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REPORTS OF CASES

DECIDED BETWEEN

OCTOBER 31, 1986 and MARCH 19, 1987

IN THE

Supreme Court of Nebraska

VOLUME CCXXIV

DONALD C. PATTON

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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Number of District	Counties in District	Judges in District	City
First	Johnson, Pawnee, Nemaha, and Richardson	Robert T. Finn	Tecumseh
Second	Sarpy, Cass, and Otoe	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George A. Thompson	Papillion
Third	Lancaster	Robert R. Camp	Lincoln
		William D. Blue	Lincoln
		Dale E. Fahrnbruch	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Thurston, Dodge, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Saline, Thayer, and Nuckolls	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Dakota, Dixon, and Cedar	Robert E. Otte	Dakota City
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Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	Grand Island Grand Island
Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Hooker, and Thomas	Donald E. Rowlands II John P. Murphy	North Platte North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	McCook
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 44520: **Thompson v. Serve All Services Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-324: **Weber v. Hopkins.** Stipulation allowed; appeal dismissed.

No. 85-646: **Lorimer v. Lorimer.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. 85-969: **Kurtz v. Marquardt.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-003: **Newton v. City of Omaha.** Joint motion to remand with directions approved.

No. 86-025: **First National McCook Company v. Klein.** Stipulation allowed; appeal and cross-appeal dismissed.

No. 86-026: **Kuhlman v. Grimminger.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-114: **Central National Ins. Co. v. Omaha Indemnity Company.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 86-150: **Dougherty v. Shortridge.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 86-163: **State v. Smith.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-170: **State v. Kelly.** By order of the court, appeal dismissed for want of jurisdiction.

No. 86-194: **First National Bank in Morrill v. Adams.** Stipulation allowed; appeal dismissed.

No. 86-206: **F.T.C., Inc. v. Jones.** Stipulation allowed; appeal dismissed.

No. 86-256: **McVoy v. Nebraska Liquor Control Commission.** Stipulation allowed; appeal dismissed.

Nos. 86-311, 86-312: **Mason State Bank v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-346: **Kuhlman v. Grimminger.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-363: **State v. Graber.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-366: **State v. Byram.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-392: **Dodge v. Smith.** Stipulation allowed; appeal dismissed.

No. 86-429: **Hupf v. Hupf.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-431: **State v. Johnson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-438: **Eaton v. Lutheran Medical Center.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 86-451: **State v. Garcia.** Judgment affirmed; see Rule 7A.

No. 86-463: **State v. Hudnall.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-464: **State v. Reed.** Motion of appellee for summary dismissal sustained; appeal dismissed as out of time; see Rule 7B(1).

No. 86-469: **State v. Sanders.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-470: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 86-480: **In re Interest of L.W.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule

7B(2).

No. 86-505: **Brill v. Brill.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-530: **Field v. Jensen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-537: **State v. Wykoff.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-538: **State v. Dorzweiler.** Judgment affirmed; see Rule 7A.

Nos. 86-543, 86-563: **State v. Melton.** Judgment affirmed; see Rule 7A.

Nos. 86-554, 86-555: **State v. Moore.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-560: **Martinez v. State.** On stipulation of the parties, case remanded to the district court for Douglas County, Nebraska.

No. 86-567: **Harris v. Mastercraft Furniture Corp.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-568: **State v. Hunt.** Judgment affirmed; see Rule 7A.

No. 86-576: **Coyle v. Coyle.** Stipulation of settlement approved. Appeal dismissed and cause remanded to the Douglas County District Court with instructions to modify decree in conformity with terms of stipulation.

No. 86-579: **State v. Jefferson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-589: **State v. Bick.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-591: **State v. Britain.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-592: **State v. Fry.** Court finds appeal wholly

frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-602: **State v. Gartner.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-603: **State v. Reed.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-619: **State v. Gustafson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-620: **State v. Brock.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-622: **State v. Bass.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-624: **State v. Rankin.** Judgment affirmed; see Rule 7A.

No. 86-627: **State v. Rohde.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-628: **Huck v. Huck.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-630: **State v. Cottrell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-631: **State v. Coon.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-632: **Wegner v. Grammar.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 86-633: **Lee v. Gregg.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-634: **State v. Clark.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-635: **State v. Clark.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-636: **State v. Rich.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-640: **State v. Welsh.** Judgment affirmed; see Rule 7A.

No. 86-643: **State v. Madsen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-644: **State v. Colbert.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-645: **Hannibal v. Ames Center Realty, Inc.** Stipulation allowed; appeal dismissed.

No. 86-647: **Raschke v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-654: **State v. Hatcher.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-658: **State v. Abel.** Judgment affirmed; see Rule 7A.

No. 86-659: **In re Estate of Peverill.** Stipulation allowed; appeal dismissed.

No. 86-663: **State v. Harrington.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-665: **State v. Shaul.** Judgment affirmed; see Rule 7A.

No. 86-666: **Lammers v. Lammers.** Stipulation allowed; appeal dismissed.

No. 86-670: **Central Waste Systems, Inc. v. Shields.** Stipulation allowed; appeal dismissed.

No. 86-672: **State v. Hutchinson.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-673: **State v. Manchester.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-674: **State v. Clark.** Court finds appeal wholly

frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-676: **State v. Armour.** Motion of appellee for summary affirmance sustained. Judgment affirmed; see Rule 7B(2).

No. 86-688: **Woods v. County of Douglas.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-690: **State v. Hernandez.** Stipulation allowed; appeal dismissed.

No. 86-695: **Fritz v. Baker's Supermarkets, Inc.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-698: **State v. Bean.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-703: **State v. Young.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-707: **Dop v. American Family Mutual Ins. Co.** Stipulation allowed; appeal dismissed.

No. 86-708: **State ex rel. Carter v. Grammer.** Judgment affirmed; see Rule 7A.

No. 86-714: **State v. Wendell.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-715: **State v. Robinson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-716: **In re Interest of Crawford.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-717: **Lake v. Lake.** Stipulation allowed; appeal dismissed.

No. 86-719: **State v. Lott.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 86-726: **State v. Foreman.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-730: **State v. Winchester.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-731: **State v. Sullivan.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-735: **State v. Clark.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-736: **State v. Young.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-737: **State v. Gruhn.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-738: **State v. Farber.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-739: **State v. Straughn.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-740: **State v. Kehoe.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-749: **State ex rel. Taylor v. Gunter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-750: **Hedman v. Hesser.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-751: **Ansley Ready-Mix, Inc. v. McAlvey.** Stipulation

allowed; appeal dismissed.

No. 86-753: **Ritchey v. Square D Company.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 86-754: **American Standard Ins. Co. v. United States Fidelity & Guaranty Ins. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-755: **Haiar v. County of Douglas.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 86-756: **State v. Mulder.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-757: **State v. Onnen.** Judgment affirmed; see Rule 7A.

No. 86-758: **Meints v. Meints.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 86-761: **Bank of the Midlands v. Hogan.** Stipulation allowed; appeal dismissed.

No. 86-766: **Bank of Burwell v. Seidel.** Stipulation allowed; appeal dismissed.

No. 86-771: **State v. Jacob.** Judgment affirmed; see Rule 7A.

No. 86-774: **State ex rel. Hartmann v. Ford.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-776: **State v. Burns.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-778: **State v. Pickens.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-782: **Grosshans v. Board of Education.** Stipulation allowed; appeal dismissed.

No. 86-784: **State v. Scholl.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-785: **In re Application of Northwestern Bell.** Stipulation for remand and dismissal approved. Motion to dismiss appeal sustained; appeal dismissed.

No. 86-789: **Insurance Co. of Illinois v. United Fire and Casualty.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

Nos. 86-794, 86-797: **State v. Donaldson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-795: **State v. Lupino.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-796: **State v. Jones.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-802: **Goreham v. Ozbay.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-808: **State v. Mayes.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-810: **State v. Nelson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-813: **State v. Rein.** Judgment affirmed; see Rule 7A.

No. 86-818: **Ginn v. Ginger Cove Improvement Assn.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-821: **State v. Mueller.** Judgment affirmed; see Rule 7A.

No. 86-822: **State v. Collins.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-824: **In re Interest of Kessler.** Motion of appellant to

dismiss appeal sustained; appeal dismissed.

No. 86-828: **Lenco v. Slama.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice; each party to pay own costs.

No. 86-829: **State v. Hurbenca.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-832: **State v. Loper.** Judgment affirmed; see Rule 7A.

No. 86-838: **Case v. Stevens.** Stipulation allowed; appeal dismissed.

No. 86-841: **Park Place Pontiac v. Nebraska Motor Vehicle Industry Licensing Board.** Motion of appellant to dismiss appeal sustained; appeal dismissed and the 24-hour period of suspension of appellant's dealer's license No. DL-712 shall be from 10 p.m. on December 23, 1986, to 10 p.m. on December 24, 1986.

No. 86-849: **Osborne v. Rojas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-851: **Lonnie's Ladder, Inc. v. Sorensen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-857: **Beef Nebraska, Inc. v. Volcek.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-861: **State v. Dennis.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-862: **Delgadillo v. Prime International.** Stipulation allowed; appeal dismissed.

No. 86-863: **Central Soya Co. v. Land & Cattle Enterprises.** Stipulation of settlement approved; motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-864: **Leesley v. Jensen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-865: **Federal Land Bank of Omaha v. Shanahan Farms, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-866: **Keith County Bank & Trust Co. v. Corman.** Stipulation approved; affirmed as modified.

No. 86-868: **Braunbeck v. Des Enfants.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-871: **Moos v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. 86-872: **Scherer v. Ragsdale.** Stipulation allowed; appeal dismissed with prejudice per the terms of the stipulation.

No. 86-873: **Costello v. Costello.** Stipulation allowed; appeal dismissed.

No. 86-874: **Tachovsky v. Tachovsky.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 86-878: **Johnson v. Grammer.** Stipulation allowed; appeal dismissed.

No. 86-882: **State ex rel. Sullivan v. Grammer.** Judgment affirmed; see Rule 7A.

No. 86-898: **Hicks v. Sikes.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-900: **Gauthier v. Harvest Commodities, Inc.** Stipulation of settlement approved; appeal dismissed as per terms of stipulation.

No. 86-901: **Goding v. Heritage Village of Grand Island.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-914: **Janes v. Ford Motor Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-919: **State v. Skarsvog.** Judgment affirmed; see Rule 7A.

No. 86-921: **Bank of Dixon County v. Farmers Coop. Assn.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-922: **Kaup v. National Farms, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-925: **State v. Watson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-926: **State v. Blackwood.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule

3B.

No. 86-927: **State v. Budd.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-930: **Packers Engineering v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. 86-935: **State v. Lofton.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-937: **State v. Holroyd.** Judgment affirmed; see Rule 7A.

No. 86-943: **In re Interest of Stabler.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-949: **Frazier v. Burlington Northern Railroad Co.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-952: **Boro v. Woodward.** Stipulation allowed; appeal dismissed.

No. 86-953: **Chalupa v. Chalupa.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-955: **State v. Kirtley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-960: **State v. Chrisley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-962: **State v. Armfield.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-963: **State v. Reed.** Judgment affirmed; see Rule 7A.

No. 86-971: **Schiro v. Spic and Span Linen Supply.** Stipulation allowed; appeal dismissed.

No. 86-973: **State v. Miller.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-980: **Trujillo v. Vitek.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-983: **Neilsen v. Carney.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-1000: **In re Estate of Kunz.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 86-1021: **State v. Johnson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1024: **Ackerman v. Ackerman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-1048: **State v. Taylor.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1062: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-1069: **Valmont Industries, Inc. v. Omaha National Bank.** Stipulation of settlement approved. Cause is remanded to the Douglas County District Court to implement the terms and provisions of the settlement agreement.

Nos. 86-1070, 86-1071: **Anderson v. Payne.** Stipulation allowed; appeal dismissed.

No. 86-1084: **Barnett v. Magner.** Stipulation allowed; appeal dismissed.

No. 86-1092: **Teeter v. Brendle.** Stipulation allowed; appeal dismissed.

No. 87-013: **Dvorak v. Dunning.** Stipulation allowed; appeal dismissed.

No. 87-029: **State ex rel. Tyler v. Gunter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-072: **In re Interest of Tyler.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

NANCY D. VICE, APPELLANT, V. DARM CORPORATION, A NEBRASKA CORPORATION, APPELLEE.

395 N.W.2d 524

Filed October 31, 1986. No. 85-456.

1. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, that is, when the controversy is properly resolved as a matter of law.
2. _____. In considering a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
3. **Innkeepers: Liability: Negligence.** The proprietor of a place of business who holds it out to the public for entry for his business purposes is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm.

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

Rodney J. Rehm of Rehm & Bartling, for appellant.

Steven E. Guenzel of Barlow, Johnson, DeMars & Flodman, for appellee.

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

CAPORALE, J.

Plaintiff-appellant, Nancy D. Vice, alleges that defendant-appellee, Darm Corporation, negligently permitted her to be injured during a fight at its bar. At the close of all the evidence, the district court sustained defendant's motion for a directed verdict and entered a judgment dismissing plaintiff's petition. Plaintiff's assignments of error challenge the correctness of the district court's judgment, contending that there existed questions of fact for the jury to decide. We affirm.

On November 22, 1980, plaintiff watched a football game on television with friends in her apartment. After the game they went to Oscar's, a bar in Lincoln owned by defendant. In the crowded bar plaintiff's roommate, Mary Jo O'Grady, directed plaintiff's attention to Rhonda Cudney, who had watched the game with plaintiff. Rhonda Cudney had Kelly McCarthy, who was in tears, pushed up against the wall. Although the evidence is vague, it appears Kelly McCarthy had blamed Rhonda Cudney for throwing a beer at her, and Rhonda Cudney may have slapped Kelly McCarthy.

Donald Arena, president and secretary of the defendant corporation and full-time manager of Oscar's, heard the two women arguing and went to see what the problem was. He testified that the women indicated there was no problem, only a misunderstanding, and that they apologized to him. Plaintiff went over to talk to Rhonda Cudney to see if she was all right, after which the three women remained in the bar.

Arena further testified that he watched the tables where Kelly McCarthy and Rhonda Cudney were each sitting but that he was not overly concerned because "[v]ery, very seldom do you have women get up and start knocking each other around." In fact, Oscar's had never experienced a fistfight between two women. Arena believed the incident was a momentary thing, maybe a misunderstanding, that it was sufficiently settled, and that it was not a problem. Plaintiff herself testified that she was not worried, and other patrons testified that they were not worried for their safety.

Sometime after the disturbance involving the two women, their brothers, David Cudney and Mike McCarthy, arrived at the bar. David Cudney sat with his sister at the "Cudney table,"

and Mike McCarthy sat at the "McCarthy table." Plaintiff was seated somewhere in the vicinity of the two tables. (It is difficult to determine exactly where plaintiff was sitting, for, while a drawing was used during the course of the trial and while the index to the bill of exceptions states that the drawing and a variety of other exhibits are contained in separate volumes to the bill of exceptions, those volumes were not filed with the clerk of this court. See Neb. Ct. R. of Prac. 5C(5) and 5F (rev. 1986), dealing with the responsibility for filing and the proper placement of exhibits in a bill of exceptions. Nonetheless, we have, in this instance, reviewed the case, as the missing exhibits do not appear to bear in any crucial way on the question involved.)

The exchange of words between the Cudney table and the McCarthy table escalated until, about an hour after the disturbance involving the two women, David Cudney was seen to "fly" over a table, and a physical fight broke out between the brothers. There is no evidence the exchanges between the two tables were such that Arena was or should have been aware of them. After the brothers began to fight, others also became involved, but it is not clear whether they were participating in the fight or trying to break it up.

When the fight started, plaintiff decided to go to the restroom and wait it out. As she was getting up from her chair, some unknown person knocked her to her knees, and she was severely injured. The fight stopped when those involved realized that plaintiff had been hurt.

This review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986), that is, when the controversy is properly resolved as a matter of law. *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986). Further, in considering a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.

Myers, Trustee v. National Transp., Inc., 223 Neb. 688, 393 N.W.2d 43 (1986).

This court recently considered the liability of a business proprietor to a patron in *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982). Therein, another bar customer, without prior warning, grabbed and shoved the assaulted patron's dancing partner aside with such force as to propel her to the floor, and immediately thereafter struck the patron in the face, severely injuring him. In sustaining a directed verdict in favor of the bar owner, *Harvey* relied upon *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946), and the Restatement (Second) of Torts § 344 (1965), and applied the rule that

> "the proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm. . . ."

Harvey at 611-12, 319 N.W.2d at 727-28.

Hughes affirmed a judgment of dismissal entered at the close of the patron's evidence. The patron was stabbed, just as he entered defendant's restaurant, as the result of a fight between two other customers. In reaching its decision the *Hughes* court noted that the altercation happened suddenly, unexpectedly, and without warning and that there had been no prior history of altercations.

The tavern owner in *Welsh v. Zuck*, 192 Neb. 1, 218 N.W.2d 236 (1974), maintained a firing range under the bar. A customer who used the range kept his gun at the bar. On the day in question the customer took the unloaded gun from the bar, left the bar, loaded the gun, and returned within the hour. Thinking that he heard some disparaging remarks concerning his wife, the customer took out the gun to fire it in the air. Another customer attempted to disarm him, and a bystander patron was

injured when the gun went off in the ensuing struggle. In concluding that the trial court erred in not directing a verdict for the tavern owner, this court stated:

> It seems clear that the primary or proximate cause of the accident in this case was not the knowledge of the tavern owner that Rima prior thereto had a gun on the premises, but the acts of the defendant Rima in reloading the gun after leaving the tavern, returning to the tavern, and engaging in the fight which has been described. There was no possible way that defendant Zuck could have foreseen that the above events would transpire; nor was there any possible or reasonable way for him to have prevented what eventually happened.

Id. at 9, 218 N.W.2d at 241.

The patron in *Crane v. Whitcomb*, 160 Neb. 527, 70 N.W.2d 496 (1955), was shot outside the tavern by the tavern owner's husband following an altercation which began inside the tavern. In reversing a judgment for the patron, this court noted that the patron had left the premises because he thought the husband was going to get a gun, and then drove back to the bar when the husband called for him. The shooting took place in a struggle outside the bar. Although the *Crane* court discussed the patron's own contributory negligence, it concluded that the owner had not been negligent.

However, questions for the jury both on the issue of the bar's negligence and the patron's contributory negligence were presented in *Fimple v. Archer Ballroom Co.*, 150 Neb. 681, 35 N.W.2d 680 (1949). Therein, a female patron attending a New Year's Eve dance was injured by a beer bottle which was thrown at her from a table of boisterous veterans. In celebrating their reunion the veterans had become intoxicated, and over a period of 1½ hours used loud and profane language, broke several glasses, and threw a whiskey bottle. Throughout the 1½ hours preceding the incident resulting in her injuries, the patron had been sitting next to the table from which the bottle was thrown.

The law as developed in the foregoing cases leads to the conclusion that the district court correctly determined that as a matter of law the argument between Rhonda Cudney and Kelly McCarthy did not make it foreseeable that their brothers would

later arrive and get involved in a fight, at the start of which plaintiff would be injured. Unlike the situation in *Fimple*, there was not in the present case a continuing disturbance for such a length of time as to have warned defendant that the safety of its patrons was at risk. On the contrary, the initial disturbance involving the two women had subsided; plaintiff was injured just as a sudden and unexpected fight broke out without warning between the brothers.

Furthermore, there is absolutely no showing that plaintiff was knocked down as a consequence of the fight. It would be no more speculative to conclude that she was accidentally knocked down by someone who was not involved in the fight. Thus, not only was the defendant not negligent but plaintiff failed to show that the fight proximately caused her injuries. *Prorok v. County of Custer*, 221 Neb. 789, 381 N.W.2d 106 (1986).

The judgment of the district court being correct, it is hereby affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DALE BOWERSMITH, APPELLANT.

395 N.W.2d 527

Filed October 31, 1986. No. 85-836.

1. **Miranda Rights: Confessions: Words and Phrases.** Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
2. **Constitutional Law: Search and Seizure.** Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact.
3. **Motions to Suppress: Appeal and Error.** This court will not overturn the trial court's factual findings when determining the correctness of the trial court's rulings on the suppression of evidence unless those findings are clearly wrong.
4. **Confessions: Evidence.** To be admissible as evidence in his trial, an accused's statements must have been voluntarily made and must not have been the product of any inducement, no matter how slight.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

Douglas Veith of Pelton, Bertolini, Schroeder, Veith and O'Neal, for appellant.

Robert M. Spire, Attorney General, and Bernard L. Packett, for appellee.

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

GRANT, J.

Defendant, Dale Bowersmith, was convicted, after jury trial, on three counts of sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 1985). He was sentenced to imprisonment of 2 to 3 years on each count, with the sentences to be served concurrently. Defendant appeals, assigning error in the trial court's failure to sustain defendant's motion to suppress statements of Daniel Scott, an investigator for the Nebraska State Patrol. Defendant alleges the testimony of investigator Scott concerned statements made by the defendant during custodial interrogation in which proper rights advisements and *Miranda* warnings were not given and that the statements were elicited as a result of improper influence. For the reasons hereinafter stated we affirm.

The record shows the following. On September 16, 1984, Daniel Scott, an investigator for the Nebraska State Patrol, was requested by the Nebraska City police chief to investigate the sexual molestations of two minor children. Scott was informed during his interview of the complainants (the mothers of the children involved) that defendant was the individual who molested the children. At the hearing on the motion to suppress, investigator Scott testified that, while he had made no judgment as to the guilt of the defendant, he knew he would have to speak with him concerning the allegations.

Scott, in plain clothes, drove in an unmarked car to defendant's home. Upon arriving there Scott was greeted by defendant's wife. Scott identified himself as a police officer and asked to speak with the defendant. Scott waited at the door until the defendant joined him. Since it was cold outside, the

two men decided to talk in Scott's car. The defendant voluntarily joined Scott in Scott's unmarked police car, which was in front of the Bowersmith residence. The car was moved to the side of the residence, where the two men spoke for approximately 5 minutes. The defendant was advised of the allegations made against him. At this point the defendant indicated a desire to talk elsewhere, so he was driven to another location. The defendant and Scott remained at this location for approximately 35 minutes before defendant was driven home.

Scott testified that during their conversation he advised the defendant of the allegations. Furthermore, the defendant was advised that he did not have to talk to Scott, that he was not in custody, that Scott was not there to arrest him, that he had a right to call his attorney, and that he could quit talking at any time and Scott would drive him home.

The defendant testified that he did not feel that he could get out and leave anytime he wanted. Furthermore, he testified Scott asked him to admit to the allegations.

The following day, an officer of the Nebraska City Police Department arrested the defendant and brought him to the courthouse. Investigator Scott then told the defendant he wanted to speak with him concerning the allegations. Scott then fully advised the defendant of his *Miranda* rights. Defendant would not waive these rights, nor would he give a statement.

The defendant argues that investigator Scott's interview in the car on September 16, 1984, was a custodial interrogation. Furthermore, defendant argues the scope of questioning was accusatory rather than investigatory. The U.S. Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), forbids the prosecution from introducing defendant's statements stemming from "custodial interrogation" unless the proper rights advisement has been given. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or *otherwise deprived of his freedom of action in any significant way*." (Emphasis supplied.) 384 U.S. at 444. This court in *State v. Saylor*, 223 Neb. 694, 699, 392 N.W.2d 789, 793 (1986), citing *California v. Beheler*, 463 U.S. 1121, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983), stated

the ultimate inquiry regarding the custodial status of a suspect " 'is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' " The pertinent question for purposes of this appeal is whether the district court erred in holding that at the time of the interview on September 16, 1984, the matter was still in the investigatory stages and that the defendant was not deprived of his freedom in any significant way. Determinations as to whether a person has been seized, in the constitutional sense, are questions of fact. *State v. LaChappell*, 222 Neb. 112, 382 N.W.2d 343 (1986). While there was testimony to the contrary, we hold the evidence was sufficient for the trial court to find the interview was not custodial in nature and the defendant was not deprived of his freedom in any significant way. Investigator Scott testified he advised the defendant that he did not have to talk. It was the defendant's wish to drive to another location to continue the conversation. Scott testified that he told the defendant he would drive him home whenever defendant desired.

The defendant also argues his statements were solicited through improper coercion or inducement. This court has held that to be admissible as evidence in his trial, an accused's statements must have been voluntarily made and must not have been the product of any inducement, no matter how slight. *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

The defendant relies on the holding in *State v. Erks*, 214 Neb. 302, 333 N.W.2d 776 (1983), a single-judge opinion. In *Erks*, Judge Boslaugh affirmed the district court's sustaining of Erks' motion to suppress certain statements made in response to an offer by the interrogator to provide help for the defendant and avoid unnecessary embarrassment for the family. It was held in *Erks* that such offers of help constituted sufficient evidence to support the trial court's finding that statements made after the inducement were not voluntary.

The defendant in the case at bar alleges investigator Scott solicited a confession by discussing the effects the allegations of sexual assault would have on the defendant's wife. The evidence in the case at bar, however, shows that Scott did not offer any inducements to defendant with regard to defendant's wife. Instead, defendant testified as follows: "Q- [Defendant's

counsel] Did he [investigator Scott] talk to you about your wife and what effect this would have on your wife? A- I did." Investigator Scott testified, on this issue of coercion or inducement, that after defendant expressed concern about his wife, Scott told defendant "that if something like this was happening, that if his wife truly cared about him, that she'd understand and they'd work it out." Such statements fall far short of the inducement offered in *State v. Erks, supra*, and clearly constituted sufficient evidence on which the court could determine that no inducement had been offered defendant, and to support the trial court's finding that defendant's statements were voluntary and admissible. In considering such evidence we are bound by the rule that this court will not overturn the trial court's factual findings when determining the correctness of the trial court's rulings on the suppression of evidence unless those findings are clearly wrong. *State v. LaChappell, supra*. The trial court's findings are not clearly wrong and, indeed, are fully supported by the evidence.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANKIE L. COLE, APPELLANT.
395 N.W.2d 532

Filed October 31, 1986. No. 85-934.

1. **Postconviction: Proof: Convictions: Appeal and Error.** Defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set aside in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal.
3. _____: _____. Issues which were known to defendant and counsel at the time of trial and were capable of being raised in a direct appeal, but were not raised in defendant's direct appeal, are not proper grounds for postconviction relief.
4. _____: _____. It is within the discretion of the district court to determine whether counsel shall be appointed in a postconviction proceeding to represent defendant on appeal to this court, and in the absence of a showing of abuse of discretion, the failure to appoint counsel is not error.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Frankie L. Cole, pro se.

Robert M. Spire, Attorney General, and Dale D. Brodkey, for appellee.

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

GRANT, J.

This is an appeal filed pro se from a dismissal of a postconviction motion to vacate sentence filed by defendant, Frankie L. Cole.

On March 10, 1983, defendant was convicted by jury in the district court for Douglas County of one count of burglary of a service station, in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1985), and one count of theft by unlawful taking of an automobile from a repair shop, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1985). Defendant was sentenced to a term of 10 years' imprisonment in the Nebraska Penal and Correctional Complex on each of the two counts, to be served consecutively. Defendant appealed to this court. The defendant filed a pro se brief in addition to a brief filed by counsel from the Douglas County public defender's office. Defendant's pro se brief raised a number of issues in his assignments of error which were not included in counsel's brief. Defendant argued that his appointed trial counsel and counsel on appeal were inadequate and incompetent. Defendant's convictions were affirmed by this court in *State v. Cole*, 218 Neb. 1, 352 N.W.2d 154 (1984). In affirming defendant's convictions this court found that the assignments of error in the defendant's pro se brief were without merit.

Defendant filed a postconviction motion to vacate sentence on February 5, 1985. This motion alleged ineffective assistance of both trial counsel and counsel on direct appeal. On November 18, 1985, an evidentiary hearing was held, and the district court found the application for postconviction relief to be without merit on the ground that this court had already heard and decided these issues in the direct appeal. The district

court also dismissed counsel appointed to represent defendant on the motion to vacate sentence. Defendant timely filed an appeal to this court.

In his pro se brief, defendant assigns three errors:

(1) That it was error not to rule on new facts raised in the motion to vacate sentence, which were not raised in the issue of ineffective counsel on direct appeal; in particular, that counsel failed to object to an all-white jury and failed to raise arguments of insufficiency of the evidence to sustain conviction under Neb. Rev. Stat. § 28-511 (Reissue 1985);

(2) That it was error to dismiss defendant's counsel when the defendant still had the right to appeal;

(3) That it was error to dismiss the motion to vacate sentence on the ground that the issue of ineffective assistance of counsel had been raised on direct appeal, when it was improperly raised on direct appeal.

We affirm.

Our review of a judgment denying postconviction relief is governed by the holdings of our earlier cases reviewing such matters. We have held that the defendant in a postconviction case bears the burden of establishing a basis for relief, and a conviction will not be set aside in the absence of a showing that an error created actual prejudice rather than merely the possibility of prejudice. *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986). In *State v. Brown*, 220 Neb. 305, 369 N.W.2d 639 (1985), we held that the findings of the district court will not be disturbed on appeal unless they are clearly wrong.

Regarding the first assignment of error, defendant contends that trial counsel's failure to object to a jury composed of members of the white race when defendant is a black man constitutes a new fact not raised in the direct appeal. Defendant, who filed a pro se brief, had an opportunity to raise this issue on direct appeal, but did not do so. At the evidentiary hearing, defendant testified, "What I did was submitted my—you know, the contentions that I wanted to the Supreme Court . . . ." We have stated that issues which were known to defendant and counsel at the time of trial and were capable of being raised in a direct appeal, but were not raised in

defendant's direct appeal, are not proper grounds for postconviction relief. *State v. Isikoff,* 223 Neb. 679, 392 N.W.2d 783 (1986); *State v. Peery, supra; State v. Hurlburt,* 221 Neb. 364, 377 N.W.2d 108 (1985). In addition, no testimony was presented at the evidentiary hearing showing actual prejudice to defendant. We note that the facts of the underlying crimes committed by defendant overwhelmingly pointed to his guilt.

The error assigned that counsel failed to raise arguments of insufficiency of the evidence to sustain conviction under § 28-511 paraphrases errors raised in defendant's direct appeal. A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal. *State v. Isikoff, supra; State v. Hurlburt, supra.* Nor will a defendant be permitted to rephrase issues already presented in order to obtain a further consideration of them. *State v. Peery, supra.* Accordingly, defendant's first assignment of error will not be considered.

Secondly, defendant claims that it was error for the district court to dismiss defendant's appointed counsel at the hearing on the motion to vacate his sentence when defendant still had the right to appeal. It is within the discretion of the district court to determine whether counsel shall be appointed in a postconviction proceeding to represent defendant on appeal to this court, and in the absence of a showing of abuse of discretion, the failure to appoint counsel is not error. *State v. Isikoff, supra; State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982). The trial court did not abuse its discretion by refusing to appoint appellate counsel on this postconviction appeal.

Lastly, defendant claims that the issue of ineffective counsel was improperly raised on direct appeal, and thus should not prevent review of that issue in the postconviction proceeding. Defendant's argument, although difficult to comprehend, seems to contend that a claim of ineffective counsel is civil in nature and should not have been adjudicated in the direct criminal appeal. In that direct appeal, defendant sought to have his criminal convictions reversed on the basis that he had ineffective counsel. He now contends that this court should not have considered that point. His argument on this issue is totally without merit.

The district court has committed no error in dismissing defendant's motion for postconviction relief. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RYAN T. ROBB, APPELLANT.
395 N.W.2d 534

Filed October 31, 1986. No. 85-995.

1. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
2. **Intent: Words and Phrases.** Intent is the state of mind operative at the time of an action.
3. **Criminal Law: Intent.** Intent may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct.
4. **Intent: Presumptions.** The law presumes that one of sound mind intends the obvious and probable consequences of his or her voluntary acts.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded for a new trial.

William G. Line of Kerrigan, Line & Martin, for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

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

CAPORALE, J.

Defendant, Ryan T. Robb, was convicted of two counts of theft by the unlawful taking on each occasion of property having a value in excess of $1,000, all in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1985). His assignments of error claim (1) that the trial court abused its discretion by admitting evidence concerning an earlier theft by Robb and (2) that the evidence is insufficient to support the convictions. We reverse and remand for a new trial.

Robb was employed as the manager of the Fremont Village Inn Pancake House, a restaurant, from July of 1984 to February 12, 1985. The restaurant's daily receipts were recorded by cash registers and reported to Vicorp Restaurants, Incorporated, its corporate owner, by weekly sales reports prepared by other employees and approved by Robb. Deposit slips for the receipts were prepared in duplicate twice daily by other employees and a copy of the deposit slips forwarded to the restaurant's owner. Pending deposit, the receipts were kept in a safe, to which a number of persons had access. Only Robb, however, deposited the receipts in the restaurant's account at a Fremont bank.

The owner, as the result of information provided to it by a restaurant employee, caused an audit to be made of the restaurant's financial activities. The audit revealed that the restaurant's receipts, $2,805.46 for February 9, 1985, and $2,374.65 for February 10, 1985, for which deposit slips had been prepared, were not deposited in the restaurant's bank account. When confronted with that fact by the owner's auditor on February 12, 1985, a Tuesday, Robb stated, "The bank must be wrong, because I made last weekend's deposit on Monday." Robb, however, rejected the auditor's request that they go to the bank and see if they could "get this straightened out," left the restaurant's keys with the auditor, and departed from the premises, never to return.

One of the State's witnesses in chief testified that he had employed Robb as the manager of a fast-food restaurant in Omaha from approximately June through October of 1982. Upon confrontation, Robb admitted that during that employment he had stolen "something over" $2,000 and ultimately made restitution for $3,300. After establishing through cross-examination that the money had not been taken through the failure to deposit receipts, for which deposit slips had been prepared by others, Robb moved to strike this witness' testimony and instruct the jury to disregard the testimony. The trial court overruled those motions.

Robb maintains that Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of the foregoing evidence and that the trial court abused its discretion by overruling his

motions. Section 27-404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We have held § 27-404(2) to be an inclusionary rule permitting the use of relevant, specific acts for all purposes except 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 acts if such acts are relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985); *State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

In making its rulings the trial court indicated the evidence of Robb's earlier theft was admissible because it bore on his intent to commit the crime for which he was being tried.

Intent is the state of mind operative at the time of an action. *State v. Stewart, supra.* It may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct. *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985). See, also, *State v. Beard*, 221 Neb. 891, 381 N.W.2d 170 (1986). Moreover, the law presumes that one of sound mind intends the obvious and probable consequences of his or her voluntary acts. *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984).

There was no defense raised or evidence presented in this case which attempted to establish that if defendant took the February 9 and 10 receipts, his intent could not be inferred from that fact. That being so, the evidence of his prior theft cannot be said to have been introduced to show his intent to commit the thefts which are the subject of this case. In truth and fact, the evidence of his prior theft bore not on Robb's intent at the time of the thefts in question but, rather, on his propensity or disposition to commit those crimes. The evidence of his prior theft was therefore evidence of his character. As such, the trial

court abused its discretion in overruling Robb's motions to strike that evidence and to admonish the jury to disregard it. Given the nature of the evidence concerning whether Robb took the receipts in question, it cannot be said the error in overruling his motions was harmless beyond a reasonable doubt.

Having come to that conclusion, we need not consider whether there were or were not sufficient similarities between the prior theft and the subject crimes as to make the evidence relevant, or whether, even if relevant, the nature of the evidence was such as to require its exclusion under the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1985) as presenting a danger of unfair prejudice to the defendant which substantially outweighed its probative value. Neither do we need concern ourselves with Robb's second assignment of error.

The judgments and sentences of the district court are each reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting in part.

I dissent from that part of the opinion which holds that the evidence concerning the defendant's prior offense was not admissible.

The opinion states that evidence of the prior theft cannot be said to have been introduced to show the defendant's intent at the time of the recent theft because intent is inferred from the words and acts of the defendant and the facts and circumstances surrounding his conduct. On that theory, evidence of prior acts could never be admissible as proof of intent. The rule is to the contrary.

The general rule is that evidence of similar offenses is admissible where an element of the crime charged is motive, a particular criminal intent, or guilty knowledge. *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975). The rule was codified when Neb. Rev. Stat. § 27-404(2) (Reissue 1985) was adopted.

It is clear that intent is a material element of theft by unlawful taking or disposition. Neb. Rev. Stat. § 28-511(1) (Reissue 1985).

In *State v. Stewart*, 219 Neb. 347, 351, 363 N.W.2d 368, 371

(1985), we stated:

> We have previously dispelled the erroneous notion that Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) contains pigeonholes for admission of evidence pertaining to "other acts." Rule 404(2) of the Nebraska Evidence Rules is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged. *State v. Craig, ante* p. 70, 361 N.W.2d 206 (1985).

