that her assailant "had obviously unlocked the doors before he came into [her] bedroom because all he did was reach out and pull on the knob" when he exited the apartment. The victim continued to pursue her assailant within the well-lighted common area inside the apartment building, at one point meeting him face to face. She then chased him out the outside door of the apartment building. After realizing that she was naked, the victim ran back into her apartment and immediately summoned the police.

Officer Bergmark of the Grand Island Police Department responded to the call and arrived at the victim's apartment approximately 5 minutes after she had summoned the police. After taking a short time to regain her composure, the victim described the incident and her assailant for Bergmark. Bergmark testified that the victim did not hesitate in answering his questions regarding the description of her assailant, and testified that her answers were "clear and concise."

The victim testified that before going to bed, she had "definitely locked" the sliding screen door and had attempted to lock the sliding glass door, but because she "had been having

some problems with the latch" on the sliding glass door, she could not be sure that it was locked. Before leaving the victim's apartment, Bergmark inspected the sliding screen door and sliding glass door to the apartment and found that the screen door was unlocked. The victim testified that after she returned to her apartment, she checked the sliding glass door and found that it was not locked, so she "relocked" it.

On September 23, 1987, the victim met with Captain Hetrick and Lieutenant Shum of the Grand Island Police Department to create a composite sketch of her assailant. After this sketch had been constructed, she viewed a photographic lineup consisting of an array of six photographs and determined that a picture of her assailant was not included.

On September 28, the victim again met with Hetrick to view another photographic lineup. Like the one she initially viewed, this lineup also consisted of an array of six individuals. However, unlike the first one, the September 28 lineup included a photograph of Tyrrell. The photograph of Tyrrell differed from the others in the lineup in that Tyrrell's picture was one which had been used for a newspaper publication, while the other five were more typical of photographs taken by police when "booking" a criminal suspect. Hetrick testified that law enforcement personnel had mentioned Tyrrell's name as a possible suspect, but because he was unaware of Tyrrell's prior criminal record, Hetrick obtained the newspaper photograph for use in the photographic lineup.

When reviewing the September 28 photographic lineup, the victim indicated that Tyrrell appeared similar to her assailant. Hetrick testified (without objection by Tyrrell) that the victim placed her hand across the bottom portion of the face pictured and "stated that the hair and the forehead and the eyes are correct," but because of the expression on his face, she could not be sure. (The picture of Tyrrell within the September 28 photographic lineup is a closeup of Tyrrell smiling, but the assailant did not smile during the assault.) The victim testified she told Hetrick that " '[y]ou are after somebody who looks just like this.' . . . 'I realize that that might sound crazy because it looks like you cut this picture out of a magazine and used it as a filler.' " Again referencing the photograph of Tyrrell in the

September 28 lineup, the victim also testified that "[i]t looked like the person but I thought I was crazy because it looked like they cut it out of a magazine so I just disregarded it."

Sergeant Dreyer of the Kearney Police Department testified that Tyrrell had been arrested on October 26, 1987, in connection with a burglary in Kearney. As a result of that arrest and in the course of following standard arrest procedures, Kearney police photographed Tyrrell. The Kearney Police Department was not at that time aware of any pending investigation involving Tyrrell. At the hearing on the motion to suppress the victim's in-court and out-of-court identifications of Tyrrell, the State conceded that the Kearney police had illegally arrested Tyrrell.

On November 5, 1987, Dreyer visited the Grand Island Police Department while obtaining background information in connection with an unrelated case. During this visit, Dreyer met with Hetrick and, in the course of their conversation, discussed the assault on the victim in this case and the apparent burglary for which Tyrrell had been arrested in Kearney. Hetrick then showed Dreyer the photograph of Tyrrell that the Grand Island police had used in the September 28 photographic lineup, and Dreyer indicated that Tyrrell had a somewhat different appearance when he was arrested by the Kearney police on October 26. Dreyer subsequently provided Hetrick with a photographic lineup consisting of an array of eight photographs, including the photograph of Tyrrell which had been taken when he was arrested by Kearney police on October 26.

The victim again met with Hetrick on November 11, 1987, to view the photographic lineup which Dreyer had provided. At that time the victim identified the photograph of Tyrrell as being that of her assailant. She also identified Tyrrell as her assailant during Tyrrell's trial and at the hearing on the motion to suppress the in-court and out-of-court identifications of Tyrrell. The district court overruled Tyrrell's objection to the use of the photograph which the Kearney police had obtained when they illegally arrested Tyrrell.

However, the district court granted Tyrrell's motion to suppress statements he had made to one Detective Sorenson of

the Lincoln Police Department, admitting to six 1985 assault/burglary incidents in Lancaster County, on the ground they had been induced by a promise of immunity and were thus not made voluntarily. In four of the cases Tyrrell had attempted to sexually assault his victims. In two of the incidents Tyrrell made contact with the victims in their homes but did not physically attack them; when these victims resisted, Tyrrell left their residences.

Tyrrell's first assignment of error claims that the trial court erred in receiving the victim's out-of-court identification of Tyrrell. The basis for this contention is that the identification was derived from the "fruit of the poisonous tree," i.e., that the photograph which the victim identified was obtained by the Grand Island Police Department as a result of the Kearney Police Department's illegal arrest of Tyrrell.

At the hearing on the motion to suppress the use of the photograph to identify Tyrrell, the prosecutor, for purposes of the hearing, conceded, as noted earlier, that Tyrrell's arrest was illegal. Despite this concession, it is apparent that the State is entitled to use the photograph which was taken by the Kearney police. The issue presented here is one which the Supreme Court of California considered in *People v. McInnis*, 6 Cal. 3d 821, 494 P.2d 690, 100 Cal. Rptr. 618 (1972), a case involving circumstances very similar to those presented here.

In *McInnis*, the defendant robbed a liquor store, and witnesses later identified him from a photograph which had been obtained as a result of an illegal arrest on another charge by an independent and separate law enforcement agency. (The Pasadena police were investigating the liquor store robbery, while Los Angeles authorities had made the illegal arrest.) The defendant contended that the use of the photograph to identify him was unlawful and that the in-court identifications made by witnesses were tainted by this use.

In part quoting *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), the California court stated at 6 Cal. 3d at 824-26, 494 P.2d at 692-93, 100 Cal. Rptr. at 620-21:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the

more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' [Citation.]" The court indicated (at p. 487 [9 L.Ed.2d at p. 455]) that where "the connection between the lawless conduct of the police and the discovery of the challenged evidence" is so attenuated as to dissipate the taint, such evidence is admissible.

. . . .

The taking of a photograph during the booking process is standard police procedure . . . bearing no relationship to the purpose or validity of the arrest or detention. Commonly known as "mug shots," the photos are kept in permanent files regardless of the eventual disposition of the case; indeed, thousands of persons ultimately found to be entirely innocent undoubtedly have their photographs, as well as fingerprints, on record with law enforcement agencies. [Citations omitted.]

To hold that all such pictures resulting from illegal arrests are inadmissible forever because they are "fruits of the poisonous tree" would not merely permit the criminal "to go free because the constable has blundered" (Cardozo, J., in *People v. Defore*, (1926) 242 N.Y. 13, 21 [150 N.E. 585]) but would allow the criminal immunity because another constable in another jurisdiction in another case had blundered. It would in effect be giving a crime insurance policy in perpetuity to all persons once illegally arrested: if the photograph of a person obtained because of such an arrest becomes instrumental in the identification of that person for a crime committed many years later, it could be urged that *but for* the old illegal arrest the criminal would not have been identified. Rationally, however, a "but for" relationship alone is insufficient to render the photograph inadmissible since it cannot be said that many years later the illegality of the earlier arrest was being "exploited." As declared in *United States v. Edmons* (2nd Cir. 1970) 432 F.2d 577, 584: "We

> are not obliged here to hold that when an arrest made in good faith turns out to have been illegal because of lack of probable cause, an identification resulting from the consequent custody must inevitably be excluded."
>
> In the case at bar, while the time span between the illegal arrest and the robbery was not one of years but only a month, nevertheless the principle remains the same, and there is no evidence whatever of exploitation. . . . That the robbery victim and witness were shown defendant's more recent likeness, in preference to outdated photographs, suggests a reasonable police procedure rather than exploitation of an isolated arrest deemed improper.

(Emphasis in original.)

The *McInnis* analysis is equally applicable in the present case. Furthermore, the approach taken by the *McInnis* court is the approach generally followed. See, e.g., *United States ex rel. Moore v. Lane*, 612 F.2d 1046 (7th Cir. 1980); *People v. Pettis*, 12 Ill. App. 3d 123, 298 N.E.2d 372 (1973); *Kinsey v. State*, 639 S.W.2d 486 (Tex. App. 1982); *State v. Price*, 27 Ariz. App. 673, 558 P.2d 701 (1976). See, also, *Robinson v. State*, 53 Md. App. 297, 452 A.2d 1291 (1982), which follows *McInnis* and cites numerous cases from various jurisdictions, stating:

> We think that the approach taken in these cases is the correct one, whether expressed as "attenuation" or simply as a rational and commonsense application of the "fruit of the poisonous tree" doctrine. In the absence of evidence (or a reasonably firm and detailed proffer of evidence) tending to show that appellant's . . . arrest was not only illegal but was merely a pretext for a general exploratory search (as in *Davis v. Mississippi,* [394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969)]) or for gathering evidence in this case (as in *United States v. Crews,* [445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980)]), a routine "booking" photograph taken as a consequence of that arrest would not be suppressible as tainted fruit in this proceeding.

Robinson v. State, supra at 312, 452 A.2d at 1299.

While Tyrrell relies on *Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969), in arguing that the

photograph which Grand Island authorities obtained from the Kearney Police Department should not be admissible, *Davis* is easily distinguishable from the case presently before us.

In *Davis*, Meridian, Mississippi, police officers arrested the defendant without probable cause while investigating the rape for which the defendant was eventually charged. In investigating the rape, Meridian authorities illegally (i.e., without warrants or probable cause) arrested and fingerprinted the defendant and numerous other youths. Fingerprints obtained in the course of these arrests linked the defendant to the crime. The U.S. Supreme Court concluded that this fingerprint evidence was obtained in violation of the defendant's protection against unreasonable search and seizure under the fourth amendment, and therefore declared that this evidence could not be used to convict the defendant.

Unlike the situation in *Davis*, the investigating Kearney law enforcement agency in this case did not act illegally for the purpose of gathering the evidence used to convict Tyrrell. Although Grand Island police officials did use the photograph which it obtained from Kearney authorities, that photograph had been obtained by a separate law enforcement agency pursuant to a separate, albeit illegal, arrest on an unrelated charge. Neither the record nor Tyrrell suggests that the Grand Island police conspired with Kearney police to facilitate the acquisition of the photograph used to identify the present victim's assailant.

In sum, *People v. McInnis*, 6 Cal. 3d 821, 494 P.2d 690, 100 Cal. Rptr. 618 (1972), provides the correct rule to follow, and the facts of the present case require the same result as that reached in *McInnis*.

In addition to the foregoing, it should be noted that the prime purpose of the rule excluding evidence seized in violation of the fourth amendment is deterrence of future unlawful police conduct. *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). In deciding whether evidence should be suppressed in any given case, a court must properly weigh the deterrent effect of suppression against its societal costs. See, e.g., *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L. Ed. 2d 1046 (1976). Where little or no deterrence

will result from suppression, suppression is inappropriate, for where the reason for the exclusionary rule ceases, its application also must cease. *United States v. Fitzgerald*, 724 F.2d 633 (8th Cir. 1983), *cert. denied* 466 U.S. 950, 104 S. Ct. 2151, 80 L. Ed. 2d 538 (1984).

In this case, Tyrrell's illegal arrest by the Kearney police was entirely unrelated to the investigation of the assault of the victim. Consequently, exclusion of the photograph which was obtained as a result of Tyrrell's illegal arrest has no deterrent effect on unlawful police conduct.

It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Chapman, ante* p. 369, 451 N.W.2d 263 (1990); *State v. Foley, ante* p. 304, 450 N.W.2d 694 (1990). See, also, *State v. Roach, ante* p. 620, 452 N.W.2d 262 (1990). Because the trial court did not abuse its discretion by overruling Tyrrell's objection to the use of the photograph which Kearney authorities supplied to the Grand Island police, Tyrrell's first assignment of error is without merit.

As his second assignment of error, Tyrrell argues that the victim's in-court identification of him as her assailant "was the result of unnecessarily suggestive and prejudicial procedures which created a substantial likelihood of misidentification so as to deprive . . . Tyrrell of a fair trial . . . ."

It should be noted at this point that Tyrrell made no objection when the victim identified him at the trial. Thus, Tyrrell waived his right to assert error arising from the trial court's reception of this evidence. See, *State v. Welsh*, 232 Neb. 219, 440 N.W.2d 225 (1989); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989). Nonetheless, the fact is that the evidence was admissible in any event.

Tyrrell argues that the procedures which the Grand Island police employed to identify Tyrrell were unduly suggestive due to the type of photograph (i.e., one obtained from a local newspaper) used in the September 28 photographic lineup and because Tyrrell was the only person whose picture was repeated in the November 11 photographic lineup. This contention ignores the fact that at both the hearing on the motion to suppress and at trial, based upon her independent recollection

of her assailant from the night of the assault, the victim identified Tyrrell as the assailant. The victim further testified that she did not even realize that the two different pictures of Tyrrell were pictures of the same individual until Hetrick so informed her after she had identified Tyrrell in the November 11 photographic lineup.

Even assuming, despite the record's lack of support for such a finding, that the photographic lineups used by the Grand Island police were unduly suggestive, the victim's in-court identification of Tyrrell was admissible, since the victim's identification was based upon her independent recollection of the night of the assault. See, *State v. Hunt*, 212 Neb. 304, 322 N.W.2d 624 (1982); *State v. Price*, 229 Neb. 448, 427 N.W.2d 81 (1988). Thus, the trial court properly allowed the victim to identify Tyrrell during the trial.

Tyrrell's third assignment of error alleges that the State presented insufficient evidence to prove that he committed burglary because the State presented insufficient evidence to show that a "breaking" had occurred.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Frazier, ante* p. 107, 449 N.W.2d 230 (1989); *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989); *State v. Wokoma*, 233 Neb. 351, 445 N.W.2d 608 (1989); *State v. Wyatt, ante* p. 349, 451 N.W.2d 84 (1990).

Section 28-507(1) states: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." Evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking. The opening of a closed door is a "breaking" within the definition of burglary. *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985); *State v. Jones*, 230 Neb. 968, 434

N.W.2d 333 (1989); *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988).

The victim testified that she had "definitely locked" the screen door on the night of her assault. While inspecting the apartment immediately after the assault, Bergmark inspected the sliding screen door and sliding glass door to the apartment and found that the screen door was unlocked. The victim further testified that she had locked the deadbolt lock on her other apartment door before retiring, but observed that her assailant "had obviously unlocked the doors before he came into [her] bedroom because all he did was reach out and pull on the knob" when he exited the apartment. These facts, combined with the victim's observation of the intruder's having gained entrance to her apartment, provide sufficient evidence of a breaking to convict Tyrrell of burglary under § 28-507(1).

Tyrrell's fourth assignment asserts that the district court judge improperly considered the suppressed statements which Tyrrell had made to Sorenson when determining Tyrrell's sentences. With respect to the statements which Tyrrell made to Sorenson, the district court judge's journal entry states:

> The defendant's statements made by the defendant to Detective Sorenson of the Lincoln, Nebraska Police Department on November 2, 1987, were induced by a promise of immunity, are involuntary statements, and may not be used by the State in this case. The defendant's Motion to Suppress should be granted.

Once again, it must be noted that Tyrrell and his attorney had the opportunity to and apparently did review the presentence report prior to the sentencing hearing and did not object to the contents of that report. The failure to object to the presentence report precludes Tyrrell from challenging it in this appeal. *McKisic v. State*, 238 Ga. 644, 234 S.E.2d 908 (1977). However, the facts do not establish error in any event.