In *State v. Hitt*, 207 Neb. 746, 749, 301 N.W.2d 96, 99 (1981), we stated:

> It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.

The rationale for the rule that evidence of other acts is admissible as proof of intent is stated in 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[12] at 404-84, 404-87 (1986), as follows:

> Criminal intent has been defined "as that state of mind which negatives accident, inadvertence or casualty." Consequently, evidence of another crime which tends to undermine defendant's innocent explanation for his act will be admitted; "the oftener a like act has been done, the less probable it is that it could have been done innocently." Repetition affords an "opportunity for reflection and for foresight of the consequences," so that even if defendant did not possess the requisite intent initially, it may be inferred that after being involved in a number of incidents, he must have arrived at a mental state inconsistent with innocence by the time of the charged act.

In 2 J. Wigmore, Evidence in Trials at Common Law § 302 at 241 (J. Chadbourn rev. 1979), the theory of the rule is stated as

follows:

> In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent.

As the majority opinion indicates, the defendant in this case, when confronted about the missing deposits, claimed that "[t]he bank must be wrong, because I made last weekend's deposit on Monday." In my opinion, evidence of the defendant's prior offense was admissible as proof of motive, intent, plan, and absence of mistake or accident.

HASTINGS, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. NOEL J. HEATHMAN, APPELLANT.

395 N.W.2d 538

Filed October 31, 1986. No. 86-047.

1. **Criminal Law: Venue: Juries.** To secure a change of venue the defendant must show that pretrial publicity has made it impossible to secure a fair and impartial jury.
2. **Criminal Law: Escape: Sentences.** Nebraska's escape statute, Neb. Rev. Stat. § 28-912 (Reissue 1985), defines one offense and sets out factors which, if present, change the range of the penalty.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

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

WHITE, J.

This is an appeal from the district court for Lancaster County in which the appellant, Noel J. Heathman, was charged with one count of escape. Appellant was found guilty and sentenced to the Department of Correctional Services for a period of 18 months.

Appellant's assignments of error may be summarized as follows: (1) The trial court erred in overruling the appellant's motions for change of venue due to pretrial publicity; (2) The court erred in requiring the appellant to remain in leg irons during trial; (3) The court erred in overruling the appellant's motion for mistrial due to prosecutorial misconduct during opening statements; and (4) The court erred in failing to instruct the jury that the elements of the offense of escape are escape from official detention after conviction for the commission of an offense.

The facts are as follows. During a preliminary hearing, counsel for the appellant moved for a change of venue on the basis of the pretrial publicity Heathman's escape had received. Newspaper clippings of the escape were offered and received into evidence. The motion was denied on the basis that there had been an insufficient showing of prejudice to justify a change of venue. There had been no survey of potential jurors, nor, in the eyes of the court, was any more publicity given the Heathman escape than that given other alleged criminal activities.

During the voir dire examination, the motion was renewed. The trial judge permitted the appellant's counsel to voir dire potential jurors in groups of six. While several of the potential jurors remembered hearing or reading something about the

appellant's escape, each person stated that he or she could be a fair and impartial juror. The motion for change of venue was again renewed, and counsel for the appellant refused to pass the panel for cause. The court held that no juror had been shown to have formed or expressed an opinion as to the guilt of Heathman, and although some members of the panel stated that they had knowledge of the incident, their knowledge was vague and indefinite. More importantly, each juror pledged to render a fair and impartial verdict. The trial court again overruled the motion for change of venue.

Appellant next objected to the court's order requiring the appellant to wear leg irons when in the presence of the jury. In response, the court stated:

> I think considering the nature of the charge and his expressed intentions, I don't know what other alternative there is to really provide for security. Do you have any suggestions? We have one, two, three, four doors into the courtroom. I suppose we're talking about, if we were to make sure he could not bolt and get away, I suppose we're talking about a minimum almost of six individuals as guards. I suppose the alternative is he's got the leg irons on.
>
> The other alternative is the courtroom looks like an armed camp. I don't know. Do you have any suggestions?
>
> MR. KEEFE: Well, I don't know that the courtroom has to look like an armed camp.
>
> THE COURT: Do you want to chain him to the window or something? I don't know.

The court permitted the arm shackles to be removed but required Heathman to remain in leg irons.

Next, appellant moved for mistrial during opening statements as a result of comments made by the prosecutor in his opening remarks. The State made reference to the fact that at the time of his escape Heathman was incarcerated after a conviction for kidnaping. After some discussion with regard to the relevance of counsel's remarks, the court denied the appellant's motion for mistrial and, at the request of the prosecutor, admonished the jury that the reference to Heathman's prior offense was irrelevant and should be totally

disregarded.

Finally, counsel for the appellant contends that the trial court erred in failing to instruct the jury that the elements of the offense of escape include official detention after conviction for the commission of an offense. The jury was instructed: "On or about the 9th day of September, 1984 in Lancaster County, Nebraska, the defendant, Noel Heathman, did unlawfully remove himself from official detention." Counsel for the appellant argued that the language "following conviction for the commission of an offense" must be included in the instruction as an essential element of the crime of escape under Neb. Rev. Stat. § 28-912 (Reissue 1985). The trial court held that under *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981), the language at issue would go only to the penalty phase of the proceedings and, therefore, should not be included in the instruction on the essential elements of the crime of escape. We affirm.

Addressing appellant's first assignment of error, appellant contends that he was denied a fair and impartial jury due to the extensive pretrial publicity his escape received. We have often repeated, most recently in *State v. Irish*, 223 Neb. 578, 391 N.W.2d 137 (1986), that a motion for change of venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. Looking to the record of the voir dire, we find no abuse of discretion.

In *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976), we set out an analysis of the factors to be taken into account in the consideration of a motion for change of venue. They include: (1) the nature of the publicity; (2) the degree to which the publicity has circulated throughout the community; (3) the degree to which publicity has circulated to areas to which venue could be changed; (4) the length of time between the dissemination of the publicity and the date of the trial; (5) the care exercised and the ease encountered in the selection of the jury; (6) the severity of the charge; and (7) the size of the area from which venire is drawn.

Applying the *Ell* analysis to the facts of the case at hand, we note that the publicity centered around the method of the escape and the effects of the escape upon the prison, not

primarily upon Heathman himself. The defense counsel examined the potential jurors in groups of six with respect to the issue of pretrial publicity. Of the 24 persons on the panel, only 12 recalled hearing something about the case, and their knowledge was vague and indefinite. None could remember specific details. See *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970). Each member of the panel was able to commit himself or herself to rendering a fair and impartial verdict. None had formed or expressed any opinion as to the defendant's guilt.

To secure a change of venue the defendant must show that pretrial publicity has made it impossible to secure a fair and impartial jury. *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980); *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983). It is not required that the jurors be completely ignorant of the facts of the case. It is sufficient that the jurors are able to lay aside their impressions or opinions and render a verdict based solely upon the evidence adduced at trial. *State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985); *State v. Torrence*, 192 Neb. 213, 219 N.W.2d 772 (1974), *cert. denied* 420 U.S. 928, 95 S. Ct. 1127, 43 L. Ed. 2d 399 (1975). We find no merit in this assignment of error.

The appellant's second assignment of error centers upon the trial court's requirement that Heathman remain in leg irons while in the presence of the jury. An examination of the record makes clear that the trial court chose the least restrictive means available. In *State v. Weikle*, 223 Neb. 81, 388 N.W.2d 110 (1986), we faced circumstances very similar to the case at hand. In *Weikle* there were inmate witnesses in the courtroom to testify, and the appellant there also had expressed an intent to escape. There, we held the action of the trial court to be both reasonable and prudent to ensure the safety of all involved.

In *South v. State*, 111 Neb. 383, 196 N.W. 684 (1923), this court held that a defendant should be free from shackles during a criminal prosecution *unless they are necessary to prevent violence or escape*. As we noted in *Weikle*, not every practice that tends to single out the accused must be struck down. *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). In light of this case law and in view of the court's consideration on the record of the available alternative,

Heathman's expressed intent to escape again, and his criminal history, we can find no error in the court's decision to require Heathman to remain shackled during the course of the trial.

The appellant argues that the trial court placed the burden upon him to demonstrate why he should not be shackled, instead of placing the burden upon the State to demonstrate why he should be shackled. We disagree. In the dialogue with defense counsel, the court recited the considerations it felt required the shackling and invited defense counsel to refute those considerations. No burden was unfairly placed on the appellant. The action of the district court was correct.

Focusing upon appellant's third assignment of error, the trial court's refusal to grant a mistrial on the ground of prosecutorial misconduct, again we find no error in the court's action. Exactly what was said by the prosecutor is not known, as the opening statement was not reported. All seem to agree that the remark addressed itself to the status of appellant and the crime for which he was incarcerated. As was noted above, the proper curative measures were taken by the trial court. The two cases cited by the appellant in his brief differ critically from the case at hand. In *Stennett v. State*, 340 So. 2d 67 (Ala. 1976), no curative measures were taken by the trial court after the jury was told by the State in opening remarks that it was about to hear a case about the defendant's selling marijuana. In *State v. Boss,* 195 Neb. 467, 238 N.W.2d 639 (1976), the prosecutor made reference to the defendant's prior conviction. There was no motion for mistrial, objection, or request for a cautionary instruction.

At trial, evidence was introduced to show that Heathman was incarcerated, that he escaped, and that he was subsequently returned to the penitentiary by an officer of the Department of Correctional Services, after apprehension in California. Evidence was adduced to show that the appellant had been committed and was an inmate, after commitment to the Department of Correctional Services, on the date of the escape. Evidence established that Heathman had no permission to be absent from the penitentiary on that date. A witness testified to observing two persons climbing along the outside wall on the date of the escape. Testimony also established that appellant

was not in his cell during a count of the inmates on that date and was absent until being returned on December 19, 1984.

In light of the overwhelming evidence adduced at trial with reference to the facts of the escape, we cannot say that Heathman was in any way prejudiced by the prosecutor's remarks. *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985). A motion for mistrial will be addressed to the sound discretion of the trial court. Absent an abuse of that discretion, the trial court's ruling will not be disturbed on appeal. *State v. Ammons*, 208 Neb. 812, 305 N.W.2d 812 (1981). Appellant has not met his burden of showing that he was prejudiced by this alleged error. *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984).

Appellant's final assignment of error involves the court's instruction with regard to the elements of the crime of escape. Appellant argues that the instruction that he escaped from official detention should have been an escape from official detention after the conviction for the commission of an offense. This assignment of error centers around the case of *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). The appellants there contended that the government did not allege the proper elements of the crime of kidnaping to justify the convictions. Specifically, the informations were defective in that they did not allege that the victim was liberated alive. There, we rejected the appellants' argument that Neb. Rev. Stat. § 28-313 (Reissue 1985) set out two different offenses, one in which the victim was liberated alive and one in which the victim was not. Focusing upon the statute which governs the crime of kidnaping, we noted that subsection (1) defines the offense; subsection (2) sets out the basic penalty; and subsection (3) sets out a mitigating factor, the liberation of a live victim, which, if applicable, permits the sentencing court to impose a lesser sentence. Appellant contends that our interpretation of the kidnaping statute in *Schneckloth* was erroneous and the same reasoning cannot be used in the case at hand. We disagree. As this court stated in *Schneckloth*, the view that the kidnaping statute defines only one offense is the better reasoned approach and the view which is supported by the case law. We adhere to that interpretation.

We find no support for the appellant's contention that the escape statute defined two separate offenses: one in which the defendant escaped from official detention and one in which the defendant escaped from official detention after conviction for the commission of an offense. Section 28-912 reads:

> (1) A person commits escape if he unlawfully removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited period. Official detention shall mean arrest, detention in or transportation to any facility for custody of persons under charge or conviction of crime or contempt or for persons alleged or found to be delinquent, detention for extradition or deportation, or any other detention for law enforcement purposes; but official detention does not include supervision of probation or parole or constraint incidental to release on bail.
>
> (2) A public servant concerned in detention commits an offense if he knowingly permits an escape. Any person who knowingly causes or facilitates an escape commits a Class IV felony.
>
> (3) Irregularity in bringing about or maintaining detention, or lack of jurisdiction of the committing or detaining authority shall not be a defense to prosecution under this section if the escape is from a prison or other custodial facility or from detention pursuant to commitment by official proceedings. In the case of other detentions, irregularity or lack of jurisdiction shall be a defense only if:
>
> (a) The escape involved no substantial risk of harm to the person or property of anyone other than the detainee; and
>
> (b) The detaining authority did not act in good faith under color of law.
>
> (4) Except as provided in subsection (5) of this section, escape is a Class IV felony.
>
> (5) Escape is a Class III felony where:
>
> (a) The detainee was under arrest for or detained on a felony charge or following conviction for the commission of an offense; or

(b) The actor employs force, threat, deadly weapon, or other dangerous instrumentality to effect the escape; or

(c) A public servant concerned in detention of persons convicted of crime purposely facilitates or permits an escape from a detention facility or from transportation thereto.

In our opinion the escape statute defines one offense and, as does the kidnaping statute, sets out factors which, if present, simply change the range of the penalty. The escape statute is structurally similar to the kidnaping statute, and prior interpretations of § 28-912 support this conclusion. E.g., *State v. Schlothauer*, 206 Neb. 670, 294 N.W.2d 382 (1980); *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981); *State v. Coffman*, 213 Neb. 560, 330 N.W.2d 727 (1983).

In summary, appellant has not shown that any of the above claimed errors are meritorious. The judgment and sentence are affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in the result.

I concur in the result reached by the majority in this case. I write separately, however, because I do not wish it to be understood that I agree that as a general rule one charged with escape should be shackled during the trial. For reasons more fully set out in my dissent in *State v. Weikle*, 223 Neb. 81, 388 N.W.2d 110 (1986), I do not believe that one charged with escape should be shackled absent evidence that the defendant intends to try to escape from court and there is no other reasonable method of restraining him.

In the instant case Heathman was found outside the walls of the prison. Unlike the facts in *State v. Weikle, supra*, the evidence in this case was so overwhelming that shackling Heathman could not prejudice his case. Where, however, the evidence is not clear that an escape has occurred, as was the case in *State v. Weikle, supra*, shackling the defendant simply sends a message to the jury which, in my view, is prejudicial to the defendant's rights. Because Heathman was not prejudiced by the shackling, I concur in the majority's conclusion that the judgment and sentence should be affirmed.

STATE OF NEBRASKA, APPELLEE, V. LARRY PRIBIL, APPELLANT.

395 N.W.2d 543

Filed October 31, 1986. No. 86-113.

1. **Directed Verdict.** A motion to dismiss a criminal complaint at the close of the State's evidence can only be granted if there was a total failure of competent proof to support the existence of a material element of the alleged crime or if the testimony adduced was of so weak or doubtful a character that a conviction based thereon could not be sustained.
2. **Lesser-Included Offenses.** To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
3. _____. When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, *may* constitute another crime or crimes, such other crime or crimes are included within the crime charged.
4. _____. Where the lesser offense may be committed in two or more independent ways, one type may be a lesser-included offense even though the remaining type or types are not.
5. **Indictments and Informations: Lesser-Included Offenses.** The nature of the crime charged in the information must be such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge.
6. **Lesser-Included Offenses: Jury Instructions.** Even though a lesser-included offense charge is wrongfully included in the court's instructions to the jury, where the defendant is found guilty of the greater crime, he or she has not been prejudiced by the erroneous instruction.
7. **Lesser-Included Offenses: Jury Instructions: Appeal and Error.** In a prosecution for a felony, error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged unless requested to do so.
8. **Jury Instructions.** It is the duty of a trial court to instruct as to the law applicable to the case. Neither the defense nor the prosecution has the option of precluding the court from carrying out this duty in hopes of forcing an "all or nothing" verdict.
9. **Lesser-Included Offenses: Jury Instructions: Case Disapproved.** The trial court may instruct on a lesser-included offense over the objection of the defendant if the information or complaint charging the crime is such as to give the defendant notice that he or she could at the same time face the lesser-included offense charge. To the extent that *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), contains language to the contrary, such language is expressly disapproved.
10. **Lesser-Included Offenses: Jury Instructions: Appeal and Error.** Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

L.W. Kelly, Jr., of Kelly & Kelly, for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

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

HASTINGS, J.

The defendant, Larry Pribil, appeals a jury trial verdict in the district court for Holt County wherein he was found guilty of attempt to commit assault in the first degree. We affirm.

On July 1, 1985, LaVonne Pribil was at a friend's home in O'Neill, Nebraska, until approximately midnight. At that time Ms. Pribil drove out of O'Neill on Highway 281 toward her home. She noticed an automobile was following her. It pulled up beside her and began crowding her, forcing her to stop. She recognized that the other automobile belonged to her ex-husband, Larry Pribil, the defendant. The defendant got out of his car, came over to Ms. Pribil's car, and yanked open her car door. He tried to pull Ms. Pribil from the car, but she grabbed ahold of the steering wheel. He then grabbed ahold of her breast and started squeezing and pinching it. Defendant finally pulled her from her car and began to beat her with his fists in the head and neck area. He also kicked her in the back, legs, and ribs. He suddenly stopped beating her, returned to his car, and left the area.

Defendant was charged with first degree assault. At the close of the State's case in chief, defendant moved the court to dismiss the complaint, arguing that the State had failed to prove the element of serious bodily injury necessary for first degree assault. The motion was overruled.

At the close of all the evidence, a jury instruction conference was held. Apparently on its own motion, the court proposed and subsequently gave instructions Nos. 4 and 5, which submitted first degree, attempted first degree, and third degree assault to the jury. Defense counsel objected to those instructions insofar as they submitted the lesser-included offenses of attempted first degree assault and third degree assault to the jury. Those objections were overruled. The case was submitted to the jury, and a verdict of guilty to attempted

first degree assault was returned. A motion for new trial was filed and overruled.

Defendant raises two issues on appeal: (1) whether there was sufficient evidence of serious bodily injury to instruct the jury on first degree assault; and (2) whether it was proper for the district court to instruct the jury on the lesser-included offenses of attempted first degree assault and third degree assault when the defendant had objected to the giving of those instructions.

At the close of the State's case, defendant's counsel moved the trial court to dismiss the complaint, arguing that the State had offered no evidence to prove the existence of one of the material elements of first degree assault, that being the victim's serious bodily injury. See Neb. Rev. Stat. § 28-308 (Reissue 1985). The court could have granted that motion only if there was a total failure of competent proof to support "serious bodily injury" or if the testimony adduced was of so weak or doubtful a character that a conviction based thereon could not be sustained. See *State v. Rubek*, 220 Neb. 537, 371 N.W.2d 115 (1985).

In Neb. Rev. Stat. § 28-109(20) (Reissue 1985), serious bodily injury is defined as "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." During the State's case, evidence was presented showing that as a result of the beating by the defendant, the victim suffered extensive tenderness and bruises on her neck and chest; scratch-type injuries and bruises on both breasts; skinned knees, ankles, and left arm; a fractured rib; limited range of motion of her neck; and some kidney trauma as evidenced by blood in her urine. She was hospitalized overnight and was in bed approximately a week, taking pain medication. A month after the beating, Ms. Pribil had to have a tooth extracted because it was split. There was evidence showing that the split tooth could have been caused either by the blow to the side of her head or by biting down on something hard.

Certainly such a beating resulting in those injuries is not a total failure of competent proof on the issue of "serious bodily injury." Contrary to defendant's argument, it is not necessary

that the injury *caused* death, or serious permanent disfigurement or impairment of the function of any part or organ of the body, but only that it *involved a substantial risk* of producing those results. Clearly, from a description of the nature and extent of the injuries inflicted, there was presented to the jury a fact question on that issue. The fact that the jury ultimately determined that the defendant was not guilty of first degree assault is totally irrelevant to the issue of whether there was sufficient evidence to submit the crime of first degree assault to the jury. First degree assault was properly submitted to the jury.

Before we address the second of the defendant's allegations of error, we must first address a threshold issue: that being whether third degree assault is a lesser-included offense of first degree assault. Third degree assault may be committed in a variety of ways. It may be accomplished by intentionally, knowingly, *or* recklessly causing bodily injury to another person, or by threatening another in a menacing manner. Neb. Rev. Stat. § 28-310 (Reissue 1985). To commit first degree assault one must intentionally *or* knowingly cause serious bodily injury to another. § 28-308.

The most recent definition of the term "lesser-included offense" appears in *State v. Murphrey*, 220 Neb. 699, 371 N.W.2d 702 (1985). Therein we said, quoting from *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982): " ' "To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. . . ." ' " 220 Neb. at 702, 371 N.W.2d at 705. If the defendant in the instant case intentionally or knowingly caused serious bodily harm to the victim, he surely had intentionally or knowingly caused bodily harm to the victim so as to be guilty of third degree assault.

The confusion in identifying a lesser-included offense, if any exists, results from the additional explanatory language offered in *Lovelace* and countless cases before it: "In sum the lesser included offense is one all the elements of which are necessarily included in the greater." 212 Neb. at 359, 322 N.W.2d at 675. The argument is made that because third degree assault *may* be established by recklessly causing bodily injury to another, or by

threatening another in a menacing manner, these elements are not necessary to establish first degree assault; therefore, third degree assault is not a lesser-included offense.

Perhaps a more clear statement of that summary is found in *State v. McClarity*, 180 Neb. 246, 249, 142 N.W.2d 152, 154 (1966), in which we said: "When some of the elements of the crime charged in the information, without the addition of any element irrelevant to the original crime charged, *may* constitute another crime or crimes, such other crime or crimes are included within the crime charged." (Emphasis supplied.)

In other words, where, as here, the lesser offense may be simple assault committed in two or more independent ways, one may be a lesser-included offense even though the remaining types are not. *State v. Carmichael*, 405 A.2d 732 (Me. 1979).

However, the problem in this case is that the court, in charging the jury as to the material elements of the lesser-included crime of assault in the third degree, required the jury to find that the defendant intentionally, knowingly, or *recklessly* caused bodily injury to the victim. The definition of third degree assault as given to the jury took that crime out of the category of a lesser-included offense of first degree assault because it would have permitted the jury to find the defendant guilty of third degree assault if it found the defendant had recklessly caused bodily injury, an element not present in first degree assault.

It was error for the trial court to include within its definition of third degree assault bodily injury caused recklessly, because the nature of the charge in the information must be such as to give the defendant notice that he could at the same time face the lesser-included offense charge. *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971). In other words, one who is informed upon and comes prepared to defend against an intentional or knowing act is not necessarily prepared to refute an allegation of reckless conduct. A quick reference to the horrendously complicated definition of the term "recklessly" contained in § 28-109(19) will make that painfully clear.

Nevertheless, erroneous though the instruction may be, we do not find that it constituted prejudicial error. Here, as in *State v. Murphrey*, 220 Neb. 699, 371 N.W.2d 702 (1985), the court

properly instructed the jury on attempt to commit assault in the first degree and then continued with language to the effect that if the jury finds beyond a reasonable doubt that the defendant was guilty of the greater crime, the lesser-included crime of third degree assault should not be considered.

> Since the jury found the defendant guilty of attempted burglary and the instruction told them not to consider the "lesser included offenses hereafter set forth," we find no prejudice in the instruction. We presume the jury followed the court's instruction and did not consider any of the purported lesser-included offenses after the defendant was found guilty of the primary charge against him.

Id. at 702, 371 N.W.2d at 705.

We now turn to the question of whether it is error to instruct the jury on a proper lesser-included offense over the objection of the defendant. Defendant, relying on *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), argues that it was error for the trial court to have instructed the jury, over his objection, on the lesser-included offenses of third degree assault and attempted first degree assault. In *McConnell* the defendant was tried upon a charge of assault with intent to commit rape. He was found guilty. He argued to this court that the trial court erred in failing to instruct the jury, sua sponte, on the lesser offenses of assault and battery and simple assault. Quoting the third syllabus point from *Barr v. State*, 45 Neb. 458, 63 N.W. 856 (1895), we held: " 'In a prosecution for a felony error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested to do so.' " *McConnell, supra* at 775, 110 N.W. at 667. Because McConnell had not requested such an instruction, he could not raise as error the failure of the trial court to instruct on those lesser included-offenses. That is still the law in Nebraska. *State v. Bell*, 194 Neb. 554, 233 N.W.2d 920 (1975).

We then went on to state in *McConnell, supra* at 775, 110 N.W. at 667:

> It may be said for this rule that it is not without reason for its support. It may happen that, where a defendant is charged with a heinous crime, and the evidence against him is slight, he would prefer to have the jury understand

> that he must be found guilty of the particular crime charged, or else not guilty. For in such a case the jury might well refuse to convict of the heinous crime, and yet readily agree to find the defendant guilty of a lesser offense, amounting, perhaps, to no more than a misdemeanor. *By adhering to this rule we offer a defendant an opportunity to exercise his election, and have such an instruction by requesting the court to give it.*

(Emphasis supplied.) Defendant argues that this language supports his contention and is controlling.

Defendant is correct in his assessment that the above language supports his argument, but is not correct in stating that the language is controlling. The holding in *McConnell* is merely that a defendant must request instruction on lesser-included offenses before he can argue on appeal that he should have had such instructions. The rest of the language in *McConnell* is dicta.

Moreover, the language in *McConnell* upon which defendant relies runs counter to the general duty of a trial court to instruct on the law in the case, whether requested to do so or not, *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983), and is expressly disapproved.

The propriety of instructing the jury on lesser-included offenses when the defendant objects to such a request has been raised in Nebraska, but never decided. See *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982). The issue has, however, been decided in Michigan in the case of *People v Chamblis*, 395 Mich. 408, 236 N.W.2d 473 (1975). In that case the defendant was charged with armed robbery. The trial judge, over the defendant's objection, instructed the jury on the lesser offenses of unarmed robbery and larceny from the person. The jury found the defendant guilty of the lesser offense of larceny from the person. The court of appeals reversed the trial court. The Supreme Court of Michigan reversed the court of appeals and reinstated the jury conviction.

The Michigan Supreme Court first addressed the defendant's contention that it was error for the trial court to have instructed the jury on the lesser offenses over the defendant's objection. The court rejected the defendant's contention, stating:

> Defense counsel's objection to the giving of the instruction on lesser included offenses is not controlling. It is the duty of the trial court to instruct the jury as to the law applicable to the case. [Citation omitted.] *Neither the defense nor the prosecution has the option of precluding the court from carrying out this duty in hopes of forcing an "all or nothing" verdict.*

(Emphasis supplied.) *Id.* at 415, 236 N.W.2d at 476. The reason for this rule was best stated by the California Supreme Court in *People v. Wickersham*, 32 Cal. 3d 307, 324, 650 P.2d 311, 319, 185 Cal. Rptr. 436, 444 (1982):

> The fulfillment of this obligation ensures that the jury will consider the full range of possible verdicts—not limited by the strategy, ignorance, or mistakes of the parties. The jury should not be constrained by the fact that the prosecution and defense have chosen to focus on certain theories. "Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. . . ."

Chamblis did not, however, *require* the trial court to instruct sua sponte on lesser-included offenses.

> We do not say here that a trial judge *must* instruct *sua sponte* on a lesser included offense, but simply that he *may* do so if the evidence adduced at trial would warrant conviction of the lesser charge and defendant has been afforded fair notice of those lesser included offenses.

(Emphasis in original.) 395 Mich. at 417, 236 N.W.2d at 477-78. *Chamblis* goes on to explain "fair notice" as follows:

> To assure defendant's due-process rights to fair notice, the trial judge may not instruct on lesser included offenses over defendant's objection unless the language of the charging document "be such as to give the defendant notice that he could at the same time face the lesser included offense charge". *United States v. Whitaker*, 144 US App DC 344, 350; 447 F2d 314, 320 (1971).

395 Mich. at 418, 236 N.W.2d at 478.

Although we have discussed the duty of the trial court to

instruct on the law of the case whether requested to or not, we should point out that no error can be claimed for failure to instruct on a lesser-included offense where that instruction has been expressly waived by the defendant.

Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted. The rationale for this conclusion is based on the rule that where the general charge as contained in the instructions fairly presents the case to the jury, error cannot be predicated on a failure to instruct on some particular phase of the case unless a proper instruction has been requested by the party complaining. See, *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978); *State v. Lynch*, 196 Neb. 372, 243 N.W.2d 62 (1976).

We therefore hold that it is not error for a trial court to instruct the jury, over the defendant's objection, on any lesser-included offenses supported by the evidence and the pleadings. This holding is consistent with our decision in *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983), in which we stated that it was not error for a trial court to instruct a jury, over the defendant's objection, on the defense of intoxication.

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. I do so because I do not believe that the provisions of Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1985) can be dissected to the extent that the majority has done. The term "reckless" cannot be removed from the phrase "intentionally, knowingly." Therefore, under our holdings in *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982), and *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984), assault in the third degree is not a lesser-included offense of first degree assault. Specifically, in *State v. Lovelace, supra* at 359, 322 N.W.2d at 675, we defined a lesser-included offense as

> "one which is necessarily established by proof of the greater offense. Fuller v. United States, 407 F.2d 1199. To

> be a lesser included offense, the *elements* of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Certain v. State, 261 Ind. 101, 300 N.E.2d 345. In sum the lesser included offense is one *all* the elements of which are necessarily included in the greater. See, State v. Jones, 186 Neb. 303, 183 N.W.2d 235; State v. McClarity, 180 Neb. 246, 142 N.W.2d 152." See, also, *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981).

(Emphasis supplied.)

The majority recognizes this rule but attempts to get around it by simply providing that the reckless portion of assault in the third degree may be disregarded when attempting to determine if it is a lesser-included offense of assault in the first degree. But our holding in *State v. Lovelace, supra*, required that all the elements of the lesser must be present in determining the greater. So long as reckless is a part of the offense and one of the elements, then the lesser-included offense is not one all the elements of which are necessarily included in the greater.

I am simply unaware of any authority that permits us to disregard a part of the statute as we have in the instant case. Whether one had committed an act knowingly and intelligently or simply recklessly is a question of fact to be determined by a jury and not one which the court in the first instance should direct.

Looking at the problem from the other end perhaps makes the problem even clearer. It has long been the rule in this jurisdiction that if one is charged in the language of the statute, the complaint is sufficient. See, *State v. Lingle*, 209 Neb. 492, 308 N.W.2d 531 (1981); *State v. Lauver*, 26 Neb. 757, 42 N.W. 762 (1889). Therefore, one may be charged with the offense of third degree assault by simply alleging that the defendant did "intentionally, knowingly, or recklessly" cause bodily injury to another. I cannot imagine that if a defendant filed a motion requiring the State to elect whether it intended to prove the defendant had committed the assault knowingly and intentionally, as opposed to recklessly, we would sustain such a motion. And yet, we have, by our majority opinion here today, created what appear to be separate offenses. Moreover, without

authority to do so, we have interpreted the act to reach our goal. This we should not have done. We have long held that a statute which is clear and unambiguous requires no interpretation. In *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 302, 363 N.W.2d 362, 366 (1985), we said: "Generally, a statute is not read as automatically requiring judicial construction. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning." See, also, *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 206 Neb. 535, 294 N.W.2d 598 (1980); *State v. Adkins*, 196 Neb. 76, 241 N.W.2d 655 (1976). There is nothing ambiguous about the statute defining assault in the third degree which requires us to interpret it or to conclude that there are various elements of the statute which can, for some purposes, be disregarded, except, apparently, our desire to make assault in the third degree a lesser-included offense of assault in the first degree—sometimes. The instruction was in error, and requires us to reverse and remand the matter.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY K. JAMESON, APPELLANT.

395 N.W.2d 744

Filed October 31, 1986. No. 86-149.

1. **Speedy Trial: Time.** The right to a speedy trial does not include the time after the defendant has been found guilty and before he is sentenced.
2. **Criminal Law: Prior Convictions: Indictments and Informations: Drunk Driving.** Just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.

Appeal from the District Court for Kearney County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Gary L. Hogg, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

PER CURIAM.

The appellant, Timothy K. Jameson, was charged in the county court for Kearney County, Nebraska, with driving while intoxicated, third or subsequent offense, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). Pursuant to a plea bargain, Jameson, accompanied by counsel, entered a plea of no contest. The court subsequently found that Jameson had been previously convicted of more than three prior offenses and sentenced Jameson to 3 months in jail, fined him $500, and suspended and revoked his license to drive for the remainder of his life. The decision of the county court was appealed to the district court for Kearney County, where the decision was in all respects affirmed. It is from that decision that Jameson now appeals to this court.

He assigns as error the following: (1) The trial court erred in accepting Jameson's plea before properly arraigning Jameson on an amended complaint. (2) The trial court erred in holding the enhancement hearing more than 6 months from the date of the alleged crime and the date Jameson was arrested. (3) The trial court erred in receiving in evidence previous convictions at the enhancement hearing, when the dates on the convictions did not conform with the dates alleged in the complaint and did not further comply with certification or authentication requirements. (4) The sentence is excessive.

We have carefully reviewed all of the assignments and find none of them to have merit. For that reason the judgment and sentence are affirmed.

The record discloses that on July 9, 1984, a woman driving northbound on Highway 10 out of Minden, Nebraska, encountered a southbound vehicle traveling in the northbound lane. The vehicle crossed back and forth across the centerline, causing the woman to drive onto the shoulder of the road in order to avoid an accident. Shortly thereafter, the woman returned to Minden. As she approached the intersection of

Highway 10 and U.S. Highway 6, she observed the same vehicle stopped in the middle of the road and noticed that the driver appeared to have "passed out." She contacted the Minden police and reported these facts. The chief of police drove to the scene. Upon arriving there he detected a strong odor of alcohol coming from the driver, whom he determined was Jameson. After Jameson was awakened by the chief of police, he swayed and staggered and needed assistance in maintaining his balance. A breath test was later administered and registered .19 percent blood alcohol content. He was therefore charged with driving while intoxicated, third or subsequent offense, and ordered to appear in court on July 16, 1984. On July 13, 1984, a formal long-form complaint, utilizing the language of § 39-669.07, was filed. It listed five previous convictions with dates of May 1, 1982, June 1, 1980, December 18, 1978, March 27, 1976, and July 17, 1974.

On July 16, 1984, the date on which Jameson was to appear in court, he requested and was granted a continuance. Again, on July 31, 1984, he requested a continuance, which was granted. On August 20, 1984, Jameson and his attorney appeared in court for arraignment. Four individuals were arraigned at the same time. The prosecuting attorney read the names of the parties and stated that they were all present. The court then advised all four of the defendants of their constitutional rights. The record reflects that the trial court was meticulous in explaining all of their rights, the charges then pending against them, and the possible pleas which could be made by the various defendants. Jameson specifically stated that he understood the charge and the possible penalties and acknowledged that his attorney was present.

Jameson's counsel then advised the court that Jameson had not received a copy of the formal complaint prior to arraignment, and requested a continuance. The arraignment was continued until September 17, 1984. On September 6, 1984, Jameson filed a written plea of not guilty, demanding a jury trial. Jameson was then ordered to appear on October 2, 1984, for a pretrial conference. However, on September 26, he requested a continuance, and it was granted until October 23. At that time trial was set for December 11. On November 13

Jameson requested a continuance until December 18, which was granted. While the record does not disclose any further continuances, apparently at least one more continuance was granted, because trial was not held until January 8, 1985.

At the time set for trial, Jameson appeared with his attorney. Pursuant to plea negotiations, he agreed to plead to the underlying offense of driving while intoxicated and to have the enhancement proceedings held at a later date. The State agreed to that, and further agreed not to attempt to seek a revocation of probation that Jameson was then serving on two previous sentences. The court proceeded to accept Jameson's plea of no contest to the underlying charge of driving while intoxicated. Before doing so the trial court again advised Jameson of all of his necessary constitutional rights. The court found that the plea was made voluntarily and accepted it. The court began to inform Jameson of the possible penalties but was interrupted by Jameson's counsel because, apparently, the parties had agreed to postpone the sentencing hearing until another time. Specifically, Jameson waived his right to include the time between the date of the trial and the date of the enhancement proceedings for the purpose of computing time pursuant to the Nebraska speedy trial statute.

On March 11, 1985, an enhancement proceeding was held. The State introduced exhibits 1 through 6, which were certified copies of previous county court convictions for driving while intoxicated. Exhibit 1 is the transcript for a proceeding of an offense committed January 14, 1981. A journal entry reflects that on July 27, 1982, Jameson, in the presence of his attorney, entered a plea of no contest to the charge. Exhibit 2 is the transcript for a proceeding of an offense committed May 1, 1982. A journal entry reflects that on July 27, 1982, with counsel present, Jameson also pleaded no contest to this charge. Exhibit 3 is the transcript for a proceeding in connection with an offense committed June 1, 1980. A journal entry reflects that on June 9, 1981, while counsel was present, Jameson pleaded guilty. Exhibit 4 is the transcript for a proceeding on an offense committed March 27, 1976. A journal entry reflects that on July 15, 1976, with counsel present, Jameson pleaded no contest. Exhibit 5 is the transcript for a

proceeding for an offense committed December 18, 1978. A checklist in the court record reflects that on February 28, 1980, with counsel present, Jameson pleaded guilty. Exhibit 6 is the transcript for a proceeding on an offense committed May 5, 1974. There is an affidavit stating that Jameson was unable to procure counsel and a certificate of appointment of counsel dated July 18, 1974. The record further reflects that on August 1, 1974, Jameson entered a plea of guilty.

The record also reflects that before sentence was imposed Jameson was afforded an opportunity to review all of the records. He stated that he had no objection as to authenticity but objected on the following bases: (1) that there was a lack of foundation; (2) that the dates of the convictions were different from those listed in the complaint; (3) that there was no showing for factual basis for the pleas; (4) that the pleas were not knowing, intelligent, and voluntary; and (5) that the checklist in exhibit 5 was hearsay. On March 22, 1985, the county court found Jameson guilty of third offense driving while intoxicated. The matter was then continued to May 14, 1985, at which time a presentence investigation was received by the court. At this time the court imposed sentence.

While this court is mindful of the fact that counsel has a duty to his or her client, and the court encourages counsel to vigorously and fully defend, the court, nevertheless, must observe that the appeal in this case borders on the frivolous. The record is clear, beyond question, that prior to accepting Jameson's plea, the court, in the presence of his counsel, informed Jameson of all of his necessary constitutional rights, including the nature of the charges against him, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination. See *State v. Irish,* 223 Neb. 814, 394 N.W.2d 879 (1986). The record makes it clear that Jameson's plea of no contest was made freely, voluntarily, and knowingly, and any claim to the contrary is wholly unsupported by the record.

Jameson's claim that the court erred in holding the enhancement hearing more than 6 months from the date of the alleged crime has absolutely no merit at all. In the first instance the record discloses that he specifically requested all of the

continuances, including the time for imposing sentence, and specially waived any objection. While one might say that the court was more lenient with Jameson than it should have been, one cannot say that Jameson's right to a speedy trial under either Nebraska law or the U.S. Constitution was violated. Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 1985) clearly provides that in computing the time for trial the period of delay resulting from a continuance granted at the request of the defendant or his counsel is excluded. In this case that amounts to 80 days. On that basis Jameson was required to have been *tried* by March 30, 1985. In fact, he was tried on January 8, 1985. The right to a speedy trial does not include the time after the defendant has been found guilty and before he is sentenced.

The language of § 29-1207 reads as follows: "(1) Every person indicted or informed against for any offense shall be *brought to trial* within six months . . . ." (Emphasis supplied.) There then follow certain exceptions, including "[t]he period of delay resulting from a continuance granted at the request . . . of the defendant . . . ."

Nor does a delay occasioned by the various requests made by the defendant constitute a violation of a defendant's right to a speedy trial under the sixth amendment to the U.S. Constitution. It would be a strange anomaly if a defendant could first ask for a series of continuances and then be immune from prosecution because he had not been granted a speedy trial. Even under the most liberal view of the sixth amendment, that argument will not "hold water." The assignment of error is simply without basis.

Jameson's third assignment of error is, likewise, without merit. He maintains that the previous convictions should not have been received in evidence, principally because the dates set out in the complaint did not correspond with the dates of the previous convictions. Unfortunately, the complaint alleged that *prior convictions* occurred on May 1, 1982, June 1, 1980, December 18, 1978, March 27, 1976, and July 17, 1974. While it is true that the convictions were entered on dates other than those listed in the complaint, the dates listed, other than the July 17, 1974, date, were in fact the dates on which each of the offenses was committed. The July 17, 1974, date was in error.

However, in view of the fact that there were more than two prior convictions without the July 17, 1974, event, it may be disregarded. Jameson was fully advised of the previous convictions the State intended to rely upon in proving that this was at least a third offense. Not only did the State seek to offer into evidence the prior convictions but in each instance introduced what appear to be the entire proceedings, including the complaint, any requests for continuances, and the judgment. In each instance the record reflects that Jameson was represented by counsel when he entered his plea to charges as set out in the complaint.

A reading of § 39-669.07 makes it clear that the substantive offense is driving while under the influence of alcohol or with more than .10 percent of alcohol in one's body fluid. The number of times a person has previously been convicted of such a charge is not itself a crime but, rather, is a factor which the trial court is to consider in imposing sentence. To that extent it is similar to our habitual criminal act, Neb. Rev. Stat. § 29-2221 (Reissue 1985). One is not sentenced for the crime of being a habitual criminal. Instead, the sentence imposed for violating some law of this state is enhanced because the defendant has previously been convicted. *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981). The same is true with regard to driving while under the influence of alcohol. See, also, *State v. Helgeson*, 235 Kan. 534, 680 P.2d 910 (1984); *State v. Nelson*, 178 Mont. 280, 583 P.2d 435 (1978); *State v. Carpenter*, 29 Or. App. 879, 565 P.2d 768 (1977).

And just as a wrong date in an information will not preclude a defendant from being sentenced as a habitual criminal if the record discloses the defendant could not have been misled or confused, so, too, a wrong date in a complaint will not preclude a defendant from being sentenced as one who has previously been convicted of driving while under the influence of alcohol if the record discloses that the defendant could not have been misled or confused.

In *State v. Harig*, 192 Neb. 49, 55-57, 218 N.W.2d 884, 889-90 (1974), we said:

> [T]he Habitual Criminal Act does not create a new and separate criminal offense . . . but provides merely that the

repetition . . . aggravates the guilt and justifies greater punishment . . . . Under this act, the inaccurate allegation of the date or time of a prior felony would have no effect with respect to the sufficiency of the information as to its allegation of the principal or underlying felony or felonies. As to such felonies the time of a prior conviction is only a historical fact. . . .

. . . While it is undoubtedly desirable and helpful to have the dates of the prior felonies alleged in the information charging a defendant with being an habitual criminal, we do not find that the absence of such allegation would necessarily render the information invalid. . . . [I]t is necessary to read the provisions of the Habitual Criminal Act . . . with the provision of section 29-1501 . . . : "No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected . . . for omitting to state the time at which the offense was committed in any case where time is not the essence of the offense; nor for stating the time imperfectly . . . ." [U]nder Nebraska law, informations are generally subject to the same requirements as are indictments. . . . It is clear that the exact time of the commission of an alleged prior felony is not of the essence of a charge . . . and the failure of the information in this case to state accurately the time of a prior felony does not render that information insufficient . . . .

. . . This is not to say that evidence need not be presented to establish the exact time or date of the prior felony or felonies generally alleged. But we see no constitutional problems in this regard so long as means are and were provided for the defendant to obtain the information relative to the specific dates of the offenses relied upon as prior felonies . . . .

In the instant case the record is clear that Jameson could not have been misled or confused. If anything, he was probably better informed by being told the date the offense was committed rather than the date of the conviction, which was delayed by Jameson's requests for continuances. The claim of

error is without merit.

Jameson's other claims of error in connection with the enhancement hearing are likewise without merit. Clearly, the records were properly authenticated and admissible into evidence without further foundation. Moreover, each record reflected that Jameson was represented by counsel at each proceeding. That is all that the State has the burden of proving before offering the previous records. See, *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986); *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986). If in fact other deficiencies existed, the burden was upon Jameson to come forward with the evidence. See § 39-669.07. This he did not do.

And, finally, Jameson argues that the sentence is excessive. The sentence was required by the provisions of § 39-669.07. Subsequently, it is true, the Legislature did amend the statute to provide that

> [a]ny person who prior to April 19, 1986, has had his or her motor vehicle operator's license revoked for life pursuant to section 39-669.07 or 39-669.08 may submit an application to the court for a reduction of such lifetime revocation. The court in its discretion may reduce such revocation to a period of fifteen years.

Neb. Rev. Stat. § 39-669.38 (Cum. Supp. 1986). We believe that the county court which originally sentenced Jameson should be afforded the opportunity to exercise that discretion, and therefore we do not modify the order, subject, however, to Jameson's right to petition the county court for Kearney County, Nebraska, for a reduction in sentence.

In view of the fact that there is no error, the judgment and sentence are affirmed.

AFFIRMED.

BOSLAUGH and WHITE, JJ., concur in the result.

DONNA BELLE ALLEN, APPELLEE, V. JOSEPH BERNARD ALLEN, APPELLANT.
395 N.W.2d 551

Filed October 31, 1986. No. 86-276.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

R. Bradley Dawson, for appellant.

R.W. Satterfield, for appellee.

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

PER CURIAM.

This is an appeal from a property division award incident to a dissolution action. After reviewing the matter de novo to determine whether the trial court abused its discretion, *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984), we find we agree with the disposition made in the division of property ordered by the trial court.

The judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALEX J. BORCHARDT, APPELLANT.
395 N.W.2d 551

Filed October 31, 1986. No. 86-355.

1. **Pleadings: Trial: Evidence: Appeal and Error.** Ordinarily, the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error.
2. **Pleadings: Trial: Appeal and Error.** One wishing to preserve error on the basis of remarks contained in an opening statement generally must object to the questioned remarks when made, notwithstanding the overruling of a motion in limine.
3. **Trial: Appeal and Error.** A litigant may rely on a trial judge's announcement of what he or she will permit an opponent to do.

4. **Motions for Mistrial.** The determination of whether to grant a motion for mistrial lies within the sound discretion of the trial court.
5. _____. A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events.
6. **Motions for Mistrial: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike improper material is sustained and the jury is admonished to disregard such material.
7. **Attorney and Client.** A lawyer should represent a client zealously within the bounds of the law.
8. **Criminal Law: Prosecuting Attorneys.** The responsibility of a public prosecutor differs from that of the usual advocate; his or her duty is to seek justice, not merely to convict. This special duty exists because (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial, the prosecutor is not only an advocate but he or she also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence known to him or her that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he or she believes it will damage the prosecutor's case or aid the accused.
9. **Attorneys at Law.** In appearing in his or her professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
10. **Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
11. **Trial: Evidence: Rules of Evidence: Words and Phrases.** Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Rev. Stat. § 27-702 (Reissue 1985), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
12. **Convictions: Appeal and Error.** A conviction will not be set aside in the absence of a showing that an error created prejudice.
13. **Trial: Evidence: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence, 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 is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

14. **Appeal and Error.** It is not for this court to accept one version of a case over another; that is for the jury.
15. **Verdicts: Appeal and Error.** After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

James R. Mowbray of Mowbray, Chapin & Walker, P.C., for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

CAPORALE, J.

A county court jury found defendant, Alex J. Borchardt, guilty of operating or being in actual physical control of a motor vehicle while under the influence of alcoholic liquor in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1985). After an enhancement hearing, during which it was established that defendant had once before been convicted of drunk driving, the county court adjudged him guilty of second offense drunk driving and sentenced him to imprisonment for 30 days, ordered him to pay a $500 fine and costs, and suspended his driver's license for 1 year. The district court affirmed the county court's judgment and sentence. In this court defendant urges the district court erred in failing to find error appearing on the record made in the county court, in that the county court erred in (1) overruling his motion in limine, (2) overruling his motions for a mistrial, (3) admitting testimony concerning the results of the field horizontal nystagmus test, and (4) determining the evidence sufficient to support the jury's finding of guilt. We affirm.

FACTS

On June 11, 1985, at approximately 10:40 p.m., Trooper

Gerald Carlson of the Nebraska State Patrol was proceeding north on 84th Street in Lincoln when he observed a vehicle driven by defendant approaching him in the southbound lane. Carlson detected from the headlights of defendant's vehicle that it was continually crossing over the centerline. At one point defendant's vehicle crossed completely into the northbound lane, forcing Carlson into a ditch to avoid a collision. Carlson then turned his vehicle around, activated his flashing lights, and pursued defendant. Defendant continued to cross over the centerline with the left wheels of his vehicle and once again crossed completely into the northbound lane. Carlson believed that because he had been following defendant with his emergency lights flashing, an approaching vehicle had pulled over to the shoulder, thus avoiding a possible collision with defendant. Defendant eventually pulled over and came to an abrupt stop.

Carlson then pulled his patrol car behind defendant's vehicle and approached defendant. Carlson observed that defendant's eyes were bloodshot, that he emitted a moderate odor of alcohol, and that he sometimes slurred his speech. Carlson informed defendant that he had crossed the centerline several times and had nearly run his patrol car and another vehicle off the road. Defendant replied he did not feel that he had done anything wrong.

Carlson then asked defendant to accompany him to his patrol car in order that sobriety tests could be performed. While walking to the patrol car, defendant staggered and leaned on the hood of the patrol car for support. Once inside the patrol car, defendant was asked to perform several field sobriety tests. Carlson first asked defendant to recite the alphabet from *a* to *z*. Defendant slowly, but correctly, recited the alphabet to the letter *p*, when he stopped and told Carlson that he did not desire to continue. Defendant was then asked to count backward from 100 to 70 by 1s. This test was performed correctly. Defendant was next asked to count forward from 1 to 10, then backward from 10 to 1. Defendant counted from 1 to 10 correctly; however, he became confused when counting backward and mixed the numbers. Finally, Carlson asked defendant to perform a horizontal nystagmus test, the purpose of which was

to check defendant's eyes for unusual twitching or jerking, the presence of which would indicate intoxication. Carlson testified that during this test he observed a definite twitching in defendant's left eye.

Defendant was then asked to perform two further sobriety tests outside the patrol car in order to test his balance. First, defendant was asked to walk, placing one foot in front of the other, heel to toe, on a roadside line. Defendant was not able to walk heel to toe at all times and was unable to stand still without swaying. Defendant was next asked to perform a one-leg stand, raising the opposite foot off the ground 3 to 6 inches. During this test, defendant swayed "badly" and placed the suspended foot on the ground three times. Carlson testified that based on all of the facts before him, he had concluded that defendant was under the influence of alcohol.

Carlson and defendant got back into the patrol car in order for Carlson to give defendant a preliminary breath test. Defendant asked Carlson if he could be let go or allowed to park his car, to which the officer replied in the negative. Defendant then again told Carlson he felt he had not done anything wrong and wanted to speak with someone of higher authority. Carlson contacted Sgt. Kevin Stukenholtz and asked Stukenholtz to meet him at the site of the investigation.

While waiting for Stukenholtz, Carlson performed the preliminary breath test, then informed defendant that he was under arrest for driving while intoxicated. Defendant repeated he felt that he had not done anything wrong and again asked if there were any way to deal with the situation other than by arrest. Carlson replied in the negative.

When Stukenholtz arrived at approximately 11:30 p.m., he was met by Carlson and informed of what had transpired. Stukenholtz then entered the patrol car with the defendant, leaving Carlson outside. Stukenholtz testified that he observed defendant to have bloodshot eyes, a moderate odor of alcohol on his breath, and slurred speech. Defendant asked the officer the reason for his arrest and if there were not some other way the matter could be handled. Stukenholtz replied that the matter would continue according to established procedure. Defendant then asked Stukenholtz if he was "really that bad."

Defendant was then taken to the county-city jail in Lincoln. Defendant was unsteady when he walked from the patrol car to the jail. At the jail defendant was given the *Miranda* warnings and was then questioned by Carlson, with Stukenholtz observing. Stukenholtz testified that when defendant spoke, he began clearly but would ramble toward the end and start running his words together.

In reply to questioning defendant said that he had been at the Ashland Country Club for a social outing and had been drinking from approximately 7 p.m. to 10 p.m. When asked how many drinks he had consumed, he replied, "one drinking." When asked if he was intoxicated or under the influence of alcohol, defendant replied in the negative. Stukenholtz nonetheless formed the opinion that defendant was under the influence of alcohol.

Defendant testified that on the day of his arrest, he had come in from the golf course at Ashland Country Club somewhere between 5:30 and 6:15 p.m. No alcohol was allowed on the course, so defendant had not been drinking prior to this time. Up until approximately 8:30 p.m., he consumed four or five vodka tonics, after which he began to drink coffee.

Defendant admitted crossing the centerline as he was driving home that evening, but attributed the occurrence to the fact that he had been working excessively long days and was "dozing off" rather than under any influence of alcohol. He denied completely crossing the centerline or forcing any other drivers into a ditch.

Defendant also considers his performance on the field sobriety tests to have been adequate. First, defendant believes that Carlson asked him to "recite the alphabet," not "do the alphabet from A to Z." Defendant stopped at the letter *p* because he felt that he had performed adequately. Defendant also does not believe he mixed the numbers while counting backward from 10 to 1. He explains his performance on the balance tests on the grounds that it was dark and the only light provided to walk the line came from the trooper's flashlight. Defendant also testified that any difficulty he had with the one-leg stand was due to the fact that he had severely fractured his right ankle in January 1984 and had a screw placed in the

ankle for healing. Although the screw had been removed, the ankle continued to cause pain and was in fact causing pain at the time of the arrest. Defendant admitted he told Carlson he was not handicapped before performing any tests, as he does not consider himself such.

Defendant also testified that he had attempted to dissuade Carlson from arresting him because he did not believe he was under the influence of alcohol.

Carlson testified that defendant had remained friendly, cooperative, and talkative throughout the evening. The two witnesses called by defendant testified, however, that when defendant was under the influence of alcohol, he was loud, belligerent, and uncooperative. One of these witnesses, a close friend and employee of defendant, testified that he had been with defendant at the outing, and while he knew defendant had been drinking, defendant was not drunk. The other witness, also an employee of defendant, picked defendant up at the police station sometime after midnight, and he testified that he did not observe defendant to have slurred speech or to be staggering. It was this witness' opinion that defendant was not intoxicated.

MOTION IN LIMINE

The first assignment, that the county court erred in overruling defendant's motion in limine, is based on the fact that the Intoxilyzer failed to print on the test card the reading the machine had displayed. Reasoning that such a failure would make it impossible for the State to meet its burden of proving the machine was operating properly, defendant moved for an order directing the prosecutors to refrain from making any direct or indirect reference, during opening statement or at any other stage of the trial, to the Intoxilyzer test or its results. One of the prosecutors, however, assured the court the State would lay a proper foundation for admitting the test results and detailed what she thought that evidence would be. In making its ruling the court noted that at that point it did not know what the State would be able to show in the way of foundation for admission of the test. During the State's opening statement, one of the prosecutors described the Intoxilyzer test procedure and revealed that a sample of defendant's breath produced a

reading which showed that he had .186 of 1 percent by weight of alcohol in his body fluid, more than one and a half times the ten-hundredths of 1 percent permitted by law.

The State argues that as defendant did not object to the prosecutor's statements during the opening statement, he cannot now be heard to complain about the fact that the prosecutor revealed the Intoxilyzer reading. It is true we have held that the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve error. *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983); *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983). It follows, therefore, that one wishing to preserve error on the basis of remarks contained in an opening statement generally must object to the questioned remarks when made, notwithstanding the overruling of a motion in limine. We have also noted, however, that a litigant may rely on a trial judge's announcement of what he or she will permit an opponent to do. *State v. Williams*, 212 Neb. 860, 326 N.W.2d 678 (1982). In the case before us the trial judge had overruled the motion in limine on the basis he did not know what foundation the State would be able to lay with respect to the Intoxilyzer test. Since the judge had acquired no further information in that regard at the time of the opening statement, it was not necessary that in order to preserve error the defendant object at that time to remarks the judge had already said he would permit the prosecutor to make.

While defendant's first assignment of error fails, it does so not because he did not object at the time the questioned remarks were made but because, as discussed in greater detail in connection with defendant's next assignment of error, the jury was admonished and instructed to disregard what it was told in that regard.

MOTION FOR MISTRIAL

The second assignment concerns the claim that the county court erred in failing to declare a mistrial. This claim is based on two events. The first occurred when Carlson was handed a "checklist" in order that it might be marked for identification as an exhibit while he was testifying as to the manner in which the Intoxilyzer test was performed. At this time Carlson was approximately 5 feet from the jury and handling an 8½- by

11-inch exhibit which contained, among other things, hand-printed test results in figures approximately three-sixteenths of an inch high and seven-sixteenths of an inch long. Defendant objected on the ground that Carlson held the checklist exhibit in such a fashion that the jury could see the test results. In addition to lodging his objection, the defendant moved to voir dire the jury to determine whether anyone had actually seen the results reflected on the exhibit, and also moved for a mistrial.

The second event centers around the county court's determination that the Intoxilyzer test results were inadmissible, not because the machine failed to print the test results, but because during the discovery phase the State had inadvertently supplied defendant with maintenance records for the machine which covered a period other than that which last preceded the test. The county court reasoned that having been supplied with the wrong maintenance record, defendant had been prejudiced in the preparation of his defense to the Intoxilyzer test.

In overruling defendant's various motions, the county court directed Carlson to keep the checklist exhibit out of view, and observed that although the jurors may have seen the exhibit, it was unlikely that they were able to read the test results from such a distance.

The county court also informed the jury that all testimony concerning the Intoxilyzer chemical test had been stricken from the record, and admonished that "you are specifically instructed to disregard that testimony." The county court's charge to the jury included the following instruction:

> Certain statements were made by counsel, and testimony was adduced by a witness, regarding a chemical test performed by an intoxilyzer model 4011AS. Those statements made by counsel and that testimony regarding a chemical test were stricken from the record. You are instructed to disregard those statements and that testimony and neither should influence your verdict.

It is appropriate that at this point we review some basic rules relating to motions for mistrial. The first of these is that the determination of whether to grant such a motion lies within the

sound discretion of the trial court. *State v. Bostwick,* 222 Neb. 631, 385 N.W.2d 906 (1986); *State v. Archbold,* 217 Neb. 345, 350 N.W.2d 500 (1984). A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events. See, *State v. Bostwick, supra; State v. Archbold, supra.* Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. See, *State v. Ross,* 220 Neb. 843, 374 N.W.2d 228 (1985); *State v. Archbold, supra.* See, also, *State v. Vrchota,* 212 Neb. 567, 324 N.W.2d 394 (1982); *State v. O'Kelly,* 193 Neb. 390, 227 N.W.2d 415 (1975).

Defendant argues he was entitled to a mistrial because the revelation of the Intoxilyzer test results during the opening statement and the display of the checklist exhibit during Carlson's testimony were both done to present to the jury material the prosecutors well knew was inadmissible and that the combined damaging effect of the two events was not cured by the trial court's admonition and instruction to the jury.

It is true, as defendant argues, that a criminal defendant is entitled to a fair trial and that it is the responsibility of the prosecutor to see that the defendant receives such a trial. *State v. Atwater,* 193 Neb. 563, 228 N.W.2d 274 (1975). In recognition of that precept, the Code of Professional Responsibility adopted by this court includes as an ethical consideration to Canon 7, which provides that a lawyer should represent a client zealously within the bounds of the law, the following:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental

> powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make time [sic] disclosure to the defense of available evidence known to him that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

Canon 7, EC 7-13, Code of Professional Responsibility (rev. 1984). Additionally, the following disciplinary rule has been adopted: "In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence." Canon 7, DR 7-106(C)(1), Code of Professional Responsibility (rev. 1984).

Consequently, if the record were to have established that the prosecutors deliberately put before the jury the Intoxilyzer test results, knowing full well that that evidence was inadmissible, they would have been subject to discipline, no matter what the outcome of this case. The record does not, however, so establish. What the record does establish is that the prosecutors were in the process of laying the foundation one of them had represented would be adduced as a foundation for admitting the Intoxilyzer test into evidence. Without countervailing testimony, the fact that the Intoxilyzer failed to print the test results does not necessarily mean the machine did not properly measure the level of alcohol in defendant's blood. The record also shows the prosecutors were handling more than one case with defendant's counsel which involved Intoxilyzer test results. Thus, there existed a reasonable explanation for inadvertently giving defendant the wrong maintenance record.

We therefore conclude there was nothing so flagitious about the conduct of the prosecutors as to require the declaration of a mistrial. We also conclude there was nothing so indelibly damaging about the stricken remarks and evidence that the county court's admonition and instruction to the jury did not adequately protect defendant.

HORIZONTAL NYSTAGMUS TEST

There being no merit to defendant's second assignment of error, we move on to a consideration of his third assignment, that the county court erred in admitting Carlson's testimony about the field horizontal nystagmus test.

Carlson testified that he received training in administering the test at a seminar given at the State Patrol office in Lincoln. The seminar was taught by another patrol officer who had received his training elsewhere. During the seminar, Carlson performed the test on both intoxicated and sober volunteers and was able to compare the results from each group. The seminar concluded with a written examination, after which Carlson was given some sort of certificate.

The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982). Neb. Rev. Stat. § 27-702 (Reissue 1985) 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."

The major difficulty with the testimony is that the record contains no competent evidence that this new test is valid, that is, that it in fact reveals the presence of intoxication. Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of § 27-702, unless and until it is established that the the test result demonstrates what it is claimed to demonstrate. It was such a failure of proof which led this court to conclude in *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949), that polygraph, or so-called "lie detector test," results had not gained such standing and scientific recognition as to

justify being admitted into evidence.

Thus, the county court erred in permitting Carlson to testify as to the administration and interpretation of the horizontal nystagmus test.

That conclusion does not, however, resolve the matter, for a conviction will not be set aside in the absence of a showing that an error created prejudice. *State v. Lynch,* 223 Neb. 849, 394 N.W.2d 651 (1986). No prejudice resulted from the error, because Carlson's opinion was based on a number of other factors, and, more importantly, the other evidence, as the discussion which follows demonstrates, overwhelmingly establishes that defendant was under the influence of alcohol to the extent that his driving abilities were substantially impaired. It should perhaps be noted, however, that counsel acts at his or her peril when undertaking to overprove a point. In a marginal case the receipt of improper evidence may well lead to a reversal of the trial result.

SUFFICIENCY OF EVIDENCE

Defendant's fourth and final assignment of error challenges the sufficiency of the evidence to support the jury's finding of guilt. In support of this assignment defendant reminds us of the testimony which contradicts that of Carlson and Stukenholtz. It, however, is a well-established axiom that in resolving a challenge to the sufficiency of the evidence, 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 is for the trier of fact and must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Hruza,* 223 Neb. 837, 394 N.W.2d 643 (1986); *State v. Ellis,* 223 Neb. 779, 393 N.W.2d 719 (1986). Stated more simply, it is not for this court to accept one version of a case over another; that is for the jury. *State v. Murphrey*, 220 Neb. 699, 371 N.W.2d 702 (1985). Moreover, it is well established that after a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if the evidence sustains some rational theory of guilt. *State v. Wilkening*, 222 Neb. 107, 382 N.W.2d 340 (1986).

There is more than sufficient evidence to sustain a rational theory of guilt. Carlson testified that upon the initial confrontation with defendant, he observed that defendant's eyes were bloodshot, that he smelled of alcohol, and that his speech was slurred. Further, defendant performed inadequately on several field sobriety tests. In addition, there was the matter of defendant's own admission as to the amount of alcohol he had consumed, and Stukenholtz's corroboration of many of the observations made by Carlson. Most importantly, there was defendant's erratic and dangerous driving itself.

DECISION

The judgment of the district court, being correct, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CONNIE K. NISSEN, APPELLANT.

395 N.W.2d 560

Filed October 31, 1986. No. 86-386.

1. **Criminal Law: Police Officers and Sheriffs: Evidence: Arrests.** Generally, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.
2. **Criminal Law: Police Officers and Sheriffs: Arrests.** The obligation of an officer making an arrest under a warrant is twofold: to apprehend the person named in the warrant and to avoid interfering with one not involved.
3. **Criminal Law: Police Officers and Sheriffs: False Reporting: Words and Phrases.** The language of Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985), "to impede the investigation of an actual criminal matter," includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant.
4. **Criminal Law: Police Officers and Sheriffs: False Reporting: Arrests.** Law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect; and although persons so questioned may have the right to refuse to answer such inquiry, if they choose to answer they may not give false information without subjecting themselves to criminal liability.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

William G. Line of Kerrigan, Line & Martin, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

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

HASTINGS, J.

The defendant, Connie K. Nissen, appeals the district court's affirmance of a judgment of the county court for Dodge County finding her guilty of false reporting with intent to impede the investigation of an actual criminal matter. The county court imposed a sentence of 6 months' probation, which the district court affirmed. We also affirm.

On November 27, 1985, state trooper Gomez telephoned the Fremont Police Department and reported that a man named Vu Pham had just entered an apartment complex on West 9th and that there was an active warrant for his arrest. When Fremont police officer Burkhardt went to the apartment, several males and the defendant were present. Officer Burkhardt asked one of the men, Thu Van Le, whether Vu Pham was there. He said that Vu Pham was not at the apartment. Trooper Gomez then arrived and told Officer Burkhardt that Vu Pham had just walked in the back door.

The officer and the trooper proceeded into the apartment and asked Vu Pham if his name was Vu Pham, to which he replied, "No." They then asked the defendant if the person they believed to be Vu Pham was in fact him, and she said he was someone else. Thu Van Le then apparently became upset and ran into his bedroom and got a rifle. The officer cleared the apartment and then went outside to find Vu Pham, who had left the place where he was told to stay. Trooper Gomez came back to the defendant and asked her three times if the person they were looking for was Vu Pham. She denied that he was. After Trooper Gomez told her that she was in just as much trouble as Vu Pham was, she told him who Vu Pham was.

Officer Burkhardt testified he had told the defendant that he

had a warrant for Vu Pham's arrest. The officer also testified he was not sure who Vu Pham was. Trooper Gomez, on the other hand, said he knew all along Vu Pham was Vu Pham but assumed that he would have to have some sort of identification for Officer Burkhardt and the sheriff's office. Trooper Gomez also testified that if the defendant had told him who Vu Pham was initially, they would have just taken him and would have been gone and that the whole incident would have taken less time.

The defendant raises on appeal the single issue of whether the service of a misdemeanor warrant is an investigation of an actual criminal matter, so that the defendant's false statement as to the identity of the individual named in the warrant constitutes impeding the investigation of an actual criminal matter, proscribed by Neb. Rev. Stat. § 28-907(1)(a) (Reissue 1985).

In support of her contention that the service of a misdemeanor warrant is not an investigation of an actual criminal matter, the defendant relies solely on the construction of the words "actual criminal matter" found in *State v. Ewing*, 221 Neb. 462, 468, 378 N.W.2d 158, 162 (1985): "In using the words 'actual criminal matter,' the Legislature intended that law enforcement officers be required to prove the existence of *a legitimate and valid investigation of facts which could constitute a predicate offense* before a violation of the false reporting statute may stand." (Emphasis supplied.) Relying on that language, the defendant argues that when law enforcement officers are investigating a completed crime, the giving of the false information must impede an investigation of facts upon which the law enforcement officer could predicate another criminal offense before the provider of that false information can be convicted of violating § 28-907(1)(a). In this case the defendant argues that there was no further offense requiring investigation; the law enforcement officers were merely serving a misdemeanor warrant.

Although on its face the language quoted from *Ewing* does seem to support the defendant's contention, that language cannot be severed from the context of the facts in *Ewing* and blindly applied to the set of facts in this case.

In *Ewing* a police officer went to a trailer home with the mother of a 16-year-old girl to see if the girl was there. The mother had informed the officer that there was alcohol present in the trailer, that her daughter was smoking, and that she had been unable to remove her daughter from that environment. The officer went to the trailer, knocked, and asked the defendant if the girl was in the trailer house. The defendant responded that she was not there, that she had left. In fact, the girl was in the trailer and the defendant knew that. The girl was never arrested for any crime.

On appeal the defendant argued that in order for § 28-907(1)(a) to apply there must have been an actual crime committed of which the defendant's false information impeded the investigation. We determined that the term "actual criminal matter" was broader than "crime" and, thus, held that the giving of false information with the intent to impede the investigation of facts which could constitute a predicate offense was sufficient to trigger the application of the statute. It was not necessary for the State to prove that an actual crime was committed before someone could be convicted of false reporting. Because the officer reasonably believed a minor could be in possession of alcohol and someone could be contributing to the delinquency of a minor, the conviction of the defendant was affirmed.

Thus, in *Ewing* the words "actual criminal matter" were construed in response to the situation where a reasonable possibility existed that a crime was in progress. In this case we instead are confronted with a situation where some law enforcement officer had earlier had probable cause to believe that crimes had been committed so as to substantiate the issuance of arrest warrants. However, as a practical matter, no criminal investigation is complete until sufficient facts have been obtained to justify the arrest and conviction of the defendant.

Although not directly in point, in *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128 (Fla. App. 1985), the Florida court, with reference to the definition of *criminal investigative information* as used in the Florida statutes relating to the exception of certain information from

the requirements of freedom of information statutes, went on to state that, in one respect, the law required criminal investigative information "to be furnished only after there has been an arrest or public charge made, such as the time, date, and location of the incident and *arrest* . . . ." (Emphasis supplied.) *Id.* at 1131.

Furthermore, as stated in *Wallner v. Fidelity & Deposit Co.*, 253 Wis. 66, 33 N.W.2d 215 (1948), the obligation of an officer making an arrest under a warrant is "twofold, to apprehend the person named in the warrant and to avoid interfering with one not involved." *Id.* at 69-70, 33 N.W.2d at 216.

We hold that the language of § 28-907(1)(a), "to impede the investigation of an actual criminal matter," includes the impeding of the gathering of information as to the identity of a defendant named in an arrest warrant. So as to avoid the possibility of false arrest suits, law enforcement officers have a legitimate right to question persons about the identity of the subject of an arrest warrant before they arrest the suspect. This is not to say that persons questioned may not have a right to refuse to answer such inquiry; but if they choose to answer, they may not give false information without subjecting themselves to criminal liability under § 28-907(1)(a).

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOEL R. EVANS, APPELLANT.
395 N.W.2d 563

Filed October 31, 1986. No. 86-413.

1. **Postconviction.** An evidentiary hearing on a motion for postconviction relief is not required if the motion, files, and records of the case show the defendant is not entitled to relief.
2. _____. Postconviction motions cannot be used to obtain a further review of issues already litigated, nor shall a defendant be permitted to rephrase issues already presented to achieve that end.
3. _____. Generally, a motion for postconviction relief may not be used to secure review of an issue which could have been raised on direct appeal.

4. _____. Once a motion for postconviction relief has been judicially determined, any subsequent motions for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion.
5. **Effectiveness of Counsel.** The test of effective assistance of counsel involves a two-part determination: first, counsel must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second, the attorney must conscientiously protect the client's interests. The defendant must also demonstrate how the absence of counsel's error would have changed the result in the case.
6. **Arrests: Probable Cause.** The test of probable cause for a warrantless arrest is whether, at the time of the arrest, the officer had knowledge of facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense.
7. **Right to Counsel: Identification Procedures: Indictments and Informations.** The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against the defendant by way of complaint, indictment, or information.
8. **Miranda Rights: Constitutional Law: Self-Incrimination.** The *Miranda* warnings are procedural safeguards intended to secure the privilege against compelled self-incrimination.
9. **Trial: Effectiveness of Counsel: Witnesses.** The decision as to whether to call a witness is a matter of trial strategy within counsel's judgment.
10. **Prosecuting Attorneys: Convictions.** Generally, for prosecutorial misconduct to warrant vacation of a conviction, there must be evidence of prejudice to the defendant's right to a fair and impartial trial.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Joel R. Evans, pro se.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellee.

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

PER CURIAM.

The defendant, Joel R. Evans, has appealed from the order of the district court denying him postconviction relief and an evidentiary hearing on his second motion for postconviction relief pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).

The facts surrounding the four cases in which the appellant was convicted and sentenced to imprisonment for 45 to 80 years are detailed in *State v. Evans*, 218 Neb. 849, 359 N.W.2d 790 (1984), where the judgment denying defendant's first motion for postconviction relief was affirmed.

On direct appeal the records in all four cases were examined by this court and found to be free from prejudicial error. Motions to withdraw filed by the defendant's counsel were sustained and the judgments affirmed on July 8, 1981.

On this appeal the defendant has assigned three general categories of error, that is, the district court erred (1) in failing to grant an evidentiary hearing, (2) in failing to appoint counsel, and (3) in failing to grant postconviction relief. The defendant claims 28 separate errors in support of his third general assignment of error.

We do not consider the defendant's second assignment of error, as that issue was not discussed in his brief. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986).

Consideration of the two remaining general assignments of error is necessarily combined, as an evidentiary hearing on a motion for postconviction relief is not required if the motion, files, and records of the case show the defendant is not entitled to relief. *State v. Apodaca*, 223 Neb. 258, 388 N.W.2d 837 (1986).

Postconviction motions cannot be used to obtain a further review of issues already litigated, nor shall a defendant be permitted to rephrase issues already presented to achieve that end. *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986). It is also true that, generally, a motion for postconviction relief may not be used to secure review of an issue which could have been raised on direct appeal. *State v. Peery, supra*. Further,

> once a motion for postconviction relief has been judicially determined, any subsequent motions for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion.