At the sentencing proceeding the district court judge stated:

> I've read carefully the presentence report and all the other reports that have been attached thereto.
>
> The sentences I'm about to give you reflect my feelings with regard to that report. I, of course, do not think you are a good candidate for probation because I think there is

> a substantial risk you are going to engage in further crimes.
>
> You've been sentenced to the penitentiary before for other crimes, hasn't had — seemed to have had any effect on you.

The report contains references to the involuntary admissions Tyrrell made to Sorenson noted earlier in this opinion. In that connection, Tyrrell focuses on the district court judge's statements: "I've read carefully the presentence report and all the other reports that have been attached thereto. The sentences I'm about to give you reflect my feelings with regard to that report." Tyrrell then argues that these statements indicate that the judge improperly considered Tyrrell's statements to Sorenson when sentencing Tyrrell.

In making his argument, Tyrrell relies on *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972), in which the sentencing court specifically considered the defendant's three prior felony convictions and imposed the maximum term allowed. It was later found that two of the three convictions noted by the sentencing court were constitutionally invalid because the accused was denied his right to counsel. The U.S. Supreme Court stated at 404 U.S. at 446-47:

> It is surely true . . . that a trial judge . . . generally has wide discretion in determining what sentence to impose. It is also true that before making that determination, a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come. . . .
>
> But these general propositions do not decide the case before us. For we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. . . . The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him. Yet it is now clear that two of those convictions were wholly unconstitutional
>
> . . . .

Tyrrell further relies upon *State v. Jones*, 213 Neb. 1, 328

N.W.2d 166 (1982), a case in which the sentencing court, solely upon the basis of testimony given by the defendant under a grant of immunity in a previous case, found that aggravating circumstances existed which justified imposition of the death penalty. This court remanded the case for a new sentencing hearing, stating:

> We therefore hold that where the defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or indirectly derived from it in determining whether a death sentence should be imposed under the provisions of § 29-2523 and related statutes.

State v. Jones, supra at 15, 328 N.W.2d at 174.

While in this case the district court did find that Tyrrell's statements to Sorenson were induced by a promise of immunity and should be suppressed, the facts here mirror neither *State v. Jones, supra*, nor *United States v. Tucker, supra*. In *Tucker*, the sentencing court specifically considered a defendant's prior convictions which later proved to be "wholly unconstitutional." *United States v. Tucker, supra* at 404 U.S. at 447. Unlike that situation, the district court judge in the case now before us merely made general benign statements, saying: "I've read carefully the presentence report and all the other reports that have been attached thereto. The sentences I'm about to give you reflect my feelings with regard to that report." The references in the report to, and discussion of, Tyrrell's statements to Sorenson comprise only a small part of the presentence report, and it cannot be concluded that the district court judge's general statements demonstrate that he specifically considered Tyrrell's involuntary statements to Sorenson in determining an appropriate sentence. The canon that in a case tried to the court without a jury there is a presumption that the trial court, in reaching its decision, only considered evidence that is competent and relevant, *State v. Sheridan*, 230 Neb. 979, 434 N.W.2d 338 (1989), has equal application to a sentencing court's consideration of a presentence report. Thus, on appeal from a criminal sentence, it is presumed that in considering a presentence report the sentencing judge considered only

material which is relevant and competent. Indeed, the district court judge's other statements in this connection confirm that he relied on information contained within the presentence report exclusive of Tyrrell's immunized statements in rendering his sentence. The district court judge stated: "I, of course, do not think you are a good candidate for probation because I think there is a substantial risk you are going to engage in further crimes. You've been sentenced to the penitentiary before for other crimes, hasn't had — seemed to have had any effect on you." Thus, there is no reason not to indulge in the appellate presumption described earlier. Furthermore, as developed more fully in connection with the remaining two assignments of error, the record, exclusive of references to Tyrrell's immunized statements, clearly supports the sentences imposed.

That brings us to the fifth and sixth assignments of error, which assert that the district court abused its discretion by imposing excessive sentences and requiring that Tyrrell serve these sentences consecutively rather than concurrently.

Addressing first Tyrrell's claim that the respective lengths of the sentences imposed were excessive, it cannot be said that the district court abused its discretion. First degree sexual assault is a Class II felony, § 28-319(2), punishable by 1 to 50 years' imprisonment, Neb. Rev. Stat. § 28-105 (Reissue 1985), while burglary is a Class III felony, § 28-507(2), punishable by 1 to 20 years' imprisonment, § 28-105. The controlling rule is that a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Letscher, ante* p. 858, 452 N.W.2d 767 (1990); *State v. Von Busch, ante* p. 119, 449 N.W.2d 237 (1989); *State v. Von Dorn, ante* p. 93, 449 N.W.2d 530 (1989).

In the course of finding that Tyrrell was not a mentally disordered sex offender, the district court correctly noted the psychiatric opinion that there exists a substantial risk that Tyrrell, given the opportunity, would engage in sexual misconduct again. Under the circumstances, the sentences imposed, while they are the maximum indeterminate sentences allowable, Neb. Rev. Stat. § 83-1,105(1) (Reissue 1987), cannot be said to be excessive and thus do not individually constitute an

abuse of discretion.

Nor did the district court abuse its discretion by imposing consecutive rather than concurrent sentences. See *State v. Ellefson*, 214 Neb. 747, 336 N.W.2d 88 (1983) (trial court held not to have abused its discretion in imposing consecutive terms of not less than 5 nor more than 10 years for burglary and not less than 15 nor more than 25 years for first degree sexual assault where sentences imposed were within the statutory guidelines).

Moreover, this court would not, under the power conferred upon it by Neb. Rev. Stat. § 29-2308 (Reissue 1989), independently impose consecutive prison sentences of shorter terms than did the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY A. REIN, APPELLANT.
453 N.W.2d 114

Filed March 30, 1990. No. 89-406.

1. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The test to determine whether an investigative stop is justified is whether the police officer has a reasonable suspicion based on articulable facts which indicate that a crime has occurred, is occurring, or is about to occur and that the suspect may be involved.
2. _____: _____: _____: _____. An officer is not required to wait until a crime has occurred before making an investigatory stop. It is sufficient if there is an objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity.

Appeal from the District Court for Dawes County, PAUL D. EMPSON, Judge, on appeal thereto from the County Court for Dawes County, JAMES T. HANSEN, Judge. Judgment of District Court affirmed.

David E. Veath for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

After a trial to the county court on stipulated facts, the defendant, Gary A. Rein, was found guilty of driving while under the influence of alcoholic liquor, second offense. The defendant was sentenced to 48 hours in the county jail, fined $500 plus court costs, suspended from driving for 6 months, and ordered to obtain alcohol counseling. Upon appeal to the district court, the judgment was affirmed.

The defendant has appealed to this court and contends that his arrest was the result of an illegal stop and that his motion to suppress the evidence obtained as a result of the illegal stop should have been sustained.

On March 31, 1988, at approximately 10:45 p.m., Officer DaMoude of the Chadron Police Department, while on routine patrol, saw two vehicles leave U.S. Highway 20 on the west edge of Chadron, Nebraska, and enter the frontage road which leads to several businesses in the area. All of the businesses were closed. He started checking the buildings with his spotlight to see if everything was in order and to see if the two vehicles which he had observed were in the area. When he got to Solar Motors, he saw the defendant's truck parked with other vehicles in the lot, with its lights turned off. At that time Officer DaMoude did not know where the second vehicle that had turned off Highway 20 was located, where its driver was, what its driver was doing, or whether there was any relationship between the defendant and the other vehicle. He saw the defendant, who was sitting in the truck, turn and look toward him, but the officer did not recognize the defendant at that time. The officer then saw the lights on the pickup truck come on and the defendant back up and drive off.

After the defendant left the parking lot, the officer drove north around some vehicles on the lot and followed the pickup truck onto the highway, where he stopped the defendant's vehicle. He testified that he had decided to stop the pickup truck because there had been recent vandalism to buildings in town and he believed it was suspicious for the pickup truck to be

parked in the lot at that time of night, with all of the businesses closed.

Before the officer made the stop, he did not observe the defendant driving erratically. After stopping the defendant, the officer approached the defendant and recognized him as Rein. Officer DaMoude asked for the defendant's driver's license, registration, and proof of insurance and returned to his car to check them.

When the officer returned to the defendant's truck, he told the defendant he could smell the odor of alcohol on his person or coming from the vehicle and asked the defendant to perform some field sobriety tests. The officer determined that the defendant did not successfully perform the tests, so he then asked the defendant to take an Alco-Sensor breath test, which the defendant failed. The defendant was arrested and read the implied consent form. The defendant's blood alcohol content was found to be .131 percent.

The issue on appeal is whether the investigatory stop of the defendant's vehicle was illegal as a violation of the defendant's fourth amendment rights under the U.S. Constitution and of his rights under article I, § 7, of the Nebraska Constitution. At the hearing on the defendant's motion to suppress the evidence gained as a result of the stop, the court found the defendant's constitutional rights had not been violated and overruled the motion.

The facts of this case are similar to those in two recent decisions of this court.

In *State v. Kavanaugh*, 230 Neb. 889, 434 N.W.2d 36 (1989), the defendant was stopped while leaving his place of business at 1:20 a.m. and arrested for driving while under the influence of alcoholic liquor. It was foggy at the time of the stop, and the deputy sheriff did not recognize the defendant until after the defendant had been stopped. The deputy stopped the defendant's vehicle because businesses in that area had experienced burglaries and vandalism and he suspected that a burglary might have taken place at the defendant's business. This court found that "the evidence as to the totality of the circumstances was such that the trial court could conclude that the investigatory stop of the defendant's vehicle by Deputy

Walsh was justified," stating, "It is difficult to imagine what legitimate reason a stranger would have entering the defendant's premises at 1:20 a.m. on a foggy night when visibility was poor." *Id.* at 897-98, 434 N.W.2d at 41.

In *State v. Carter*, 232 Neb. 666, 441 N.W.2d 640 (1989), a sergeant of the Hall County Sheriff's Department, while on patrol of the airport area, saw a vehicle leave an office area at 12:15 a.m. No businesses were open in that area at that time, and there was no other traffic in the area at night. The officer decided to stop the vehicle because of the amount of burglaries in the area, although no burglaries had been reported in the area that night, and the last burglary had occurred 2 months before. After the vehicle had been stopped, the officer discovered that the defendant's license had been suspended and that he had failed to appear on a prior speeding charge. The defendant was then arrested. This court determined that "the defendant's automobile was stopped only because the sheriff's officer wanted to know what the vehicle was doing in the area" and that "[t]here was no particularized and objective basis for suspecting the defendant of criminal activity sufficient to justify an investigatory stop." *Id.* at 669, 441 N.W.2d at 642.

The test to determine whether an investigative stop is justified is whether the police officer has a reasonable suspicion based on articulable facts which indicate that a crime has occurred, is occurring, or is about to occur and that the suspect may be involved. *State v. Carter, supra*; *State v. Kavanaugh, supra*.

In *State v. Davis*, 104 N.J. 490, 504, 517 A.2d 859, 866-67 (1986), the court said: " 'The police would be derelict in their duties if they did not investigate' " circumstances which to an experienced police officer indicate that " 'something amiss might be taking place or is about to take place.' "

In this case the defendant testified that he had been bowling and drank "four to five glasses" of beer at the bowling alley. He said that he went to Solar Motors to pick up a loaner truck so that he could leave the truck which he was driving to be repaired. He did not explain why his truck was parked in the lot with the lights turned off or how he expected to pick up the loaner truck at 10:45 p.m. when the business was closed.

The circumstances in this case were such that Officer DaMoude was justified in stopping the defendant to identify him and ascertain why he had driven a truck with a foreign county license plate into the Solar Motors lot at 10:45 p.m., a time when the business was closed; had parked the truck in the lot, with the lights turned off; and then had waited until Officer DaMoude drove into the lot before driving away. Although there is no evidence that a crime had been committed at that time, the circumstances were such to suggest that a crime might have been committed or was about to be committed. An officer is not required to wait until a crime has occurred before making an investigatory stop. It is sufficient if there is an objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981). The circumstances here justified an investigatory stop to find out who the defendant was and what he was doing parked in the Solar Motors lot with his lights turned off at 10:45 p.m. when all of the businesses in the area were closed. The circumstances permitted an inference that the defendant was hoping that by parking in the Solar Motors lot behind other vehicles, with his lights turned off, he would not be noticed or seen by Officer DaMoude. This is a circumstance that was not present in either the *Kavanaugh* or *Carter* case.

The judgment is affirmed.

AFFIRMED.

WHITE, J., dissenting.

As I am unable to reconcile the opinion in this case with the holding in our recent case of *State v. Carter*, 232 Neb. 666, 441 N.W.2d 640 (1989), I dissent.

CAPORALE, J., joins in this dissent.

SHANAHAN, J., dissenting.

Nor can I; therefore, so do I. See *State v. Carter*, 232 Neb. 666, 441 N.W.2d 640 (1989). Cf. *State v. Kavanaugh*, 230 Neb. 889, 434 N.W.2d 36 (1989).

STATE OF NEBRASKA, APPELLEE, V. JEFF BOPPRE, APPELLANT.

453 N.W.2d 406

Filed March 30, 1990. No. 89-481.

1. **Plea in Abatement: Appeal and Error.** Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
2. **Constitutional Law: Bail Bond.** The federal prohibition against excessive bail is applicable to the states.
3. _____: _____. Neither the 8th nor the 14th amendment to the U.S. Constitution requires that everyone charged with a state offense be given his liberty on bail pending trial.
4. **Venue: Appeal and Error.** A trial court's ruling on a motion for change of venue will not be disturbed absent an abuse of discretion.
5. _____: _____. A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
6. **Venue.** Factors to be considered in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in the area to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of the trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
7. **Juror Qualifications.** The law does not require that a juror be totally ignorant of the facts and issues involved in a case; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based upon the evidence presented in court.
8. **Trial: Venue: Appeal and Error.** The refusal of a trial court to grant a motion for a public opinion poll rests within the court's discretion.
9. **Venue: Juror Qualifications.** Compared to a public opinion poll, voir dire examination is the better, more probative forum for ascertaining the existence of community and individual prejudice or hostility toward an accused.
10. **Trial: Witnesses: Indictments and Informations.** Pursuant to Neb. Rev. Stat. § 29-1602 (Reissue 1989), a trial court may, in the exercise of its discretion, permit the names of additional witnesses to be endorsed upon an information after the information has been filed when doing so does not prejudice the defendant in the preparation of his defense.
11. **Pretrial Procedure: Appeal and Error.** A trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of discretion.
12. **Due Process: Prosecuting Attorneys: Evidence.** Although the due process clause requires a prosecutor to disclose exculpatory evidence which is material to the accused's guilt or innocence, such evidence is material only if there is a reasonable probability that had the evidence been disclosed, the result of the

proceeding would have been different.

13. **Juror Qualifications: Death Penalty.** It is entirely permissible to exclude from jury service venirepersons whose views on capital punishment are such as to prevent or substantially impair their ability to impartially apply the law to the evidence.
14. **Trial: Jurors.** The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court.
15. **Criminal Law: Trial: Juries: Appeal and Error.** The determination of whether a jury should be sequestered during the trial of a criminal case is left to the discretion of the trial court, and absent an abuse of that discretion or evidence of jury tampering or misconduct, its decision will not be reversed on appeal.
16. **Trial: Evidence: Appeal and Error.** When a trial court overrules a motion in limine to exclude certain evidence, the movant must object when that evidence is offered during trial in order to predicate error upon the admission of that evidence.
17. **Motions to Suppress: Appeal and Error.** Even though a trial court has considered the admissibility of certain evidence in ruling on a pretrial motion to suppress, the movant must object to the introduction of the evidence at trial in order to predicate error upon it.
18. **Trial: Testimony.** Lay testimony should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine.
19. **Rules of Evidence: Other Acts.** The rule contained in Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is an inclusionary one which permits the use of evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged.
20. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
21. **Convictions: Appeal and Error.** A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant.
22. **Trial: Evidence: Convictions: Appeal and Error.** Improper admission of evidence constitutes harmless error where the evidence is cumulative and there is other competent evidence to support the conviction.
23. **Trial: Evidence: Appeal and Error.** A ruling excluding evidence is not reviewable unless the substance of the evidence was made known by offer or was apparent from the context within which the question was asked.
24. **Trial: Expert Witnesses: Appeal and Error.** The admission of evidence from expert witnesses is a matter left to the discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.
25. **Criminal Law: Motions to Dismiss: Evidence.** On a defendant's motion to dismiss for insufficient evidence of the crime charged against the defendant, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.

26. **Criminal Law: Directed Verdict.** In a criminal case a district court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.
27. **Criminal Law: Verdicts: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
28. **Motions for New Trial: Appeal and Error.** The granting or refusal of a motion for new trial is left to the discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal.
29. **Motions for New Trial.** In order for a new trial to be granted, it must be shown that a substantial right of the defendant's was adversely affected and that the defendant was prejudiced thereby.
30. **Trial: Prosecuting Attorneys: Motions for Mistrial: Juries.** Remarks made by the prosecutor during final argument which do not mislead or unduly influence the jury do not rise to the level sufficient to require granting a mistrial.
31. **Trial.** The responsibility for conducting a trial in an orderly and proper manner for the purpose of ensuring a fair and impartial trial rests with the trial court.
32. **Sentences: Appeal and Error.** A sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion by the sentencing judge.
33. **Sentences.** In imposing a sentence, a sentencing judge should consider, among other things, the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
34. **Sentences: Evidence: Appeal and Error.** The mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Leonard G. Tabor for appellant.

Robert M. Spire, Attorney General, and Sharon M. Lindgren for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

Pursuant to verdicts, defendant-appellant, Jeff Boppre, was

adjudged guilty of two charges of first degree murder in violation of Neb. Rev. Stat. § 28-303 (Reissue 1989), two charges of robbery in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1989), and two charges of using a firearm to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1989). He was thereafter sentenced to consecutive terms of imprisonment for life on the murder convictions, to concurrent terms of imprisonment of 8 to 15 years on the robbery convictions, and to imprisonment for 6⅔ to 20 years on each of the use of a firearm convictions, to be served consecutively to all other sentences. Boppre asserts that the district court erred in (1) overruling his plea in abatement, (2) denying bail, (3) refusing a change of venue, (4) denying payment for a public opinion poll, (5) allowing additional endorsement of witnesses, (6) failing to permit certain discovery, (7) sustaining certain of the State's cause challenges to prospective jurors, (8) overruling Boppre's cause challenges to certain prospective jurors, (9) failing to rule on certain motions, (10) failing to sequester the jury, (11) overruling his motion in limine, (12) failing to suppress certain evidence, (13) admitting or excluding certain evidence, (14) refusing a directed verdict, (15) refusing a new trial, and (16) imposing excessive sentences. We affirm.

II. FACTS

Boppre began using cocaine sometime in 1987. Beginning in July 1988, Ricky Zogg began to supply Boppre with cocaine and marijuana which Zogg purchased from Richard Valdez, who occupied a house north of the town of Scottsbluff with his girlfriend, Sharon Condon. Zogg was allowed to testify, over Boppre's objections, that because Valdez did not know Boppre, Valdez at first would not let Boppre enter Valdez' house, but that after a period of time, Valdez came to trust Boppre enough to let him into the house to buy the drugs himself. Zogg testified that Valdez flaunted his money in front of Zogg and Boppre and told them he had $9,000 to $11,000.

About 2 months before the killings, Boppre suggested to Zogg, "Let's just take [Valdez'] money and his drugs, that way we don't have to buy it [any] more." Zogg agreed, and they planned to "[j]ust go in and shoot [Valdez]." Armed with guns,

Boppre and Zogg twice went to Valdez' house but left before accomplishing their purpose.

For 1 to 2 months before the killings, Boppre had been supplying Kenard Wasmer and Alan Niemann with cocaine which he had been purchasing from Valdez. On the evening before the killings, September 18, 1988, Boppre acquired some cocaine from Valdez at Niemann's request. Boppre met Niemann at a mobile home which Niemann and Wasmer shared, and Boppre and Niemann used the cocaine. During the course of the evening, Boppre and Niemann went to Valdez' house several more times to buy more cocaine. Each time, they acquired about a quarter or half gram of the substance and shared it with Wasmer before returning to Valdez' for more.

Sometime after midnight on September 19, Boppre suggested to Wasmer and Niemann, "Let's just go blow [Valdez] away." According to Wasmer, Boppre

> looked at [Niemann] and asked [Niemann] if he'd go do it with him and [Niemann] said no, that he couldn't do it, he couldn't just shoot somebody. And he kept trying to get [Niemann] to do it and [Niemann] kept saying no and he called him a pussy and asked me, he looked at me and said, "Come on, Wasmer, I know you can do it." I told him, I said, "Dude, the guy has never done nothing to me, I don't even know the man, I'm not going to go do something to him."

Boppre told them, "Well, I'll go do it myself then," and walked out the door. Niemann followed Boppre, telling Wasmer, "I'm going to go talk him out of it." Wasmer remained at the trailer.

Boppre and Niemann went back out to Valdez', where Boppre bought a quarter gram of cocaine and they left. After Boppre and Niemann used the cocaine, Boppre drove to his father's house, where he was living, went inside, changed clothes, and got a gun. They then returned to Valdez' house, and Boppre got out of the vehicle and knocked on the door. According to Niemann, he heard a man's voice yell, "Who is it?" After Boppre identified himself, the door opened and Niemann heard "a loud, 'Oh,' something, 'Oh God, oh, shit.' " Niemann then heard two shots, saw Boppre "jump up into the

house," arms aiming downward, and then heard a series of additional shots.

Niemann went into the house and found Valdez lying on his back on the kitchen floor with his head and shoulders in the middle of the doorway between the kitchen and living room. As Niemann was leaving the house, Valdez rolled onto his right side. Boppre came out of the house and reloaded his gun, saying, "[T]here couldn't be any witnesses." Boppre then went back inside the house, and Niemann heard a woman's high-pitched voice and a series of still more shots. Boppre came out of the house with several items in his hands and then went back into the house and knocked out the kitchen light with a hammer. While traveling back to Niemann's and Wasmer's trailer, Boppre told Niemann, "[Y]ou should have seen it. . . . You should have seen that bitch plead for her life."

When they arrived at the trailer, they carried inside the things that were taken from Valdez—a black purse, a black shaving kit, and a camera with two lenses. Niemann told Wasmer, "He blew them both away." Wasmer noticed Boppre had "something red up the side of his right thumb and he wiped it down the side of the right leg of his blue jeans." Boppre and Niemann went into the back bedroom of the trailer and dumped the contents of the purse onto the floor. Boppre found some cocaine in the purse, and he, Niemann, and Wasmer used it. Then Boppre pulled out a wad of money. According to Niemann, Boppre "mentioned that there was $1,700 there and also . . . said, 'That wasn't good but it wasn't bad either for taking two people's lives.' "

At Boppre's suggestion, Wasmer and Niemann agreed to travel to Phoenix, Arizona, with Boppre, where they could use the money they took from Valdez to acquire a considerable amount of cocaine. They put several of the things they had stolen into the trunk of Boppre's vehicle, Boppre placed the gun he had used for the killings under the front seat of the vehicle, and the three left. Over Boppre's relevance objections, Wasmer was allowed to testify that on their way to Phoenix, Boppre discussed stopping somewhere to buy more shells for the gun and "was talking about going into 7-11, Mini Mart stores, robbing them and killing whoever was behind the cash register

or in the store." This prompted Wasmer to dismantle the gun and throw pieces of it out the window of the vehicle "so they couldn't be replaced" "[t]o keep anybody else from being killed with that gun." The district court instructed the jury that the evidence of Boppre's planned robberies was received for a limited purpose and could only be considered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, and could not be considered to prove Boppre's character in order to show that he acted in conformity therewith.

Later, while still traveling, Wasmer asked Boppre how he felt about the killings. Boppre "just started laughing and said, 'I like it, I want to do it again.' " At some point, Boppre told Wasmer:

> Well, it started off the conversation, he told me that when he went up to the door he had decided to not shoot anybody, he had changed his mind, he was just going to buy another quarter gram. He said when [Valdez] opened the door, the gun just come up and he pulled the trigger and he said after he pulled the trigger the first time, he couldn't quit.
>
> He said he went inside the house, went into the bedroom and didn't see anybody and he had left the bedroom and then went back in and there was a woman on the other side of the bed that was crouched down behind it and asked him what he wanted, told her he wanted to know where the drugs and the money was and she told him that there was some drugs in her purse and then he shot her.

Near Gallup, New Mexico, Boppre decided to dispose of the gun. According to Wasmer, they drove out of Gallup for

> a ways and [Boppre] spotted . . . quite a big washout beside the road. We stopped, pulled over, [Boppre] got the gun out of the car, we all jumped over the fence, I walked over to the edge of it, stopped . . . [Boppre] and [Niemann] walked on down farther and stayed there for a few minutes, not very long, and then came back, we got in the car and left.

Niemann testified similarly that to dispose of the gun, they

crossed over a fence into a ravine by the side of the road and that Boppre threw the gun into one mud puddle and the gun clip into another puddle.

The morning after the killings, Condon's body was found in the bedroom of the Valdez house, and Valdez' body was found in the kitchen near the doorway into the living room. According to Niemann, who reviewed a picture of Valdez' body as found, Valdez' body was discovered in a different position than when he last saw it. Law enforcement personnel found four shell casings and seven bullets in and around Valdez' body and two shell casings and two bullets around Condon's body. Pieces of glass from a broken light bulb were discovered in the kitchen. Police also found a package of cocaine on Valdez' body and in a closet found a bag containing marijuana and $11,000.

The district court received into evidence, over Boppre's hearsay objections, pictures which portray writing on the floor near where Valdez' body was found and writing on the casement of the door between the kitchen and living room. As depicted in the pictures, the letters "J-F-F B-O-P-E" were written in white grease on the floor by the left side of Valdez' body, and the letters "J-E-F-F" were written toward the bottom of the side of the casement nearer to Valdez' body within reach of the body's right hand.

Police Lt. Robert Kinsey testified that there "appear[ed] to be blood" on the side of the casement closest to Valdez and that the letters written on the door casement appeared to be written in blood. Kinsey further testified that blood was also present on the side of the door casement farther from Valdez. Boppre objected to this testimony after it was given, on the basis that there was no foundation for Kinsey to testify that the substance on the farther casement was blood. The district court asked Kinsey to rephrase his answer, which he did, testifying that the substance "appear[ed] to be blood." Police Det. Mark Overman corroborated Kinsey's testimony, saying that the letters on the side of the door casement nearer to Valdez were written in what "appear[ed] to be blood." Although Boppre objected, Overman was allowed to further testify that it appeared someone wrote the markings on the door casement with a finger.

When Valdez was found, there was white grease present on the index and middle fingers of his right hand and blood present on both of his hands. Valdez' brother testified that Valdez was right-handed. A nearly empty tube of white "lubriplate gear grease" was discovered under Valdez' body. According to a criminalist who testified for the State, the substance in the tube, on the floor, and on Valdez' fingers was "similar and could have originated from a common source." A documents examiner for the Nebraska State Patrol opined that the writing on the floor in grease "was consistent with having been written with a human finger," but testified that the writing was of insufficient quality and quantity for a positive identification of the writer to be made.

The pathologist who performed the autopsies on the two victims discovered four gunshot entrance wounds on Valdez' chest, abdomen, and left arm. According to the pathologist, Valdez died from the gunshot wounds to his chest and abdomen, "which resulted in massive internal damage to the organs" in those areas. The pathologist also opined that an individual with injuries such as Valdez' would live 15 minutes after the wounds were received and could have retained consciousness for 10 to 15 minutes. The pathologist was of the further opinion that it was possible that Valdez could have moved around and written something on the floor and wall for 5 to 15 minutes after receiving the wounds.

The pathologist also testified that Condon had seven "gunshot entrance wounds" located on her head, chest, and arms, which were caused by at least six gunshots. According to the pathologist, Condon died instantly from the gunshot wound to her head, which caused massive brain damage. Because of the gunpowder deposited within the tissues of the skin around the two gunshot entrance wounds to Condon's head and the entrance wounds on her arms, the pathologist was able to determine that the gun was held no more than 3 feet from her body when she was shot.

A pathologist testifying on Boppre's behalf expressed the view that it was "highly unlikely that [Valdez] would have been physically capable of writing the descriptions" which were discovered next to his body. He opined that a person who

sustained the injuries Valdez sustained "would have not remained conscious longer than probably three minutes and probably would have died within the next five or six minutes."

Just after the killings, Boppre's father told law enforcement personnel that Boppre owned a .32-caliber handgun. Although the handgun could not be located in the father's house, the father showed the officers an area southwest of his residence where Boppre practiced shooting at targets with the gun, and allowed them to pick up some .32-caliber shell casings which were lying on the ground.

With Niemann's and Wasmer's help, law enforcement personnel discovered the .32-caliber handgun in the canyon near Gallup, New Mexico, where Boppre had thrown it. The State's ballistics expert described the gun as an LA Industrial Orbea-Eibar .32-caliber semiautomatic pistol. When found, the gun was missing several parts, including a thumb latch safety, the disconnector, the hammer pin, and the sear spring.

Boppre testified that he bought a .32-caliber gun several months before the killings but that he had traded the gun to Valdez about 10 days prior to the killings. According to Boppre, he told his parents and an acquaintance prior to the killings that he had sold the gun. Neither Boppre's father nor Boppre's acquaintance were allowed to testify as to whether Boppre ever made such a statement.

The State's ballistics expert compared the shell casings found in Boppre's father's yard and those found at Valdez' house with shell casings which he acquired from his own test firing of the gun the police recovered near Gallup. He determined that the shell casings which were found at the Boppre and Valdez residences were all fired from the gun the police recovered near Gallup. He also compared the bullets found at the Valdez residence and those he test fired from the gun and determined that the bullets found at the Valdez residence were fired from the gun the police found. The expert testified that if the gun's clip were filled with bullets, the gun could be fired nine times without having to be reloaded.

Michael Neu, who was incarcerated in the Scotts Bluff County jail at the same time as Boppre, testified, over Boppre's objections, that he "built up a situation of trust in regard to

[himself] and . . . Boppre," that Boppre told him "Mr. Valdez couldn't have wr[itten] the name on the floor" because Valdez "was shot and he was dead instantly," and that Boppre said, "You ought to heard the bitch beg for mercy, beg for her life."

III. ANALYSIS

1. Plea in Abatement

Boppre first assigns error to the district court's overruling of the plea in abatement he filed pursuant to Neb. Rev. Stat. § 29-1809 (Reissue 1989). On September 21, 1988, a complaint was filed in county court charging Boppre with two counts of first degree murder. On September 30, the day of the preliminary hearing, an amended complaint was filed in county court charging Boppre with the four additional counts described in part I above. Boppre argues that "[t]he evidence presented at the preliminary hearing was insufficient to enable the County Court to bind" him over for trial and that because four additional charges were added to the complaint on the day of the preliminary hearing, he was unable to adequately prepare for the hearing. Brief for appellant at 12.

Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence. *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987). The deciding issue is thus whether the evidence was sufficient to support the conviction, *State v. Jacobs, supra*, a matter which is the subject of part III(14) below, which analyzes Boppre's challenge to the sufficiency of the evidence.