State v. Rust, 223 Neb. 150, 155, 388 N.W.2d 483, 489 (1986).

On appeal from denial of the defendant's first motion for

postconviction relief, this court rejected claims of trial and appellate counsel's alleged ineffectiveness. Those claims were based on counsel's alleged failure to challenge tainted identifications; to obtain psychiatric examinations to determine the defendant's competence at the time of the offenses and to stand trial; to properly brief the issue of the prosecutor's alleged comment on the defendant's right to remain silent; and to appeal the sentence imposed as so excessive as to constitute cruel and unusual punishment. *State v. Evans*, 218 Neb. 849, 359 N.W.2d 790 (1984). The defendant's assignments of error 3b, 3c, 3e, 3h, 3i, 3j, 3k, 3*l*, 3m, 3o, 3p, 3s, 3w, 3x, 3y, 3AA, and 3bb all generally relate to one of the issues determined in *State v. Evans, supra*, and were properly rejected for relitigation by the district court.

All but one of the remaining claims could have been raised on direct appeal, where this court found the trial records to be free of prejudicial error. See *State v. Evans, supra*. The one claim previously unavailable is the defendant's assertion that counsel on his first postconviction motion provided ineffective assistance "in failing to properly preserve, present, and argue the substantive constitutional issues." Consequently, we consider the issues not previously raised only as they relate to the alleged ineffectiveness of counsel on the defendant's first motion for postconviction relief. See *State v. Rust, supra*.

The test of effective assistance of counsel involves a two-part determination: first, counsel "must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second, the attorney must conscientiously protect the client's interests." *State v. Birge,* 223 Neb. 761, 763, 393 N.W.2d 713, 715 (1986). The defendant must also demonstrate how the absence of counsel's error would have changed the result in the case. *State v. Birge, supra.*

Initially, the defendant maintains he was illegally arrested on April 27, 1980, without a warrant and without probable cause. The test of probable cause for a warrantless arrest is whether, at the time of the arrest, the officer had knowledge of facts and circumstances based on reasonably trustworthy information which was sufficient to warrant a prudent man in believing the defendant had committed or was committing an offense. *State*

v. Ware, 219 Neb. 594, 365 N.W.2d 418 (1985); *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980). Testimony by the arresting officer in this case shows the defendant's claim to be without merit.

The deputy sheriff testified that he originally stopped the defendant after the defendant was observed walking in a field near the Papio Creek, which was being watched by authorities for the suspect in a recent armed robbery of a nearby restaurant. The defendant met the description of the robbery suspect aired in the police broadcast. A pat-down search revealed the defendant was carrying a handgun, several $1 and $5 bills, and a large amount of change. The defendant's pants were muddy on an otherwise dry evening. The defendant was returned to the robbery scene and separately identified as the robber by two eyewitnesses approximately 45 minutes after the crime. Clearly, there was probable cause to arrest the defendant at that time. Counsel on the defendant's first postconviction motion cannot be said to have acted ineffectively by failing to raise a meritless issue.

The defendant next contends that his rights were violated by placing him in lineups following his arrest without the opportunity to contact counsel, without being advised of the charges against him, and without being advised of the *Miranda* warnings.

The lineups in question occurred before any of the informations had been filed against the defendant. The right to counsel at a police lineup attaches only at or after the time when adversary judicial proceedings have been initiated against the defendant by way of complaint, indictment, or information. *State v. Ellis*, 219 Neb. 408, 363 N.W.2d 389 (1985). See, also, *State v. Saylor*, 223 Neb. 694, 392 N.W.2d 789 (1986).

The defendant does not explain how the alleged failure of the police to advise him of the charges against him denied him of any rights.

Further, there is no evidence that any statements made by the defendant while being subjected to custodial interrogation were introduced into evidence in any of his trials. The *Miranda* warnings are procedural safeguards intended to secure the privilege against compelled self-incrimination. *State v. Saylor,*

supra. Since no statements by the defendant were introduced against him in the present cases, the alleged failure to advise him of his *Miranda* rights is without significance. As there is no merit to these arguments, counsel cannot be said to have acted ineffectively in failing to raise them.

Similarly, the defendant contends he was improperly questioned by law enforcement authorities while in custody and after requesting an attorney. He also asserts that the police officers attempted to compel him to provide a handwriting exemplar without the assistance of counsel. Again, there is an absence of evidence demonstrating that these alleged police tactics resulted in statements or handwriting exemplars which might have been suppressible. As such, there is no merit to these arguments, and counsel cannot be faulted for failing to raise a frivolous issue.

Next, the defendant argues that trial counsel was ineffective in refusing to call his brother-in-law as an alibi witness in the trial for the April 27, 1980, robbery. It is urged that this testimony would have shown that a short time prior to the crime the defendant was playing pool at a bar some distance from the robbery. The defendant maintains that this testimony would have proved that it was difficult, if not impossible, for him to have committed the robbery, given the distances involved.

The decision as to whether to call a witness is a matter of trial strategy within counsel's judgment. *State v. Lofquest*, 223 Neb. 87, 388 N.W.2d 115 (1986). The effect of the brother-in-law's testimony would have been to corroborate the defendant's own testimony regarding his whereabouts and possessions just prior to the April 27 robbery. In a signed statement attached to the defendant's present motion for postconviction relief, the brother-in-law states that he was waiting outside the courtroom to be called as a witness for the trial on the April 27 robbery. He states further that the defendant's trial attorney became upset with him (the brother-in-law) when counsel witnessed him speaking with an old friend who was a juror in a different case. Because the witness was conversing with the juror, counsel refused to call him to testify.

Given the several eyewitness identifications of the defendant, and his possession, upon capture, of a large sum of

money and of a gun similar to that used in the robbery, it is difficult to see how the brother-in-law's cumulative testimony would, with a reasonable probability, have changed the result in this case. See *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986). Thus, the defendant has not met his burden to show that postconviction counsel acted ineffectively in failing to raise this issue.

Next, the defendant contends there was prosecutorial misconduct in his September 8-9, 1980, trial. He alleges that the prosecutor had contact with the jury, in the jury room, outside the presence of the judge, defendant's counsel, and the defendant. The defendant makes no allegation as to the nature of the alleged contact. He does assert that the jury returned its guilty verdicts shortly after the encounter. There is no allegation, however, showing how or even if the defendant was prejudiced by this alleged contact. Generally, for prosecutorial misconduct to warrant vacation of a conviction, there must be evidence of prejudice to the defendant's right to a fair and impartial trial. See, *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977); *Lindsay v. State*, 46 Neb. 177, 64 N.W. 716 (1895). Absent any allegation of prejudice beyond the defendant's mere conclusory statements, postconviction counsel cannot be said to have acted ineffectively nor to have prejudiced the defendant's case by failing to raise this issue.

The defendant argues that he was denied a fair sentencing hearing because the presentence report contained false, inaccurate, and misleading information. The information objected to includes statements indicating that he was arrested for crimes in which there was no prosecution, the charges were dropped, or the defendant was not represented by counsel. A review of the sentencing hearing shows that the court was well aware that some of the charges were either dismissed or not prosecuted. The defendant does not explain how the alleged absence of legal representation in any of those cases resulted in false, misleading, or inaccurate information in the report.

He also complains that the report reflects a lack of an employment history, when he had in fact worked construction and other jobs. A review of the August 1980 report indicates the defendant was employed by his father from 1973 to 1979 and

had worked at numerous jobs since his divorce in 1979. It is difficult to see how the defendant could have been prejudiced by the failure to mention his construction work. In fact, at his trial for the April 27, 1980, robbery, the defendant admitted he was not working regular jobs and was unemployed on the date of the robbery.

The defendant contends the report also falsely stated that he had not paid child support, when in fact his wages had been garnisheed to satisfy that obligation. Our review shows that the garnishment of wages is reflected in the report.

Finally, the defendant argues he did not admit commission of the robberies to the probation officer, as reflected in the report. The report indicates the defendant admitted to all but one of the robberies that went to trial. Given the fact that the defendant was found guilty by unanimous jury verdicts, it is again difficult to perceive how the defendant was prejudiced by the allegedly false admissions. As such, postconviction counsel cannot be said to have acted ineffectively nor to have prejudiced the defendant's case by failing to raise the presentence report issues.

Because the motions, files, and records show no entitlement to postconviction relief, the district court was not clearly wrong in denying the defendant's request for an evidentiary hearing. The judgment is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN DAVID ANDREAS, APPELLANT.

395 N.W.2d 569

Filed October 31, 1986. Nos. 86-460, 86-461.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed as modified.

Steven R. Brott, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

PER CURIAM.

The appellant, John David Andreas, was charged in case No. 86-460 with theft by receiving stolen property in violation of Neb. Rev. Stat. § 28-517 (Reissue 1985). In a second count he was charged with carrying a concealed weapon in violation of Neb. Rev. Stat. § 28-1202(1) (Reissue 1985). He was further charged in case No. 86-461 with assault in the second degree in violation of Neb. Rev. Stat. § 28-309(1) (Reissue 1985). As part of a plea agreement, Andreas pled guilty to all three charges. The district court then sentenced Andreas. On count I in case No. 86-460, he was sentenced to imprisonment for a term of 20 years and fined $25,000. On count II, carrying a concealed weapon, he was sentenced to imprisonment for a term of 5 years and fined $10,000, the sentence to be consecutive to the sentence on count I. In case No. 86-461 he was sentenced to imprisonment for a term of 5 years and fined $10,000, the sentence to be consecutive to the sentences previously imposed in case No. 86-460.

Andreas, in his appeal to this court, does not maintain that the prison terms were excessive, but maintains only that the imposition of the fines was excessive and should be reduced. We have reviewed the record, and we find no abuse of discretion. We have consistently held that a sentence imposed within statutory limits will not be modified absent an abuse of discretion on the part of the sentencing judge. *State v. Pearson*, 215 Neb. 339, 338 N.W.2d 445 (1983). Being unable to find any abuse of discretion, we do not believe that there is any basis to modify the sentences on that ground.

The Attorney General, however, has called our attention to one matter which does require us to modify one of the sentences. In 1984 the Legislature of the State of Nebraska amended the penalty for the crime of carrying a concealed weapon. Prior to the amendment, the crime of carrying a concealed weapon was a Class IV felony, punishable by up to 5

years' imprisonment and a fine of $10,000. However, by reason of the amendment to § 28-1202, carrying a concealed weapon, first offense, is now a Class I misdemeanor, punishable by imprisonment up to 1 year and a fine not to exceed $1,000. In view of the fact that the sentence was clearly in excess of the court's authority, we are compelled to modify that portion of the sentence. We believe no purpose will be served by returning the case to the district court for sentencing, but, rather, we simply reduce the sentence on count II in case No. 86-460 to imprisonment for a period of 1 year and a fine of $1,000, the sentence to be served consecutively to the sentence imposed in count I in case No. 86-460. In all other respects the sentences of the district court are affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JAMES HAVERKAMP, APPELLANT.
395 N.W.2d 570

Filed October 31, 1986. Nos. 86-472, 86-473.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed as modified.

Curtis L. Maschman of Kotouc, Fankhauser & Maschman, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

PER CURIAM.

Appellant pled guilty to each of three counts filed in two informations: theft by receiving stolen property (Neb. Rev. Stat. § 28-517 (Reissue 1985)), a Class III felony; carrying a concealed weapon (Neb. Rev. Stat. § 28-1202(1) (Reissue

1985)), a Class I misdemeanor if the offense is a first offense; and assault in the second degree (Neb. Rev. Stat. § 28-309(1) (Reissue 1985)), a Class IV felony.

The trial court sentenced the appellant to 20 years' imprisonment (effectively 1 to 20 years) and ordered him to pay a $25,000 fine on count I. He was sentenced to a term of 5 years' imprisonment on count II and ordered to pay a $10,000 fine. The trial court sentenced appellant to a term of 5 years' imprisonment (effectively 0 to 5 years) and ordered him to pay a $10,000 fine on count III. All terms of incarceration were ordered to run consecutively, and credit was given for 315 days of jail time awaiting sentence.

The sentences for counts I and III are well within the statutory limits and are not excessive, nor are they an abuse of the trial court's discretion, and are therefore affirmed.

As to count II, the sentence of 5 years' imprisonment and a $10,000 fine must be modified. In 1984 the Legislature amended the penalty for carrying a concealed weapon, changing a first offense for this crime from a Class IV felony to a Class I misdemeanor. 1984 Neb. Laws, L.B. 1095. The penalty imposed by the district court exceeds the statutory limits for a Class I misdemeanor and is hereby reduced to a term of 1 year. The appellant is further ordered to pay a $1,000 fine. See, Neb. Rev. Stat. § 29-2308 (Reissue 1985); *State v. Goham*, 187 Neb. 34, 187 N.W.2d 305 (1971).

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLANT, V. TED SALTZMAN, APPELLEE.
395 N.W.2d 530

Filed October 31, 1986. No. 86-588.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed.

Randy R. Stoll, Seward County Attorney, for appellant.

Bruce E. Stephens, for appellee.

GRANT, J.

This case comes before a single judge of this court by way of an appeal by the State from a ruling of the district court sustaining defendant's motion to suppress defendant's statements made to a Nebraska State Patrol investigator. Defendant's statements were made after the investigator told defendant that allegations had been made that defendant had committed certain acts supporting a possible offense of first degree sexual assault on a child. The facts of this case are much the same as those set out in the one-judge opinion in *State v. Meyers,* 223 Neb. 773, 393 N.W.2d 533 (1986). Indeed, the allegations against appellee concerned a young female child of the same family as that involved in *Meyers, supra.*

As was true in *Meyers,* I conclude that this review is controlled by the rule that the trial court's findings of fact in ruling on a motion to suppress evidence will not be overturned on appeal unless, given the totality of the circumstances, the findings are clearly wrong. *State v. LaChappell,* 222 Neb. 112, 382 N.W.2d 343 (1986); *State v. Bowersmith, ante* p. 6, 395 N.W.2d 527 (1986).

In this case the facts elicited at the hearing on defendant's motion to suppress showed the following. On February 5, 1986, at about 1 p.m., Chief Lowell Sellmeyer of the Milford Police Department telephoned appellee, Ted Saltzman, advising him that a state investigator was at the city hall in Milford and Saltzman could talk to him if he wanted to. A few days earlier, on January 30, 1986, Sellmeyer had received a report indicating that Saltzman might be sexually involved with an 11-year-old female. Saltzman apparently learned about this inquiry and contacted Sellmeyer at the police station. At some previous time Saltzman had expressed a desire to speak to a state investigator.

After Sellmeyer's call on February 5, Saltzman drove to city hall. There, Chief Sellmeyer introduced him to investigator Adler of the Nebraska State Patrol. Both Sellmeyer and Adler testified that Saltzman was not in custody at this time.

Investigator Adler advised Saltzman of the nature of the investigation, advised him that he was not under arrest, told

him that he was free to go at any time, and told him that if he did not want to answer any of Adler's questions, he did not have to. Adler also told him that if he did decide to talk to Adler, he would be free to leave at the conclusion of the interview. Saltzman testified that Adler told him that he could leave at any time and did not have to talk to him.

Saltzman agreed to talk to investigator Adler. They went to a room located in a hallway off of the police department. During this initial 45-minute interview, Saltzman admitted sexual involvement with a young female child. Adler testified that he made no threats or promises to Saltzman prior to obtaining these statements.

After Saltzman's initial statement, he and investigator Adler moved to a larger room so that a videotaped statement could be given. A video tape camera was activated, and Saltzman again related his sexual involvement with the child. At the conclusion of the videotaped statement, Saltzman was not arrested and was allowed to leave the Milford Police Department. The videotaped statement was received as an exhibit in the suppression hearing and was shown to this reviewing judge in the presence of counsel for the parties.

Appellee contends he was pressured into making his statements. He alleges that investigator Adler's voice went up when he questioned him. On cross-examination, however, Saltzman testified Adler's voice was not really loud and that Adler did not scream. Saltzman admitted that he generally gets nervous when speaking to the police, but also admitted that he was not physically threatened and was advised that he could leave.

For all the reasons set out in *State v. Bowersmith, supra*, it must be concluded that Saltzman was not in custody at the time he made his inculpatory statements to Adler and that the trial court's findings and rulings thereon are clearly wrong. The ruling appealed from is reversed.

REVERSED.

DALE DOBROVOLNY, APPELLANT, V. LLOYD WANISKA, APPELLEE.
395 N.W.2d 480

Filed October 31, 1986. No. 86-616.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Reversed and remanded with directions to dismiss.

Dale Dobrovolny, pro se.

Lloyd Waniska, pro se.

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

PER CURIAM.

The appellant, Dale Dobrovolny, initially filed a small claim in the county court for Richardson County, Nebraska, claiming $770 due for baling hay. Judgment was entered for Dobrovolny and against Waniska in the amount of $420 plus costs. Dobrovolny appealed to the district court for Richardson County, where the district court affirmed the judgment of the county court. Still dissatisfied with the result, Dobrovolny then appealed to this court, maintaining that the judgment which the court entered should have been for $770 plus interest from January 1, 1982. For reasons more specifically set out herein, we regret that we must reverse and remand with directions to dismiss.

The judgment entered by the district court on June 19, 1986, reads as follows: "Matter came on for trial; petitioner *failed* to appear; defendant's [sic] appeared pro se. Court affirms judgment entered in County Court. Bailiff to notify parties and County Court." (Emphasis supplied.)

Unfortunately, however, under the provisions of Neb. Rev. Stat. § 24-541.07 (Reissue 1985), appeals from small claims court to the district court are tried "de novo." The district court's entry and the absence of a bill of exceptions in this case make it clear that in fact no trial was had, no evidence was adduced, and, therefore, no judgment could be entered. Absent evidence, which appellant was obligated to produce, there was no basis for the district court to enter a judgment for the

plaintiff. In *Fuchser v. Jacobson*, 205 Neb. 786, 788, 290 N.W.2d 449, 451 (1980), we said: "Inasmuch as no specific theories of recovery are required to be pleaded in Small Claims Court, that court's decision must be affirmed by the District Court if it can be founded on any theory *supported by the evidence*." (Emphasis supplied.) The problem in the instant case, however, is that there is no evidence to support the verdict.

It is, of course, unfortunate that such a result must prevail. Nevertheless, if parties choose to represent themselves and fail to appear when it is necessary for them to be present and offer evidence, they must, of necessity, accept the consequences of their acts.

There being no evidence to support the judgment entered by the district court, the judgment must be reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

ED CHLOPEK AND KARL CHLOPEK, APPELLEES, V. KELLY J. SCHMALL, JAMES H. SCHMALL, AND JO ANN L. SCHMALL, APPELLANTS.

396 N.W.2d 103

Filed November 7, 1986. No. 85-092.

1. **Judgments: Appeal and Error.** The findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Motor Vehicles: Negligence.** It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course be changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he is traveling.
3. _____: _____. The basis of the foregoing rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him.
4. **Motor Vehicles: Highways.** A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is

approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection.

5. **Property: Damages.** Where the damage to personal property can, at a reasonable cost, be repaired and the property restored to substantially its condition immediately before the damage occurred, and the cost of repair does not exceed the difference in market value of the property before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the loss of use of the property for the reasonable amount of time required to complete the repair.
6. _____: _____. Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.
7. _____: _____. The reasonable value of the loss of use of personal property is generally the fair rental value of property of a like or similar nature or the amount actually paid for rental, whichever is less.
8. _____: _____. Where property used for commercial or business purposes cannot be rented, then loss of profits may establish the reasonable value of the loss of use.
9. **Property: Damages: Case Overruled.** To the extent that any prior cases would limit the total compensation for damage to personal property to the fair market value of the property immediately before the injury, they are expressly overruled.
10. **Pleadings.** A pleading may be amended in furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense. The decision to allow or deny such amendment rests in the sound discretion of the court.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Michael J. Javoronok of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellants.

James R. Hancock of Hancock & Denton, P.C., and Robert G. Pahlke of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees.

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

PER CURIAM.

This is an action for damages by the plaintiffs, Ed and Karl Chlopek, resulting from a collision between a truck with a "pup" trailer, owned by the plaintiffs, and an automobile operated by defendant Kelly J. Schmall, which was owned by her parents, defendants James H. and Jo Ann L. Schmall.

The pleadings raised issues of defendant Kelly Schmall's negligence, the contributory negligence of plaintiffs' driver, and the nature and extent of plaintiffs' damages.

Both parties filed motions for summary judgment, plaintiffs seeking judgment on all issues and defendants seeking partial summary judgment on the issue of whether, as a matter of law, plaintiffs could recover as damages loss of use of the truck and pup trailer if the property was totally destroyed, that is, if the cost to repair the truck and trailer exceeded their market value before the accident.

In deciding the summary judgment motions, the district court determined that defendant Kelly Schmall was negligent and that her negligence is imputed to defendant James Schmall, her father and the head of the family. The trial court further found that the actual damages to the truck, trailer, and other personal items in the truck totaled $49,947.40. The court also determined that, as a matter of law, where a commercial truck is totally destroyed, plaintiffs may recover damages for loss of use of the truck until another truck can be obtained, and where a rental truck is not available, then the loss of use is measured by the loss of profits.

The balance of the summary judgment motions were overruled, and the case proceeded to trial to the court on the remaining issues of the contributory negligence of plaintiffs' driver and the amount of damages for loss of use of the truck and pup trailer.

Following trial, the district court found that plaintiffs' driver was not negligent and that plaintiffs suffered a loss of profit, until they could replace the truck, in the sum of $13,225.18, and entered judgment against all three defendants in the total sum of $63,172.58.

At the hearing on defendants' motion for new trial, plaintiffs were given leave, over objection, to amend the total amount of

the prayer of their petition, up to the amount of the judgment, a difference of $364.81. Defendants' motion for new trial was then overruled, and this appeal followed.

Defendants on appeal do not challenge the trial court's finding that defendant Kelly Schmall was negligent or the amounts of the damages determined. They do assign as error: (1) The trial court's finding that plaintiffs' driver was not contributorily negligent; (2) The allowance as a matter of law of damages for loss of use of a totally destroyed commercial vehicle; and (3) Abuse of discretion in allowing plaintiffs to amend their petition after trial and judgment.

We note at the outset that the district court's entry of partial summary judgment held that the negligence of Kelly J. Schmall was to be imputed only to her father, James H. Schmall, as head of the family, under the Nebraska family purpose doctrine. Although not assigned as error, Jo Ann L. Schmall should have been dismissed from the suit, since, as a result of that holding, no negligence could be imputed to her, and the amended petition contained no allegations that she was personally negligent. The judgment against her is reversed and the petition is ordered to be dismissed as to her.

We turn to defendants' contention that the trial court erred in finding that plaintiffs' driver was not contributorily negligent. Our review of this issue is governed by what we have often said:

> [T]he findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In such a circumstance it is not within our province to resolve conflicts in or to weigh the evidence; if there is a conflict in the evidence, this court will review the judgment rendered and will presume that controverted facts were decided in favor of the successful party.

Wheeler Constr. v. Town & Country Realty, 217 Neb. 424, 427, 348 N.W.2d 890, 892 (1984); *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983).

The accident took place at the intersection of U.S. Highway 26, an east-west highway, and a north-south county road in Morrill County, Nebraska. Highway 26 is protected by stop signs on the county road.

Steven Doornbos was driving plaintiffs' truck and the pup trailer loaded with approximately 94,000 to 100,000 pounds of sugar beets. He testified that he was proceeding west on Highway 26, and as he crested an incline he saw defendants' car stopped behind the stop sign on the county road on the north side of the intersection, facing south. He was about 1,000 feet from the intersection at that point. Defendant's car remained stopped until Doornbos was 500 to 700 feet from the intersection, then moved forward and stopped again. When he was 400 feet from the intersection and moving at about 50 m.p.h., the car proceeded into the intersection in front of him. He applied his brakes, but as the car continued to move across the westbound lane, he released his brakes and swerved to his left to avoid a collision, which was unsuccessful, the vehicles colliding just across the centerline of Highway 26 in the eastbound lane. After impact, the truck veered back toward the centerline, overturned on its side, slid down the highway, rotated twice, and caught fire.

Kelly Schmall, by deposition, testified that at the time of the accident she was 14 years of age and was driving her parents' automobile on a learner's permit. Riding in the car with her were her 16-year-old sister and 11-year-old brother. The three were going to school and were late getting started.

Kelly drove south on the county road to Highway 26 and stopped at the stop sign. She then moved forward to the edge of the highway and stopped again, intending to turn left and proceed east on Highway 26. She looked to her left, but a glare off a road sign to the east made it difficult to see anything. She pulled onto the highway, saw plaintiffs' truck about 100 feet away, stopped, and tried to put the gear in reverse. She remembers nothing else.

There is no significant conflict in the versions of the two drivers. Defendants argue that the truck was traveling at an excessive speed under the conditions existing. Those conditions were that traveling at 50 m.p.h., Doornbos estimated it would take him one-quarter to one-half mile to stop the loaded truck and pup trailer, that he was aware of a sign (the one whose glare blinded Kelly Schmall) which said "slow moving trucks" as he approached the intersection, and was aware of defendants' car

stopped at the stop sign when he was 1,000 feet from the intersection.

In addition, defendants rely on evidence that the load on the truck and trailer violated the maximum allowed by statute and that plaintiffs violated Neb. Rev. Stat. § 39-6,133 (Reissue 1984) in that the truck and trailer were not equipped with a braking system adequate to bring the vehicle traveling at 20 m.p.h. to a stop in a distance of not more than 65 feet. Violation of such statutes, however, does not constitute negligence in and of itself, but is merely evidence of negligence. *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978). The trial court must have determined that any such negligence was not a proximate cause of the collision. We agree.

The crucial question to be decided is whether plaintiffs' operator was negligent in driving the truck at 50 m.p.h. on Highway 26 at a point 400 feet from an intersection and knowing that (1) an automobile was stopped at the stop sign protecting his lane of travel and (2) he could not stop the truck at that speed in less than one-quarter mile. In other words, was his speed excessive under those conditions and circumstances?

In arguing that it was excessive, defendants would invoke the "range of vision" rule. It is a general rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway, at any time, at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within his range of vision in the direction he was traveling. See *Ritchie v. Davidson*, 183 Neb. 94, 158 N.W.2d 275 (1968). In *Ritchie* we went on to say at 97, 98, 158 N.W.2d at 277:

> " 'The basis of the foregoing general rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object *in front of him*.' "

(Emphasis supplied.)

The foregoing rule is not applicable here. Plaintiffs' driver was not approaching any vehicle or object in front of him, but was approaching an intersection on the favored highway

protected by stop signs, where Kelly Schmall was stopped before pulling out in front of him. The applicable rules are:

> A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection. . . . It is such a driver's duty to look both to the right and to the left and to maintain a proper lookout for the safety of himself and others traveling on the streets. . . .
>
> A person traveling on a favored street protected by stop signs of which he has knowledge may properly assume, until he has notice to the contrary, that motorists about to enter from a nonfavored street will observe the foregoing rules.

Hartman v. Brady, supra at 562, 270 N.W.2d at 911-12.

Plaintiffs' driver was traveling on a national highway within the speed limit. Defendants would require him to operate at such a speed as he approached an intersection protected by stop signs so as to stop or swerve and avoid a collision with a motorist who pulls in front of him, regardless of his distance from the intersection at the time. Plaintiffs' driver had no duty to engage in such defensive driving. The trial court was correct in concluding that plaintiffs' truck was at such distance as to constitute a hazard when Kelly Schmall pulled out in front of it and that her negligence in doing so was the sole proximate cause of the accident. Any violation of statutes regarding maximum load of the truck or required braking distance was not evidence of any negligence that was a proximate cause of the accident.

In allowing plaintiffs the sum of $13,225.18 as damages for loss of use of the truck until a suitable replacement could be obtained, the trial court departed from our prior holdings as to measure of damages for damage to a motor vehicle. In *Helin v. Egger*, 121 Neb. 727, 728-29, 238 N.W. 364, 365 (1931), we established the rules to measure the damages by quoting with approval from *Langham v. Chicago, R. I. & P. R. Co.*, 201

Iowa 897, 208 N.W. 356 (1926), as follows:

> "When the automobile is totally destroyed, the measure of damages is its reasonable market value immediately before its destruction.
>
> "Where the injury to the car can be repaired, so that, when repaired, it will be in as good condition as it was before the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the use of the car while being repaired, with ordinary diligence, not exceeding the value of the car before the injury.
>
> "When the car cannot, by repair, be placed in as good condition as it was in before the injury, then the measure of damages is the difference between its reasonable market value immediately before and immediately after the accident."

Our holdings have consistently adhered to these rules. *Lund v. Holbrook*, 153 Neb. 706, 46 N.W.2d 130 (1951); *Dorn v. Sturges*, 157 Neb. 491, 59 N.W.2d 751 (1953); *Riley v. National Auto Ins. Co.*, 162 Neb. 658, 77 N.W.2d 241 (1956); *Wylie v. Czapla*, 168 Neb. 646, 97 N.W.2d 255 (1959); *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963); *Sky Harbor Air Service, Inc. v. Lang*, 194 Neb. 428, 231 N.W.2d 704 (1975); *Hatch v. Heim*, 200 Neb. 735, 265 N.W.2d 444 (1978); *Husebo v. Ambrosia, Ltd.*, 204 Neb. 499, 283 N.W.2d 45 (1979).

Generally, the law in Nebraska has been that damages allowed are limited to an amount not to exceed the fair market value of the motor vehicle immediately prior to the accident. Thus, previously in those instances where the vehicle was totally destroyed or where repairs could not restore it to substantially its condition before the collision, no damages for loss of use were allowed. Even where the vehicle could have been repaired, damages for loss of use were allowed only to the extent that the combined cost of repair and the loss of use did not exceed the value of the vehicle before the accident.

The trial court relied on *Long v. McAllister*, 319 N.W.2d 256 (Iowa 1982), in allowing loss of use damages to the totally destroyed truck. Ironically, the Iowa Supreme Court in *Long* allowed loss of use damages, and in so doing modified (in effect

overruled) its prior rules first formulated in *Langham v. Chicago, R. I. & P. R. Co., supra*, the case we cited with approval when our identical rules were established in *Helin v. Egger, supra*. The measure of recovery in all civil cases is compensation for the injury sustained. *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960). Considering that longstanding rule of law, we deem it appropriate to reexamine our rules which limit loss of use damages.

It does not appear that in any of our prior holdings we articulated any rationale for the limitation of damages to the market value of the vehicle immediately before the accident. In the opinion of the Iowa Supreme Court,

> Damages for destruction of chattels were based on analogy to conversion. The reasonable market value of the chattel was viewed as adequate compensation under this concept in the common law action of trover. The rigidity of the analogy obscured any distinction between destruction of chattels generally and destruction of chattels of such utility that the owners incurred loss of use expense. Perhaps this distinction became important only with the advent of the motor vehicle and the practice of motor vehicle leasing and rental.

Long v. McAllister, supra at 259.

In D. Dobbs, Handbook on the Law of Remedies, *Tangible Property—Damages, Destruction, and Retention* § 5.11 at 384-85 (1973), three arguments are suggested for denying loss of use damages:

> Loss of use claims are most commonly asserted for a period of time when the chattel is being repaired, but sometimes the chattel is destroyed and is not repairable. In such cases, loss of use claims are sometimes asserted for the period required to replace the chattel. A number of courts have refused to permit loss of use awards in cases of total destruction, and have limited recovery in such cases to the value of the article. Destruction, of course, was closely analogous to a conversion, where the measure of damages was the value of the chattel at the time of conversion, and it was natural enough to import the

conversion measure into the destruction situation. There was probably some thought that the market value of the chattel—which reflected the right to use it gainfully—plus interest for the time the owner was deprived of it, actually furnished full compensation. Another argument made against granting loss of use where there was total destruction sounds rather strange in modern ears. The authors of Sedgwick on Damages argued that when compensation for the whole value of the property destroyed is sought, "it is upon the theory that the plaintiff's entire interest in the property ceased at the time of the injury, and was replaced by a right to have the value of the property in money. Since, therefore, the plaintiff no longer has title to the property, he can no longer claim that he might make a future gain from it. . . ." Such an argument probably would not be accepted, or even thought of, today. It is a conceptual argument that does not interest itself in whether the owner has actually lost something of value beyond the market value of his property; it interests itself only in a legal concept—passage of title—that is not a part of the real world of facts and has no significant relation to important facts of actual loss. A third argument against granting loss of use recovery where a chattel is totally destroyed is that to grant such recoveries opens the door to speculation. This argument, if acceptable, would seem to apply equally to any loss of use claim, whether there was destruction or merely damage. But the argument does not seem acceptable, because there is no essential reason why loss of use claims must be speculative. There is nothing speculative about the cost of a rental car for a specified time while the *damaged* vehicle is being repaired, nor is there anything speculative about the cost of a rental car for a specified time while a *destroyed* vehicle is being replaced. If loss of use leads also to loss of profits, they are speculative as much or as little as other claims of lost profits and the question of speculation becomes in the end, a question whether the evidence of loss is sufficient in each case.

The number of jurisdictions which allow loss of use damages even in total destruction cases is extensive and reflects the trend in this area. See Annot., Recovery for Loss of Use of Motor Vehicle Damaged or Destroyed, 18 A.L.R.3d 497 (1968). See, also, Restatement (Second) of Torts § 927 (1979).

The court in *Long v. McAllister,* 319 N.W.2d 256, 259 (Iowa 1982), expressed well the illogic of its former rules (the same as our present rules):

> [W]hen the vehicle can be restored by repair to its prior condition, the owner is not only entitled to compensation for the reasonable cost of repair but for reasonable loss of use damages. Although market value is nevertheless a ceiling on recovery even in this situation, full compensation is possible when the cumulated damages do not exceed the limitation.
>
> In other cases, however, the present rules plainly do not permit full compensation. Loss of use damages will be incurred as readily when a vehicle is totally destroyed or when it cannot be restored by repair to its prior condition as when the vehicle can be restored by repair. Just as loss of use damages are necessary for full compensation when the vehicle can be restored to its prior condition, they are warranted when the vehicle is destroyed or cannot be so restored. No logical basis exists for cutting them off when the total reaches the vehicle's market value before the injury.

Compensation for injuries sustained as to the measure of recovery means *full* compensation, an amount that will make the damaged party whole. Denying loss of use damages as a matter of law thwarts this fundamental principle. Therefore, our rules are modified as follows:

1. Where the damage to personal property can, at a reasonable cost, be repaired and the property restored to substantially its condition immediately before the damage occurred, and the cost of repair does not exceed the difference in market value of the property before and after the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of the loss of use of the property for the reasonable amount of time required to complete the repair.

2. Where the damage to personal property is such that it cannot be repaired and the property thereby restored to substantially its condition immediately before the damage occurred, or when the reasonable cost of repair exceeds the difference in market value of the property immediately before and immediately after the injury, the measure of damages is the lost market value plus the reasonable value of the loss of use of the property for the reasonable amount of time required to obtain a suitable replacement.

The reasonable value of the loss of use of personal property is generally the fair rental value of property of a like or similar nature or the amount actually paid for rental, whichever is less. *Husebo v. Ambrosia, Ltd.*, 204 Neb. 499, 283 N.W.2d 45 (1979). Where property used for commercial or business purposes cannot be rented, then loss of profits may establish the reasonable value of the loss of use. *Kunkel v. Cohagen*, 151 Neb. 774, 39 N.W.2d 609 (1949).

To the extent that any prior cases would limit the total compensation for damage to personal property to the fair market value of the property immediately before the injury, they are expressly overruled. The new rules shall apply to this case, any pending case in which error has been presented on the issue, and all cases tried after the date of filing of this opinion.

At the hearing on defendants' motion for new trial, plaintiffs requested and were permitted to amend the prayer of their petition from $62,807.77 to $63,172.58, the latter amount to correspond with the court's judgment. The difference in amount is $364.81 and clearly was done to conform to the proof at trial. A pleading may be amended in furtherance of justice, to conform to the proof, if the proposed amendment does not change substantially the claim or defense. The decision to allow or deny such amendment rests in the sound discretion of the court. Neb. Rev. Stat. § 25-852 (Reissue 1985); *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983). The trial court acted well within its discretion in permitting the amendment.

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

JOSEPHINE M. KNOELL ET AL., APPELLANTS, V. H. DAN HUFF AND NORTH KANSAS FINANCIAL CORPORATION, APPELLEES.

395 N.W.2d 749

Filed November 7, 1986. No. 85-232.