2. Bail

Boppre twice requested the district court to release him on bail. The district court, however, determined, after reviewing the evidence presented at the preliminary hearing, that "the proof was evident and the presumption great that [Boppre] had committed the crime of murder and that [he] should be held without bail."

The U.S. Supreme Court has never recognized a federal constitutional right to bail under the eighth amendment to the U.S. Constitution. See 2 W. LaFave & J. Israel, Criminal

Procedure § 12.3(b) (West 1984).

While this court has determined that the "federal prohibition against excessive bail is applicable to the states," *State v. Pilgrim*, 182 Neb. 594, 598, 156 N.W.2d 171, 173-74 (1968), it has also determined that neither the 8th nor the 14th amendment to the U.S. Constitution requires that everyone charged with a state offense be given his liberty on bail pending trial. *Parker v. Roth*, 202 Neb. 850, 278 N.W.2d 106 (1979), *cert. denied* 444 U.S. 920, 100 S. Ct. 240, 62 L. Ed. 2d 177, *reh'g denied* 444 U.S. 1104, 100 S. Ct. 1072, 62 L. Ed. 2d 790 (1980).

As Boppre concedes, not all offenses are bailable offenses under the Nebraska Constitution. Neb. Const. art. I, § 9, provides in part: "All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great." (Pursuant to Neb. Rev. Stat. § 29-506 (Reissue 1989), only those defendants accused of bailable offenses may be released in accordance with the provisions contained in chapter 29, article 9.)

We conclude that the district court did not err in refusing to release Boppre on bail. At the preliminary hearing, the State established that Valdez and Condon had been shot and killed with a .32-caliber weapon; that in the months prior to the killings Boppre and Zogg had twice planned to kill Valdez for his money; that Niemann, Wasmer, and Boppre were all using cocaine the night of the murders; that Boppre and Niemann went to Valdez' house, where Boppre shot Valdez and Condon and stole some of their possessions; that the three men then traveled to New Mexico, where Boppre disposed of the gun; that Boppre owned a .32-caliber handgun; that the shell casings found at Boppre's father's residence and those found at the crime scene were all fired from the same gun; and that writings implicating Boppre were discovered near Valdez' body. Thus, there was certainly sufficient evidence presented at the preliminary hearing to support the district court's determination that "the proof is evident or the presumption great" that Boppre had committed the murders of Valdez and

Condon. See *State v. Hamilton*, 187 Neb. 359, 190 N.W.2d 862 (1971) (defendant charged with first degree murder properly denied bail under constitutional provision rendering murder a nonbailable offense where the proof is evident or the presumption great).

3. Venue

Boppre filed two pretrial motions for change of venue based upon pretrial publicity. The district court denied his motions, stating in answer to Boppre's argument,

> Well, if there are jurors "out to get the defendant," you will have your chance to question them under oath when we begin jury selection. Obviously if there are jurors out to get the defendant the Court's not about to let them serve on a case. We should know that firsthand when jury selection begins.

Boppre urges that his motions for change of venue should have been granted because the publicity was "very inflammatory, prejudicial and sensational"; because the case was more widely publicized in Scotts Bluff County than in other parts of the state; because of the short period of time between the dissemination of the publicity and the time of trial; because the selection of the jury was difficult; because of the number of challenges for cause exercised; because of the severity of the offenses; and because of the size of Scotts Bluff County, which he tells us is approximately 38,344 people.

At the hearings on the motions, Boppre presented a great deal of evidence concerning pretrial publicity. From the time the bodies were found, numerous articles appeared in the local area newspaper reporting details concerning the investigation of the murders, the evidence discovered at the scene of the crime, Boppre's arrest, the evidence presented at the preliminary hearing, all the pretrial proceedings, and the selection of the jury. According to one article, Valdez told his father that "someone was out to kill him" and that if he was killed, he would write the name of "the guy that did the shooting." Several articles reported that Boppre's name had been written in white grease next to Valdez' body.

Boppre also presented videotaped recordings of several local

television news shows that were shown at the time the bodies were found and of several other telecasts that were shown during the time of the trial. Several of the telecasts show footage of Boppre after his arrest, making obscene hand gestures toward the camera. One of the telecasts reports the district court's finding, in declining to set bail for Boppre, that the evidence against Boppre was strong and the presumption great.

Boppre further presented the affidavits of 38 Scotts Bluff County residents that "because of bias, prejudice and hostility" of area residents, Boppre would be unable to receive a fair trial, and of 11 area attorneys that each is convinced it is impossible for Boppre to have a fair trial in Scotts Bluff County. According to the affidavit of the news director for two area radio stations, one of the stations presented 26 reports about the case and the other 136 reports about the case during the 2 months after the crimes were discovered. According to the affidavits of the news directors for two area television stations, one of the stations presented 14 reports and the other 19 reports during the 2 months after the crimes were discovered.

Jury selection commenced on February 13, 1989, and continued through February 15. The trial did not resume until March 6, 1989. According to both briefs, there were 99 persons on the venire. The record demonstrates that all of the venirepersons had heard something about the case. Twelve venirepersons were excused for cause because they had formed opinions concerning Boppre's guilt or innocence based on pretrial publicity; eight were excused because they indicated they could not be impartial because they knew either Boppre or a member of his family; eight were excused because they indicated they could not be impartial because they knew Valdez or a member of his family; four were excused because they indicated they could not be impartial because they knew certain witnesses; and, finally, one was excused because she worked for the sheriff's department. Of the venirepersons who were not excused for cause, none indicated that they had formed an opinion concerning Boppre's guilt or innocence.

A trial court's ruling on a motion for change of venue will not be disturbed absent an abuse of discretion. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987); *State v. Bird Head*, 225 Neb.

822, 408 N.W.2d 309 (1987). Neb. Rev. Stat. § 29-1301 (Reissue 1989) provides that upon motion by the defendant the district court shall transfer venue where it appears by affidavits presented to the court that a fair and impartial trial cannot be had in the county where the offense was committed. Accordingly, a trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial. *State v. Jacobs, supra.* Factors to be considered in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in the area to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of the trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn. *Id.* The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinions and render a verdict based upon the evidence presented in court. *Id.* Indeed, Neb. Rev. Stat. § 25-1636 (Reissue 1989) specifically provides that it shall not be a

> cause of challenge that a juror has read in the newspapers an account of the commission of a crime with which a prisoner is charged, if such juror shall state on oath that it is the belief of said person that he or she can render an impartial verdict according to the law and the evidence; and the court shall be satisfied as to the truth of such statement . . . .

We find no abuse of discretion in the district court's denial of Boppre's motions for change of venue. The various news media accounts are factual and do not reveal a hostility or animosity toward Boppre. Many of the news shows report evidence tending to exculpate Boppre, as well as evidence tending to inculpate him, and display no animosity or bias toward Boppre. In several of the broadcasts, as much suspicion is placed upon

Niemann, the principal witness against Boppre, as upon Boppre himself. The affidavits of individual area residents, stating not that they have formed an opinion of Boppre's guilt or innocence but that area residents in general are biased, prejudiced, and hostile, have no probative value. While 12 venirepersons were excused because they had formed opinions on the basis of pretrial publicity and 21 others were excused because they knew pertinent persons, the jurors who were not excused stated that they had not formed an opinion and could be impartial.

We do not overlook the fact that 19 days elapsed between the completion of the jury selection and the resumption of trial. The practice of permitting such a time interval between jury selection and the resumption of the rest of the trial seems questionable, and we hold that when such a hiatus has been permitted, a trial court must, if requested, grant the parties an opportunity to re-voir dire the jury as selected in order to determine whether anything has transpired in the interim to affect a juror's impartiality. Boppre, however, made no request for additional voir dire. Moreover, the district court repeatedly admonished the venirepersons and the jury when selected not to read or listen to news reports of the case, talk to anyone about the case, nor form any opinion prior to deliberations. In the absence of a showing to the contrary, we indulge the appellate presumption that the selected jurors followed the district court's admonitions. See *Kitts v. State*, 153 Neb. 784, 46 N.W.2d 158 (1951) (mere opportunity to violate admonition provides no basis to find trial court abused its discretion by refusing to investigate jury for possible misconduct).

4. Opinion Poll

To provide support for his first motion for change of venue, Boppre requested that the district court authorize the payment of $6,000 to hire a professional pollster to survey prospective jurors in Scotts Bluff County as to whether pretrial publicity would impair Boppre's ability to receive a fair trial. Boppre's attorney filed an affidavit stating that neither Boppre nor his family had the financial means to pay for the survey. At the hearing on the request for survey funding, Boppre and his

father concurred that they did not have the financial means to pay. The district court denied Boppre's request, deciding to wait until voir dire began to determine whether Boppre could receive a fair trial.

Boppre urges that the district court erred in refusing his request, arguing that under *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), due process and the sixth amendment right to effective assistance of counsel require that the State provide the defendant with the use of any experts that will assist counsel in preparing the defense and that the survey would have been "extremely helpful to the trial court in determining whether or not defendant's motion for change of venue is well taken." Brief for appellant at 14.

Boppre cites us to no Nebraska case on this subject, nor do we find any. In *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984), where the defendant requested State funds to conduct a survey similar to that Boppre requested, the Supreme Court of North Carolina recognized that an indigent defendant has the right to the effective assistance of counsel and that the State must provide an indigent defendant with the basic tools for preparation of an adequate defense. However, the court determined that expert assistance need only be provided by the State when the defendant can show it is probable he will not receive a fair trial without the expert assistance or upon a showing that there is a reasonable likelihood the assistance will materially assist the defendant in the preparation of his defense. The court concluded that because the defendant had an opportunity to assemble available data on pretrial publicity and to question jurors about their exposure to the publicity and its effect, and because the poll could not demonstrate the amount of bias or whether publicity was noted by individuals who might serve as jurors, the lower court did not abuse its discretion in determining that the defendant had failed to show there was a reasonable likelihood the poll would have materially assisted him in the preparation of his defense.

Similarly, in *State v. Weatherford*, 416 N.W.2d 47 (S.D. 1987), the Supreme Court of South Dakota considered whether the trial court erred in refusing to appoint an expert to conduct a public opinion poll for purposes of a venue motion because of

the pretrial publicity in a first degree murder case. In determining that the trial court did not abuse its discretion in denying the defendant's request, the reviewing court held that voir dire examination is the better forum for ascertaining the existence of community and individual prejudice or hostility toward the accused. See, also, *Wyle v. State*, 777 S.W.2d 709 (Tex. Crim. App. 1989) (pollster to show level of community prejudice for purposes of venue motion was unnecessary, as defendant may offer newspaper accounts, evidence of television or radio coverage, and witnesses from the community); *Wilson v. State*, 250 Ga. 630, 300 S.E.2d 640 (1983), *cert. denied* 464 U.S. 865, 104 S. Ct. 199, 78 L. Ed. 2d 174, *reh'g denied* 464 U.S. 1004, 104 S. Ct. 514, 78 L. Ed. 2d 701; *State v. Haislip*, 237 Kan. 461, 484-85, 701 P.2d 909, 927 (1985), *cert. denied* 474 U.S. 1022, 106 S. Ct. 575, 88 L. Ed. 2d 558 (motion to obtain funds for public opinion poll for purposes of venue motion properly denied where cost of survey was $2,000 and because "random sample of the population would not reliably indicate whether a fair and impartial jury could be selected"); *State v. Greenawalt*, 128 Ariz. 150, 624 P.2d 828 (1981), *cert. denied* 454 U.S. 882, 102 S. Ct. 364, 70 L. Ed. 2d 191 (refusal pursuant to state statute to appoint for indigent defendant an expert to conduct public opinion poll in order to determine for purposes of venue motion the extent pretrial publicity has permeated the community was proper because jury selection and venue are not matters having a bearing on the ultimate question of the defendant's guilt or innocence and thus were not contemplated by state statute's requirement that expert be necessary to the presentation of the defense at trial); Annot., 74 A.L.R.4th 330 (1989).

The refusal of a trial court to grant a motion for a public opinion poll rests within the court's discretion. See *State v. Weatherford, supra*. See, also, *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989) (the right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court). Assuming, but not deciding, that there are circumstances under which it would be an abuse of discretion to deny an indigent defendant funds to conduct a public opinion poll, we conclude that in this case the

district court did not abuse its discretion in denying Boppre's motion for such. As suggested in *State v. Weatherford, supra*, voir dire examination is the better, more probative forum for ascertaining the existence of community and individual prejudice or hostility toward the accused. Boppre had the opportunity to thoroughly question the venirepersons concerning their ability to be impartial. Further, Boppre had an opportunity to assemble a variety of data on the pretrial publicity, including newspaper articles, radio and television reports, and the affidavits of various people in the community. The poll was not necessary to Boppre's presentation of evidence in support of his motion for change of venue.

5. Endorsement of Additional Witnesses

On February 6, 1989, a month prior to the trial, the State filed a motion to endorse upon the information four additional witnesses, Neu, Fred Ruff, Robert Gall, and Jeffrey Patterson. A hearing on the motion was held on February 24, 1989, 10 days prior to trial, after which the district court permitted the endorsement.

Boppre asserts that the allowance of the endorsement about 9 days before trial allowed

> insufficient time for the defense to adequately prepare for those witnesses' testimony at trial. This constitutes "surprise" to the defense, was unfairly prejudicial . . . and was an abuse of discretion . . . . Especially the testimony of witnesses Neu (incriminating statements allegedly made by Defendant) to him and Robert Gall (testimony that he had sold the .32 caliber handgun to Defendant) were extremely important matters, and lack of sufficient time to discover and prepare for their testimony prohibited Defendant from receiving a fair trial.

Brief for appellant at 34.

Pursuant to Neb. Rev. Stat. § 29-1602 (Reissue 1989), a trial court may, in the exercise of its discretion, permit the names of additional witnesses to be endorsed upon the information after the information has been filed when doing so does not prejudice the defendant in the preparation of his defense. *State v. Mecum*, 225 Neb. 293, 404 N.W.2d 431 (1987); *State v. Ellis*,

223 Neb. 779, 393 N.W.2d 719 (1986). The purpose of § 29-1602 is to notify the defendant as to witnesses who may testify against him and give him an opportunity to investigate them. *State v. Ellis, supra.* We have held that to obtain a reversal on the grounds of an additional endorsement of witnesses, the defendant must have requested a continuance at trial and must demonstrate prejudice. *Id.*

We begin by noting that Robert Gall was not called as a witness by the State but, instead, was called by Boppre during his case; thus, Boppre can certainly show no prejudice as to the claimed late endorsement of Robert Gall. Further, it was not Robert Gall, as Boppre asserts, but Carl Gall who testified that he sold a .32-caliber handgun to Boppre. Carl Gall was endorsed as a witness upon the original information.

For at least 1 month before trial, Boppre was aware, from the State's motion, that the witnesses the State wished to endorse might testify at trial. At the hearing on the endorsement motion, the State provided Boppre with information as to the expected content of the witnesses' testimony. Boppre had 10 days thereafter to review the evidence and interview the witnesses. Furthermore, Boppre could have requested a continuance if he needed more time to prepare for these witnesses. At the hearing on the motion, the State stated that witness Neu did not come forward with his testimony until February 3. In light of these factors, we hold that it was not error for the district court to allow the State to endorse the additional witnesses.

6. Discovery

In a pretrial discovery motion, Boppre requested that the State provide him with, among other items, (1) any police reports known to the State involving Ricky Zogg, Richard Valdez, and Sharon Condon during the past 5 years "in order to determine what other person or persons might have had a motive to commit the crimes"; (2) any documents that the State intended to use for purposes of refreshing witnesses' recollections; and (3) any and all prior oral and written statements of any witnesses the State planned to have testify. The district court granted Boppre's discovery motion as to all

items, except the three listed above on the basis that the above requests were outside the scope of Neb. Rev. Stat. § 29-1912 (Reissue 1989). The district court noted that Boppre would have the opportunity to review any documents used to refresh any witness' recollection at trial, as required by Neb. Rev. Stat. § 27-612 (Reissue 1989). In addition, Boppre requested and was allowed to depose Zogg, Niemann, Wasmer, and Condon's mother.

A trial court is vested with broad discretion in considering discovery requests of defense counsel, and error can be predicated only upon an abuse of discretion. *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988); *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984).

Boppre fails to show how he was prejudiced by the district court's refusal to grant discovery of the three items. He does not claim that he was denied the opportunity at trial to review any documents used to refresh any witness' recollection, and nothing in the record indicates that the State possessed, see Neb. Rev. Stat. § 29-1914 (Reissue 1989), or that there even existed, prior statements of which Boppre was not aware or that the past criminal records of either of the victims or of Zogg would have revealed that persons other than Boppre had a motive to commit the crimes. Furthermore, Boppre was allowed to depose the three witnesses whose testimony was most prejudicial to him, providing him an opportunity to inquire as to the existence of any prior statements made by those witnesses. See *State v. Meis, supra* (holding trial court did not abuse its discretion, in prosecution for first degree murder and use of a firearm in the commission of a felony, in overruling defendant's motion to require the State to furnish copies of all statements taken from every witness whom the State intended to call at trial and to produce copies of reports of some nine law enforcement officials, where leave was granted defendant to depose all of the State's witnesses, and where there was no showing that the requested evidence was either favorable or material to the case).

Boppre makes no claim that the district court's failure to grant discovery of the requested items infringed his sixth amendment right to confrontation. Nor does Boppre claim that

the prosecutor withheld evidence favorable to him and material to his guilt or innocence, and thus he raises no issue under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Even if he were making such claim, it would fail. Under *Brady* and *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), although the due process clause requires the prosecutor to disclose exculpatory evidence which is material to the accused's guilt or innocence, such evidence is material only if there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. See *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989). The record simply fails to demonstrate that the outcome of the trial would have been different had Boppre's discovery requests been granted.

7. State's Cause Challenges

Boppre asserts that the district court erred in excusing two venirepersons, Helen Hort and Bertha Neideffer, from jury service because of their opposition to the death penalty. Boppre concedes that the law is, as we stated in *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989), that it is entirely permissible to exclude from jury service venirepersons whose views on capital punishment are such as to prevent or substantially impair their ability to impartially apply the law to the evidence. See, also, *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Burchett*, 224 Neb. 444, 399 N.W.2d 258 (1986); Neb. Rev. Stat. § 29-2006(3) (Reissue 1989) (which provides that it is good cause to challenge one called for jury service in a capital case if his or her opinions are such as to prevent "finding the accused guilty"). However, Boppre asserts that neither Hort nor Neideffer indicated an inability to be impartial.

The district court excused Hort on the basis of the following colloquy:

> THE COURT: Okay. Two counts in this case have first degree murder, and for the potential punishment that can be imposed includes the death penalty on those two counts.

People's attitudes toward the death penalty are relevant in determining whether they should sit on a jury in a case or not. How many of you, we have 13 people left, how many of you oppose the death penalty? One. Does anyone oppose, again? Okay. That one was Mrs. Hort, right?

JUROR HORT: (Nods head affirmatively.)

THE COURT: Do you believe it's not right to do that?

JUROR HORT: I believe it's not right.

. . . .

MR. TABOR: . . . Now do you any of you believe that your convictions are so strong that you cannot follow the instructions as he reads them to you and gives you a written copy of the instructions?

JUROR HORT: I'm sure I can.

. . . .

MR. TABOR: Do you think it's true that every citizen that is called to jury duty should set aside their opinions as to whether any law is wrong or right and follow the law as the judge instructs you to do?

JUROR HORT: It's hard to state my opinion but, like the judge says, you have to be neutral, and I don't know. I do — I feel my convictions, what I just said, I do not believe in capital punishment.

MR. TABOR: Do you understand that as a juror in a case like this if there's a conviction that the [jury] has no say-so in the sentencing whatsoever?

. . . .

JUROR HORT: . . . I understand that.

MR. TABOR: Given that fact, do you think you could follow the judge's instructions . . . ?

JUROR HORT: I'm sure I could follow the judge's instructions.

MR. TABOR: You feel that you can impartially weigh the evidence presented by both sides in this case?

JUROR HORT: I think I could listen to it. That's a hard question to ask, I'm sure I could, I just know what the end result could be and if that's not my worry as far as — I don't know how to answer that question. I really don't.

. . . .

MR. TABOR: Do you think you could set aside your opinion . . . and decide [this case] in a fair and impartial manner both as to the defendant and as to the State?

JUROR HORT: I don't know. I can't answer that question. I can't answer that.

MR. TABOR: If the judge should instruct you to put aside personal opinions when deciding this case you would follow his instructions, wouldn't you?

JUROR HORT: Yes, I believe so.

. . . .

THE COURT: The bottom line is you believe in your heart you would be influenced; is that right?

. . . .

JUROR HORT: I believe so.

THE COURT: That it would affect you in reaching that ultimate decision of guilt or innocence?

JUROR HORT: Yes.

The district court excused Neideffer after she indicated that she was opposed to the death penalty and expressed the following reservations about serving as a juror where the death penalty was a potential sentence:

JUROR NEIDEFFER: . . . I would like to say that I don't feel that I would like to serve as a juror for someone who is up on these charges.

THE COURT: Because of the view you are afraid?

JUROR NEIDEFFER: Because of my view and because of my religious beliefs.

THE COURT: You are not the only one, by the way.

JUROR NEIDEFFER: I just want to make that statement because I don't believe in capital punishment.

. . . .

JUROR NEIDEFFER: I don't want to be on a jury where somebody might be condemned to death because I would feel guilty.

The retention or rejection of a venireperson as a juror is a matter of discretion with the trial court. *State v. Rice*, 231 Neb. 202, 435 N.W.2d 889 (1989); *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987). The district court did not abuse its discretion in determining that Hort's and Neideffer's views were

such that they would prevent or substantially impair the venirepersons' ability to be impartial. Although Hort stated she could follow the judge's instructions, she ultimately expressed the view that her views on capital punishment would influence her decision. Similarly, Neideffer stated she could not render a guilty verdict without feeling guilty. Both indicated that because of their opposition to the death penalty, they could not perform their duties as jurors.

8. Boppre's Cause Challenges

Boppre further asserts that the district court erred in overruling his challenges for cause relating to numerous prospective jurors. He does not discuss this error in his brief, however, and, thus, we cannot determine which jurors he claims should have been excused nor why he claims they should have been excused. We do not consider assigned errors which are not discussed. See *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989).

9. Ruling on Motions

Boppre contends that the district court's failure to rule on four motions he made during trial, namely, a motion for individual questioning of jurors, a motion to prevent unlawful use of peremptory challenges, a motion to submit NJI 14.80 prior to death-qualifying the venire, and a motion to preclude death-qualifying the venire, was a "blatant irregularity in the proceedings of the Court" and "prohibited [Boppre's] ability to receive a fair trial herein." Brief for appellant at 36.

It is impossible to understand Boppre's complaint in regard to the district court's alleged failure to rule on his motion for individual questioning of jurors in light of the fact that Boppre was permitted to and did ask questions of whichever individual venirepersons he chose.

Also impossible to understand is Boppre's complaint that the district court failed to rule on his motion to prevent the State from using its peremptory challenges "for the unlawful purpose of excluding from the jury persons who may entertain scruples against the death penalty . . . ." To the extent the complaint relates to "death-qualifying" the jury, the matter is resolved by the analysis which relates to his next complaint. If the claim is

that the State made other "unlawful" uses of its peremptory challenges, there simply is no showing that such in fact occurred.

This brings us to Boppre's next complaint, which claims that the district court failed to rule on his "motion to preclude death qualification" of the venire. Yet, according to one of the district court's journal entries, the district court overruled this motion and, as is evident from the record, proceeded to question the venire as to whether any person's views on capital punishment were such as to prevent or substantially impair his or her ability to impartially apply the law to the evidence. Moreover, we have repeatedly rejected the argument that such questioning produces a more conviction-prone jury than would otherwise be the case. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Burchett*, 224 Neb. 444, 399 N.W.2d 258 (1986).

Boppre's last complaint in this regard is as devoid of merit as the foregoing three. It claims that the district court failed to rule on his "motion to submit NJI 14.80 prior to allowing death qualification." However, the record shows that twice prior to questioning each group of venirepersons as to whether any persons had scruples against the death penalty, the district court instructed them in accordance with NJI 14.80, which provides: "You have nothing whatever to do with the punishment of the defendant in the event of his conviction. Therefore, in determining his guilt or innocence, you have no right to take into consideration what punishment he may or may not receive in the event of his conviction."

10. Nonsequestration

Boppre requested that the jury be sequestered from the time it was selected and sworn. The district court denied his request but, as required by Neb. Rev. Stat. § 29-2022 (Reissue 1989), ordered the jury sequestered during its deliberations and, throughout the trial, repeatedly admonished the jury not to discuss the case among themselves or with anyone else, not to listen to any conversation concerning the case, not to read or listen to news reports about the case, and not to form or express

an opinion until submission of the case to it. Boppre urges that the

> overwhelming evidence of the pretrial publicity in this matter, and the probability that the media would focus its attention on the trial of the matter, should have convinced the Trial Judge to sequester the jury from and after the time that they were in fact selected to serve on the jury. In any event, the Court should have sequestered the jury once the trial commenced. . . . The possibility of a juror or jurors being exposed to publicity during the trial was so great that the Court did abuse its discretion in failing to sequester the jury.

Brief for appellant at 14-15.

The determination of whether a jury should be sequestered during the trial of a criminal case is left to the discretion of the trial court, and absent an abuse of that discretion or evidence of jury tampering or misconduct, its decision will not be reversed on appeal. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). Boppre makes no showing that any juror was actually exposed to publicity, that any other juror misconduct occurred, nor that he was in any other way prejudiced by the district court's refusal to sequester the jury during trial. Therefore, we hold that it was not error for the district court to deny Boppre's motion to sequester the jury from the time of its selection.

11. Motion in Limine

Boppre contends that the district court erred in overruling that part of his motion in limine which sought to prevent the State from introducing any testimony from Zogg, Niemann, or Wasmer. Because Boppre limits his discussion to Zogg's testimony, so do we. Boppre argues that Zogg should not have been allowed to testify about the two occasions when he and Boppre planned to shoot and rob Valdez. Boppre did not object at trial to any of Zogg's testimony concerning these incidents and thus waived any claim of error. When a trial court overrules a motion in limine to exclude certain evidence, the movant must object when that evidence is offered during trial in order to predicate error upon the admission of that evidence. *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989).

12. Motion to Suppress

Boppre further complains about the district court's overruling of his motion to suppress, which sought to prevent admission into evidence of the handgun found near Gallup, New Mexico, and the shell casings seized from Boppre's father's residence, because the searches which generated this evidence were "made without warrant and authority; made without the consent of the Defendant; made without exigent circumstances to justify a search without a warrant; the searches were not incident to an arrest, without probable cause and were unreasonable." Brief for appellant at 33-34. Once again, Boppre did not object at trial to the admission into evidence of the handgun or the shell casings and thus waived any claim of error as to their admission. *State v. DiBaise*, 232 Neb. 217, 440 N.W.2d 223 (1989) (even though the district court has considered the admissibility of certain evidence in ruling on a pretrial motion to suppress, the movant must object to the introduction of the evidence at trial in order to predicate error upon it). See, also, *State v. Cox, supra*.

13. Admission and Exclusion of Evidence

(a) Photographs of Writing

Boppre asserts that the district court erred by allowing into evidence photographs which depicted the writing on the floor and on the door casement in Valdez' residence, arguing that the writings are hearsay and do not fit within any exceptions to the hearsay rule. While Boppre is correct that the writings are hearsay, it cannot be said the district court erred in determining that the writings constitute both excited utterances and dying declarations, and thus are admissible into evidence under exceptions to the hearsay rule.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," Neb. Rev. Stat. § 27-801(3) (Reissue 1989), and a statement is defined in part as "an oral or written assertion," § 27-801(1). Because the writings are written out-of-court statements offered to prove that Boppre committed the crimes, they are hearsay.

Neb. Rev. Stat. § 27-803(1) (Reissue 1989) provides a

hearsay exception, even where the declarant is available, for a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." We have determined that in order for a statement to qualify as an excited utterance, three conditions must exist: (1) There was a startling event; (2) the statement relates to the event; and (3) the statement was made by the declarant while under the stress of the exciting event. *State v. Lee*, 216 Neb. 63, 341 N.W.2d 600 (1983). Neb. Rev. Stat. § 27-804(2)(b) (Reissue 1989) provides a hearsay exception, where the declarant is unavailable as a witness, for a "statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death." We agree with the district court's determinations that there was sufficient evidence to establish that Valdez was the person who wrote Boppre's name on the floor and door casement, that the three conditions for an excited utterance existed, and that Valdez wrote Boppre's name while believing that his death was imminent.

(b) Condon's Statements to Mother

Boppre attacks the district court's sustainment of objections by the State to two questions Boppre put to Condon's mother during her testimony. Boppre asked Condon's mother whether Condon had ever talked about any problems she and Valdez had at their house. The district court sustained the State's objection to the question on the ground that the question called for hearsay. After Condon's mother testified that Condon and Valdez went to Texas several weeks before their deaths and stayed for 10 days to 2 weeks, Boppre asked her if she knew why they went to Texas. The district court again sustained the State's objection to the question on the ground of hearsay and told the witness she could not repeat "what someone else told [her]."

Boppre concedes that the two questions sought hearsay answers, but argues that the catchall exception contained in § 27-804(2)(e) applies to the out-of-court statements sought to be introduced. That statutory rule sets forth a hearsay exception, where the declarant is unavailable, for a

> statement not specifically covered by any of the foregoing

> exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Boppre admits that he did not provide notice to the State that he was planning to offer the statements, but argues that such notice was unnecessary in this case because "the defense had taken a deposition of the witness, on a prior occasion, in the presence of the State, at which time those matters were inquired into." Brief for appellant at 37-38.

In *State v. Leisy*, 207 Neb. 118, 295 N.W.2d 715 (1980), we considered and rejected a similar argument. There, the defendant argued that certain hearsay evidence should have been admitted under § 27-804(2)(e). We concluded at 129-30, 295 N.W.2d at 723:

> The ruling of the court in rejecting the offer was correct . . . . The proponent did not make known to the adverse party the proposal to use the hearsay testimony. The giving of such notice is one of the requirements necessary to make such evidence admissible. The prosecutor did know of Mrs. Schafer's statement and, because of her emotional condition, had agreed not to call her. He did not know, however, that the defense proposed to use her out-of-court statement. The defendant argues that, under these circumstances, the giving of the notice was unnecessary. Two opinions of the Second Circuit U.S. Court of Appeals have held that the pretrial notice requirement is to be rigidly enforced. [Citations omitted.]

> Some courts have held otherwise. [Citation omitted.] We hold that the notice requirement is mandatory.

Thus, it is not enough that the adverse party is aware of the unavailable declarant's statement; the proponent of the evidence must provide notice to the adverse party of his intentions to use the statement in order to take advantage of the hearsay exception in § 27-804(2)(e). Because Boppre did not provide the necessary notice, he cannot take advantage of the exception.

Moreover, because we have no indication of what Condon's statements to her mother were, we cannot determine whether the statements have the necessary "circumstantial guarantees of trustworthiness," nor can we determine whether the statements were offered as evidence of material fact. The district court did not err in refusing to allow Condon's mother to testify concerning statements Condon had made.

(c) Door Markings

Boppre asserts that the district court erred in allowing Police Detective Overman to testify that it appeared someone wrote the markings found on the door casement with a finger. He argues that Overman was "not ever qualified by the State as being an expert witness or otherwise qualified . . . to be able to answer that particular question." Brief for appellant at 38.