1. **Demurrer.** For the purpose of ruling on a demurrer, the court accepts well-pleaded facts in the petition, as distinguished from the conclusions alleged, as true.
2. **Appeal and Error.** Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court.
3. **Actions: Banks and Banking: Securities Regulation.** The Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 et seq. (Reissue 1983), is not the exclusive remedy under Nebraska law in cases involving the sale of securities.
4. **Statutes.** Where the same word is used repeatedly in the same act, unless the context requires otherwise, the word is to have the same meaning.
5. **Negligence.** In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure. The petition must allege these essential elements and the proof must support the allegations, or there can be no recovery.
6. **Pleadings.** The right to amend or correct a defect in a pleading is not without limitation.
7. **Fraud.** The elements of fraud are (1) a false representation of material fact, (2) knowledge that the representation was false or made in reckless disregard as to its truthfulness or falsity, (3) an intent to induce another to act, (4) a justifiable reliance on the representation, and (5) injury or damage resulting from such reliance.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed.

David C. Huston of Paine & Huston, for appellants.

Rodney M. Confer of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

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

PER CURIAM.

Plaintiffs-appellants, Josephine M. Knoell and nine others (investors), appeal from an order of the Lancaster County District Court which sustained a demurrer in favor of the defendants-appellees, H. Dan Huff (Huff), a resident of

Lancaster County, and North Kansas Financial Corporation (NKFC), a Nebraska corporation. The investors brought this suit to recover damages because of financial losses they sustained when the stock they had purchased in NKFC from Huff became worthless. The district court sustained the demurrer and dismissed the investors' petition. The court held that all five causes of action in the third amended petition were barred by the statute of limitations under the Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 et seq. (Reissue 1983), and that all five failed to state facts sufficient to constitute a cause of action. We affirm in part and in part reverse.

The facts in this case are set out in the investors' third amended petition. For the purpose of ruling on Huff's and NKFC's demurrer, we accept the well-pleaded facts in the petition, as distinguished from the conclusions alleged, as true. *Allen v. County of Lancaster*, 218 Neb. 163, 352 N.W.2d 883 (1984). The facts alleged in the petition are deemed admitted for the purpose of ruling on Huff's and NKFC's demurrer.

The investors are stockholders and debenture holders of NKFC. NKFC was formed for the purpose of acting as a holding company to own the stock of a Kansas corporation known as North Kansas Savings Association (NKSA). NKSA was a federally chartered savings and loan association with offices in Beloit and Phillipsburg, Kansas.

In September 1980 the investors were solicited by Huff and his agent, Tom Scheer, to invest in NKFC, which would in turn own a controlling interest in NKSA. During the solicitation, the investors were informed by Huff and Scheer that Huff had experience as a promoter in numerous bank acquisitions in the past and had been successful in arranging the ownership of financial institutions through holding companies. Huff and Scheer also represented to the investors that Huff would act as their agent and would (1) form a holding company to own the stock of NKSA and (2) gain federal home loan bank board approval of the transfer. The investors paid the purchase price for their securities at various times between September 1980 and January 1981. The money paid in was deposited in a repurchase, or "repo," account, earning interest. The total amount invested by all 10 investors was $266,500.

The petition shows that Huff, before soliciting the investors, acquired controlling interest in NKSA in January 1980. To finance the purchase of the NKSA stock, Huff made a downpayment of approximately $300,000 from funds borrowed by him from the National Bank of Commerce in Lincoln, Nebraska. Huff later negotiated a loan of $1.3 million from the Merchants Bank in Topeka, Kansas, to complete the financing. Huff used the funds solicited from the investors to repay part of the $300,000 loan from the National Bank of Commerce.

At the time Huff acquired the stock of NKSA, he was informed by the NKSA stockholders and employees that there was a lawsuit pending against NKSA in the district court of Geary County, Kansas, relating to the breach of a loan commitment.

The holding company (NKFC) was formed on January 5, 1982. At that time Huff assigned to NKFC all of the stock acquired by him in NKSA, representing 89.45 percent of the stock of NKSA. Each investor was issued between one-half and two debentures and 150 to 600 shares of stock in NKFC, depending upon the amount of investment.

On July 29, 1982, judgment was entered against NKSA in the Geary County, Kansas, lawsuit, in the amount of $1,495,944. Thereafter, the federal home loan bank board closed NKSA. By letter dated November 22, 1982, Huff informed the investors that the judgment against NKSA had precipitated the closing by the federal home loan bank board, that he had knowledge of the pending lawsuit at the time he acquired the NKSA stock, and that their investments should be considered worthless. At no time before November 22, 1982, did any of the investors have knowledge of the existence of the Geary County lawsuit pending against NKSA.

The investors filed their petition, setting out three causes of action, against Huff and NKFC on November 21, 1983, for damages incurred as a result of the securities becoming worthless. Huff and NKFC filed a motion to strike and to make the petition more definite and certain. This motion was sustained in part. An amended petition was filed. A second motion was sustained in part, and the investors filed a second

amended petition. Huff and NKFC demurred, and the district court sustained the demurrer on the ground that none of the counts in the petition stated a cause of action. The court again gave the investors additional time to file a further amended petition.

The investors filed their third amended petition on September 24, 1984, setting out five causes of action. Huff and NKFC again filed a demurrer on October 12, 1984, alleging that the causes of action in the petition were barred by the statute of limitations under the Securities Act of Nebraska, §§ 8-1101 et seq., and that the petition did not state sufficient facts to constitute a cause of action. The trial court sustained the demurrer and dismissed the investors' petition with prejudice.

The investors have assigned six errors, which may be consolidated into two: (1) That the court erred in determining that the "Nebraska Blue Sky Law" (now Securities Act of Nebraska, Neb. Rev. Stat. §§ 8-1101 to 8-1124 (Reissue 1983)) provides the exclusive remedy for those who sustain damages in the purchase of securities and that all of the investors' causes of action were barred by the statute of limitations in that act; and (2) That the court erred in determining that none of the causes of action stated facts sufficient to constitute a cause of action.

We first determine whether the trial court was correct in determining that the "exclusive remedy" to the investors was through §§ 8-1101 to 8-1124. Regarding questions of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court. *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

A review of the investors' third amended petition shows that all five causes of action are based upon the alleged misconduct of Huff surrounding the sale of stock in NKFC. As previously noted, the trial court determined that the exclusive remedy to the investors was through the Securities Act of Nebraska. The trial court also determined that the contract for the sale of the securities in NKFC "occurred no later than January, 1981." Section 8-1118(3) provides in part that "[n]o person may sue under this section more than two years after the contract of sale." Under the trial court's reasoning, the investors had until January 1983 to timely file their petition in order to pursue their

rights under the Securities Act of Nebraska. The investors filed their original petition on November 21, 1983.

In arguing their first assignment of error, the investors maintain that the Securities Act of Nebraska is not their exclusive remedy and that even if it is, the trial court incorrectly determined the time when the statute of limitations began to run.

The investors argue that their claims are based on negligence, breach of fiduciary duty, and misrepresentation (fraud)—all common-law actions which carry 4-year limitation periods under Neb. Rev. Stat. §§ 25-201 et seq. (Reissue 1985). The investors contend that they are entitled to bring their common-law action as opposed to only seeking a remedy under the Securities Act of Nebraska because "There is no express language in the [current] Blue Sky Law which excludes all other common law causes of action." Brief for Appellants at 19. The investors contend that statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the act compel it.

Huff and NKFC contend the trial court was correct in its determination that the Securities Act of Nebraska was the exclusive remedy in this case. They point to § 8-1124(1), which they contend "expressly precluded any civil suit to enforce preexisting common law remedies law [sic] after August 18, 1967." Brief for Appellees at 5. Section 8-1124(1) provides:

> Prior law shall exclusively govern all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before August 18, 1965, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after August 18, 1965.

Our review, however, of the history of this section and its earlier enactments leads us to the conclusion that the reference to "prior law" refers not to prior common law but, rather, to prior statutory law governing "blue sky" transactions.

Nebraska has had a "blue sky" law in one form or another since at least 1913. See 1913 Neb. Laws, ch. 199, p. 603. Section 13 of that act established a 1-year statute of limitations. The act provided in part: "[P]rovided, however, no action to rescind any contract of sale made in contravention of *the provisions of this act* shall be maintainable unless the same is instituted within one year." (Emphasis supplied.) It seems quite clear from the language of § 13 that one had an option. He or she could either maintain an action to rescind a contract of sale under the newly enacted "blue sky" law, so long as it was instituted within 1 year, or could bring any common-law action within the applicable statute of limitations then in existence for such action. Nothing is said in the law of 1913 about the act's being cumulative. Yet, it is quite clear from a reading of the act that such is the case.

In 1921 the "blue sky" laws were again amended. See 1921 Neb. Laws, ch. 308, p. 967. For the first time there appears language regarding the extent of one's liability. Section 28 specifically provides: "Nothing herein contained shall limit or diminish the liability of any person or company now imposed by law, or prevent the prosecution of any person or company violating any of the provisions of this Act for the violation of any other statute or of any other provision hereof." While one may argue that the reference to "law" in § 28 refers to the common law, reading the section in its entirety leads one to the conclusion that liability "imposed by law" refers to other statutory laws and does not in any manner attempt to either expand or diminish an individual's common-law liability.

This becomes even clearer when, in 1937, the Legislature adopted a comprehensive "blue sky" law. See 1937 Neb. Laws, ch. 195, p. 790. Section 38 of the 1937 act provides as follows: "The provisions of Sections 81-5419, 81-5428 and 81-5429, Compiled Statutes of Nebraska, 1929, shall be and remain in full force and effect and shall apply to all of the provisions of this Act the same as though they had been originally enacted herein." Comp. Stat. § 81-5429 (1929) is identical with § 28 of the 1921 act. The language of § 81-5429 was brought in its entirety into Neb. Rev. Stat. § 81-346 (1943).

It was not until 1965 that any attempt was made to limit

liability under "blue sky" laws. See 1965 Neb. Laws, ch. 549, p. 1762. Section 24(1) of that enactment provided:

> Prior law shall exclusively govern all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of this act, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after the effective date of this act.

It seems clear to us that no attempt was being made by the Legislature to do away with common-law causes of action, but only to make it clear that a suit could not be brought under a prior "blue sky" act unless suit was commenced within 2 years after the effective date of the act. Prior to 1965 one could maintain an action under either the 1937 act or the pre-1937 acts without limitation. After 1965 one was required to bring an action under the pre-1965 law for causes of action accruing prior to the effective date of the act and, in any event, must do so within 2 years after August 18, 1965, or forever be precluded from maintaining such action. This is further made clear when one looks at § 8-1124(3), which reads: "Prior law shall apply in respect of any offer or sale made within one year after August 18, 1965, pursuant to an offering begun in good faith before its effective date on the basis of an exemption available under prior law." Obviously, there were no exemptions available under the common law, the common law having no application to either registration or exemption. Therefore, Huff's and NKFC's argument that the term "prior law" includes the common law as well as statutory "blue sky" law must fail. It is a long-recognized rule of statutory construction that where the same word is used repeatedly in the same act, unless the context requires otherwise, the word is to have the same meaning. See, *Seward County Rural Fire Protection Dist. v. County of Seward*, 156 Neb. 516, 56 N.W.2d 700 (1953); *Edgerton v. Hamilton County*, 150 Neb. 821, 36 N.W.2d 258 (1949). Section 8-1124(1) creates a transition period between prior statutory "blue sky" laws and current statutory "blue sky" laws. This transition period allowed causes of action arising out of facts

and circumstances prior to August 18, 1965, the effective date of the act, to be brought within its period of limitation, but in no event later than August 18, 1967. The statute, however, does not preclude common-law actions from being brought before their statutes of limitations have run.

We hold, therefore, that the language of § 8-1124(1) does not provide that the Securities Act of Nebraska is the exclusive remedy under state law in cases involving the sale of securities.

Having decided this issue, we must now determine if the trial court correctly determined that none of the allegations stated facts sufficient to state a cause of action. With respect to the first cause of action, the trial court ruled that no sufficient facts were alleged from which a conclusion can be drawn that Huff and NKFC were negligent and that the negligence was the proximate cause of investors' damages.

> "In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure.
>
> "The petition must allege these essential elements, and the proof must support the allegations, or there can be no recovery."

Ring v. Kruse, 158 Neb. 1, 6, 62 N.W.2d 279, 284 (1954).

Investors' third amended petition does allege the representation by Huff that he would act as investors' agent in handling their money, forming a holding company, and issuing stock and debentures. The petition further alleges that Huff breached his duty to investors by failing to inform them of the pending lawsuit, by failing to hold their funds in escrow, and by failing to consult with an attorney regarding the merits of the pending lawsuit. Finally, the petition alleged damages in the amount of $266,500 plus interest. The essential elements to constitute actionable negligence have been alleged, and the trial court was incorrect in dismissing investors' first cause of action.

The second cause of action, which alleges constructive fraud and the imposition of a trust, is one in equity. A constructive trust is a relationship, with respect to property, subjecting the

person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. Each case involving the existence of a constructive trust is to be determined on the peculiar facts, circumstances, and conditions presented therein. *Ruppert v. Breault*, 222 Neb. 432, 384 N.W.2d 284 (1986). The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985). Accepting as true the facts alleged in the petition, the investors have alleged facts sufficient to state a cause of action. The trial court was incorrect in sustaining Huff's and NKFC's demurrer on this cause of action.

In their assignment of error concerning their third cause of action, the investors allege that the district court erred "in determining that the third cause of action did not state facts which were sufficient to constitute a cause of action under 15 U.S.C. § 77L(2) and that the cause was barred by the limitation of 15 U.S.C. § 77m." The investors have raised two issues in this assigned error; one being a statute of limitations issue and the other presenting a pleading issue. Both §§ 77*l*(2) and 77m are part of the Securities Act of 1933, 15 U.S.C. §§ 77a et seq. (1982), an act designed to protect investors by promoting full disclosure of information believed to be necessary to the making of informed investment decisions. Our authority to review and grant relief under the Securities Act of 1933 is set out in § 77v(a), which provides that state courts shall have jurisdiction of offenses and violations under the 1933 act concurrent with U.S. district courts. See, *First National City Bank New York v. Smith*, 531 P.2d 321 (Okla. 1975); *Greenfield v. Cheek*, 122 Ariz. 70, 593 P.2d 293 (1978), *aff'd* 122 Ariz. 57, 593 P.2d 280 (1979).

The investors' third cause of action is based upon alleged prospectus and interstate communications violations by Huff and NKFC under the 1933 act, pursuant to § 77*l*(2). The investors allege that the omission of "material fact" in this case is the nondisclosure of the Geary County, Kansas, lawsuit. In dismissing the investors' third cause of action, the trial court

determined that any relief to the investors under the 1933 act was barred by the statute of limitations of § 77m, which provides that any action under § 77*l*(2) must be brought within 1 year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence, but in no event later than 3 years after the sale. The 3-year limitation period acts as a complete bar, regardless of when discovery is made. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301 (9th Cir. 1982); *Summer v. Land & Leisure, Inc.*, 664 F.2d 965 (5th Cir. 1981).

In deciding if the statute of limitations under § 77m has run, the issue, as framed by both parties, is whether or not the action was brought "more than three years after the sale." § 77m. The investors argue that there was no sale until after the formation of the holding company on January 5, 1982. For the reasons set out below, we do not agree. The contract begins to run after the contract of sale.

On its face, the third amended petition shows that 7 of the 10 investors, namely, Josephine Knoell, Susan Huston, Julius Kowalski, Gerald Siedband, Charles Newell, Ford Van Lines, and Vern Westberg, all paid for their investment units in September and October of 1980. Other courts have agreed with our holding above, that a "sale" under the Securities Act of 1933 occurs when an offer to purchase was accepted. See *Tirone v. Calderone-Curran Ranches, Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 96,480 (W.D.N.Y. 1978). In this case the sale occurred when the investors accepted Huff's offer of sale by the payment of their purchase price for the investment units. Accordingly, the actions of the above-named investors are time barred by § 77m, since they did not bring this action until November 21, 1983, more than 3 years after the sale to them occurred.

The three remaining investors, Dale Herman, Lloyd Wheeler, and James Wheeler, paid for their investments in December 1980 and January 1981. The trial court was incorrect in finding that these investors were time barred by § 77m. However, in dismissing the third cause of action (as to all the investors), the trial court determined that the "third cause of action does not state facts sufficient to constitute a cause of action in that it contains no allegations sufficient to support a

recovery by plaintiffs [investors]."

Compliance with § 77m is a substantive rather than a procedural matter, and a plaintiff must affirmatively allege facts indicating his action has been brought timely when seeking relief under the 1933 act. *Dahl v. Gardner*, 583 F. Supp. 1262 (D. Utah 1984). The third amended petition did not set out any allegations as to the time and circumstances of discovery of the alleged fraud, any allegations as to why the alleged fraud was not discovered sooner, nor any allegations as to what diligence the investors used in making discovery. *Brick v. Dominion Mortg. & Rlty. Trust*, 442 F. Supp. 283 (W.D.N.Y. 1977). The Wheelers and Herman have not included allegations as to their diligence in attempting to discover the alleged fraud or any reason why they did not discover it within 1 year of the sales to them in December 1980 and January 1981.

Ordinarily, a plaintiff is allowed to amend his petition to attempt to plead sufficient facts to constitute a cause of action. However, in this case absolute dismissal is appropriate. The investors have pled and repled this cause of action in essentially the same way four different times. In the initial petition and in the third amended petition, they pled facts concerning an alleged violation of § 77*l*(2) in the same way. Neb. Rev. Stat. § 25-854 (Reissue 1985) provides that if a demurrer be sustained, the adverse party may amend his pleading "if the defect can be remedied by way of amendment." That right to amend, however, is not without limitation. In *Suzuki v. Gateway Realty*, 207 Neb. 562, 565, 299 N.W.2d 762, 765-66 (1980), we stated:

> This section of the statute has been held by this court on several occasions to not provide an absolute right of amendment. See, *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). 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. *Coverdale & Colpitts v. Dakota County; Weiner v. Morgan.*

See, also, *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984). The trial court did not err in not ordering a further right to amend the investors' petition with respect to the third cause of action.

The district court held that investors' fourth cause of action did not state facts sufficient to state a cause of action. We agree with the trial court's determination. The pleadings constituting this cause of action merely restate facts contained elsewhere in the third amended petition. These facts are duplicative and no separate theory of recovery is alleged. We cannot discern a theory of recovery and so affirm the sustaining of Huff's and NKFC's demurrer with respect to this cause of action.

The fifth cause of action alleges fraud, and investors assign as error the court's determination that there were insufficient facts from which the necessary intent for fraud could be inferred. Investors alleged fraudulent misrepresentations and omissions and damages. The elements of fraud are (1) a false representation of material fact, (2) knowledge that the representation was false or made in reckless disregard as to its truthfulness or falsity, (3) an intent to induce another to act, (4) a justifiable reliance on the representation, and (5) injury or damage resulting from such reliance. *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985). The essential elements to constitute fraud have been alleged, and the trial court was incorrect in dismissing investors' fifth cause of action.

For the reasons set forth above, the judgment of the trial court is affirmed in part and reversed in part.

AFFIRMED IN PART, AND
IN PART REVERSED.

GRANT, J., dissenting.

I dissent from so much of the majority opinion that holds, in effect, that the 2-year statute of limitations of Neb. Rev. Stat. § 8-1118(3) (Reissue 1983) does not control the disposition of plaintiffs' action in this case. Section 8-1124(1) provides:

> Prior law shall exclusively govern all suits, actions, prosecutions, or proceedings which are pending or may be

> initiated on the basis of facts or circumstances occurring before August 18, 1965, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after August 18, 1965.

This section created a transition period between "prior law" and the Securities Act of Nebraska (Neb. Rev. Stat. §§ 8-1101 to 8-1124 (Reissue 1983)). This period allowed causes of action arising out of facts and circumstances prior to August 18, 1965, to be brought within the period of limitation applicable to those actions, but in no event later than August 18, 1967. These actions included common-law actions, such as fraud and negligence. In enacting §§ 8-1101 et seq., the Legislature knew that common-law causes of action had limitation periods extending beyond August 18, 1967. Section 8-1124(1) became law on August 18, 1965. The language of § 8-1124(1) plainly states that the Legislature intended that all actions that arose under "prior law" concerning securities had to be brought within 2 years after August 18, 1965. In requiring all "prior law" actions to be brought within this time, the Legislature made it clear that the Securities Act of Nebraska provided the controlling statute of limitations in securities cases arising after August 18, 1965, no matter what the theory of recovery.

"Prior law" included the Blue-Sky Law, Neb. Rev. Stat. §§ 81-302 to 81-346 (Reissue 1958). Section 81-346 of the Blue-Sky Law preserved preexisting common-law remedies in providing: "Nothing contained in sections 81-302 to 81-345 shall limit or diminish the liability of any person or company now imposed by law, or prevent the prosecution of any person or company violating any of the provisions of said sections for the violation of any other statute . . . ." The Blue-Sky Law, including § 81-346, was repealed by 1965 Neb. Laws, ch. 549, § 25, p. 1798. The Securities Act of Nebraska was enacted by 1965 Neb. Laws, ch. 549, §§ 1 to 24, pp. 1762-98. It appears to me that in repealing § 81-346, the Legislature specifically determined that the newly enacted Securities Act of Nebraska would be controlling as to all security transactions.

I note also that the Securities Act of Nebraska, as adopted,

was modeled substantially after the Uniform Securities Act, 7B U.L.A. 509 et seq. (1985). Specifically, § 8-1118 is almost a complete adopting by the Nebraska Legislature of § 410 of the Uniform Securities Act. A key provision of the Uniform Securities Act, § 410(h), however, was not adopted. That section provided: "The rights and remedies provided by this act are *in addition to* any other rights or remedies that may exist at law or in equity, but this act does not create any cause of action not specified in this section or section 202(e)." (Emphasis supplied.) By refusing to enact the provisions of § 410(h) of the Uniform Securities Act, the Legislature made a conscious decision that the Securities Act of Nebraska controlled all actions concerning securities. It appears to me that if the Legislature desired to preserve other general statutes of limitations under the new Securities Act of Nebraska, then either the Legislature would not have repealed § 81-346 or it would have enacted a provision similar to § 410(h) of the Uniform Securities Act.

I believe, therefore, that the language of § 8-1118(3) sets out the applicable statute of limitations of 2 years under Nebraska law in cases involving the sale of securities. Other jurisdictions have reached the same result. See, *O'Hara v. Kovens*, 625 F.2d 15 (4th Cir. 1980); *Dehler v. Setliff*, 143 Ga. App. 430, 238 S.E.2d 723 (1977); *Diamond v. Lamotte*, 709 F.2d 1419 (11th Cir. 1983); *Friedlander v. Troutman, Sanders, Lockerman*, 788 F.2d 1500 (11th Cir. 1986).

Plaintiffs' action was not brought within the 2-year period. I would affirm the judgment of the trial court dismissing plaintiffs' action.

BOSLAUGH and HASTINGS, JJ., join in this dissent.

CHILES, HEIDER & CO., INC., APPELLEE, V. PAWNEE MEADOWS, INC., A NEBRASKA CORPORATION, APPELLANT, RICHARD WOZNIAK ET AL., APPELLEES.

396 N.W.2d 111

Filed November 7, 1986. No. 85-450.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

August P. Ross and Annette E. Mason of Ross & Mason, P.C., for appellant.

Michael G. Lessmann and Thomas E. Johnson of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee Chiles, Heider & Co.

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

PER CURIAM.

This is the second appearance of this case in this court. The facts of the case are set out in detail in our earlier opinion, *Chiles, Heider & Co. v. Pawnee Meadows*, 217 Neb. 315, 350 N.W.2d 1 (1984) (*Chiles, Heider I*), and will not be repeated herein except to the extent necessary to make this opinion clear.

For the purpose of developing certain property described as Lots 1 to 58, inclusive, in Pawnee Meadows, a subdivision in Saunders County, Nebraska, Sanitary and Improvement District No. 4 of Saunders County, Nebraska, was created pursuant to the provisions of Neb. Rev. Stat. §§ 31-701 et seq. (Reissue 1978). In August of 1974 Chiles, Heider and S.I.D. No. 4 entered into a letter agreement in which Chiles, Heider agreed to purchase certain construction fund warrants issued by S.I.D. No. 4. As a part of that agreement to purchase, Chiles, Heider and Pawnee Meadows, Inc., entered into a separate agreement in which Pawnee Meadows agreed that

> [a]t any time on or after a date four (4) years after the date of the first warrant issued by SID and purchased by Chiles, Heider, upon request of Chiles Heider, [Pawnee Meadows] will purchase from Chiles, Heider, or any other holder of warrants issued by SID, all unpaid warrants

issued by SID requested by Chiles, Heider to be so purchased.

To secure its performance Pawnee Meadows executed and delivered to Chiles, Heider a mortgage covering the property located within S.I.D. No. 4 and owned by Pawnee Meadows. It is significant for an understanding of the problem presented by this appeal to recognize, as we determined in *Chiles, Heider I*, that the agreement between Pawnee Meadows and Chiles, Heider was not a guaranty of S.I.D.'s obligation on the warrants but, rather, was a separate and independent agreement entered into between Pawnee Meadows and Chiles, Heider. Further, it is important to recognize that the mortgage executed by Pawnee Meadows and given to Chiles, Heider was not to secure the payment of the warrants issued by S.I.D. No. 4 but, rather, was to secure the agreement of Pawnee Meadows to repurchase the warrants, under certain conditions, upon request by Chiles, Heider.

At a time 4 years after the date that the first warrant was issued by S.I.D. and purchased by Chiles, Heider, the latter requested Pawnee Meadows to purchase all of the warrants. Pawnee Meadows refused to do so, and Chiles, Heider instituted foreclosure proceedings. Following trial, a decree of foreclosure was entered. It was that decree which we reviewed in *Chiles, Heider I*. Essentially, we affirmed all that the district court had ordered, except that we required Chiles, Heider to tender to the clerk of the district court the warrants which Chiles, Heider desired Pawnee Meadows to purchase. Chiles, Heider did so, and when Pawnee Meadows failed to purchase the warrants within the time allowed, the order of foreclosure was carried out. At the sale, Chiles, Heider purchased the property for the sum of $44,672.93, far less than the principal amount due and owing on the warrants. The district court subsequently entered an order confirming the sale and directing that the unpurchased warrants, then in the possession of the clerk of the district court, be returned to Chiles, Heider. Pawnee Meadows has once again appealed to this court, contending that the district court erred (1) in directing the distribution of the proceeds by returning to Chiles, Heider all of the warrants and not requiring the payment of the bid for

Pawnee Meadows' benefit or (2) in not directing that warrants, to the extent that the same could be purchased by the bid, be delivered to Pawnee Meadows.

While generally we disagree with the arguments presented by Pawnee Meadows, we are in complete accord with the statement contained in Pawnee Meadows' brief that "this is not the usual mortgage foreclosure where there is a debt due and owing and a mortgage given in security for said debt." Brief for Appellant at 6. It is, of course, the unusual nature of the action which creates some of the difficulty. We believe, however, that when the situation is properly viewed, the order of the district court was, in all respects, correct and should be affirmed.

Turning first to Pawnee Meadows' second assignment of error, we have already disposed of that argument. In *Chiles, Heider I*, we held that the obligation imposed upon Pawnee Meadows to repurchase the warrants was not a guaranty but, rather, an independent obligation assumed by Pawnee Meadows. The mortgage given by Pawnee Meadows was to secure its performance to purchase the warrants, and not to satisfy the S.I.D.'s obligation to pay the warrants. Furthermore, *Chiles, Heider I* clearly held that Pawnee Meadows was not entitled to purchase less than all of the warrants tendered by Chiles, Heider.

To now hold that Pawnee Meadows is entitled to receive physical possession of part of the warrants simply flies in the face of what we have already determined. The question of how the money is to be allocated by Chiles, Heider has not been determined by this action and undoubtedly is a matter between Chiles, Heider and its warrant holders. It cannot be decided in this action, where the warrant holders were neither given notice that such matter would be resolved nor made parties to the action. The assignment of error is simply without merit and must be overruled.

To the same extent, Pawnee Meadows' first assignment of error must be overruled. While the assignment of error is unclear and the argument made by appellant in support of the assignment does little to clear up the confusion, we assume appellant believes that Chiles, Heider should have been required to tender a check in the amount of $44,672.93. We are

simply unable to comprehend how the formality of requiring Chiles, Heider to execute and deliver a check to the clerk of the district court in the amount of $44,672.93, only to receive back from the clerk of the district court a check in the amount of $44,672.93 is necessary in order to somehow give validity to the transaction. Where the individual who is to receive the proceeds is the same individual who is required to pay in the proceeds, a memo entry without a check seems to this court to be sufficient. How Pawnee Meadows would realize a greater benefit if the above formality were followed is simply beyond comprehension. The mortgage given by Pawnee Meadows was not to secure the payment of the warrants but, rather, was to secure the performance by Pawnee Meadows to purchase the warrants. This it failed to do, and for that reason the property was foreclosed. There is nothing more for it to receive by way of benefit. Nor is it entitled to possession of the warrants. Those warrants are still outstanding obligations of the S.I.D. They are not an obligation of Pawnee Meadows. Therefore, the unpaid warrant holders are entitled to have the warrants returned to them. While we did not in *Chiles, Heider I* direct what should be done with the warrants in the event that Pawnee Meadows did not purchase all of them, it seems obvious that the district court, in entering its order confirming the sale, was required to order their return. As noted in 5 Am. Jur. 2d *Appeal and Error* § 992 at 419-21 (1962):

> On remand, the trial court may consider and decide any matters left open by the appellate court and is free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. The mandate is to be interpreted according to the subject matter and, if possible, in a manner to promote justice.

We believe that is precisely what the district court did in the instant case. The district court did not ignore our mandate in *Chiles, Heider I*, nor expand it, but, rather, did precisely what we ordered it to do, and then proceeded to take such further

necessary action as required by our opinion to conclude the matter following the foreclosure sale. The district court's order was not a modification of the judgment, as was contended by Pawnee Meadows. We are unable to find any error in what was done by the district court, and for that reason the actions taken by the district court are in all respects affirmed.

AFFIRMED.

CAPORALE, J., not participating.

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

395 N.W.2d 758

Filed November 7, 1986. No. 85-996.

Parental Rights. One need not have physical possession of a child to demonstrate the existence of the neglect contemplated by Neb. Rev. Stat. § 43-292(2) (Reissue 1984), which provides for the termination of parental rights when the parents have "substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection."

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Robert C. McGowan, Jr., for appellant.

Donald L. Knowles, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

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

PER CURIAM.

The separate juvenile court terminated the mother's parental rights to her now 2-year-old son, J.N.V. By her assignments of error the mother questions the sufficiency of the evidence to establish that she "substantially and continuously or repeatedly neglected" her son or that she refused to give him "necessary parental care and protection" as contemplated by Neb. Rev. Stat. § 43-292(2) (Reissue 1984). We affirm.

On July 19, 1984, the mother, without aid, gave birth to her son on the floor of her kitchen. At the time, the mother was sharing her apartment with her paramour and 7-year-old daughter. While the paramour lay sleeping on the living room couch during the birth, the daughter ran to a neighbor's home to seek assistance. The attending physician at the hospital to which the mother and her son were admitted became concerned about the sanitary conditions at the mother's apartment because both she and her daughter had come to the hospital with head lice. As a consequence, the hospital contacted the Child Protective Services office. A representative of that office inspected the apartment on July 24, 1984, and found there was no clothing or crib for the newly born son, nor was there any food for anyone else. The mother had no plans to provide for her son until she was to receive her Aid to Dependent Children check on the 1st of August. The mother was instructed by the Child Protective Services representative that before her son, who was then still hospitalized, could be returned to her, the apartment needed to be cleaned; a crib, diapers, and food provided; and that she and her daughter needed to get rid of their head lice. The mother was also provided with some items and with information to help her obtain other necessities.

As of August 13, the mother had still made no preparations for her son, who had been placed in temporary foster care. By this time her paramour had left the apartment, had taken the daughter with him, and had left the mother without any funds. The mother was apparently agitated and repeatedly stated to a visiting nurse, who was assisting the mother to prepare for her son's return, that "I don't know what to do, I don't know what to do." Concluding that the mother could not manage daily living by herself, the visiting nurse referred her to Adult Protective Services. The mother was then moved to the Booth Salvation Army Residence.

The mother expressed a desire for both of her children to be returned to her, and attempts to secure necessities for the son by nurses, the staff at Booth hospital, and others continued. With the help of her caseworkers the mother obtained Social Security and medicaid payments. However, the mother had become "immobilized" and was incapable of doing anything. Her

Adult Protective Services caseworker testified that the mother could not make decisions or any plans for her future or for her son.

In September this caseworker thought it necessary to commit the mother to the Community Mental Health Center at the Douglas County Hospital; however, the mother ultimately entered the hospital voluntarily. In October she was moved to a halfway house in Omaha. During this period, the mother visited her son at the Nebraska Children's Home until November 1984, when the home lost contact with the mother.

In March or April of 1985 the mother returned to the care of the halfway house. It is not clear exactly how long the mother's whereabouts were unknown or where the mother had been living after she returned from her disappearance, what type of therapy she was receiving, or what type of arrangements were being made to prepare her to raise her son. It does appear, however, that once her whereabouts again became known, she resumed visits with her son.

The evidence further reflects that the mother had considered the possibility of the son's foster parents adopting him. She eventually signed a relinquishment for adoption, but later withdrew it because of a disagreement as to what rights she would have with respect to her son after adoption.

The mother was diagnosed as a paranoid schizophrenic whose personal grooming had deteriorated to the point that as of October 25, 1985, 6 days before the hearing resulting in the judgment appealed from, her body odor was offensive; she did not respond to efforts to communicate with her, either individually or in groups; and she exhibited intense anger, was constantly nervous and agitated, remained entirely by herself, and threatened suicide. Long-term hospitalization was recommended, as her condition was not expected to improve in the near future. According to her attorney, at the time of the hearing she was involuntarily committed to the board of mental health. The evidence further revealed that there has been no bonding between the mother and her son, and the mother becomes anxious when performing child care duties alone.

The operative petition alleges that the son comes within the meaning of § 43-292(2). That statute provides for the

termination of parental rights when such action is in the juvenile's best interests and it appears by the evidence that "[t]he parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection."

The mother's argument is not that she is fit to be a mother but, rather, that the evidence does not establish the ground pled as the basis for terminating her parental rights. More specifically, she contends that as she at no time had physical possession of her son, she could not have neglected him and refused to give him the necessary parental care and protection contemplated by § 43-292(2).

It is true that the State might have elected to assert as a ground for terminating her rights the mother's inability to discharge her parental responsibilities because of her long-term mental illness or deficiency, § 43-292(5), or that more careful advocacy on the part of the State would have suggested that it amend its pleading by adding § 43-292(5) as a ground for the judgment it sought. However, the law on the issue of neglect is not as the mother perceives it to be.

One need not have physical possession of a child to demonstrate the existence of the neglect contemplated by § 43-292(2). In the case of *In re Interest of C.L.F.*, 216 Neb. 631, 344 N.W.2d 674 (1984), the child was born to a mother who abused drugs. The child was at all relevant times retained in the custody of the State because it was alleged that the mother would not be able to care for the child upon her release from the hospital. A rehabilitation program was established; however, the mother remained subject to the influence of drugs, did not attend all of her therapy sessions, disappeared for a period of time, and did not attend the court hearings. This court affirmed the termination of the mother's rights to the child, under § 43-292(2), for neglect.

Similarly, in *In re Interest of Wagner and Russell*, 209 Neb. 33, 305 N.W.2d 900 (1981), the parental rights of the natural father of one of the children involved were terminated. The father had never lived with or married the mother. The evidence showed that in the 3 years prior to his incarceration, the father gave no support to the child and made only seven or eight visits.

The court stated that the evidence was sufficient to show neglect and incapacity to carry out his parental responsibilities, notwithstanding the fact that the mother wanted no help from him.

In a situation not dissimilar to that presented by this case, it was held evidence that the mother suffered from chronic undifferentiated schizophrenia, as the result of which she was and would likely remain unable to care for her children, was sufficient to support a finding that her infant son was a "neglected child." *Department of Social Servs., St. Lawrence County v Joan R.*, 61 A.D.2d 1108, 403 N.Y.S.2d 368 (1978).

A parent may as surely neglect a child of whom she does not have possession by failing to put herself in a position to acquire possession as by not properly caring for a child of whom she does have possession. It would have been hazardous in the extreme to have entrusted the son's fragile life to his mother's possession, when she failed to put herself in a position to properly care for him. While it might have been kinder in these sad and unfortunate circumstances for the State to have proceeded under § 43-292(5), it was not required to do so.

We conclude from our de novo review of the record that the evidence clearly and convincingly establishes the son was substantially and continuously neglected, that the mother refused to give her son necessary parental care and protection, and that the son's best interests require that the mother's parental rights in and to him be terminated.

The judgment of the separate juvenile court, being correct, is affirmed.

AFFIRMED.

CAPORALE, J., dissenting.