Because Overman was not qualified as an expert, the question is whether the subject was proper for a lay witness. Neb. Rev. Stat. § 27-701 (Reissue 1989) provides:

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

Accordingly, we have held that lay testimony should be excluded whenever the point is reached at which the trier of fact is being told that which it is itself entirely equipped to determine. *State v. William*, 231 Neb. 84, 435 N.W.2d 174 (1989).

Overman testified as to personal observations he made of the

writings at the scene of the crime, and his testimony was helpful to the jury, which only saw the writings as depicted in photographs. As such, the district court did not err in allowing Overman's testimony.

(d) Plans to Rob

In regard to this assignment of error, Boppre first asserts that Wasmer's testimony that Boppre "was talking about going into 7-11, Mini Mart stores, robbing them and killing whoever was behind the cash register or in the store" was received in violation of the hearsay rule. Boppre's statements to Wasmer are clearly not hearsay under § 27-801(4)(b), which provides that a statement is not such if it is offered against a party and is the party's own statement.

Boppre apparently also makes the argument that the testimony is improper evidence under Neb. Rev. Stat. § 27-404(2) (Reissue 1989), which 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.

The subject rule is an inclusionary one which permits the use of evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged. *State v. Ruyle, ante* p. 760, 452 N.W.2d 734 (1990); *State v. Methe,* 228 Neb. 468, 422 N.W.2d 803 (1988). There are four requirements for the admissibility of evidence under § 27-404(2): (1) The evidence must have a proper purpose; (2) the evidence must be relevant; (3) the probative value of the evidence must outweigh its potential for unfair prejudice; and (4) the district court must instruct the jury to consider the evidence only for the purpose for which it was admitted. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989).

Assuming that Boppre's statements of an intention to commit a crime constituted evidence of other "crimes, wrongs, or acts" for purposes of § 27-404(2), Boppre's statements to

Wasmer were nevertheless admissible for the purpose of showing why Wasmer disassembled the gun and for corroborating Wasmer's testimony by connecting the facts that Wasmer disassembled the gun and that the gun was found with several parts missing. Moreover, the district court instructed the jury that the evidence was being received and could only be considered for properly limited purposes. The district court did not err in admitting Boppre's statements into evidence.

(e) Past Threats by Wasmer and Niemann

Boppre further complains about the district court's sustainment of the State's objections to Boppre's questions to Wasmer as to whether Wasmer had ever threatened to kill anybody or ever told another person he was going to kill anybody. The district court sustained the objections on the basis that the questions sought irrelevant information. Boppre argues that the

> answers to those questions should have been allowed by the Court, because they might have been reflective on the character of the witness, and his past patterns or incidents of violent behavior or threats. He had originally been a suspect in the case, and a jury should have been able to consider evidence of this nature (bias and prejudice).

Brief for appellant at 38-39.

The district court properly determined that the evidence was not relevant. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); Neb. Rev. Stat. § 27-401 (Reissue 1989). Whether Wasmer threatened persons other than Valdez or Condon is not probative of any fact that is of consequence to the determination of this action.

Similarly, Boppre complains about the district court's sustainment of the State's relevance objection to Boppre's question to Niemann as to whether he remembered "making any statement . . . concerning some physical acts [he was] threatening to do against some third parties" other than Valdez. Boppre argues that Niemann should have been allowed to

answer the question because the "partiality of a witness is subject to exploration at trial and is always relevant as discrediting the witness and affecting the weight of his testimony." Brief for appellant at 39. Boppre does not explain how evidence of past threats made by Niemann is probative of Niemann's partiality. Just as discussed above, this evidence is not relevant.

(f) Zogg Testimony

Boppre's next claim is that the district court erred in permitting Zogg to testify, over Boppre's hearsay and improper opinion objections, that because Valdez did not know Boppre, Valdez at first would not let Boppre enter Valdez' house, but that after a certain period of time, Valdez would allow Boppre to enter the house and buy the drugs himself. Boppre urges that Zogg was not qualified to give an opinion "of Richard Valdez's actions" and that the answer contains hearsay. Brief for appellant at 39.

Zogg's testimony is based upon his personal observations rather than upon anything Valdez said and thus is not hearsay. Furthermore, Zogg's lay conclusion as to the relationship between Valdez and Boppre is rationally based upon his perception and was helpful to the jury in understanding how Boppre came to know and buy drugs from Valdez and, thus, is admissible under § 27-701 as set forth in a preceding discussion.

Moreover, Boppre has not shown how the introduction of this evidence was prejudicial to him in any way. Boppre himself testified that he bought drugs from Valdez at Valdez' house on many occasions. A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant. *State v. Rowland, ante* p. 846, 452 N.W.2d 758 (1990); *State v. Chapman, ante* p. 369, 451 N.W.2d 263 (1990). Improper admission of evidence constitutes harmless error where the evidence is cumulative and there is other competent evidence to support the conviction. *Rowland, supra*; *Chapman, supra.*

(g) Neu Testimony

Boppre further claims that Neu should not have been allowed to testify that he "built up a situation of trust in regard to himself and Defendant" when they were in jail together

because it amounted to a "conclusion as to what was in the mind of the Defendant, something which . . . Neu could not have possibly known." Brief for appellant at 39. The problem with Boppre's argument is that Neu was not testifying that Boppre believed there existed a situation of trust between them but that Neu himself believed there existed a situation of trust between them. Neu did not lack personal knowledge to express his own view of the relationship he had with Boppre.

(h) Boppre's Statements to Neu

Error is also assigned to the introduction of the statements Boppre made to Neu while the two were incarcerated, on the basis that the State "has not laid sufficient foundation to enable the witness to answer those types of questions." Brief for appellant at 39. The State established where and when the conversation between Neu and Boppre took place, that no other person was present during the conversation, and that no other person could have overheard the conversation. Boppre did not enlighten the district court, nor does he enlighten us, as to what further foundation was necessary.

(i) Robert Kinsey's Testimony

Boppre complains that the district court erred in allowing Kinsey to testify that there was blood on the door casement, for the reason that "Kinsey was never qualified as an expert witness to the extent he would be able to give his opinion as to something of that nature." Brief for appellant at 40. As noted in part II above, although Kinsey at first testified the substance on the casement was blood, Boppre objected, and the district court asked Kinsey to rephrase his answer, which Kinsey did, testifying that the substance "appear[ed] to be blood." Boppre did not object to Kinsey's second answer. However, even if Boppre had preserved his objection to the second answer, Kinsey's testimony was nevertheless properly admitted. As set forth previously, under § 27-701 if the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue. Kinsey testified as to personal observations he made of

the substance at the scene of the crime, and his testimony was helpful to the jury, which only saw the substance as depicted in photographs. As such, the district court did not err in allowing Kinsey's testimony.

(j) Gun Sale

In two related assignments, Boppre complains about the district court's refusal to allow his father and an acquaintance to testify as to whether Boppre told them he sold his .32-caliber handgun to Valdez. Boppre made an offer of proof at trial that the acquaintance would testify that "within a month . . . of the murders . . . Boppre informed him that he had sold that .32 caliber handgun to Richard Valdez. And that he would also testify that he was aware that [Boppre] had been attempting to sell that gun prior to . . . that time."

Boppre concedes that any statements he may have made to his father or his acquaintance are hearsay, but argues that the statements are admissible under § 27-803(2). That rule sets forth a hearsay exception, even where a witness is available, for

> [a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

As specifically provided under § 27-803(2), hearsay statements of memory offered to prove the fact remembered are not admissible under the state-of-mind exception. Thus, Boppre's statements that he sold his gun to Valdez are not admissible under § 27-803(2) to prove that he did indeed sell his gun to Valdez.

According to the offer of proof, the acquaintance would have testified that "he was aware that [Boppre] had been attempting to sell that gun" prior to the time he allegedly sold it to Valdez. The offer of proof is not sufficient to show that the evidence should have been admitted. The record provides no indication of whether the acquaintance's awareness that Boppre was trying to sell his gun was based upon his own personal

knowledge, in which case the evidence would be admissible, or whether the acquaintance's awareness was based upon statements that another person made to him, in which case the evidence would be hearsay. If the acquaintance's awareness that Boppre had been trying to sell his gun was based on statements Boppre had made to him prior to allegedly selling the gun, statements that he was planning to sell the gun, then those statements would be admissible under § 27-803(2). However, if the acquaintance's awareness that Boppre had been trying to sell his gun was based on statements Boppre had made to him after he sold the gun, statements that he had been trying to sell the gun, then the statements would not be admissible under § 27-803(2). Thus, the district court did not err in refusing to admit the testimony on the basis of the offer of proof.

Boppre made no offer of proof with respect to his father, and, thus, there is nothing to discuss with respect to that matter. See, *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984); Neb. Rev. Stat. § 27-103 (Reissue 1989).

(k) Opinion Testimony re Writing

Boppre tried to introduce into evidence the opinion of Douglas Caywood, a "forensic science consultant," concerning whether one could write the letters found on the floor and door casement in the dark. As part of this witness' job, he studied and made identifications of the handwriting of vision-impaired people. The district court sustained the State's objections on the basis that the witness was not qualified, stating that the studies made by him were "dissimilar" to the question at hand.

Boppre claims the consultant's opinion should have been received, apparently on the basis that he qualified the consultant as an expert to give such opinion. Neb. Rev. Stat. § 27-702 (Reissue 1989) provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Thus, in order for expert testimony to be admissible, the witness must be qualified as an expert relative to the matter about which he testifies, and his testimony must be

helpful to the jury.

Boppre failed to show that the consultant was qualified to form an opinion whether the letters could have been written in the dark. The consultant's experience and training in studying and making identifications of the handwriting of vision-impaired people is not sufficient to qualify the consultant to testify as to whether a sighted person could write in the dark.

As with the admission of all evidence, the admission of evidence from expert witnesses is a matter left to the discretion of the trial court, and its ruling will be upheld absent an abuse of discretion. *Dotzler v. Tuttle, ante* p. 176, 449 N.W.2d 774 (1990). It was not an abuse of discretion for the district court to determine that the consultant was not qualified to give the opinion Boppre sought.

14. Submission to Jury

Boppre complains that the district court erred in overruling his motion to dismiss the charges at the close of the State's case and his motion for directed verdict at the close of all the evidence, for the reason that the record "shows a complete failure of evidence to establish the essential elements of the crime [sic] charged, and the evidence was so doubtful in character and lacking in probative value that a conviction based thereon could not be sustained." Brief for appellant at 42.

On a defendant's motion to dismiss for insufficient evidence of the crime charged against the defendant, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). In a criminal case a district court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained. *Id.*

Viewing the evidence in the light most favorable to the State, there was certainly sufficient evidence for the jury to conclude that Boppre killed Valdez and Condon purposely and with

deliberate and premeditated malice in violation of § 28-303, that with the intent to steal he forcibly and by violence or by putting in fear took from Valdez and Condon money or personal property in violation of § 28-324(1), and that he used a deadly weapon to commit felonies in violation of § 28-1205(1).

In a related argument, although not assigned as error, Boppre argues that the evidence was insufficient to support his convictions. He urges that because Niemann's testimony was the "only real direct evidence" against him, "it is imperative that this Court review [Niemann's] testimony . . . to weigh his credibility, even though this Court does not normally do that." Brief for appellant at 35. Boppre urges that Niemann lacks credibility because of his past prior felony convictions, the fact that the State offered him a plea agreement for his participation in the events, and that Niemann's testimony was "wholly impeached" and "totally contradicted" at trial. Brief for appellant at 35-36.

Despite Boppre's supplication that we reweigh Niemann's testimony, it is simply not within our province to do so. We have repeatedly stated that in determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of the Supreme Court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. *State v. Wyatt, ante* p. 349, 451 N.W.2d 84 (1990); *State v. Frazier, ante* p. 107, 449 N.W.2d 230 (1989).

15. New Trial Motion

Boppre asserts the district court erred in failing to grant him a new trial because of, in addition to matters resolved by the preceding analyses, misconduct by the prosecutor and by certain spectators. The granting or refusal of a motion for new trial is left to the discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal. *State v. Whiteley, ante* p. 693, 452 N.W.2d 290 (1990); *State v. Andersen,* 232 Neb. 187, 440

N.W.2d 203 (1989). Moreover, in order for a new trial to be granted, it must be shown that a substantial right of the defendant's was adversely affected and that the defendant was prejudiced thereby. *State v. Whiteley, supra.*

(a) Prosecutorial Conduct

Boppre suggests that the prosecutor made an improper remark in the following excerpt from the State's closing argument:

> And guess what they said? Mr. Tabor gets up and he says, ladies and gentlemen, in the middle of the night on the way back from Phoenix, [Boppre] wakes up and the guys have pulled off the road, [Wasmer] and [Niemann] have pulled off the road on the interstate in the middle of the night. Okay. So he wants you to believe that they're coming home, they're on the other side of the interstate highway someplace, they get out of the car in the darkness in the middle of the night, walk across the interstate highway, jump across the fence, go down some canyon or something, throw the gun and pistol grips away, come back across the road and then leave. This is what we're supposed to believe now about the gun. . . .
>
> They left Flagstaff at 3:00 o'clock in the afternoon, it's 166 miles according to Alex Moreno then on from Flagstaff to where the gun was found if you come back this way. Is that the middle of the night, how do normal people travel on interstates, 166 miles in the middle of the night from 3:00 o'clock in the afternoon? Doesn't make too much sense. . . .
>
> MR. TABOR: Your Honor, I was going to impose an objection . . . . I did not say in the middle of the night, I said nighttime. There is a big difference.
>
> THE COURT: Okay. I'll let the jury remember what you said.

Boppre apparently claims that during his closing argument, he stated he awoke "at night," not "in the middle of the night," and, thus, the prosecutor improperly misquoted Boppre's closing argument. Brief for appellant at 43. The relevant portion of Boppre's closing argument is not in the record, and

we therefore are unable to determine whether the prosecutor did indeed misquote Boppre's argument. Moreover, Boppre testified at trial that when he awoke, it was "the middle of the night." Therefore, the prosecutor's remarks were not a misstatement of Boppre's actual testimony at trial.

Remarks made by the prosecutor during final argument which do not mislead or unduly influence the jury do not rise to the level sufficient to require granting a mistrial. *State v. Greeno*, 230 Neb. 568, 432 N.W.2d 547 (1988). In light of the fact that Boppre testified at trial that he awakened in the middle of the night, the prosecutor's statement could not have misled or unduly influenced the jury.

Although not raised in Boppre's new trial motion, Boppre also asserts that the prosecutor acted improperly by objecting during Boppre's closing argument to statements concerning Caywood's testimony. The district court did not permit Caywood to give his opinion at trial concerning the ability of a sighted person to write the descriptions found by Valdez' body in the dark. Thus, the prosecutor properly objected to Boppre's attempt to discuss Caywood's testimony on this matter.

(b) Spectator Conduct

Boppre filed his affidavit and those of several members of his family, which stated that during their testimony certain members of the Valdez family, especially Valdez' brother, were mouthing obscene words or making various hand motions which distracted and upset them during their testimony. Boppre argues that he was prejudiced by the alleged misconduct of the various spectators

> [b]ecause of the nature of this case, and because of the extreme conflicting evidence which the record discloses, it is quite obviously extremely important that the defense witnesses be presented in a fair and impartial light to enable the jury to properly weigh their testimony. Since the jurors are the sole judge of the witnesses' credibility, based on watching the witnesses while testifying and observing their demeanor, etc., spectator influence on how a witness testifies or acts on the stand while testifying would adveresly [sic] affect the jurors' opinions as to whether or

not the witness was telling the truth . . . .

Brief for appellant at 48.