While I agree that the mother's parental rights in and to her son probably must be terminated, I must nonetheless regretfully dissent. I do so because the State simply chose to ignore the fact it was dealing with a mentally ill mother who, through no fault of her own, could not care for her son, and treated her as if she were of sound mind and had consciously elected to neglect her parental responsibilities. Accordingly, I would reverse the judgment of the court below, with the instruction that the son be kept in foster care until the State

performs its task of proving its right to terminate the mother's parental rights in the manner prescribed by law.

Neb. Rev. Stat. § 43-292 (Reissue 1984) provides that the juvenile court may terminate parental rights on a variety of grounds, including when:

> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection;
>
> . . . .
>
> (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period.

The statute further provides that when "termination of the parent-juvenile relationship is sought under subdivision (5) of this section, the court shall appoint a guardian ad litem for the alleged incompetent parent."

Thus, while the majority opinion makes no distinction between a mentally ill parent and one who is not, § 43-292 does make such a distinction.

There is good reason for making such a distinction. The notion of neglect contemplates the existence, among other things, of intelligence, judgment, and reason, rendering one capable of recognizing and adhering to a required standard of care. It is for that reason that in negligence actions we require a child to exercise only that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation. *Gadeken v. Langhorst*, 193 Neb. 299, 226 N.W.2d 632 (1975).

Therefore, under the State's pleading, the real question in this case is not whether a mother can neglect a son whom she does not have in her possession but whether the mother had the capacity to neglect her son. The evidence clearly establishes she did not have such capacity and that she therefore does not come within the purview of § 43-292(2).

The evidence establishes, however, that she may come within the purview of § 43-292(5). The difficulty is that the State did not give the mother notice, through a guardian ad litem, that it

was her mental ability to be a parent which was at issue. In *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983), we noted, in connection with a statute empowering a court to appoint a guardian ad litem for a minor seeking an abortion, that the duties of a guardian ad litem are not coextensive with those of an attorney representing the minor. We observed that the guardian ad litem was to determine the best interests of the minor without reference to the minor's wishes.

The majority opinion ignores a statutory requirement and deprives a mentally ill mother of the valuable right to have her interests protected by a guardian ad litem. Proper notice is more than a matter of form, it is a constitutional requirement which is met only when one is advised of the matters to be considered in a manner which is fair in view of the circumstances and conditions existent at the time. *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986). It is fundamentally unfair to tell a mother it is the neglect of her son which is at issue and then try her for lacking the mental capacity to carry out her parental responsibilities. See *Tuch v. Tuch*, 210 Neb. 601, 316 N.W.2d 304 (1982).

The majority's opinion, although expedient, is, in my view, legally incorrect.

KRIVOSHA, C.J., and SHANAHAN, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. WILLIAMS, APPELLANT.

396 N.W.2d 114

Filed November 7, 1986. No. 86-016.

1. **Postconviction: Trial: Evidence: Witnesses.** In an evidentiary hearing, as a bench trial provided by Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony.
2. **Postconviction: Appeal and Error.** In an appeal involving a proceeding for

postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

3. **Constitutional Law: Right to Counsel: Effectiveness of Counsel.** As a result of Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the right to counsel is the right to effective assistance of counsel. For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests.
4. **Criminal Law: Effectiveness of Counsel.** To sustain a claim of ineffective assistance of counsel and obtain reversal of a criminal judgment, a defendant must show (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense.
5. **Effectiveness of Counsel: Words and Phrases.** In cases of alleged ineffective assistance of counsel, prejudice has been characterized as 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.
6. **Constitutional Law: Effectiveness of Counsel: Presumptions: Conflict of Interest.** There is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.
7. **Rules of Evidence: Witnesses.** The credibility of a witness may be attacked by any party, including the party calling him. Neb. Evid. R. 607 (Neb. Rev. Stat. § 27-607 (Reissue 1985)).
8. **Rules of Evidence: Trial: Prior Statements: Hearsay: Witnesses: Perjury.** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the witness' testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)).
9. **Rules of Evidence: Hearsay: Impeachment: Prior Statements: Evidence.** What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Neb. Evid. R. 801(4)(a)(i) are satisfied. Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985).
10. **Rules of Evidence: Witnesses: Prior Statements: Evidence.** Subject to the exception specified in Neb. Evid. R. 801(4)(a)(i) (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1985)), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules.
11. **Witnesses: Juries.** Witness credibility and the weight to be given a witness' testimony are matters for evaluation and determination by the jury.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Patrick W. Healey and Douglas L. Kluender, for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

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

SHANAHAN, J.

Robert E. Williams appeals the judgment of the district court for Lancaster County, which denied postconviction relief to Williams, see Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), on Williams' claim of ineffective assistance of counsel based on his lawyers' alleged conflict of interest. We affirm.

In an evidentiary hearing, as a bench trial provided by §§ 29-3001 et seq. for postconviction relief, the trial judge, as the "trier of fact," resolves conflicts in evidence and questions of fact, including witness credibility and weight to be given a witness' testimony. Cf. *State v. Craig*, 219 Neb. 70, 80, 361 N.W.2d 206, 214 (1985) ("In a bench trial of a criminal case, the court, as the 'trier of fact,' is the sole judge of the credibility of witnesses and the weight to be given to their testimony"). In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous. *State v. Pearson*, 220 Neb. 183, 368 N.W.2d 804 (1985).

As reported in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), in a 1978 trial a jury found Williams guilty of the first degree murders of Patricia A. McGarry and Catherine M. Brooks, notwithstanding Williams' defense of insanity. The jury also found Williams guilty of sexually assaulting one of the victims. Two psychiatrists for the State testified that Williams was not insane at the time of the murders. For the defense, one psychiatrist "could not say [Williams] did not know that what he was doing was wrong," while a second psychiatrist testified Williams "would know his actions were wrong only if he took time to think." 205 Neb. at 63, 287 N.W.2d at 23. Williams' ex-wife, Merrilee, was not a witness in the murder trial. A

three-judge panel sentenced Williams to death for the murders. Williams' defense was conducted by the Lancaster County public defender's office. This court affirmed Williams' conviction and sentence of death.

In *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984), we affirmed the judgment of the district court, denying an evidentiary hearing on Williams' first motion for postconviction relief. The Lancaster County public defender's office represented Williams in that first hearing for postconviction relief.

Williams, through court-appointed counsel in place of the public defender's office, then filed a second motion for postconviction relief, claiming his trial counsel's conflict of interest was a violation of Williams' constitutional right to effective assistance of counsel. Paul Conley, a member of the public defender's office at the time of Williams' trial for the murders, had represented Williams' wife, Merrilee, in proceedings for dissolution of her marriage with Robert Williams. As evidence for the murder trial, the public defender's office did not seek testimony from Merrilee, namely, that Robert Williams was insane at the time of the murders, evidence which Williams characterized as "critical" to presentation of his insanity defense. In view of *State v. Myers*, 205 Neb. 867, 869, 290 N.W.2d 660, 661 (1980) ("a nonexpert with an intimate personal acquaintance may be allowed to testify as to the sanity or insanity of a defendant"), we ordered an evidentiary hearing "as an opportunity for Williams to establish his allegation that a conflict of interest denied effective assistance of counsel." *State v. Williams*, 218 Neb. 618, 622, 358 N.W.2d 195, 198 (1984).

On October 9, 1985, Williams' lawyer took the videotape deposition of Frances Forget, formerly Merrilee Williams, who testified about her marriage with Robert Williams and postmarital contact with Williams. During that marriage, there were a "number of times" when Merrilee received medical treatment or was admitted to a hospital on account of beatings by Williams. Conduct of such nature persisted until 1976, when Williams physically abused Merrilee and caused her to miscarry. In the spring of 1977 Merrilee petitioned for

dissolution of her marriage with Williams. A decree of dissolution was entered on August 3, 1977. On the morning of August 5 Williams "kidnapped" Merrilee in her employer's parking lot and drove her to a Lincoln park, where, after slashing Merrilee's forehead with a knife and threatening to "ram" the knife in her ear, Williams "raped" Merrilee. Later, on August 5, Williams took Merrilee to a hospital emergency room for treatment of knife wounds which she had sustained during the sexual assault in the park. Police were summoned and took Williams into custody. Williams was released on August 10. The murders of McGarry and Brooks occurred on August 11.

For approximately 1 week after the murders, Merrilee stayed with a psychiatric social worker, Sheralyn Cox. At the suggestion of personnel at a Lincoln "rape crisis clinic," Merrilee, in the company of Sheralyn Cox, departed for California. Referring to the time of the murders on August 11, Merrilee testified she did not believe Williams was "crazy" and "would not say he was crazy," but also testified she did not know whether she had told Sheralyn Cox that Williams was "crazy."

At the second postconviction hearing, Sheralyn Cox testified that Merrilee had "described [Williams] as crazy" and, after the murders of McGarry and Brooks, had made numerous comments "to the effect that [Merrilee] believed her husband to be crazy."

Thomas Hagel, formerly an attorney in the Lancaster County public defender's office and one of Williams' counsel for the murder trial, testified "nobody knew how to get ahold" of Merrilee, whose family would not "even talk" to Hagel, and further testified that he could not recall asking Conley about communications from Merrilee or her whereabouts. Hagel did not confer with Conley about Williams' defense. Conley had "absolutely no involvement" in preparation or trial of Williams' case. In a conference with Hagel shortly after the murder charges were filed, Williams mentioned his "bad feelings" toward Conley on account of the divorce proceedings, but wanted the public defender's office to "stay on the case" and was "adamant" about continued representation by the

public defender's office. The record does not reflect or indicate that any aspect or conduct of Williams' defense would have differed from that contemplated, actuated, or presented by trial counsel if Merrilee had been a witness at the murder trial.

Upon conclusion of the evidentiary hearing the district court concluded that Williams had

> failed to prove that he was denied his Sixth Amendment right to effective assistance of counsel in that:
>
> a. He has failed to show by any credible evidence that an actual conflict of interest existed.
>
> b. He has also failed to show any adverse effect on the performance of his attorneys.

The district court denied postconviction relief to Williams, who appeals claiming ineffective assistance of counsel on account of an actual conflict of interest which adversely affected his trial counsel's performance in Williams' defense to the murder charges.

As a result of Neb. Const. art. I, § 11, and U.S. Const. amend. VI, the right to counsel is the right to effective assistance of counsel. See, *State v. Pearson*, 220 Neb. 183, 368 N.W.2d 804 (1985); *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). For effective assistance of counsel a defendant is constitutionally entitled to a lawyer's representation free from conflicting interests. *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984).

> [A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. [Citation omitted.] But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. [Citation omitted.]
>
> . . . We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). See, also, *State v. Turner, supra*.

The U.S. Supreme Court stated in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984):

> The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. [Citations omitted.]
>
> Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. See *Strickland v. Washington, post*, at 693-696 [citations omitted].

466 U.S. at 659 nn.25, 26.

After issuing *United States v. Cronic, supra,* but on the same day, the U.S. Supreme Court issued *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In reference to a claim of ineffective assistance of counsel, the Court in *Strickland* characterized "prejudice" as "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," 466 U.S. at 694, and enunciated a test to determine whether counsel's assistance was "so defective as to require reversal of a conviction":

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

This court has adopted the *Strickland* test, that is, counsel's

deficient performance causing prejudice to the defense, to determine whether a criminal judgment against a defendant must be overturned as the result of ineffective assistance of counsel. See *State v. Pearson, supra.*

In *Strickland v. Washington, supra*, the Court discussed a "per se rule of prejudice" and a "rule of presumed prejudice":

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronic, ante*, at 659, and n. 25. Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. *Ante*, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.
>
> One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler v. Sullivan*, 446 U. S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, *e. g.*, Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan, supra*, at 350, 348

(footnote omitted).

Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

As indicated in *Strickland v. Washington, supra*, a conflict of interest, per se, does not annihilate or frustrate a defendant's constitutional right to effective assistance of counsel, necessitating reversal of a judgment in a criminal case. However, there is a presumption of prejudice involving a defendant's constitutional right to effective assistance of counsel when a defendant demonstrates (1) counsel actively represented conflicting interests and (2) an actual conflict of interest adversely affected performance by the defendant's lawyer. Such conflicts of interest must be shown to have resulted in counsel's conduct detrimental to the defense.

Regarding prejudice on account of ineffective assistance of counsel, *Strickland* contains the following observation by the Court:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Id. at 697.

Putting aside the question whether an actual conflict of interest exists in the case before us, and following the suggestion in *Strickland*, we dispose of Williams' appeal on the basis of presence or absence of prejudice.

Williams argues that "the testimony of Forget at the time of trial would have been more helpful than the testimony given immediately prior to the evidentiary hearing." Brief for Appellant at 6. However, we reach the same conclusion as that of the district court regarding Merrilee Williams (Frances Forget) had she been a defense witness at Williams' trial for the murders. As shown by the record from the standpoint of reasonable and practical probability, Merrilee would have expressed an opinion that Williams was not "crazy" or was sane at the time of the murders. As a likely litotes, that testimony from Merrilee would not have been helpful to Williams' attempted defense of insanity. Implicit in Williams' argument is a large leap in forensic faith and the hypothesis that, during the 7-year interval between the murder trial and the videotape deposition, Merrilee, after reflective revision, had changed her favorable testimony to something less than favorable to Williams. Unlike Williams, we reject a proposed evidentiary principle that mere passage of time necessarily produces a deliberately dichotomous declaration from a witness. A purposeful deterioration in Merrilee's testimony is categorical conjecture.

Williams advances another argument. If Merrilee (Frances Forget) had been a witness in the murder trial and testified that Williams was sane, "skillful counsel" would have been able to "impeach Forget through the testimony of other witnesses." Brief for Appellant at 6. To impeach Merrilee, Williams points to the testimony of Sheralyn Cox, namely, Merrilee's statements that Williams was "crazy." However, even the most skillful of trial advocates would not have been able to alter the Nebraska Evidence Rules and the evidentiary use of an inconsistent statement to impeach a declarant at trial.

Although Neb. Evid. R. 607 (Neb. Rev. Stat. § 27-607 (Reissue 1985)) recites, "The credibility of a witness may be attacked by any party, including the party calling him," Neb. Evid. R. 801 (Neb. Rev. Stat. § 27-801 (Reissue 1985)) provides:

> (3) Hearsay is 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; and

> (4) A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

As stated in *State v. Johnson*, 220 Neb. 392, 397, 370 N.W.2d 136, 140 (1985): "[W]hat was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Rule 801(4)(a)(i) are satisfied."

Therefore, subject to the exception specified in rule 801(4)(a)(i), a witness' inconsistent statement may be admissible evidence to aid the jury in evaluating that witness' credibility, but a witness' inconsistent statement is not substantive evidence of the matter asserted unless such statement is otherwise admissible under the Nebraska Evidence Rules. See, *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985); *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982); *State v. Payne*, 205 Neb. 522, 289 N.W.2d 173 (1980).

Merrilee's statements to Sheralyn Cox were not "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Neb. Evid. R. 801(4)(a)(i). Consequently, Merrilee's statements were hearsay and not substantive evidence on the issue of Williams' mental condition and his defense of insanity. If Merrilee, as a witness in the murder trial, had been impeached by her statements to Sheralyn Cox, Merrilee's credibility and the weight to be given to her testimony would have been matters for evaluation and determination by the jury. See *State v. Robertson,* 223 Neb. 825, 394 N.W.2d 635 (1986).

Assuming skillful counsel's achieving total discredit of Merrilee at the murder trial, causing the jury to attach no significance whatsoever to her testimony, there were still four psychiatrists as witnesses who supplied substantive evidence on the issue of Williams' insanity. While Williams may be disappointed in the outcome of his trial, he does not suggest, and the record does not disclose, in what manner the absence of

testimony from Merrilee resulted in an unfavorable or detrimental performance by Williams' trial counsel. Thus, from the verdict of guilty, Williams has traveled 360° in postconviction proceedings and returned to the point of beginning, his valid conviction for the two murders.

A defendant can waive the right to assistance of an attorney unhindered by a conflict of interest, provided such waiver is voluntarily, knowingly, and intelligently done with sufficient awareness of relevant circumstances and likely consequences. *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984). Whether Williams waived his right to counsel free from a conflict of interest is a question not decided by the district court. For that reason consideration of Williams' waiver, if any, is not necessary for disposition of the appeal before us and, therefore, is not reviewed.

After a review of all the record, the "totality of the evidence," see *Strickland v. Washington*, 466 U.S. 668, 695, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), we find that Williams has failed to establish the second component in the two-part test for a claim of ineffective assistance of counsel as the result of a conflict of interest, namely, Williams has not shown that a conflict of interest adversely affected his trial counsel's performance. Therefore, there is no prejudice, either presumed or proved, to Williams as the result of his trial counsel's conduct. We find no error by the district court and, thus, affirm the judgment denying postconviction relief to Williams.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM E. THARP, APPELLANT.

395 N.W.2d 762

Filed November 7, 1986. No. 86-116.

Right to Counsel. Once a defendant has been informed of his right to retained or appointed counsel, there is no requirement that the court advise the defendant, on each subsequent court appearance, of the same right.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Owen A. Giles, for appellant.

Robert M. Spire, Attorney General, and Charles E. Lowe, for appellee.

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

GRANT, J.

This is an appeal from an order of the district court for Sarpy County affirming defendant's conviction and sentence in the county court for Sarpy County for driving an automobile while his operator's license was suspended, in violation of Neb. Rev. Stat. §§ 60-418 and 60-430 (Reissue 1984). For the reasons hereinafter stated we affirm the judgment of the district court.

The record reveals the following. On March 2, 1985, defendant was stopped by an officer of the LaVista Police Department for driving through a red traffic control light. The defendant was unable to provide a driver's license or registration. The police officer requested a standard record check, which disclosed that defendant was driving while his license was suspended. A search preparatory to an arrest revealed a knife, in defendant's pocket, with a blade length of 4 inches. The defendant was arrested and charged in three counts with driving under suspension, driving without an operator's license, and carrying a concealed weapon.

At the initial arraignment proceedings held on March 20, 1985, the defendant appeared without counsel. Defendant stated that he understood his constitutional rights, and after the court inquired if defendant was going to hire an attorney of his

own choosing, defendant informed the court he was. The matter was continued for further arraignment on April 10, 1985, to give the defendant an opportunity to talk to an attorney of his choosing.

At the subsequent arraignment proceedings on April 10, defendant again appeared without counsel. A group arraignment was conducted. The county court informed the group of defendants as follows:

> The first order of business, we're going to take those who plan or want to claim the services of the public defender. If you are charged with an offense on which a jail sentence could be imposed and if it would prejudice or jeopardize your ability to support yourself or your dependents to hire your own lawyer, you have a right to claim the services of the public defender.

The record shows that defendant was before the court when this advice was given and that defendant informed the court he wanted to hire his own attorney and had already talked to him. Defendant also informed the court that his private attorney had told him to go before the court and enter a plea of not guilty to all the charges. The court accepted that plea of not guilty, and the case was set for trial on July 23, 1985.

On July 23 defendant again appeared without counsel before the court. At this time defendant informed the court that he had requested a jury trial when he had appeared on April 10. The court informed defendant that records before the court showed no request for a jury trial, but allowed defendant an opportunity to check the recording of the April 10 arraignment to determine if a jury had been requested. Defendant admitted, after checking, that the recording did not show a request for jury trial. The court then told defendant that the county attorney was ready to proceed, that a trial to the court would be held immediately, and that, while defendant was without counsel, the trial would proceed because defendant had before indicated that he had counsel.

Before the trial began, the county attorney informed the court that a plea agreement had been reached between defendant and the county attorney. Pursuant to the agreement, the court accepted defendant's guilty plea as to count I, driving

under suspension, and again informed defendant of the penalty for driving while his license was suspended. A factual basis for the plea was set out by the county attorney and agreed to by defendant. Before accepting defendant's plea, the court again informed defendant of the penalty for driving while his license was suspended. The court then found defendant's plea to be voluntary and intelligent, accepted the plea of guilty to count I, and, on the State's motion, dismissed counts II and III.

The court set sentencing for October 11, 1985. Defendant did not appear, was later arrested for failure to appear, and was brought before the court on October 21, 1985. A new bond was set, and defendant appeared before the court for sentencing on November 8, 1985. At this hearing defendant again appeared without counsel and, after questioning by the court, informed the sentencing court that he had waived his right to counsel on July 23, 1985, when he had entered his plea. Defendant was sentenced to pay a fine of $250 plus costs and expenses, serve a term of 40 days in the Sarpy County jail, and have his driving privileges revoked for a period of 1 year.

The defendant appealed pro se to the district court, stating in a filed handwritten document, "I intend to appeal my sentence on the 8 day of Nov. . . . ." Defendant appeared before the district court on January 3, 1986, again without counsel. Defendant asked for a continuance of the sentencing hearing. The hearing proceeded, and the matter was submitted to the district court. On January 10, 1986, defendant again appeared without counsel before the court. On that date the district court affirmed the judgment of the county court, stating that the district court had reviewed the record in the county court, that the sentence imposed was well within the limits provided by statute, and that there was no abuse of discretion by the county court. On February 6, 1986, private counsel for defendant filed a notice of appeal to this court.

Defendant first assigns as error the district court's action in affirming the judgment "[i]n the absence of a record that affirmatively demonstrated that Appellant had counsel or had validly waived his right to counsel when he entered his plea of guilty . . . ." As the facts recited above clearly disclose, the defendant was advised of his right to counsel at his initial

appearance before the county court and was advised of his right to request appointed counsel at his arraignment on April 10, 1985. Defendant chose to appear without counsel on repeated occasions. We hold that once a defendant has been informed of his right to retained or appointed counsel, there is no requirement that the court advise the defendant, on each subsequent court appearance, of the same right. After defendant has been so advised, his conduct in appearing without counsel may result in a waiver of counsel. The course of conduct defendant chose to follow in this case operated as a waiver of counsel. The district court was correct in affirming the county court in this regard.

In his second assignment of error defendant alleges, "The Court Below erred by depriving Appellant of his right to counsel." Defendant's argument presents the contention that defendant was entitled to counsel to present his appeal from the county court to the district court. Defendant argues that nothing appears on the record of the appeal to demonstrate that appellant was advised of his right to counsel. Defendant relies on this court's decision in *State v. Moore*, 203 Neb. 94, 277 N.W.2d 554 (1979), for support of his argument that if the defendant was deprived of his constitutional right to counsel in presenting his appeal to an appellate court, then he was not afforded an effective appeal and the decision must be deemed a nullity. Defendant's reliance on *Moore* is misplaced. That case involved an indigent defendant who did, in fact, ask for appointed counsel for his appeal to the district court following his conviction in the municipal court of Omaha. The appellant in the case at bar did not, at any time, ask for appointed counsel, but actually proceeded with the appeal on his own behalf. While this court has held that an accused person is entitled to counsel at every critical stage of the proceeding, see *Moore, supra*, we hold that an appellate court is not required to independently inform the defendant of his right to counsel when the defendant has already been fully informed of this right and has voluntarily and intelligently waived this right.

As stated above, once a defendant has been informed of his right to counsel, there is no requirement that the same information be conveyed to a defendant on each subsequent

court appearance. As in the case of the waiver of the right to counsel at a trial, any right a defendant may have to counsel on appeal may be waived by the defendant's conduct. In this case defendant was advised of his right to counsel, appealed pro se, and appeared before the appellate court (the district court) without counsel. Such conduct constitutes a waiver of defendant's known right to counsel.

The district court reviewed the entire record of the county court and considered whether the sentence itself was made within the county court's discretion. The district court determined there was no error in the record and that the sentence was not an abuse of the county court's discretion. We agree. The order of the district court, affirming the judgment of the county court, is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STANLEY J. BAKER, APPELLANT.

395 N.W.2d 766

Filed November 7, 1986. No. 86-435.

1. **Evidence: Verdicts: Appeal and Error.** In reviewing the sufficiency of the evidence, it is not within this court's province to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Convictions: Circumstantial Evidence.** A conviction may be based on circumstantial evidence where the evidence, taken as a whole, establishes guilt beyond a reasonable doubt.
3. _____: _____. A person charged with a crime may be convicted solely upon the basis of circumstantial evidence.
4. **Circumstantial Evidence: Drunk Driving.** Circumstantial evidence may establish the operation or actual physical control of a motor vehicle, under the provisions of Neb. Rev. Stat. § 39-669.07 (Reissue 1984).
5. **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.

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

Wilbur C. Smith and Eileen A. Hansen, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

BOSLAUGH, J.

After a bench trial the defendant, Stanley J. Baker, was found guilty of (1) operating or being in actual physical control of a motor vehicle while under the influence of alcoholic liquor, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984), and (2) refusing to take a breath test for alcoholic content when requested to do so by a law enforcement officer, in violation of Neb. Rev. Stat. § 39-669.08 (Reissue 1984). He was fined $200 and sentenced to 7 days in jail on each count, the sentences to run concurrently, and his operator's license was suspended for 180 days. Upon appeal to the district court the judgments were affirmed.

The defendant has assigned four errors on this appeal: (1) The court erred in overruling his plea in abatement; (2) The court erred in finding that Deputy Landrie observed the defendant operating or in actual physical control of a motor vehicle when she approached him; (3) The court erred in finding beyond a reasonable doubt, from circumstantial evidence, that the defendant had been operating a motor vehicle while under the influence of alcohol; and (4) The court erred in finding that the defendant refused to take the breath test when it found he had been operating or in actual physical control of a motor vehicle when apprehended.

The record shows that at 1:48 a.m. on September 20, 1985, Deputy Sheriff Kathleen Landrie observed a car parked in the turning lane on 144th Street at California Street in Douglas County, Nebraska. When the deputy approached the vehicle, she saw that the defendant was asleep on the driver's side, behind the steering wheel. The defendant, who was alone in the car, was leaning against the open car window. The deputy

detected a strong odor of alcoholic beverage in the vehicle.

After the deputy awakened the defendant, he stated, "Look, babe, I don't want any trouble." When asked for his registration and license, the defendant rummaged through his pockets and, at one point, withdrew his car keys and placed them in the car's ignition. The defendant was eventually able to produce his registration and license, but with great difficulty.

The defendant was then asked to get out of the car and perform field sobriety tests. He had to hang on to the door to exit his car, and performed the tests unsatisfactorily. He was subsequently arrested for driving while under the influence. After being transported to a road patrol office, the defendant was read an implied consent advisement. He then refused to take any further tests or to supply any type of body fluid sample.

The defendant testified at trial that he is an over-the-road truckdriver who has a habit of pulling his truck off the road and sleeping whenever he gets drowsy while driving. On the evening in question the defendant had driven from Fremont, Nebraska, to an Omaha, Nebraska, bowling alley, after returning from a 10½-hour trip from Chicago, Illinois. Between 11:30 p.m. or midnight and 1 a.m., the defendant consumed four or five alcoholic drinks. He left the bowling alley sometime before 1 a.m. and began driving home to Fremont. At about 144th and California Streets, the defendant pulled over onto what he thought was a median, off the road. He testified that his reason for doing this was to sleep, because he was tired from all the driving he had done that day. After pulling over, the defendant turned off the ignition and put the keys in his pocket. He testified that he was dazed and confused, when first approached by Deputy Landrie, because he had been asleep.

The defendant's plea in abatement alleged in substance that he was not operating or in actual physical control of the motor vehicle, when he was apprehended by the deputy sheriff, because the vehicle was parked, the defendant was asleep, the motor was not running, and the keys were in his pocket.

The general rule is that 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. Lehman*, 203 Neb. 341, 278 N.W.2d 610 (1979). Thus, the issue is whether the evidence was sufficient to support the conviction.

In his next two assignments of error, the defendant complains that the trial court erred in finding he was operating or in actual physical control of a motor vehicle when observed by Deputy Landrie and in finding there was sufficient circumstantial evidence to prove beyond a reasonable doubt that he had been operating a motor vehicle while under the influence of alcohol. All three assignments are without merit, since there was sufficient circumstantial evidence from which the trier of fact could find beyond a reasonable doubt that the defendant had been driving while under the influence of alcoholic liquor.

It is clear that a person charged with a crime may be convicted solely upon the basis of circumstantial evidence. *State v. Ellis,* 223 Neb. 779, 393 N.W.2d 719 (1986). Circumstantial evidence may also serve to establish the operation or actual physical control of a motor vehicle, under the provisions of § 39-669.07. *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).

A conviction may be based on circumstantial evidence where the evidence, taken as a whole, establishes guilt beyond a reasonable doubt. *State v. Wilkening*, 222 Neb. 107, 382 N.W.2d 340 (1986); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

In reviewing the sufficiency of the evidence, it is not within this court's province to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Ellis, supra.*

In *State v. Eckert*, 186 Neb. 134, 181 N.W.2d 264 (1970), this court, in response to a similar contention, held there was sufficient circumstantial evidence to show the defendant was operating his motor vehicle on a public highway while under the influence of intoxicating liquor. The facts in *Eckert* are very similar to those in the present case. In *Eckert* the defendant was

found parked in the right-hand lane of a public highway, slumped over the steering wheel of his car, in a drunken stupor. The defendant was the sole occupant, with no other person in proximity to the vehicle. No liquor or liquor containers were found in or near the car. The vehicle was not moving, and the engine was not running. The defendant stated he had no recollection of events from the time he left his point of departure until he was aroused by law enforcement officials at the time of his arrest.

In the instant case the defendant attempts to distinguish *Eckert* on grounds that the evidence was insufficient to show he was under the influence of intoxicating liquor when he drove to the 144th and California Streets location. Instead, he maintains he parked in the turn lane not because he was under the influence like the defendant in *Eckert* but because as a truckdriver he had a habit of pulling over to sleep when drowsy.

Taking the view most favorable to the State, we must reject the defendant's argument. There was evidence, including the defendant's testimony, from which the trier of fact could find that the defendant had driven to the 144th and California Streets location. He was the sole occupant of the vehicle parked in the turn lane at 1:48 in the morning, and the keys to the car were in his pocket. Further, there was evidence from which the court could conclude the defendant was under the influence of alcoholic liquor when he drove to that location. The defendant parked his car in a turn lane and fell asleep. When he was awakened by the deputy, the defendant's breath smelled of alcohol, his speech was slurred, his eyes were bloodshot, and he performed poorly on field sobriety tests. There is no evidence in the record of any liquor or liquor containers in or near the defendant's vehicle at the time of his arrest.

Additionally, the defendant's testimony was that he drank four or five drinks in the 60 to 90 minutes preceding his 1 a.m. drive to the point of the arrest. From all of this evidence the trial court could find beyond a reasonable doubt that the defendant was guilty of driving while under the influence, in violation of § 39-669.07.

In his final assignment of error, the defendant contends the trial court erred in finding he refused to take a breath test as

required by § 39-669.08(2). That section provides:

> Any law enforcement officer who has been duly authorized to make arrests for violations of traffic laws of this state or of ordinances of any city or village may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor to submit to a chemical test of his or her blood, breath, or urine for the purpose of determining the alcoholic content of his or her body fluid, when the officer has reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle upon a public highway in this state while under the influence of alcoholic liquor.

In essence, the defendant argues he should not have been required to submit to a chemical test because the deputy had no reasonable grounds to believe the defendant was driving or in actual physical control of a motor vehicle while under the influence.

While the deputy did not observe the defendant driving, we have concluded that she observed the defendant under circumstances from which the trier of fact could find beyond a reasonable doubt that the defendant had driven while under the influence of alcoholic liquor, in violation of § 39-669.07. Since the circumstances she observed were sufficient to convict the defendant, the deputy clearly had reasonable grounds to believe that he had committed the offense, as required in § 39-669.08(2). Thus, there is no merit to this final assignment of error. See, also, *Porter v. Jensen*, 223 Neb. 438, 390 N.W.2d 511 (1986).

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. LARRY DICKSON, APPELLEE.
395 N.W.2d 770

Filed November 7, 1986. No. 86-679.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Susan M. Koenig and Michael P. Norris, Deputy Hall County Attorneys, for appellant.

Daniel M. Placzek and D. Steven Leininger of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

WHITE, J.

This is an appeal from the order of the district court for Hall County suppressing statements made by the appellee, brought before a single judge of this court pursuant to Neb. Rev. Stat. § 29-116 (Reissue 1985). The facts of this case are set out in detail in the earlier one-judge opinion, *State v. Dickson*, 223 Neb. 397, 389 N.W.2d 785 (1986) (*Dickson I*), and need not be repeated.

In *Dickson I* a single judge of this court reversed the Hall County District Court's decision to suppress certain statements made by the defendant with reference to the death of his mother. The case was remanded to the district court for a consideration of the statements pursuant to the totality of the circumstances test. The district court's analysis was directed to include evidence of Dickson's mental capacity at the time the statements were made. The State assigns as error the district court's decision to again suppress the appellee's statements. That decision is affirmed.

In *Dickson I* a per se approach to the determination of the admissibility of volunteered statements of the mentally ill was rejected. *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). In *Blackburn v. Alabama*, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960), the U.S. Supreme Court said: "[A] complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the

particular circumstances of the case." *Id.* at 207. The Supreme Court has denoted three distinct situations in which, under the due process clause of the 14th amendment, the confession of the defendant must be suppressed. They are: (1) confessions of doubtful reliability because they were obtained by offensive police practices; (2) confessions obtained by offensive police practices, which are not of doubtful reliability; and (3) confessions obtained, regardless of the method, under circumstances in which the free choice of the defendant was significantly impaired. 1 W. LaFave & J. Israel, Criminal Procedure § 6.2(b) (West 1984). It is this last category with which this case is concerned.

The State argues that the voluntary statements of Larry Dickson in which he admitted, to some degree, responsibility for his mother's death ought to be admitted because they were not coerced or induced in any way. The State contends that absent interrogation in a custodial situation the due process clause does not apply. As was stated in *Dickson I,* the State bears the burden in a suppression hearing to show by a preponderance of the evidence that the statements were voluntary and, therefore, admissible. *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974). To be admissible the statements must have been given freely, voluntarily, and without promises or inducements on the part of the State. *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986). Finally, voluntariness will be tested by the totality of the circumstances, and the finding of the trial court will not be set aside unless clearly wrong. *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985).

As one of the psychiatrists testified by deposition:

> There is no reason to believe that his psychotic process interfered with knowing the consequences of an act. If you say "of his acts," I'm not sure, you know, that even he knows what happened that particular day, because I don't think he can sort out what is delusion, you know. Or, you know, if we could sort out what is delusional, we still would have to be faced with what he hallucinated. He, by his description, heard voices that can only be delusional or hallucinated. And he has some beliefs involved in the alleged event that are of a psychotic quality. They just

don't reality test.

The thrust of Dr. Kenney's statement is that he was unable to tell whether, in a given circumstance, the defendant was reciting a fact, stating his memory of a previous hallucination, or giving his impression of an existing delusion.

The district court sustained the defendant's motion to suppress. The decision of the district court is supported by the evidence in the record. *State v. LaChappell,* 222 Neb. 112, 382 N.W.2d 343 (1986); *State v. Bowersmith, ante* p. 6, 395 N.W.2d 527 (1986). It is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL EDWIN WILCOX, APPELLANT.

395 N.W.2d 772

Filed November 14, 1986. No. 85-991.

1. **Speedy Trial.** With certain periods of exclusion, Neb. Rev. Stat. § 29-1207 (Reissue 1985) requires that persons indicted or informed against for any offense be tried within 6 months of the filing of the information.
2. _____. Generally, the time from filing to final disposition of the defendant's pretrial motions is excluded in calculating the last permissible day for trial. Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1985).
3. _____. Judicial delay, absent a showing of good cause, does not toll the speedy trial statute.
4. _____. Regarding tolling of the speedy trial statute, the State has the burden to establish that the time comes within one of the exclusions; a failure to carry that burden warrants reversal.
5. _____. The right to a speedy trial does not grant a defendant the right to demand immediate attention or first priority.
6. _____. A defendant must accept delay as a consequence of making pretrial motions, where delay is not inordinate or unreasonable.
7. _____. Where a single pretrial motion of the defendant was under advisement for more than 1 year 3 months 23 days, the defendant was subjected to unreasonable, inordinate delay.
8. _____. The defendant is entitled to discharge of the offense charged where he was not tried within 6 months of the filing of the information. Neb. Rev. Stat. § 29-1208 (Reissue 1985).

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded with directions to dismiss.

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

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

WHITE, J.

The defendant, Michael Edwin Wilcox, was convicted of possession of marijuana with intent to deliver under Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1985) and sentenced to 2 years' probation. He asserts two assignments of error, that he was denied his right to a speedy trial under Neb. Rev. Stat. § 29-1207 (Reissue 1985) and that the trial court erred in determining that he did not have standing to challenge the admissibility of evidence seized in a warrantless search. We hold that the defendant was denied his right to a speedy trial and is entitled to total discharge of the offense charged, in accord with Neb. Rev. Stat. § 29-1208 (Reissue 1985). We accordingly reverse and remand with directions to dismiss the information with prejudice.