In *Lindsay v. State*, 46 Neb. 177, 64 N.W. 716 (1895), as the defendant took the witness stand, the mother of the victim rose from her seat, stepped forward, pointed her finger at the defendant, and accused him in an excited manner, " 'You have killed my boy! You have killed my boy!' " *Id.* at 182, 64 N.W. at 717. The judge then ordered the mother removed from the courtroom. We rejected the defendant's claim that this denied him a fair trial, stating at 182-83, 64 N.W. at 717:

> The language . . . in *Debney v. State*, 46 Neb., 856, so well illustrates the rule which should govern the branch of the case under consideration that without comment it is reproduced as follows: "It appears that at the close of the argument of the county attorney to the jury the spectators applauded by stamping of feet and clapping of hands, which applause was immediately suppressed by the presiding judge, who rebuked the persons for making the same. It was also shown that the applause was without the knowledge or connivance of those connected with the prosecution. * * The incident complained of occurred in the presence and hearing of the trial judge and he is better enabled than we to determine the effect, if any, the applause had upon the jury. . . . [T]he trial court must have been of the opinion that the demonstration was not of such a nature as to influence the verdict, and no prejudice being shown its determination will not be interfered with.

In *Wever v. State*, 121 Neb. 816, 238 N.W. 736 (1931), the defendant contended he was deprived of a fair trial because of hissing and applauding on the part of spectators in the courtroom during trial. We rejected this argument, stating:

> The court promptly rebuked such conduct and stated that if it occurred again the courtroom would be cleared. Ordinarily, this would be sufficient, but, aside from that, no objection was raised by defendant; nor is there anything in the record to disclose the nature or extent of the applause, or who was guilty of the misconduct. If counsel for defendant at the time had reason to apprehend or believe that such conduct would prejudice the rights of

> defendant, they should have then requested the court to declare a mistrial. Instead, they elected to proceed with the trial without objection, and took the chance of a favorable verdict, and now seek to overturn the verdict for causes which they knew and did not object to before the case was submitted to the jury.
>
> . . . Furthermore, it is a rule that demonstrations on the part of spectators do not constitute ground for a new trial where they are checked promptly and where it appears probable that the jury were not prejudiced thereby. [Citations omitted.] The evidence discloses nothing from which it could be inferred that defendant was in any wise prejudiced by whatever applause there may have been.

Id. at 819-20, 238 N.W. at 737-38. See, also, *Sundahl v. State*, 154 Neb. 550, 48 N.W.2d 689 (1951).

The responsibility for conducting a trial in an orderly and proper manner for the purpose of ensuring a fair and impartial trial rests with the trial court. *Wamsley v. State*, 171 Neb. 197, 106 N.W.2d 22 (1960). Boppre did not bring the spectators' actions to the district court's attention, request the district court to admonish the jury to disregard the spectators' actions, nor request a mistrial on the basis of the spectators' actions. There is no indication in the record that the district court judge was even aware of the spectators' actions. The district court impliedly determined, in ruling on Boppre's motion for new trial, that the witnesses were not so affected by the spectators' actions as to affect their credibility. There is nothing to show the district court abused its discretion in this determination.

16. Sentences

Finally, Boppre asserts that the district court imposed excessive sentences for the two use of a deadly weapon to commit a felony and the two robbery convictions.

As frequently stated, a sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion by the sentencing judge. *State v. Carter, ante* p. 378, 451 N.W.2d 271 (1990); *State v. Von Busch, ante* p. 119, 449 N.W.2d 237 (1989). In imposing a sentence, a sentencing judge should consider, among other things, the

defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988).

Neb. Rev. Stat. § 28-105 (Reissue 1985) provides that the penalty for use of a deadly weapon to commit a felony, a Class III felony, is a maximum of 20 years' imprisonment, a $25,000 fine, or both, and a minimum of 1 year's imprisonment. Section 28-1205(3) provides that use of a deadly weapon to commit a felony "shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed."

Section 28-105 provides that the penalty for robbery, a Class II felony, is a maximum of 50 years' imprisonment and a minimum of 1 year's imprisonment.

Boppre makes the argument that his coperpetrator in the robbery, Niemann, was sentenced to a lesser term than he for the same crime. However, the mere fact that a defendant's sentence differs from those which have been imposed on coperpetrators in the same court does not, in and of itself, make the defendant's sentence an abuse of discretion; each defendant's life, character, and previous conduct may be considered in determining the propriety of the sentence. *State v. Nearhood*, 233 Neb. 767, 448 N.W.2d 399 (1989).

Considering the motivation for the offenses for which Boppre was convicted and the amount of violence involved, it cannot be said the district court abused its discretion in imposing its sentences.

IV. DECISION

The record failing to support any of Boppre's assignments of error, the judgment of the district court is sustained.

AFFIRMED.

IN RE INTEREST OF T.W., D.W., B.W., A.W., D.W., AND H.W., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. D.W. AND S.W., APPELLANTS.

453 N.W.2d 436

Filed March 30, 1990. Nos. 89-711, 89-712.

1. **Juvenile Courts: Time: Notice: Fees: Appeal and Error.** To perfect an appeal from the juvenile court to the Supreme Court, the appealing party must, within 30 days after the rendition of such judgment, (1) file a notice of appeal with the juvenile court and (2) deposit with the clerk of the juvenile court the docket fee required by law in appeals to the Supreme Court.
2. **Affidavits: Fees: Appeal and Error.** As an alternative to depositing a docket fee, a person who is unable to pay the required fee may file an affidavit of poverty and proceed with an appeal in forma pauperis.
3. **Affidavits: Good Cause: Appeal and Error.** Generally, in the absence of good cause evident in the record, it is necessary for a party appealing to personally sign the affidavit in support of her or his motion to proceed in forma pauperis. Mere absence from the jurisdiction of the court from which the appeal is being taken, without more, does not show good cause for a party's failure to sign a poverty affidavit.

Appeals from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Appeals dismissed.

Douglas Veith and Mary Ellis-Harden, of Veith, P.C., Law Offices, for appellants.

Patrick Kelly, Sarpy County Attorney, and Lawrence D. Gendler for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

In these two cases, the natural parents appeal orders of the separate juvenile court of Sarpy County terminating their parental rights to six of their children.

Because the parents have failed to perfect their appeals in accordance with the Nebraska statutes, this court lacks jurisdiction to rule on the merits of the appeals.

Appeals from the juvenile courts of Nebraska are reviewed in the same manner as appeals from the district court. Neb. Rev. Stat. § 43-2,126 (Reissue 1988). Thus, to perfect an appeal from the juvenile court to the Supreme Court, the appealing

party must, within 30 days after the rendition of such judgment, (1) file a notice of appeal with the juvenile court and (2) deposit with the clerk of the juvenile court the docket fee required by law in appeals to the Supreme Court. Neb. Rev. Stat. § 25-1912 (Reissue 1989). Fulfillment of these requirements vests appellate jurisdiction in the Supreme Court. See *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989).

As an alternative to depositing a docket fee, a person who is unable to pay the required fee may file an affidavit of poverty and proceed with an appeal in forma pauperis. Neb. Rev. Stat. § 25-2301 (Reissue 1989) authorizes the commencement of an appeal without prepayment of fees and costs "by a person who makes an affidavit that he or she is unable to pay such costs or give security." See, also, *In re Interest of N.L.B., ante* p. 280, 450 N.W.2d 676 (1990).

The transcript reveals that the poverty affidavits filed in both appeals were not signed by the parents, but by their attorney. Section 25-2301 requires that the impoverished appellant, not her or his attorney, execute the affidavit which substitutes for the payment of fees and costs and the posting of security. Approximately a century and a third ago, Georgia established the principle that statutes such as § 25-2301 are to be strictly construed, and, thus, an affidavit of poverty executed by a party's attorney does not suffice. *Elder vs. Whitehead et al.*, 25 Ga. 262 (1857). Accord, *Jackson v. Fincher*, 128 Ga. App. 148, 195 S.E.2d 762 (1973); *Cohen v. Hautcharow*, 84 N.Y.S. 573 (1903). As stated in *Vance v. Vance*, 197 Miss. 332, 335, 20 So. 2d 825, 826 (1945), "[I]f a statute specifically prescribes who shall make a certain affidavit, it can be made by none other than the person specified, although there is nothing in the language of the statute to show that its designation was intended to be exclusive." See, also, *Standard of Beaverdale, Inc. v. Hemphill*, 746 S.W.2d 662 (Mo. App. 1988) (where a statute specifies who can make an affidavit, only an affidavit by that specified person will suffice).

The practice of an attorney's filing an affidavit on behalf of his client asserting the status of that client is not approved, inasmuch as not only does the affidavit become hearsay, but it

places that attorney in a position of a witness thus compromising his role as an advocate. See *Porter v. Porter*, 274 N.W.2d 235 (N.D. 1979) (a dissolution of marriage case where the wife's attorney filed an affidavit stating that his client was unable to pay the entire transcript cost or attorney fees necessary for an appeal).

We hold that generally, in the absence of good cause evident in the record, it is necessary for a party appealing to personally sign the affidavit in support of her or his motion to proceed in forma pauperis.

After careful examination of the record, we conclude that good cause has not been shown why the parents did not personally sign the affidavit. Mere absence from the jurisdiction of the court from which the appeal is being taken, without more, does not show good cause for a party's failure to sign a poverty affidavit. The parents' appeals to this court were not properly perfected, and we are without jurisdiction to hear the appeals on their merits. Accordingly, the appeals to this court are dismissed.

APPEALS DISMISSED.

SHARI L. BROOKE, APPELLANT, V. STEPHEN L. BROOKE, APPELLEE.
453 N.W.2d 438

Filed March 30, 1990. No. 89-767.

1. **Divorce: Child Custody: Appeal and Error.** The determination as to the custody of a minor child in a dissolution of marriage proceeding is initially entrusted to the discretion of the trial court, which determination will be reviewed on appeal de novo on the record; only if the trial court has abused its discretion will its determination be disturbed.
2. **Divorce: Child Custody.** In a dissolution of marriage proceeding, the issue as to which parent shall have custody of the parties' child is determined by parental fitness and the child's best interests; thus, child custody is denied to an unfit parent or a fit parent when the best interests of the child so require.
3. **Trial: Appeal and Error.** An abuse of discretion takes place when a trial court's ruling is untenable such that it deprives a party of a substantial right and just result.

4. **Divorce: Child Custody: Public Policy.** Although in a dissolution of marriage proceeding it is generally sound public policy to keep the children of the same marriage together in the custody of one parent, there are cases where the best interests of such children dictate that their custody be divided.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

Kent F. Jacobs, of Blevens & Jacobs, for appellant.

Joseph H. Murray, of Germer, Murray & Johnson, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is a dissolution of marriage action in which the trial court awarded custody of the parties' infant daughter to the respondent-appellee father, Stephen L. Brooke. In challenging that ruling the petitioner-appellant mother, Shari L. Brooke, assigns four errors, which combine to claim that the trial court erred in (1) not making specific findings of fact and (2) concluding that the child's best interests would be served by its ruling. We affirm.

The first assignment of error is resolved easily, for, so far as the record reflects, the mother did not ask the trial court to make specific findings of fact. See Neb. Rev. Stat. § 25-1127 (Reissue 1989). Moreover, as we have recently noted, the failure to make specific findings of fact in an action such as this, although such findings are unquestionably desirable and helpful in focusing our review, cannot be prejudicial inasmuch as we must in any event review the trial court's judgment de novo on the record to determine whether that court abused its discretion. *Beran v. Beran, ante* p. 296, 450 N.W.2d 688 (1990); *Parker v. Parker, ante* p. 167, 449 N.W.2d 553 (1989). See *Ritter v. Ritter, ante* p. 203, 450 N.W.2d 204 (1990). Thus, there is no merit to the first summarized assignment of error.

We begin our analysis of the issues presented by the second and last summarized assignment of error by recalling once again that the determination as to the custody of a minor child in a dissolution of marriage proceeding is initially entrusted to

the discretion of the trial court, which determination will be reviewed on appeal in accordance with the aforestated rule. Only if the trial court has abused its discretion will its determination be disturbed. *Beran v. Beran, supra*; *Hardy v. Hardy, ante* p. 702, 452 N.W.2d 296 (1990); *Ritter v. Ritter, supra*; *Sutter v. Sutter, ante* p. 118, 449 N.W.2d 236 (1989).

In a dissolution of marriage proceeding, the issue as to which parent shall have custody of the parties' child is determined by parental fitness and the child's best interests; thus, child custody is denied to an unfit parent or a fit parent when the best interests of the child so require. *Beran v. Beran, supra*; *Ritter v. Ritter, supra*.

No useful purpose would be served by detailing the evidence in regard to the parties' fitness as parents. Suffice it to say that the record convinces us that each is a fit parent. Indeed, the mother admits without reservation that the father is a good parent, and the father, although not without qualification, also recognizes the mother's general fitness.

As to the child's best interests, the record shows that the parties lived together as husband and wife for a period of approximately 1 year 3 months. At the time of trial, the father was 33 years of age, the mother was 25, and Heather Lynn, the child in question, was not quite 14 months old. A then almost 3-year-old child, a daughter born to the mother as the result of an earlier relationship, also lived with the parties.

The evidence shows that each parent has adequate housing to take care of Heather, each obviously desires to have custody of the child, and each has the requisite housekeeping and other required skills. Heather is described as a well-adjusted, well-developed, happy child.

Because the mother works, she, while having temporary custody pursuant to the trial court's consent order, relied on babysitters for Heather's daily care. Much of that care was provided by Heather's maternal grandmother, who indicated a willingness to continue doing so, as she enjoyed caring for Heather. However, during the same period of time, the mother's other daughter was being taken care of by a commercial babysitter. The mother explained that the commercial sitter would not accept Heather because she was too young and was

not yet toilet trained. The father is employed as a carpenter and must also rely on babysitters to provide Heather's daily care. On occasion, once every 3 months at the most, he might be called upon to work as far as 90 miles from home. He is described as a responsible person and, in planning for custody of Heather, had explored babysitting arrangements.

While the record describes a good and close relationship between Heather and her half sister, it also establishes that Heather has closely bonded to her father and that she delights in being with him. The mother's brother summarized the relationship between Heather and her father by testifying that her father "would be a very solid father for her. There's a good relationship. Heather plays with him and . . . she runs to him and smiles and you — you can just tell there's a good bond between the two of them." The record is replete with such characterizations of the relationship between Heather and her father.

The record also demonstrates that the father is willing to devote more of his leisure time to Heather than the mother is willing to devote of her spare time. The mother seems to have more of a need than does the father to be engaged in activities outside of the home and to be around people other than her immediate family.

The controlling question is whether the foregoing evidence establishes that awarding the father custody of Heather constitutes an abuse of discretion by the trial court. In apparent recognition that each of the sexes may possess equal child-rearing skills and means, Neb. Rev. Stat. § 42-364 (Reissue 1988) provides that in determining custody, no preference shall be given based on the sex of the parent and "no presumption shall exist that either parent is more fit to have custody . . . than the other." As noted in *Vance v. Vance*, 231 Neb. 334, 436 N.W.2d 177 (1989), § 42-364 did away with the "tender years" doctrine which assumed that the best interests of a child of tender years would be served by placing its custody in and with its natural mother.

An abuse of discretion takes place when the trial court's ruling is untenable such that it deprives a party of a substantial right and just result. *State v. Schall, ante* p. 101, 449 N.W.2d

225 (1989); *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988); *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987). There is nothing in this case which supports a conclusion that the trial court abused its discretion in ruling as it did.

To be sure, as the mother points out, the trial court's ruling necessarily means that Heather's relationship with her half sister will suffer. However, we have recognized that although it is generally sound public policy to keep the children of the same marriage together in the custody of one parent, there are cases where the best interests of even such children dictate that their custody be divided. *Ritter v. Ritter, ante* p. 203, 450 N.W.2d 204 (1990); *Boroff v. Boroff*, 197 Neb. 641, 250 N.W.2d 613 (1977). Children of parents who dissolve their marriage will nearly always lead different lives and form different relationships than would have been the case had the marriage survived. The verity which must be faced and accepted is that no judicial system can make the consequences of a marriage which has been torn asunder the same as those of a marriage which remains whole.