On October 6, 1983, law enforcement officers seized marijuana from an outbuilding located behind the house the defendant shared with his girlfriend in rural Lancaster County, and arrested the defendant. He was subsequently charged and bound over to the district court. An information was filed on October 27, 1983. The defendant filed a motion to suppress the seized material on January 12, 1984. The motion was denied 1 year 7 months 24 days later. The defendant submitted the motion before the first judge on January 25, 1984, less than 2 weeks after filing. After the defendant rested, the State asserted for the first time that the defendant lacked standing to contest the search. The court ordered a further hearing on February 22, 1984, after the standing issue was briefed.

Prior to the time set for further hearing on the motion, i.e.,

February 13, 1984, the judge wrote counsel a letter notifying them of his intent to recuse himself from deciding the motion. On April 10, 1984, the judge formally recused himself, and a second judge contacted counsel.

The record indicates no action in the case for 1 year 4 months 10 days. On August 20, 1985, the third judge received a transcript of the hearing conducted before the first judge and took the standing issue under advisement. Sixteen days later, on September 5, 1985, the third judge denied the defendant's motion to suppress. From filing to disposition, the motion took 1 year 7 months 24 days to resolve.

On September 17, 1985, the case was called before the first judge. The defendant moved to dismiss the information, asserting violation of his right to speedy trial. The motion was denied. The defendant was brought to trial before the court and convicted on September 20, 1985; 1 year 10 months 24 days after the information was filed.

Section 29-1207 requires that persons indicted or informed against for any offense be tried within 6 months of the filing of the information. Certain periods of time set out in the statute are to be excluded in calculating the last permissible day for trial. As set out in the statute in subsection (4)(a), generally the time from filing to final disposition of the defendant's pretrial motions is excluded from computation. *State v. Long*, 206 Neb. 446, 293 N.W.2d 391 (1980). In *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983), time spent by the defendant in discovery was properly excluded; however, delays due to the prosecutor's schedule were not charged against the defendant even though the discovery motions were pending at the time. Neither does judicial delay, absent a showing by the State of good cause, toll the statute, as recognized in *State v. Alvarez*, 189 Neb. 281, 290, 202 N.W.2d 604, 610 (1972): "The mandate of the statute must therefore be followed and such things as improper or inefficient docket management, scheduling of trials, or failure to use . . . an available judge from another district cannot be deemed 'good cause.' "

The State has the burden to establish that the time properly comes within one of the exclusions; a failure to carry that burden warrants reversal. *State v. Beck*, 212 Neb. 701, 325

N.W.2d 148 (1982); *State v. Kinstler*, 207 Neb. 386, 299 N.W.2d 182 (1980); *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978); *State v. Hankins*, 200 Neb. 69, 262 N.W.2d 197 (1978).

The right to a speedy trial does not grant a defendant the right to demand immediate attention or first priority. See, *State v. Clouse*, 195 Neb. 671, 240 N.W.2d 36 (1976); *State v. Watkins*, 190 Neb. 450, 209 N.W.2d 184 (1973). A defendant must accept delay as a consequence of making pretrial motions, where delay is not inordinate or unreasonable. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985); *State v. Fatica, supra; State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983). The questions presented in this case are whether the length of time taken to resolve the motion is inordinate and unreasonable, and, if so, how much of the delay is not to be attributed to the defendant.

In computing the time chargeable to the State, we note that 2 months 16 days elapsed between the filing of the information and the filing date of the motion to suppress. This time is properly chargeable to the State. The State contends that the time between the filing of the motion to suppress and the first judge's announcement of his recusal are not properly chargeable to the State (1 month 1 day). We agree.

The State concedes in its brief that it is improper to attribute the entire time the motion was unresolved to delay of the defendant, and submits that the time between the first judge's decision to recuse himself and his formal recusal (1 month 28 days) should be charged to the State. We agree.

However, the State contends that all remaining elapsed time until disposition of the motion is not chargeable to the State (1 year 4 months 26 days). Charging the State with the 15 days from disposition of the motion to the date of trial, the State's position is that the defendant was brought to trial in 4 months 27 days from the filing of the information, all other time being charged to the defendant.

For 16 days of the 1-year 4-month 26-day period from the formal recusal to resolution, the record shows the motion was actively under advisement. The rest of the time in question it lay dormant. Yet the total amount of time the State contends should be charged against the defendant during this period as

ordinary delay is over 30 times greater than the portion of that time the record demonstrates was actively spent resolving the motion. This delay cannot conceivably be described as a reasonable, ordinary consequence of filing one motion. We cannot charge the entire time from the formal recusal to resolution of the motion to the defendant.

How much of this time should be charged against the State as unreasonable delay and how much time should be attributed to the defendant under § 29-1207(4)(a) remain to be determined in order to figure out whether the State brought the defendant to trial within 6 months. We refuse the defendant's suggestion that we adopt a per se rule as a guide to what time is reasonable for resolution of pretrial motions. We also decline the task of determining exactly which days were spent reasonably and how many unreasonably. However, it is clear that 4 months 27 days are already charged against the State, leaving the State only 1 month 3 days to bring the defendant to trial. If more than 1 month 3 days are to be charged against the State as unreasonable delay, the defendant was not brought to trial within 6 months.

From the first judge's formal recusal to the disposition of the motion, 1 year 4 months 26 days passed. To say that only 1 month 3 days or less of that time is unreasonable is to say that 1 year 3 months 23 days or more is a reasonable, ordinary delay that a defendant must suffer as a consequence of a single motion to suppress evidence being taken under advisement. This we cannot require the defendant to tolerate. Therefore, more than 1 month 3 days of time was due to unreasonable delay chargeable to the State, and the defendant was untimely tried.

At the close of the State's evidence, commenting on the defendant's motion to dismiss for failure to bring him to trial within 6 months, the court said: "The matter was never finally submitted. It was never taken under advisement, actually . . . it really didn't get lost because everybody knew about it, they just didn't want — perhaps nobody wanted to do anything about it." The record makes the same impression upon this court. Judicial delay, absent a showing of good cause, does not suspend a defendant's right to a speedy trial. *State v. Alvarez*,

defendant's motion was not a waiver of his right to a speedy resolution of the charges against him; a court cannot table a motion and thereby suspend the defendant's right where judicial delay otherwise would warrant discharge of the offense charged.

The defendant was brought to trial 1 year 10 months 24 days after the information was filed. During most of that time, the motion was pending. While the defendant must accept reasonable delay as a consequence of his motion, unreasonable delay will not toll the statute.

Having decided that the defendant is to be discharged under § 29-1208, there is no need to address the second assignment of error.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

FORKER SOLAR, INC., A PENNSYLVANIA CORPORATION, APPELLEE, V. JOHN L. KNOBLAUCH ET AL., APPELLANTS.

396 N.W.2d 273

Filed November 21, 1986. No. 85-468.

1. **Actions: Pleadings.** A cause of action pleaded by amendment ordinarily relates back to the original pleading, provided that claimant seeks recovery on the same general set of facts.
2. _____: _____. The theory of recovery is not itself a cause of action. If the general facts upon which the right to recover is based are the same, the amendment relates back to the original pleading.
3. **Default Judgments: Motions to Vacate.** Factors to be considered in determining whether a trial court abused its discretion in rendering a default judgment include the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings.
4. _____: _____. One who seeks to set aside a default judgment against him must show that neither he nor his attorney was negligent in failing to appear and defend.
5. **Default Judgments: Motions to Vacate: Laches.** A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend.
6. **Contracts: Corporations: Estoppel.** A person who contracts with a corporation

is estopped from later denying its corporate existence.

7. **Pleadings: Corporations.** A general denial does not put corporate character in issue.
8. **Fraud.** To maintain an action for damages for false representations, the plaintiff must allege and prove, by a preponderance of evidence, the following elements: (1) that a representation was made; (2) that the representation was false; (3) that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely on it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result.
9. _____. A person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity.
10. **Fraud: Damages.** In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and will place him in the same position as he would have been in had the fraud not occurred.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

David L. Herzog, P.C., for appellant Knoblauch.

J. Russell Derr of Erickson & Sederstrom, P.C., for appellants Putnam and Solar Marketing Company.

John D. Hartigan, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

BOSLAUGH, J.

This case arose out of a controversy concerning a "Distributor Agreement" between the plaintiff, Forker Solar, Inc., and the defendant Solar Marketing Company (SMC). Both of these parties are corporations.

In 1977 Henry P. Forker IV, a resident of Pennsylvania, became interested in solar heating devices that were being manufactured by Solar, Inc. Forker came to Nebraska to investigate the product, which was known as the "Solar-Aire" System, and to meet the principals involved in the company. When he found he was unable to purchase stock in the manufacturing company, he decided to obtain a franchise to

distribute the equipment.

SMC is a corporation which was organized by the defendants John L. Knoblauch and James Putnam early in 1977 to handle the sales and distribution of the equipment. On April 8, 1977, SMC entered into an agreement with Solar, Inc., of Mead, Nebraska, to market the "Solar-Aire" System. A short time later, Knoblauch became a director of Solar, Inc. Forker met and talked with Knoblauch and Putnam and was provided with literature and information concerning the "Solar-Aire" System. Forker then organized the plaintiff, Forker Solar, Inc., for the purpose of distributing the equipment under a franchise agreement.

On November 17, 1977, the plaintiff and Solar Marketing Company entered into the distributor agreement which authorized the plaintiff to sell solar products in a described area in Pennsylvania and Ohio for a period of 2 years. The agreement was signed on behalf of Solar Marketing Company by Knoblauch, as president. Under the agreement the plaintiff was obligated to pay a licensing fee of $42,617, purchase a $15,000 inventory of solar products, establish a central warehouse, and establish and maintain retail dealerships.

On November 23, 1977, Knoblauch sent Forker a letter of welcome to the company, which predicted a great future for the new joint enterprise. On December 7, 1977, the plaintiff paid $28,808.50, one-half of the balance due on the agreement, to SMC. Six weeks later, on January 19, 1978, Knoblauch resigned from his position as president and left SMC to go to Valmont Industries. Forker was notified of Knoblauch's departure by a letter dated January 25, 1978, from Leo Arens, the new vice president and treasurer of SMC.

In January 1978 Forker attended a meeting in Columbus, Ohio, which was a training session concerning the equipment, its installation, operation, etc. The defendant Knoblauch was one of the lecturers at this meeting.

Forker sent the final payment due under the agreement to SMC in March or April 1978. Putnam was then president of SMC. Solar, Inc., terminated its agreement to supply products to SMC on April 7, 1978. Later that year, Forker and Putnam signed a second distributorship agreement.

The second agreement did not expressly supersede the first, and it contained several provisions which differed from the first. It granted additional territory to the plaintiff, the 2-year licensing fee was reduced to $1, the minimum inventory requirement was raised to $18,500, and SMC agreed to sell the plaintiff any solar products, rather than "Solar-Aire" products exclusively. Additionally, the agreement provided that at the time of its execution SMC owed Forker $18,500 in inventory.

Forker testified that the plaintiff entered into the second agreement because he thought he was

> in a position to press Putnam for more territory, just simply because he [Putnam] couldn't meet his demands. . . . [H]e was willing to give up that additional territory for a dollar . . . . And we took it, ah, thinking that we might as well get something and hopefully . . . he'd get healthy and we'd get healthy.

Forker testified that he viewed the second agreement as an extension of the first one. SMC did not "get healthy," but went out of business. Putnam notified Forker on January 24, 1979, that SMC was no longer in business.

This action was commenced against Knoblauch, Putnam, and SMC on June 7, 1979, seeking recovery on theories of securities violations, breach of contract, fraud, and breach of fiduciary duty. An amended petition was filed June 5, 1984, which alleged only that misrepresentations made by the defendants induced Forker to enter into the first distributorship agreement and caused him to suffer damages. Forker alleged special damages consisting of $42,617, the 2-year license fee; $15,000, representing the purchase price of the inventory required by the agreement; and $15,000 as costs of organizing and promoting the dealership.

Trial began April 11, 1985. Knoblauch was present at the trial and represented by counsel, but Putnam and SMC were neither present nor represented. The jury returned a verdict against Knoblauch in the amount of $67,616. The trial court granted the plaintiff a default judgment against Putnam and SMC on May 29, 1985, for the same amount. This appeal followed.

Knoblauch alleges 13 assignments of error which essentially contend the judgment is not supported by the evidence and is

contrary to law. Putnam and SMC contend the default judgment should be vacated and that the cause of action for fraud and deceit alleged in the amended petition was barred by the statute of limitations.

The statute of limitations contention is also made by Knoblauch. Neb. Rev. Stat. § 25-207(4) (Reissue 1985) requires all actions sounding in fraud to be brought within 4 years of the discovery of the fraud. Knoblauch and Putnam contend the cause of action for fraud and deceit is barred because the original petition alleged fraud only against SMC.

This contention is not supported by the facts of the case or the law. In the original petition four causes of action were alleged. The first cause of action alleged all of the parties had violated federal and state securities laws. The second cause of action alleged fraud against SMC, and alleged that Knoblauch and Putnam had made misrepresentations to Forker concerning SMC and the solar products it distributed. The third cause of action alleged SMC had breached its contract with the plaintiff. The fourth cause of action alleged that Knoblauch and Putnam exercised such control over SMC that the corporation had no separate existence, that the two men used the corporation to perpetrate the wrongs alleged in the first cause of action, and that this control and breach of statutory duty caused the plaintiff's loss. In addition, the petition contained allegations concerning SMC's proposed network of franchised dealers, SMC's alleged exclusive rights to market certain solar products, and representations made by Knoblauch and Putnam which had induced the plaintiff to enter into the agreement.

The amended petition did not plead the securities violations or breach of contract. Instead, the amended petition alleged solely that misrepresentations made by Knoblauch and Putnam, who purportedly acted "in the guise of Solar Marketing Company," induced the plaintiff to rely on their representations and enter into the first distributorship agreement, which caused its loss. Many of the allegations contained in the original petition were reiterated in the amended petition: the initial meeting of the parties, SMC's plans to build a nationwide franchising network, and the agreement itself.

The misrepresentations attributed to Knoblauch and Putnam in the amended petition were almost identical to those alleged in the original petition, and both petitions alleged these misrepresentations induced the plaintiff to enter into the first agreement.

A careful reading of the two petitions shows that both allege the same operative facts and seek recovery for the same injury. The original petition sounded in fraud and breach of contract, while the amended petition is limited to fraud. The plaintiff modified its theory of recovery in the amended petition but did not state a new and independent cause of action.

This court has consistently held that "[a] cause of action pleaded by amendment ordinarily relates back to the original pleading provided that claimant seeks recovery on the same general set of facts." *Abbott v. Abbott*, 185 Neb. 177, 181, 174 N.W.2d 335, 338 (1970). See, also, *Knoell Constr. Co., Inc. v. Hanson*, 210 Neb. 628, 316 N.W.2d 321 (1982). The theory of recovery is not itself a cause of action; therefore, if the general facts upon which the right to recover is based are the same, the amendment relates back. *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971).

Appellants Putnam and SMC next assign as error the trial court's failure to vacate the default judgment and grant them leave to file an amended answer to the amended petition. It is their position that the default judgment was not properly entered against them because the notice requirements of rule 12 of the Rules of Practice for the Fourth Judicial District (rev. 1985) were not followed, and because the interests of justice would require vacation.

This argument is not persuasive. Rule 12A applies to default judgments entered before trial upon the failure of a defendant to plead or appear. Rule 12B requires that a party who has appeared but later defaults must be given notice, as in other cases, of a hearing upon a motion for default judgment, or the assessment of damages, or the taking of proofs in cases. Appellants contend that rule 12B required the trial court to notify them of the hearing on the plaintiff's motion for default judgment. The trial court held rule 12B was not applicable to this case but applied only to hearings on default motions prior

to trial.

Our reading of the rule confirms the trial court's construction. Under rule 12B a defendant must receive notice of a hearing on a default motion prior to trial. In this case the default judgment was entered after trial on the merits. Putnam received notice of the trial and the hearing on the motion for a default judgment. His failure to appear and defend was a lack of due diligence and does not constitute grounds for the vacation of the default judgment.

Nebraska law has long recognized the need to set aside default judgments to ensure that litigants have a fair opportunity to present their contentions in court. See, e.g., *Urwin v. Dickerson*, 185 Neb. 86, 173 N.W.2d 874 (1970); *Lacey v. Citizens Lumber & Supply Co.*, 124 Neb. 813, 248 N.W. 378 (1933); *Lichtenberger v. Worm*, 41 Neb. 856, 60 N.W. 93 (1894). A countervailing consideration must be balanced against this need: the duty of the courts to prevent unnecessary delays in the prosecution of actions and to guard against dilatory and frivolous proceedings. *Urwin, supra.*

Factors to be considered in determining whether a trial court abused its discretion in rendering a default judgment include the promptness of the motion to vacate, the negligence or want of diligence of the party moving to vacate, and the avoidance of unnecessary delays and frivolous proceedings. *Michaelis v. Michaelis*, 187 Neb. 350, 190 N.W.2d 783 (1971); *Commercial Sav. & Loan Assn. v. Holly Development, Inc.*, 182 Neb. 335, 154 N.W.2d 510 (1967).

In *Commercial Sav. & Loan Assn., supra* at 339-40, 154 N.W.2d at 513, this court stated, " '[T]he general rule is that one who seeks to set aside a default judgment against him must show that neither he nor his attorney was negligent in failing to appear and defend a suit. . . .' " Similarly, in the earlier case of *Cleland v. Hamilton Loan & Trust Co.*, 55 Neb. 13, 14-15, 75 N.W. 239, 240 (1898), in denying a motion to vacate a default judgment obtained by the use of a forged signature, we held,

> It is an inflexible rule that a party seeking relief in equity from a judgment taken against him by default must exhibit a defense to the action and also show that such judgment is the result of fraud, accident, or mistake,

> unmixed with fault or negligence on his part. A judgment will not be set aside on the application of a party who has, by his own laches, failed to avail himself of an opportunity to defend. This salutary rule rests on principle and authority, and its rigid enforcement is necessary for the repose of society, by preventing litigation from becoming interminable.

More recently, in *Anderson Mktg. Associates v. Roberts*, 215 Neb. 670, 340 N.W.2d 384 (1983), this court reversed the trial court's vacation of a default judgment, on the grounds the defendant failed to duly defend the action. The record in that case clearly disclosed the defendant's lack of due diligence. The default judgment had been entered after a 17-month period, during which the defendant had filed only one minor pleading.

The facts of this case are similar to *Anderson*, and clearly evidence Putnam's and SMC's lack of due diligence. Putnam had notice of the trial and the default hearing. Leave to amend the answer was sought 1 year after the amended petition was filed, and almost 6 weeks after trial. The record does not show the trial court abused its discretion in denying the motion to vacate the default judgment, and the default judgment against Putnam and SMC is affirmed.

Knoblauch contends that the plaintiff is not the real party in interest and that the plaintiff's corporate existence was not proven at trial. Both contentions are without merit. The record shows that Forker entered into both distributorship agreements as president of the plaintiff. Forker testified as to his title, his duties, and the capitalization of the plaintiff. He also testified as to some of the expenses the company incurred as a result of the agreements. The only logical inference to be drawn from the record is that Knoblauch recognized the plaintiff as a corporation when he signed the first agreement.

A person who contracts with a corporation is estopped from later denying its corporate existence. *Retail Merchants Service v. Bauer & Co.*, 125 Neb. 61, 248 N.W. 813 (1933); *American Gas Construction Co. v. Lisco*, 122 Neb. 607, 241 N.W. 89 (1932). Knoblauch is therefore estopped from questioning the plaintiff's corporate existence.

Further, Knoblauch filed a general denial to the original

pleading and did not specifically deny the plaintiff's corporate existence. A general denial does not put corporate character in issue. *Davis v. Nebraska Nat. Bank of Omaha*, 51 Neb. 401, 70 N.W. 963 (1897); *Dietrichs v. L. & N. W. R. R.*, 13 Neb. 43, 13 N.W. 13 (1882); *National Life Ins. Co. v. Robinson*, 8 Neb. 452, 1 N.W. 124 (1879).

Knoblauch next asserts that the plaintiff failed to present a prima facie case of misrepresentation against him. He contends the record does not show that he made any claims, assurances, or representations to the plaintiff and Forker. Knoblauch further argues that Putnam's deposition, when read into evidence, so confused the jury that Putnam's statements were improperly attributed to him. Knoblauch also contends that any representations he made did not relate to a present or preexisting fact. Finally, Knoblauch contends that the plaintiff's recovery is barred for two reasons: First, because if the plaintiff had properly investigated before investing, it could have prevented the loss; and second, because after the first payment was made, the plaintiff was on notice of the facts which now form the basis of the action, and acted in disregard of those facts.

A jury verdict will not be disturbed on appeal "unless it is clearly erroneous, against the preponderance of the evidence, and so clearly contrary to the findings that it is the duty of the reviewing court to correct it." *Maricle v. Spiegel*, 213 Neb. 223, 232-33, 329 N.W.2d 80, 87 (1983). See, also, *Krug v. Laughlin*, 208 Neb. 367, 303 N.W.2d 311 (1981); *Lintner v. Roos*, 202 Neb. 476, 276 N.W.2d 93 (1979).

A jury verdict will be considered sufficient if the record discloses any competent evidence which supports a finding for the successful party. *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985). Conflicts in the evidence and the credibility of witnesses are for the jury's determination, not the court on review. *Id.* See, also, *Kniesche v. Thos*, 203 Neb. 852, 280 N.W.2d 907 (1979); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *disapproved on other grounds* 213 Neb. 782, 332 N.W.2d 39 (1983).

All inferences which may be drawn from the evidence must

be drawn in favor of the prevailing party. *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 360 N.W.2d 488 (1985); *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984); *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984). Our review is limited to determining whether the record evinces sufficient facts to support the verdict.

To maintain an action for damages for false representations, the plaintiff must allege and prove, by a preponderance of evidence, the following elements: (1) that a representation was made; (2) that the representation was false; (3) that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely on it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result. *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986).

The amended petition alleged all six elements of misrepresentation. The specific misrepresentations alleged included (1) that SMC had the exclusive right to distribute the "Solar-Aire" System; (2) that the "Solar-Aire" System was currently manufactured and sold for use to consumers by various distributors and dealers in SMC's marketing network; (3) that the "Solar-Aire" System had been laboratory and field tested, and its scientific viability established; (4) that no manufacturing or installation problems were being encountered; and (5) that SMC was ready to fill all orders for the system which Forker might place.

At trial Knoblauch testified that as a director of Solar, Inc., he had attended meetings throughout the fall of 1977 at which the products' quality, company finances, and production problems were discussed. He also admitted that he knew about the financial condition of Solar, Inc., prior to his resignation. Additionally, he admitted knowing about the leakage problem and having discussed it with Forker. He denied having knowledge of the results of certain laboratory tests, however, and stated that in April of 1977 SMC had a warehouse full of inventory, as well as a large number of distributors.

Knoblauch contends this testimony clearly shows that he made no misrepresentations to Forker which would support the

jury verdict. In addition, he testified that, before resigning from SMC, he called Forker and warned him to investigate further before sending the balance due on the contract. He did not follow that conversation with a letter or warn the rest of the distributors. Forker denies that such a conversation took place.

In a fraud case direct evidence is not essential, but proof of fraud drawn from circumstantial evidence must not be guesswork or conjecture, but must be rational and logical deductions from the facts and circumstances from which they are inferred. *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986). See, also, *Workman v. Workman*, 174 Neb. 471, 118 N.W.2d 764 (1962). The circumstances must be " ' "of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom." ' " *ServiceMaster Indus., supra* at 44, 388 N.W.2d at 86 (citing *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944)).

Several elements of fraud are clearly established in this record: Knoblauch's knowledge of the poor financial condition of the parent company, the attendant production problems, and the dubious future of SMC at the time of his resignation. The jury could find that Knoblauch knew of these problems when the first agreement was negotiated, when the first payment was received, and at the time of his resignation. There was conflicting evidence as to whether Knoblauch actually warned Forker of these problems. The jury decided that issue against Knoblauch. The evidence was sufficient for the jury to make that finding. *Kniesche v. Thos*, 203 Neb. 852, 280 N.W.2d 907 (1979).

Knoblauch next argues any liability he may have had to the plaintiff was eliminated by the second agreement. This argument is not persuasive. The plaintiff sustained its loss when Knoblauch failed to warn it of the inevitable failure of Solar, Inc., and SMC. The second agreement was viewed by Forker and Putnam as a continuation of the first agreement, and it did not increase the plaintiff's loss.

Similarly, Knoblauch's arguments that the plaintiff's recovery is barred by its failure to investigate and its continued participation with SMC are without merit.

Nebraska law imposes a duty of ordinary prudence. *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983). A person is justified in relying upon a representation made to him as a positive statement of fact, when an investigation would be required to ascertain its falsity. *Id.* See, also, *Fricke v. Hart*, 206 Neb. 590, 294 N.W.2d 737 (1980); *English v. Bruin Engineering, Inc.*, 201 Neb. 791, 272 N.W.2d 753 (1978).

In this case Forker was justified in relying on the statements made during the contract negotiations, as well as the provisions of the contract itself. To discover the falsity of those representations, Forker would have had to make an independent investigation of the financial security and manufacturing capability of the parent company, Solar, Inc., as well as independent laboratory and field tests of the product. In a similar case, *Little v. Gillette*, 218 Neb. 271, 354 N.W.2d 147 (1984), the plaintiff sued two realtors for misrepresenting the economic viability of a business she had purchased from them. At trial there was evidence the realtors knew the previous operation was a financial disaster, yet assured the plaintiff of the potential profits in the business. We found such evidence sufficient to support a verdict for the plaintiff. The defendants' argument the plaintiff should have investigated further was found not to be convincing. Since an independent investigation of the facts would have been required, the plaintiff was entitled to rely on the defendants' representations.

The final issue is whether the jury verdict is excessive. Forker alleged special damages in the amount of $72,617. The jury awarded damages in the amount of $67,616. At trial the plaintiff presented evidence of the two payments to SMC in the amount of $57,617, as required by the first agreement. The only additional evidence of damage was Forker's testimony that his corporation was capitalized by the infusion of $10,000 in cash, and by his testimony that his business had the "normal overhead of a small business."

In an action for fraud a party may recover such damages as will compensate him for the loss or injury actually caused by the fraud and place the defrauded party in the same position as he would have been in had the fraud not occurred. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

See, also, *Harsche v. Czyz*, 157 Neb. 699, 61 N.W.2d 265 (1953). One who enters into an agreement by virtue of a material misrepresentation may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to the position which existed before entering into the contract. *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985). Here, the plaintiff chose to affirm the contract and sue for damages.

The plaintiff's evidence at trial established actual damages in the amount of $57,617. This figure represents the amount paid on the first agreement, for which the plaintiff did not receive the agreed-upon consideration. Since no other sufficient proof of damages was presented, the verdict for $67,617, as well as the default judgment for that amount, is excessive. We conclude the record will not support an award in excess of $57,616, and a remittitur of $10,000 should be awarded.

The cause is remanded and the plaintiff shall have 10 days after the filing of the mandate of this court in the district court in which to file an acceptance of the remittitur. The judgment shall draw interest from the date the remittitur is accepted.

In the event the plaintiff fails to accept the remittitur, the defendants are granted a new trial as to the issue of damages only.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JEANNETTE ELAINE WAGNER, APPELLEE, V. JAMES FRANK WAGNER, APPELLANT.

396 N.W.2d 282

Filed November 21, 1986. No. 85-494.

1. **Child Support: Modification of Decree.** A proceeding to modify a child support order is not a retrial of the original case nor a review of the original decree.
2. _____: _____. The paramount issue in child support cases, whether originally or in proceedings for modification, remains the best interests of the children.

3. _____: _____. Increased age of children alone will not furnish a satisfactory basis for a modification of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
4. **Child Support: Modification of Decree.** Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, we limit that rule to include only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order. To the extent that the language of *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), has been misinterpreted, that interpretation is expressly disapproved.
5. **Child Support: Modification of Decree: Appeal and Error.** Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, although on appeal we are required to review the record de novo, in the absence of an abuse of discretion, the decision of the trial court will be affirmed.

Appeal from the District Court for Saline County: ORVILLE L. CODY, Judge. Affirmed.

Samuel G. Kaplan, for appellant.

Lynn B. Lamberty of Steinacher, Vosoba & Hanson, for appellee.

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

HASTINGS, J.

Upon application of the petitioner-appellee, the district court modified a November 15, 1978, decree by increasing child support for two children from $41 per week for both children to $150 per month per child.

The respondent, the former husband, has appealed, claiming that the only change in circumstances shown was the increased age of the children due to the passage of time. It is his contention that under the rule set forth in *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), a change of circumstances involving the mere passage of time does not support or justify a modification of an award of child support.

It is true that in *Graber* we said:

> Furthermore, not all material changes justify modification. Indeed, if the changes are of the type that necessarily were in the contemplation of the parties at the

> time the decree was entered, even though material, such changes do not, *of themselves*, justify a modification. For instance, it obviously is in the contemplation of all of the parties in every case that the children involved will grow older and that their needs will therefore change. That fact, *standing alone*, is not sufficient to justify a modification of a decree of dissolution.

(Emphasis supplied.) *Id.* at 819, 374 N.W.2d at 10.

However, the claimed changes of circumstances in *Graber* were the increased income of the former husband, the former wife's illness preventing her from obtaining gainful employment, an increase in mortgage payments required of her, and her desire to send the children to a private school. What the court found was that the evidence did not support the existence of such changes or, in the case of the latter two items, that both were anticipated by the parties at the time of the decree.

Graber was intended to emphasize the longstanding rule that a proceeding to modify a child support order is not a retrial of the original case nor a review of the original decree. *Tworek v. Tworek*, 218 Neb. 808, 359 N.W.2d 764 (1984). Unfortunately, the language cited above perhaps overstated the case and, as aptly set forth in the concurring opinion, was based on cases involving modification of alimony orders.

We do reemphasize the longstanding rule that the paramount issue in child support cases, whether originally or in proceedings for modification, remains the best interests of the children. *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985).

In spite of language such as that from *Pfeiffer v. Pfeiffer*, 201 Neb. 56, 58, 266 N.W.2d 82, 84 (1978), "It is also to be noted that as the ages of the children increase, the expense of care is generally greater," we do hold that evidence of the increased age of children alone will not furnish a satisfactory basis for a modification of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children. The record must disclose the circumstances as they existed originally and the present facts supporting the change.

Regarding the further language of *Graber* denying a modification of child support due to changes that "necessarily

were in the contemplation of the parties at the time the decree was entered," 220 Neb. at 819, 374 N.W.2d at 10, we limit that to anticipated changes which were specifically noted on the record at the time. For example, if the record reflects that orthodontia work on a child was planned for the following year and provisions were made therefor, once the treatment was actually begun and completed, the fact that the custodial parent is now faced with the payment for those services normally would not support a modification of the decree. On the other hand, the fact that a younger sibling is later found to be in need of similar services is not an anticipated change of circumstances because it was likely that children of the same family would require such treatment.

To the extent that certain language of *Graber* perhaps has been misinterpreted, that interpretation is expressly disapproved.

The evidence in the record indicates that the children are now ages 9 and 12. The petitioner, at the time of the original decree, had net earnings of $3,056, and at the time of the modification hearing such earnings had been reduced to approximately $1,981. By this time the petitioner had remarried. The respondent's gross income from the time of the dissolution to the hearing on the modification had remained rather constant, although for some unexplained reason respondent claimed his net income in that period of time had been reduced from approximately $16,500 to $13,990.

However, estimates though they were, the evidence seems to be undisputed that petitioner's monthly expenses have increased from $396 at the time of the decree of dissolution to a point where at the time of the modification hearing the monthly expenses attributable to the children totaled $727. These totals consisted of individual categories including housing, utilities, food, clothing, medical, insurance, automobile, and school.

Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, although on appeal we are required to review the record de novo, in the absence of an abuse of discretion, the decision of the trial court will be affirmed. *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986).

Following a de novo review of the record, we find that the judgment of the trial court was correct and should be affirmed.

AFFIRMED.

ROY A. JOHNSON, APPELLANT, V. SHEILA K. JOHNSON, APPELLEE.

396 N.W.2d 284

Filed November 21, 1986. No. 85-947.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Emily R. Scherr of Law Offices of Robert C. Guinan, for appellant.

William G. Line of Kerrigan, Line & Martin, for appellee.

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

HASTINGS, J.

Petitioner has appealed from the judgment of the district court in a marriage dissolution case which awarded custody of the parties' minor child to the respondent.

The record before this court consists only of the transcript. It is impossible for us to review errors which require a consideration of the evidence, in the absence of a bill of exceptions. *Taylor v. Wallesen*, 222 Neb. 411, 384 N.W.2d 270 (1986).

The pleadings support the action of the trial court and disclose no abuse of discretion. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

DALE THOMAS AINSWORTH, APPELLANT, V. BARBARA JEAN AINSWORTH, APPELLEE.

396 N.W.2d 285

Filed November 21, 1986. No. 85-968.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion.
2. **Child Custody.** The paramount consideration in determining who should have the care and custody of minor children following dissolution of a marriage is the best interests of the children.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Jerry J. Milner, for appellant.

L.W. Kelly, Jr., of Kelly & Kelly, for appellee.

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

PER CURIAM.

This is an appeal in a proceeding for dissolution of a marriage. The trial court dissolved the marriage; divided the property of the parties; awarded custody of the minor children to the respondent, Barbara Jean Ainsworth, subject to reasonable rights of visitation in the petitioner, Dale Thomas Ainsworth; and awarded child support.

The sole issue on appeal is the award of custody of the minor children to the respondent.

The parties were married on June 16, 1979. They have two children: Tonya Maria, born December 1, 1979, and Crystal Gail Ann, born August 25, 1981.

The parties separated in mid-October of 1984. From that time until December 3, 1984, the respondent had custody of the children during the week, while the petitioner had custody on weekends.

When the petition for dissolution of the marriage was filed, the trial court, by an ex parte order, awarded temporary custody of the children to the petitioner. On December 27, 1984, the parties stipulated to joint custody, pending trial, which gave

the parties custody on alternating weeks.

Trial was had on July 12, 1985. On August 26, 1985, the trial court awarded custody of the children to the respondent. From that order the petitioner has appealed.

The petitioner contends the trial court abused its discretion in awarding custody to the respondent, because there is considerable evidence raising doubt as to the respondent's moral fitness, stability, and capacity to provide for the physical care and needs of the children.

Although our review of the judgment is de novo on the record, child custody determinations are matters initially entrusted to the sound discretion of the trial court. On appeal the judgment of the trial court will be affirmed in the absence of a clear abuse of discretion. *Clark v. Clark*, 220 Neb. 771, 371 N.W.2d 749 (1985). We also "give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other." *Id.* at 777, 371 N.W.2d at 754. The paramount consideration in determining who should have the care and custody of minor children following dissolution of a marriage is the best interests of the children. *Id.*

The petitioner claims the respondent is of questionable moral fitness based on evidence that she sometimes stayed out late following her night shift job in 1983, that she moved in with a boyfriend and his parents shortly after the separation, and that she "allowed" the children to look at pornographic magazines. The record does not show that the incidents of staying out late occurred after 1983, some 2 years prior to trial. Further, the record shows that the children were not uncared for on the occasions when the respondent stayed out late in 1983, as the petitioner, who worked a day job, was at home with the children.

According to the respondent, she moved in with her then boyfriend's family around December 1, 1984, because of financial considerations. On December 3 the court's ex parte order awarded temporary custody of the children to the petitioner, so that the respondent only had custody on weekends. The respondent testified that when she did have the children, she and the children slept in a room separate from the

boyfriend. The respondent stopped seeing the boyfriend on a personal basis in mid-December of 1984.

Following entry of the order of joint custody on December 27, the respondent moved to a two-bedroom trailer in Doniphan, Nebraska, where she resided at the time of trial.

The petitioner contends the respondent could not provide a stable environment, as evidenced by the fact that she lived in four different residences and with two different families in the 2 1/2 months following the couple's separation. The respondent's testimony indicates that immediately following the separation she and the two children moved in with friends in Grand Island, Nebraska, for approximately 2 weeks. From there the respondent moved into a Grand Island apartment. She stayed in that apartment for only 1 month because, at that time, she could not afford the rent. The respondent then moved in with the boyfriend's family, who did not charge her rent because they wanted to help her get back on her feet financially. Within a week of the December 27 joint custody order, the respondent moved into the Doniphan trailer, where she remained the 6 months prior to trial.