The second summarized assignment of error is as devoid of merit as was the first. Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

GRANT, J., concurring.

I agree fully with the court's judgment of affirmance in this case. I question only the elevation of the concept of "parental fitness" to coequal status with the concept of a child's "best interests."

In this case, the court states: "In a dissolution of marriage proceeding, the issues as to which parent shall have custody of the parties' child is determined by parental fitness and the child's best interests . . . ."

Until recently we had consistently stated that the controlling issue in determining custody of a child is the best interests of the child. "In placing a child's custody with a parent in a dissolution proceeding, a court's primary and paramount consideration is the best interests of the child. Some factors or circumstances which may be considered . . . include considerations of the fitness of the parents . . . ." *Gerber v. Gerber*, 225 Neb. 611, 618, 407 N.W.2d 497, 502 (1987). "The polar star by which all

child custody determinations must be guided is the best interests and welfare of the child." *Moeller v. Moeller*, 215 Neb. 360, 362, 338 N.W.2d 749, 751 (1983). " 'In such a controversy for the custody of the child the order of the court should be made with a single reference to the best interests of such child.' " *Gorsuch v. Gorsuch*, 143 Neb. 572, 577, 10 N.W.2d 466, 468 (1943), quoting *Sturtevant v. State*, 15 Neb. 459, 19 N.W. 617 (1884).

I see no need to establish two primary considerations, to be guided by two polar stars, or to create two reference points on this issue. Fitness of the parents is only one factor, of many, in the basic determination of a child's best interests. Section 42-364(1) specifically so provides. That statute states: "In determining with which of the parents the children or any of them shall remain, the court shall consider the best interests of the children, which shall include, but not be limited to: (a) . . . (b) . . . and (c) . . . ." Fitness of the parents is not listed as a statutory factor. Obviously it should be considered, but I see no need to elevate the "fitness" concept to the primary requirement of "best interests" of the child affected. I believe it leads to unnecessary labeling of parents, which should be avoided, and to an inappropriate analysis in some cases.

HASTINGS, C.J., and BOSLAUGH, J., join in this concurrence.

STATE OF NEBRASKA, APPELLANT, V. WILLIAM G. VERMUELE, APPELLEE.

453 N.W.2d 441

Filed March 30, 1990. No. 89-1350.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed.

Charles W. Campbell, York County Attorney, for appellant.

Kimberly D. Mueller, of Jeffrey, Hahn & Hemmerling, P.C., for appellee.

FAHRNBRUCH, J.

The York County Attorney appeals a district court ruling suppressing evidence relating to cocaine found in a wallet belonging to the defendant, William G. Vermuele. This appeal was brought for review before a single judge of the Supreme Court pursuant to Neb. Rev. Stat. §§ 29-824 et seq. (Reissue 1989). The suppression order of the district court for York County is reversed.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Juhl, ante* p. 33, 449 N.W.2d 202 (1989). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *Id.*

It is a well-established rule that on questions of law the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court. *State v. Wren, ante* p. 291, 450 N.W.2d 684 (1990). The rule applies in appeals brought under §§ 29-824 et seq.

Pursuant to the 4th and 14th amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, a citizen has a right to be free from an unreasonable search and seizure. If police have acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search and seizure. *State v. Juhl, supra*; *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

In Vermuele's case, there was no search warrant. The State maintains that the search and seizure of the defendant's wallet containing cocaine residue was permissible under the "automobile exception" to the warrant requirement or as evidence obtained in a search pursuant to a lawful arrest.

Police officers who have lawfully stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it may conduct a warrantless search of the vehicle that is as thorough as a magistrate could

authorize by warrant. *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). This "automobile exception" to the fourth amendment's warrant requirement, established in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), applies to searches of vehicles that are supported by probable cause to believe that the vehicle contains contraband. In this class of cases, a search is not unreasonable if it is based on objective facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained. See *Carroll, supra*.

A review of the evidence in Vermuele's case reveals that there was probable cause not only for the officers to stop the vehicle in which the defendant was riding, but also to search it. In reaching those conclusions, it necessarily follows that the undisputed objective facts in Vermuele's case would justify the issuance of a search warrant.

At the hearing on the defendant's motion to suppress, two city of York police officers testified that in approximately October 1987, the York Police Department began an ongoing investigation concerning trafficking in controlled substances by Vermuele. The investigation was initiated after one of the officers had attended a drug intelligence meeting with a Hamilton County deputy sheriff and the Nebraska State Patrol. The officer also learned that Vermuele had been arrested in Polk County for possession of cocaine. The deputy sheriff informed the York police officer that Vermuele was actively engaged in trafficking in controlled substances, mainly cocaine. The second York police officer testified he was also involved in the ongoing investigation concerning Vermuele's "bringing drugs into York, Nebraska."

On the evening of December 30, 1988, an anonymous caller on a Crimestoppers line informed the York Police Department that he had personally overheard Vermuele make arrangements with the defendant's coworkers to sell them cocaine when Vermuele came to work the next evening at 7:30 at Consolidated Pet Foods (Consolidated). The informant reported that approximately 70 percent of the employees at Consolidated had cashed their checks and would be waiting for Vermuele. At that time, according to the Crimestoppers caller, the defendant

would sell them 2 to 3 ounces of 86-percent pure cocaine. The informant further reported that Vermuele had been selling a minimum of 2-ounce quantities of cocaine on a weekly basis to his fellow employees and that the defendant was a major source of "incoming cocaine [and] methamphetamine."

The Crimestoppers caller advised York police that Vermuele lived in Polk, Nebraska, drove a 1975 black Chevrolet Monte Carlo with the Nebraska license plate number 41-D653, and worked at Consolidated. The informant also gave the police a general description of the defendant, including his race, sex, birth date, height, weight, and hair and eye color. The caller said that the defendant was generally accompanied by James T. Haith of Central City, Nebraska. The informant also gave police a general description of Haith, including various vital statistics, and a description of Haith's automobile.

Approximately one-half hour after the Crimestoppers call was received by the police, York Police Officer Roger Wolfe stopped a black Chevrolet Monte Carlo with a license plate matching the description given by the informant. Vermuele was driving the vehicle, and Haith was a passenger. Wolfe testified that his stop was precipitated by a computer check that revealed the license plates on defendant's car were improper. However, a subsequent check of the car's registration showed the plates had been registered to the Monte Carlo that day and had not yet been entered on the computer. Wolfe no longer detained Vermuele and Haith. At the time of Officer Wolfe's stop, he was not aware of the Crimestoppers call that had been made to the York Police Department.

In following up on the Crimestoppers call, an independent investigation conducted by York police officers confirmed the descriptions and vital statistics of Vermuele and Haith as given by the Crimestoppers caller and their employment at Consolidated. York police previously had observed Haith driving a vehicle that was somewhat similar to the description given by the informant. Officer Wolfe testified his investigation, conducted after the Crimestoppers call, revealed that the defendant had a cocaine addiction problem and in 1988 had been convicted of cocaine possession in Polk County. Vermuele was incarcerated in the York County jail for that

crime. This information was supplied to Officer Wolfe by Vermuele's jailer, to whom the defendant admitted his cocaine addiction. Obviously, the York County jailer would be a reasonably trustworthy source of information.

On the evening of December 31, 1988, police waited for the defendant and Haith near Consolidated on Division Avenue in York, Nebraska. About 7:23 p.m., officers observed a vehicle, known by one of the officers to be Haith's, approaching Consolidated. In addition, the vehicle in several material respects matched the description of Haith's vehicle given by the informant. The officers stopped the vehicle and obtained identification from the driver, Haith, and his passenger, Vermuele. After removing identification from his wallet, Vermuele placed his wallet on the dashboard of the vehicle. The officers conducted a search for weapons and contraband. In the search, marijuana and drug paraphernalia were found on the defendant. A hash pipe was found under the driver's seat, where Haith had been seated. Both the defendant and Haith were arrested.

Vermuele's wallet was removed from the vehicle and taken to the police station, where it was searched. Inside the wallet, police discovered two razor blades. A substance on the razor blades was subsequently determined to be cocaine. Vermuele was charged with possession of cocaine, a violation of Neb. Rev. Stat. § 28-416(3) (Cum. Supp. 1988), a Class IV felony; possession of marijuana under 1 ounce, § 28-416(6), an infraction; and possession of drug paraphernalia, Neb. Rev. Stat. § 28-441 (Reissue 1989), an infraction.

Defendant moved to suppress the evidence obtained in the search and seizure of his person and property. Vermuele claimed the evidence was obtained in violation of his rights under the 4th and 14th amendments to the U.S. Constitution and article I, §§ 3 and 7, of the Nebraska Constitution.

After the hearing on the motion to suppress the evidence found in Vermuele's wallet, the trial court stated:

> The arrest and search of the defendant on December 31, 1988 rest upon the anonymous telephone call received by the York Police Department on December 30, 1988. None of the other independent information gained by the police

> department after the call and before the arrest and search corroborated or verified the "crime" and would not have supported probable cause for a warrant. Nor does the independent information establish a modus operandi.
>
> No magistrate in Nebraska would have issued an arrest warrant or a search warrant on the anonymous call or upon the independent information or upon the combination of both.
>
> No probable cause existed in the totality of the circumstances to arrest and search the defendant and his wallet on December 31, 1988 at 7:30 p.m., in York, Nebraska. "Probable cause" of Article I, Section 7 Nebraska Constitution blocks the arrest and search of a person upon an anonymous telephone call.
>
> Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.

The protection afforded by the fourth amendment varies in different settings. "[A]n individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband." *United States v. Ross*, 456 U.S. 798, 823, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). Consequently, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 825. The analysis of a warrantless search under *Ross* requires this court to address two issues, (1) the validity of the stop and (2) the existence of probable cause to believe the vehicle contains contraband.

If the York police had probable cause to arrest Vermuele, the stop was lawful.

> A peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:

(1) A felony; or

(2) A misdemeanor, and the officer has reasonable cause to believe that such person . . . (c) may destroy or conceal evidence of the commission of such misdemeanor

. . . .

Neb. Rev. Stat. § 29-404.02 (Reissue 1985). When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). See, also, *State v. Robinson*, 233 Neb. 729, 448 N.W.2d 386 (1989).

Vermuele points out that one of the police officers testified that he did not believe that he had probable cause to arrest the defendant. The validity of an arrest is premised upon the existence of probable cause, not the officer's knowledge that probable cause in fact does exist. *State v. Roach, ante* p. 620, 452 N.W.2d 262 (1990).

Vermuele had been previously convicted of cocaine possession and was the subject of an ongoing criminal investigation for drug trafficking. All of the information given by the Crimestoppers informant, except the actual possession of cocaine by the suspect, was verified by the officers and therefore proven trustworthy. In addition, the defendant was approaching Consolidated at the approximate time the Crimestoppers caller reported the drug sale would take place. Based on personal knowledge and information reasonably trustworthy under the circumstances, the York police had probable cause to believe that at least one of two felonies was being committed, i.e., possession of cocaine or possession of cocaine with intent to deliver. See § 28-416. The stop by the York police was lawful.

Next to be resolved is whether the York police had probable cause to believe that the automobile in which Vermuele was a passenger contained contraband. The scope of a warrantless search is not defined by the nature of the container in which the contraband is secreted but, rather, by the object of the search and the places in which there is probable cause to believe that it

may be found. *United States v. Ross, supra.* If probable cause existed, any expectation of privacy in the vehicle or its contents would be subject to the authority of the officers to conduct a warrantless search, and consequently, the evidence found in Vermuele's wallet would have been erroneously suppressed. See, *United States v. Ross, supra*; *United States v. Johns*, 469 U.S. 478, 105 S. Ct. 881, 83 L. Ed. 2d 890 (1985).

Probable cause exists where facts and circumstances within an officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to warrant one of reasonable caution to believe that an offense has been or is being committed. *State v. Roach, supra.*

An officer need only have a reasonable belief, based on personal knowledge and other trustworthy information, that an offense has been or is being committed. *State v. Blakely, supra*; See, also, *United States v. Sokolow*, ____ U.S. ____, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989). The concept of probable cause is not readily, or even usefully, reduced to a neat set of legal rules. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers." *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability and must be weighed in the totality of the circumstances to determine whether probable cause exists. *Illinois v. Gates, supra.* The trial court concluded that " '[p]robable cause' of Article I, Section 7 Nebraska Constitution blocks the arrest and search of a person upon an anonymous telephone call." We have previously concluded, however, that the framers of the Nebraska Constitution intended that article I, § 7, provide no greater rights than those afforded a defendant by the 4th and 14th amendments to the U.S. Constitution. See *State v. Havlat*, 222 Neb. 554, 385

N.W.2d 436 (1986).

In *Illinois v. Gates, supra* at 225, police received an anonymous letter that described drug activity by the Gates couple, the letter concluding, " 'I guarantee if you watch them carefully you will make a big catch.' " The U.S. Supreme Court, commenting on the requirement of the credibility of anonymous informants, stated:

> [Anonymous] tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise "perfect crimes." While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not.
>
> . . . The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Jones v. United States,* 362 U.S. [257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)]. . . .

Illinois v. Gates, supra at 237-39.

Given the totality of the circumstances, the officers had probable cause to believe that cocaine would be found in the vehicle in which defendant was a passenger. The Crimestoppers caller informed police he personally overheard Vermuele make plans to unlawfully deliver cocaine to a specific class of people in a specified amount at a specified time and place. An anonymous tipster's "explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles [the] tip to greater weight than might otherwise be the case." *Illinois v. Gates, supra* at 234. At the time police stopped the vehicle in which the defendant was riding, it was headed, near the specified time, toward the place where the defendant was heard to say he would deliver the

cocaine. Before the stop, every facet of the information given by the Crimestoppers caller, except the actual possession by the defendant of the cocaine, had been personally verified by the officers, including a description of two vehicles Vermuele would likely be traveling in and the approximate time that the defendant would be going to Consolidated to make the cocaine sale and delivery. In addition, the officers knew that Vermuele had been a cocaine addict, that he had been found guilty of a cocaine possession charge in the past, and that he had been previously linked with the delivery of drugs in York County. Under the totality of the circumstances the officers had reasonable grounds to believe the remaining unverified bit of the informant's information to be true, that Vermuele would have cocaine in his possession. See, *Illinois v. Gates, supra*; *Draper v. United States*, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959). The trial court erred as a matter of law in concluding that the crime must be verified. There is no requirement that the "crime" itself be corroborated or verified in order to justify probable cause for a warrantless search or arrest. See, *Illinois v. Gates, supra*; *Draper v. United States, supra*; *State v. Dussault*, 193 Neb. 122, 225 N.W.2d 558 (1975).

Finally, Vermuele complains that although police officers had ample time between the Crimestoppers call and the stop of Haith's vehicle to obtain a search warrant, they failed to do so. It is questionable that there would have been probable cause to obtain a warrant without additional verification of the information given by the Crimestoppers caller. That could not take place until just before the police stopped the Haith vehicle in which the defendant was a passenger. Immediately before the stop, police officers observed the defendant proceeding to the place where the cocaine delivery was to take place, near the time and in a car described by the Crimestoppers caller. Vermuele's complaint that police officers were required to obtain a search warrant is without merit under the facts of this case.

Because, based upon probable cause, it was lawful for York police officers to stop the vehicle in which Vermuele was riding, to search the vehicle, and to seize the cocaine in the defendant's possession, it is unnecessary to address the State's contention that the cocaine was obtained pursuant to a valid arrest.

The trial court was clearly wrong in suppressing the evidence found in Vermuele's wallet.

REVERSED.

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