Finally, the petitioner contends there are serious doubts about the respondent's ability to provide for the physical care and custody of the children, based on evidence that she had poor housekeeping skills and did not always provide balanced meals, she was not always prompt in delivering or picking up the children at the day-care center, and she declined to have the children taken to a doctor after they had begun receiving treatments for head lice. The testimony as to the respondent's housekeeping skills related to the condition of the marital home when both parties lived there. This testimony reflected unfavorably on both parties.

The respondent testified that normally she prepares balanced meals, but does on occasion "slack off." The day-care provider testified by deposition that other than on two occasions, the respondent was prompt in delivering or calling for the children at the day-care center. On one occasion the respondent was late in retrieving the children because she had car trouble.

The record does not support an inference that the children

contracted head lice as a result of any fault in the respondent's care. In fact, the condition was discovered after the children had been with the petitioner for a few days. When the children were returned to the respondent the next week, she continued the treatments that had been prescribed by a physician. Later, the respondent declined the petitioner's suggestion to take the children to the physician, because the condition was "clearing up."

While the parties lived together, they both worked and were equally responsible for the care of the children. Except for the fact that the children were sometimes dressed in diapers, the petitioner noticed nothing unusual about the care the respondent provided for the children. The petitioner testified that there were no major problems experienced during the joint custody period pending trial. There is also evidence that the respondent has made many of the children's clothes and has stayed home from work with them when they were ill.

The record does not support a finding that the respondent was without the moral fitness, stability, or capacity to provide for the care and custody of the children. Both parties have a history of providing for the children, and the trial court did not clearly abuse its discretion in awarding custody to the respondent.

The judgment is affirmed. Each party shall pay his or her own costs.

AFFIRMED.

CLAYTON MILEY LUCE, APPELLEE, V. PAULINE MARIE SCHANCE, FORMERLY PAULINE MARIE LUCE, APPELLANT.
396 N.W.2d 287

Filed November 21, 1986. No. 86-122.

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

Sandra I. Schefcik of Schefcik Law Firm, for appellant.

William C. Peters, for appellee.

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

PER CURIAM.

Pursuant to agreement, the decree of dissolution placed custody of the parties' minor child jointly in the appellant mother and appellee father. Nine months after the decree, the mother alleged that the joint custody obligations were not being fulfilled and prayed that she be given sole custody of the child. The father responded by asking that sole custody be placed in him. Following a 2-day trial, at which the evidence overwhelmingly demonstrated that the parties had not been able to fulfill their respective joint custody obligations, and at which much conflicting evidence was adduced as to which parent should have sole custody, the district court terminated the joint custody arrangement and placed sole custody in the father. Upon de novo review we conclude that the record fails to show that the district court abused its discretion in so ruling. Under that circumstance the judgment of the district court is to be, and hereby is, affirmed. *Ainsworth v. Ainsworth, ante* p. 160, 396 N.W.2d 285 (1986).

Appellant shall pay the costs of this appeal, including $750 to apply toward the services of appellee's attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SCOTT B. KENNEDY, APPELLANT.

396 N.W.2d 722

Filed November 21, 1986. Nos. 86-218, 86-219.

1. **Waiver: Words and Phrases.** A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
2. **Waiver.** A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a

defendant has waived a right constitutionally guaranteed or granted by statute.

3. **Pleas: Waiver: Indictments and Informations.** A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the indictment, information, or complaint is not sufficient to charge an offense.
4. **Pleas: Waiver: Trial: Right to Counsel.** A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case.
5. **Pleas.** A factual basis for a guilty plea may be established by inquiry of the defendant.
6. **Constitutional Law: Criminal Law: Due Process: Jury Trials.** Notwithstanding constitutional mandates regarding a jury trial, such as the sixth amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution, there is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of imprisonment of 6 months or less.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Judgment in No. 86-218 affirmed. Judgment in No. 86-219 reversed, and cause remanded with direction.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

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

SHANAHAN, J.

Scott B. Kennedy appeals from the judgment of the district court for Adams County, affirming Kennedy's convictions and sentences in the county court.

Initially, Kennedy was charged in two complaints. The first complaint (case No. 86-218) consisted of three counts, that is, two counts of third degree assault, a Class I misdemeanor, Neb. Rev. Stat. § 28-310 (Reissue 1985), and one count of criminal mischief—intentional damage to another's property, causing pecuniary loss in excess of $100 but less than $300, see Neb. Rev. Stat. § 28-519(1)(a) and (3) (Reissue 1985), which is a Class II misdemeanor. The three-count complaint alleged Kennedy's assault on Mary L. Porter and damage to Porter's personal property (an automobile). The second complaint (case No.

86-219) charged Kennedy with disturbing the peace of DeAnn L. Patterson. Disturbing the peace is a Class III misdemeanor. See Neb. Rev. Stat. § 28-1322 (Reissue 1985).

At an arraignment on April 8, 1985, and after the complaint for the assaults and criminal mischief had been read to Kennedy, the county judge informed Kennedy about the range of penalties possible on conviction of each charge, including the possibility of consecutive sentences. Additionally, the court informed Kennedy regarding the right to a jury trial and confrontation of the State's witnesses, the privilege against self-incrimination, and the right to assistance of counsel. Upon inquiry by the court Kennedy acknowledged that he understood the charges against him, as well as the various rights and privilege mentioned. The court then informed Kennedy: "Now in order to get a jury trial in this court, you must tell the court that you want a jury trial and you must tell the court of that desire within 10 days after you enter your plea of not guilty." Kennedy then stated he would retain a lawyer and return to court on April 12 to enter a plea. After posting bond Kennedy was released and, on April 12, in a written "plea of not guilty," signed and filed by his lawyer, entered a not guilty plea to each of the charges in the three-count complaint and requested a jury trial. Although Kennedy had not been arraigned on the charge of disturbing the peace alleged in the second complaint, Kennedy's lawyer, nevertheless, filed a "not guilty" plea and request for a jury trial regarding that second complaint.

The court ordered a pretrial conference for May 3. On motion by Kennedy's lawyer the court rescheduled the pretrial conference for June 7, and Kennedy's lawyer requested, and was granted, a continuance to June 28 regarding the pretrial conference. On June 10, Kennedy's lawyer also filed a motion to withdraw, alleging he was unable to contact Kennedy, who had failed to respond to letters from the lawyer. The court permitted Kennedy's lawyer to withdraw on June 13.

When Kennedy, without counsel, appeared for the pretrial conference on June 28, the county attorney called the court's attention to the fact that Kennedy had not been arraigned on the complaint charging Kennedy with disturbing the peace. An arraignment on the disturbing the peace charge was held,

during which the court informed Kennedy concerning the privilege against self-incrimination and all the various rights previously mentioned at arraignment on the other charges (assaults and criminal mischief). The court, recognizing that Kennedy had requested a jury trial on both complaints, proceeded to review the history of continuances granted in Kennedy's cases, scheduled and rescheduled pretrial conferences, and Kennedy's appearance without counsel. After acknowledging that he was not prepared for the pretrial conference, Kennedy told the court he was obtaining a lawyer. The court responded:

> [T]he Court is prepared; the defendant is not. And as far as the Court is concerned, that constitutes a withdrawal of the defendant's request for a jury trial. This matter's still gonna go on ahead for trial, and I'm gonna set a trial date today, but it's gonna be without a jury. And it'll be without an attorney on your part if you don't get one. Because you haven't requested one, and you indicate that you're able to get your own. And we'll go on ahead and set this for trial.

The court set both complaints for trial on July 29 and informed Kennedy "there will be no jury trial." At that point the following colloquy occurred:

> MR. KENNEDY: . . . [C]an I recommend a jury trial?
>
> THE COURT: No, jury trial is all over with. There won't be any jury trial. There'll just be a trial with a judge sitting up here making a decision as to whether or not the State proves it's [sic] case beyond a reasonable doubt.
>
> MR. KENNEDY: That's it?
>
> THE COURT: Yep. Instead of the six people that would normally or might be sitting over there. And in fact a vast majority of our trials are trials in front of a judge rather than a jury.
>
> MR. KENNEDY: I can't ask for a jury trial?
>
> THE COURT: You already asked for it, and because you weren't ready to go today and because you've already had two continuances, and I mean ready to go today with a pre-trial conference, the jury trial is washed out.

Later, during the pretrial conference, the court stated: "[I]t's

pretty darn difficult to have a jury trial where someone is not represented by a lawyer. And if they're not prepared for the pre-trial conference, then they don't get the jury trial."

At the conclusion of the pretrial conference, the court answered Kennedy's inquiry about court-appointed counsel:

> [W]e will not appoint one for you if you make that request in less than two weeks before the trial. Because that again is your responsibility to make that decision and get in here. Because we will not postpone the trial beyond July 29th, except for good cause. And it's not good cause if you're not making an effort to get [a] lawyer. And you should know whether or not, at least two weeks before the trial, whether or not you have a lawyer.

Before trial Kennedy never requested appointment of counsel. On July 29 Kennedy appeared without counsel and, without asserting indigency or supplying any documentation on the aspect of indigency, orally requested appointment of counsel for the trial. See Neb. Rev. Stat. § 29-1804.13 (Reissue 1985) (appointment of counsel for an indigent charged with a misdemeanor). After the court denied Kennedy's request for appointed counsel, the case was tried without a jury, namely, a bench trial on the two complaints. The State called witnesses who testified about Kennedy's assaults on Mary Porter and infliction of damage to Porter's automobile. At a recess during the State's case, Kennedy and the county attorney negotiated a plea for disposition of the charges of assault and criminal mischief. Pursuant to the negotiated disposition, the State amended the complaint for the assaults to charge Kennedy with two counts of third degree assault "committed in a fight or scuffle entered into by mutual consent," see § 28-310(2), a Class II misdemeanor, and retained the charge of criminal mischief in the amended three-count complaint. The court informed Kennedy concerning the penalty possible on conviction for third degree assaults as a Class II misdemeanor. See Neb. Rev. Stat. § 28-106(1) (Reissue 1985). Kennedy entered his plea of guilty to the amended complaint. The court expressly found that Kennedy's plea

> is knowingly, freely and voluntarily given; that a factual basis to support a finding of guilty has been provided by

> the State; and that defendant's plea of guilty to each of the three (3) counts of the amended complaint should be accepted and entered.
>
> The Court further advised the defendant that by entering a plea of guilty, he hereby waives his right to a trial, his right to confront accusing witnesses, his right to a trial by jury, and his privilege against self-incrimination.
>
> The Court being further advised in the premises finds that defendant understands that he has waived said rights; and that he understands the nature of the charges against him in the amended complaint and the possible penalties therefor.

The court then elicited a factual basis from Kennedy regarding the offense charged in each count of the amended complaint, accepted Kennedy's plea of guilty to all three charges (assaults and criminal mischief), found Kennedy guilty of the two assaults and criminal mischief, and stated: "We will proceed to try the disturbing the peace charge." The State adduced evidence regarding the disturbing the peace charge, but Kennedy did not present evidence in response to the State's case. At conclusion of the evidence on July 29, the court took the matter under advisement.

On August 5 the court found Kennedy guilty of disturbing the peace. Later, the court imposed concurrent sentences on Kennedy—imprisonment for 60 days on each conviction (assaults, criminal mischief, and disturbing the peace). Through counsel appointed after the convictions, Kennedy sought, but the court rejected, withdrawal of the guilty pleas. On appeal to the district court, the judgments of the county court were affirmed.

Regarding conviction on the charges of assault and criminal mischief, Kennedy claims that the county court erred in (1) determining that Kennedy's "request for jury trial was deemed to be withdrawn because Appellant was not prepared for a pre-trial conference" and (2) "refusing [Kennedy's] request for court appointed counsel without a reasonable inquiry into his financial condition." Concerning the conviction for disturbing the peace, Kennedy raises the same questions as those indicated in his appeal of the convictions for assault and criminal

mischief, but also claims the court erred in restricting Kennedy's cross-examination of a witness. Kennedy does not contest the court's refusal to permit Kennedy's withdrawal of his guilty pleas.

"[O]nce a defendant has been informed of his right to retained or appointed counsel, there is no requirement that the court advise the defendant, on each subsequent court appearance, of the same right." *State v. Tharp, ante* p. 126, 129, 395 N.W.2d 762, 765 (1986).

> [I]n order to support a finding that a plea of guilty or nolo contendere has been entered freely, intelligently, voluntarily, and understandingly,
>
> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.

State v. Irish, 223 Neb. 814, 820, 394 N.W.2d 879, 883 (1986).

A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct. See, *Branch v. Wilkinson*, 198 Neb. 649, 256 N.W.2d 307 (1977); *Mousel v. Daringer*, 190 Neb. 77, 206 N.W.2d 579 (1973); *Pester v. American Family Mut. Ins. Co.*, 186 Neb. 793, 186 N.W.2d 711 (1971). See, also, *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege"). A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute. See, *State v.*

Blue, 223 Neb. 379, 391 N.W.2d 102 (1986); *State v. Miles*, 202 Neb. 126, 274 N.W.2d 153 (1979).

A plea of guilty embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional, except the defense that the indictment, information, or complaint is not sufficient to charge an offense. *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986). A valid guilty plea waives the right to a trial, whether a trial by jury or without a jury, and waives the right to counsel, including the right to court-appointed counsel in an otherwise appropriate case. *Duggan v. Olson*, 146 Neb. 248, 19 N.W.2d 353 (1945). A factual basis for a guilty plea may be established by inquiry of the defendant. See *State v. Richter*, 220 Neb. 551, 371 N.W.2d 125 (1985).

As the result of our review of all the circumstances of Kennedy's case, and in view of the standards and requirements set forth in *State v. Irish, supra*, we conclude that Kennedy's guilty pleas, validly entered and accepted, resulted in a waiver of Kennedy's right to assistance of counsel and a jury trial. Therefore, the district court's judgment, affirming Kennedy's convictions and sentences for the assaults and criminal mischief (case No. 86-218), is affirmed.

This leads us to the next part of Kennedy's appeal, the question regarding a jury trial on the charge of disturbing the peace, which is a Class III misdemeanor carrying a maximum penalty of 3 months' imprisonment, or a $500 fine, or both such imprisonment and fine. There is no statutorily stated minimum regarding a Class III misdemeanor. See § 28-106(1).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

"The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court . . . ." Neb. Const. art. I, § 6.

"In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel . . . and [have] a speedy public trial by an impartial jury . . . ." Neb. Const. art. I, § 11.

Notwithstanding the preceding constitutional mandates regarding a jury trial, not every criminal charge warrants a trial by jury.

Construing the 6th amendment right to a jury trial, applicable to the states through the 14th amendment, the U.S. Supreme Court has expressed: "Crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses . . . ." *Duncan v. Louisiana*, 391 U.S. 145, 159, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). See, also, *Codispoti v. Pennsylvania*, 418 U.S. 506, 512, 94 S. Ct. 2687, 41 L. Ed. 2d 912 (1974) ("[O]ur decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes").

This court, in construing the right to a jury trial as one of the guarantees of the Nebraska Constitution, has held: "There is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of 6 months or less." *State v. Mangelsen*, 207 Neb. 213, 215, 297 N.W.2d 765, 767 (1980). See, also, *State v. Young*, 194 Neb. 544, 546, 234 N.W.2d 196, 198 (1975) (for the charge of "second offense drunk driving," punishable by a maximum penalty of 3 months' imprisonment pursuant to Neb. Rev. Stat. § 39-669.07(2) (Reissue 1974), "The defendant was not entitled to a jury trial under the Nebraska Constitution"); *State v. Nielsen*, 199 Neb. 597, 260 N.W.2d 321 (1977), *overruled on other grounds, State v. Garber,* 206 Neb. 75, 291 N.W.2d 403 (1980). Cf. *State v. Lynch,* 223 Neb. 849, 394 N.W.2d 651 (1986) (on a charge of driving "while under the influence of alcoholic liquor," in violation of a municipal ordinance and punishable by imprisonment for 6 months, the defendant was not entitled to a jury trial by virtue of the Nebraska Constitution or the U.S. Constitution).

Although there is no constitutional right to a jury trial for petty offenses, the Legislature of Nebraska has enacted Neb. Rev. Stat. § 24-536 (Reissue 1985), which in pertinent part provides: "Either party to any case in county court, except criminal cases arising under city or village ordinances, traffic

infractions, and other infractions . . . may demand a trial by jury."

As reflected by § 24-536, "[T]he right to a jury trial is part of our fundamental law." *State ex rel. Simpson v. Vondrasek*, 203 Neb. 693, 696, 279 N.W.2d 860, 863 (1979). Being a fundamental concept and a valuable process for reaching a fair and impartial decision in litigation, the right to a jury trial, although sometimes statutorily required but not constitutionally guaranteed, is accorded a defendant in the absence of a waiver of such right. Thus, while disturbing the peace, as a criminal offense, may be petty, the prescribed procedure to prove even a petty crime is not insignificant, if the will of Nebraska's people, legislatively expressed, has some stature in the criminal justice system.

That Kennedy requested a jury trial is without question. The dialogue at the pretrial conference only underscored Kennedy's desire and intention to submit his case to a jury for determination. Absence of a jury is not attributable to Kennedy's relinquishment or abandonment of his right to trial by jury. Rather, to censure Kennedy for his unpreparedness at the pretrial conference, the court precluded a jury trial. However, the right to trial by jury is not base grist to be ground under a procedural millstone as a sanction for lack of diligence attendant to a pretrial conference.

We find no affirmative showing or proof that Kennedy voluntarily and intentionally relinquished or abandoned the statutory right to a jury trial. We do find that the county court denied the jury trial requested by Kennedy. Consequently, we reverse the judgment of the district court concerning case No. 86-219 (disturbing the peace) and remand this matter to the district court with direction that the district court reverse the county court's judgment of conviction and remand this cause to the county court for further proceedings.

In view of our disposition of Kennedy's appeal in case No. 86-219, it is unnecessary to examine the questions concerning court-appointed counsel and cross-examination raised by Kennedy. However, we observe that, even if Kennedy had appeared pro se and personally conducted his own defense,

under the circumstances he was still entitled to a jury trial, a right denied by the county court.

JUDGMENT IN NO. 86-218 AFFIRMED. JUDGMENT IN NO. 86-219 REVERSED, AND CAUSE REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. JAMES C. WHITEHURST, APPELLANT.

396 N.W.2d 288

Filed November 21, 1986. No. 86-459.

Appeal from the District Court for Stanton County: RICHARD P. GARDEN, Judge. Affirmed.

Charles L. Caskey, for appellant.

Robert M. Spire, Attorney General, and Harold Mosher, for appellee.

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

HASTINGS, J.

Defendant has appealed a sentence of 2 to 5 years' imprisonment following a conviction upon his plea of guilty to the crime of manufacturing a controlled substance, marijuana, a Class III felony.

He assigns as error the receiving into evidence at the sentencing hearing the testimony of a state trooper based on information which he had received from an unnamed informant, and the excessiveness of the sentence.

There is no merit to the first assignment of error. As stated in *State v. Reeves*, 216 Neb. 206, 221, 344 N.W.2d 433, 444 (1984): " '[T]he traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.' " And later on, "Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give

information to be used by the sentencing court." *Id.* at 223, 344 N.W.2d at 445. See Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1985).

Defendant's plea resulted from a plea agreement in which two other charges involving marijuana had been dismissed. The instant crime involved the processing of approximately 600 pounds of marijuana which were to be sold at a price of $20 per pound. Some years earlier, the defendant had been convicted of possession of marijuana and theft, as well as several traffic violations.

The statute prescribed a sentence of not less than 1 year nor more than 20 years. A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. From the record presented to us no evidence of an abuse of discretion appears. The judgment of the district court is affirmed.

AFFIRMED.

CHARLES (DAN) LARABEE, APPELLANT, V. LAFI JAFARI, APPELLEE.
397 N.W.2d 22

Filed December 5, 1986. No. 85-773.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Thomas D. Wulff and John D. Hartigan, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Robert G. Decker, for appellee.

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

PER CURIAM.

This is an appeal from an order of dismissal on rehearing entered by the Nebraska Workers' Compensation Court. In entering its order the Workers' Compensation Court

acknowledged that there was a direct conflict in the testimony but concluded that the appellant, Charles (Dan) Larabee, was an independent contractor and therefore not entitled to compensation. The single assignment presented to us is whether the Workers' Compensation Court erred in failing to find that Larabee was an employee of Jafari at the time of his accident. Unless we are able to say as a matter of law that Larabee was an employee of Jafari, we are required to affirm the decision of the Workers' Compensation Court. In reviewing workers' compensation cases this court does not reweigh the facts. Our standard of review accords to the findings of fact made by the Nebraska Workers' Compensation Court after rehearing the same force and effect as a jury verdict in a civil case. Such findings will not be reversed or set aside unless clearly wrong. See *Smith v. Hastings Irr. Pipe Co.*, 222 Neb. 663, 386 N.W.2d 9 (1986). See, also, *Beavers v. IBP, Inc.*, 222 Neb. 647, 385 N.W.2d 896 (1986); *Oham v. Aaron Corp.*, 222 Neb. 28, 382 N.W.2d 12 (1986).

Furthermore, we have held that in testing the sufficiency of the evidence to support the 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. Every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can reasonably be drawn from the evidence. See *Hollinger v. Consolidated Motor Freight*, 223 Neb. 449, 390 N.W.2d 518 (1986).

We have reviewed the record and have determined that we cannot say as a matter of law that Larabee was an employee. Instead, consideration of all of the facts in the case could lead a court to conclude that Larabee was an independent contractor. See *Gregg v. Challburg*, 217 Neb. 143, 347 N.W.2d 559 (1984). Being unable, therefore, to say as a matter of law that Larabee was an employee, we affirm the decision of the Workers' Compensation Court.

AFFIRMED.

SANDRA F. EHRENBERG, APPELLANT AND CROSS-APPELLEE, V. DONALD LEE EHRENBERG, APPELLEE AND CROSS-APPELLANT.
397 N.W.2d 454

Filed December 5, 1986. No. 85-862.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed.

Virginia Koerselman of Mitchell & Demerath, for appellant.

Jewell, Gatz & Collins, for appellee.

Debra Stangl, guardian ad litem.

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

PER CURIAM.

This matter involves the dissolution of the marriage of the parties and the custody of the two minor children born to the parties as a result of the marriage. The trial court dissolved the marriage and awarded custody of the minor children to the appellant. It also granted reasonable rights of visitation to the appellee. The court has reviewed the record de novo and finds that the trial court did not abuse its discretion in awarding custody of the children to the appellant and permitting the appellee reasonable rights of visitation. See *Parsons v. Parsons*, 219 Neb. 736, 365 N.W.2d 841 (1985). The decision of the trial court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLAYTON KERN, APPELLANT.
397 N.W.2d 23

Filed December 5, 1986. No. 85-876.

1. **Venue: Appeal and Error.** A motion for change of venue filed pursuant to Neb. Rev. Stat. § 29-1301.01 (Reissue 1985) is addressed to the sound discretion of the trial court, whose ruling will not be disturbed absent a clear abuse of that discretion.

2. _____: _____. A trial court abuses its discretion in denying a motion for change of venue where the defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial.
3. _____: _____. The factors used to determine whether a change of venue should have been granted 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 areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn.
4. **Juror Qualifications.** A juror need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
5. **Trial: Evidence.** The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial judge.
6. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant other crimes, wrongs, or acts for all purposes except to prove the character of a person in order to show that such person acted in conformity with that character.
7. _____: _____. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) permits evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show defendant's propensity or disposition to commit the crime charged.
8. _____: _____. 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.
9. _____: _____. The admissibility of evidence concerning other crimes, wrongs, or acts must be determined upon the facts of each case.
10. **Rules of Evidence: Other Acts: Intent.** No exact limitation of time can be fixed as to when evidence of other crimes, wrongs, or acts tending to prove intent to commit the offense charged is remote.
11. **New Trial: Appeal and Error.** While any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish a defendant did not receive a fair trial, a new trial must be granted.
12. **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 trier of fact, and a finding made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
13. **Homicide: Intent.** Premeditation, or the design and purpose to kill, exists when the intent to kill is formed before the act causing the death, and not merely simultaneously with that act.
14. _____: _____. No particular length of time is required in order for

premeditation to exist; the time used in premeditating may be so short as to be instantaneous, and the intent to kill may be formed at any moment before the killing.

15. **Homicide: Intent: Trial.** Where first degree murder is charged, the elements of both premeditation and intent are for the jury.
16. **Verdicts: Appeal and Error.** After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustains some rational theory of guilt.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Bernard J. Ach and Patrick J. Craven, for appellant.

Robert M. Spire, Attorney General, and Dale A. Comer, for appellee.

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

CAPORALE, J.

A jury found defendant, Clayton Kern, guilty of first degree murder in violation of Neb. Rev. Stat. § 28-303(1) (Reissue 1985). He was thereafter so adjudged and sentenced to life imprisonment. The errors assigned to the district court question (1) its failure to grant a change of venue, (2) certain of its evidentiary rulings, and (3) its failure to find the evidence insufficient to prove the charge. The record does not sustain the errors assigned, and we therefore affirm the judgment and sentence of the district court.

Defendant had known for approximately a month prior to the killing that his wife, Theresa, intended to divorce him. Once he acquired that knowledge, defendant began treating his wife and adopted 11-year-old daughter, Laura, who was his wife's natural child, more kindly. He also asked Barbara Nigg, a close friend and neighbor, to help the couple reconcile.

When it became apparent that his wife would not reconsider her decision concerning the divorce, defendant searched for another living arrangement. While he continued to live with his wife at their Crete apartment, defendant had, on May 16, 1985, made a deposit for the rental of another apartment in the same city.

On the day of the killing, May 18, 1985, in the presence of defendant's nephew, Scott Kern, and Cherryl Woodard, one of Theresa Kern's sisters, defendant wrote a note which provided that in the event of his death Woodard was to receive any money owed to him by his employer. Defendant also stated he intended to have his employment insurance made payable first to Woodard, then to his daughter. He asked that in the event of his death Woodard give his wife $200 per month for the daughter's care. Upon his wife's death, Woodard was to use the money to care for the daughter. Defendant also told Woodard that she was to use part of the money to buy three burial plots and asked her to promise to bury him next to his wife.

On May 1, 1985, defendant had informed Woodard that he would rather see his wife dead than with anyone else. He also told another of his wife's sisters, Geraldine Deeringer, that he could not live without his wife and could not stand losing her. At another time during that month, "out of the clear blue," defendant had begun laughing and told Nigg he knew how to get even with his wife; he would get a spot next to where she was to be buried, and he would be buried beside her.

During the afternoon of the day of the killing, the daughter asked if she could spend the night with Woodard so that she could attend her cousin's graduation the next day. Defendant replied affirmatively, saying that he was going to let her stay at a friend's anyway if she had asked. The evidence also establishes that it was not unusual for the daughter to spend weekends with friends, and she had also not been at home the night before the killing.

Sometime before midnight on the night of the killing, defendant arrived at Woodard's residence in Ashland and wanted both Woodard and his daughter to come with him. After unsuccessfully attempting to arouse his daughter, defendant and Woodard got into defendant's automobile and began riding around. Once on the road, defendant told Woodard that he had killed his wife, stating that he had choked her to death back in their apartment when she had told him she was in love with another man. Woodard initially did not believe defendant and asked if he had been able to find a pulse. Defendant replied he had not checked for one. Woodard also

asked whether he had seen her sister's stomach move, and defendant replied that he thought he had.

Defendant and Woodard then proceeded to search for a telephone, and found one at a Greenwood bar. At the bar Woodard telephoned the Niggs and asked them to confirm whether her sister was in fact dead. Defendant then telephoned a friend, LeRoy Dimmitt, and told Dimmitt that he was in trouble because he thought he had killed his wife. Defendant also made arrangements for his nephew to come to the bar and pick up Woodard.

After those telephone calls had been made, defendant flagged down state patrolman Ronald Balthazor, who, in response to a telephone call placed by the bar owner, had been on his way to a "disturbance" at the bar. Defendant was highly agitated and began yelling, "I killed her, I killed her, I killed my wife with my own hands, I choked her to death." Defendant was then given the *Miranda* warnings, after which he stated to Balthazor that he was sure his wife was dead. When asked if he had given her any medical attention, he replied, "No, I killed her."

Defendant was later taken to the county-city jail in Lincoln for further questioning and was again given the *Miranda* warnings. According to Ronald Boardman, who questioned defendant in Lincoln, defendant stated that on the evening of the killing he and his wife had been at their apartment watching television and talking about their divorce. At what he believed to be 9 p.m., the wife said that they would make love one last time and left the room, returning undressed. While the couple was hugging and kissing, the wife told defendant she was still in love with another man. At that point defendant "lost it" and killed his wife. Defendant then carried the body into the bedroom, placed it on the bed, and planned to commit suicide. He got a knife from the kitchen, returned to the bedroom, and lay down beside his wife, but could not kill himself. Defendant then wrote a note, which was found on the headboard of the bed.

In the note defendant asked Woodard to forgive him and to take care of the things they had talked about. The note also said that while he and his wife were in bed, she said she and her lover

might get back together again, and when she said this he "just went nuts." The note went on to say he thought his wife might still be alive, and asked for help for himself and his wife if he should not succeed in his effort to kill himself. The note also observes that he was unable to kill himself. After writing the note, the defendant went to Woodard's house.

Robert Loveless, the wife's brother, testified he talked on the telephone with both defendant and his sister between 9 and 9:30 that evening and that both seemed normal.

The first assignment of error rests upon Neb. Rev. Stat. § 29-1301.01 (Reissue 1985), which provides:

> If any person shall commit an offense against the person of another, such accused person may be tried in the county in which the offense is committed, or in any county into or out of which the person upon whom the offense was committed may, in the prosecution of the offense, have been brought, or in which an act is done by the accused in instigating, procuring, promoting, or aiding in the commission of the offense, or in aiding, abetting, or procuring another to commit such offense.

The trial judge overruled the motion for a change of venue before the jury was selected. He reserved the opportunity, however, to rule differently later.

Defendant recognizes this court has ruled that a motion for change of venue filed pursuant to the foregoing statute is addressed to the sound discretion of the trial court, whose ruling will not be disturbed absent a clear abuse of that discretion. See, *State v. Heathman, ante* p. 19, 395 N.W.2d 538 (1986); *State v. Irish,* 223 Neb. 578, 391 N.W.2d 137 (1986); *State v. Navarrete,* 221 Neb. 171, 376 N.W.2d 8 (1985); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). *State v. Irish, supra*, further provides that a "trial court abuses its discretion in denying a motion for change of venue where the defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial." *Id.* at 583, 391 N.W.2d at 141. The factors used to determine whether a change of venue should have been granted due to pretrial publicity include:

"[T]he nature of the publicity; the degree to which the

> publicity has circulated throughout the community; the degree to which the publicity circulated in areas to which venue could be changed; the length of time between the dissemination of the publicity complained of and the date of trial; the care exercised and ease encountered in selection of the jury; the number of challenges exercised during the voir dire; the severity of the offense charged; and the size of the area from which the venire is drawn."

State v. Navarrete, supra at 173-74, 376 N.W.2d at 10 (quoting *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980)). Accord *State v. Heathman, supra*. Defendant invites us, however, to overrule those cases and in effect hold that a change of venue should be granted whenever a criminal defendant claims he cannot get a fair trial absent such a change, irrespective of what the evidence may show. We decline to do so, and adhere to the long-settled law of this state in considering this issue.

Defendant introduced three newspaper articles concerning the killing in support of his motion for a change of venue. Two of the articles were from Lincoln newspapers. They presented a small photograph of defendant and did little more than report the killing, the circumstances of the arrest, and the fact that a bond hearing had been held. The third article appeared in The Crete News and contained a number of photographs, including those of the defendant, his wife, the attorneys involved, and the entrance to the apartment at which the killing took place. The article gave some biographical information concerning those pictured, detailed the legal proceedings had to the date of publication, and gave the location and time of the funeral. The newspaper articles were all published within 10 days of the killing, and none contained any unduly inflammatory material.

Defendant also submitted eight affidavits in support of his motion. These documents concluded that because of The Crete News article and the community conversation about the killing, an impartial jury could not be selected.

Not only was the issue not raised during or after the jury was selected but no difficulty in selecting an impartial jury was experienced. Six of the jurors had no prior knowledge of the case. The remaining six had read newspaper accounts of the killing, but had either formed no opinion or indicated in

various ways that they could decide the case on the evidence. A juror need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court. *State v. Navarrete, supra; Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

The trial judge did not abuse his discretion in overruling defendant's motion for a change of venue, and there is therefore no merit to the first assignment of error.

This brings us to the second assignment of error, that the trial court erred in certain of its evidentiary rulings. We begin our analysis of this assignment by recalling that the admission or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986). Defendant argues the trial judge abused his discretion in a variety of respects.

The first of these claimed errors concerns the admission of the testimony of Carolyn Garber, defendant's wife at a former time. Garber testified that on March 18, 1975, after she had told defendant she was involved with another man and while the couple was living apart and in the process of divorcing, defendant broke into her trailer home and forced her into a bedroom, saying "if I can't have you, no other man can." He then placed a pillow over her face in an apparent effort to suffocate her. However, he stopped and began sobbing. When Garber tried to escape, defendant ran after her, caught her, threw her down, seized her throat, and attempted to choke her. She passed out, and when she came to, found she was alone.

At a later time, but before the divorce decree, defendant went to Garber's home with a gun and said he was going to kill her and then commit suicide. She told him she wanted to take the children to a neighbor and would return so they could talk. While on the way to the neighbor's, she heard a gunshot and called the police when she arrived at the neighbor's house.

Defendant argues that the foregoing evidence as to his conduct with Garber is so remote in time and dissimilar in circumstances as to not be admissible on the issue of his guilt of the crime with which he is charged in this case.

Neb. Rev. Stat. § 27-404(2) (Reissue 1985) 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.

It is well established that § 27-404(2) is an inclusionary rule permitting the use of relevant other crimes, wrongs, or acts for all purposes except 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 any purpose other than to show defendant's propensity or disposition to commit the crime charged. *State v. Robb, ante* p. 14, 395 N.W.2d 534 (1986); *State v. Hunt,* 220 Neb. 707, 371 N.W.2d 708 (1985); *State v. Stewart*, 219 Neb. 347, 363 N.W.2d 368 (1985); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). This rule predates the 1975 adoption of § 27-404(2). See, for example, *Sall v. State*, 157 Neb. 688, 61 N.W.2d 256 (1953); *Adams v. State*, 138 Neb. 613, 294 N.W. 396 (1940).

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. Hunt, supra; State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984); *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). At times, we have equated the foregoing more complete statement of the rule with language that there must exist "unique, almost 'signature-like' similarity between the charged crime and the other crimes." *State v. Dandridge*, 209 Neb. 885, 890, 312 N.W.2d 286, 291 (1981); *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983).

We have also observed 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. See, *State v. Hunt, supra; State v. Keithley, supra; State v. Ellis, supra.*

As the later discussion concerning the third assignment of error demonstrates in greater detail, defendant questions the adequacy of the evidence to establish that he either premeditated or intended the killing. That challenge distinguishes this case from *State v. Robb, supra*, which held evidence of a prior act less remote in time than those involved in the present case to be inadmissible. In *Robb* there was nothing to bring into question the assumption that one of sound mind intends the obvious and probable consequences of his or her voluntary acts. In the present case defendant asserted throughout that he neither planned the murder nor intended the obvious and probable consequences of his voluntary acts. Thus, how defendant responded in similar circumstances in the past is relevant on the issue of what he planned and intended in the present instance. The circumstances were sufficiently similar to make the evidence of his earlier conduct probative on the issue of his guilt of the offense charged. Defendant expressed much the same thought to Garber that he expressed to Woodard with respect to the victim in this case: if he could not have her, no other man could. In each instance his then wife was involved with another man. In each instance a divorce was pending. In each instance defendant resorted to the act of choking.

We recognize that Neb. Rev. Stat. § 27-403 (Reissue 1985) provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice. In that connection we conclude that in view of defendant's challenge to the presence of the requisite premeditation and intent and of the other evidence bearing on the issue, admission of defendant's attacks on Garber did not result in unfair prejudice to him.

Defendant also argues that the trial judge erred in at least 31 separate instances by admitting inadmissible evidence and in permitting prosecutorial misconduct by tolerating repetitive questioning which resulted in the admission of cumulative evidence. Defendant postulates correctly that while any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish a defendant did not receive a fair trial, a new trial must be granted. *State v. Davis*, 185 Neb. 433, 176 N.W.2d 657 (1970). The question, thus, is whether in the aggregate the claimed errors denied defendant a fair trial.

A study of the claimed errors reveals that in some instances either defendant's objection was sustained or the question was withdrawn by the prosecutor. The bulk of the remaining objections related either to the form of the question concerning evidence which was otherwise admissible or to the cumulative nature of the evidence sought. None of the cumulative evidence received was unduly inflammatory, and most of it related to the fact that defendant's wife was dead, a fact no one disputed. While it is true that once the death had been proved, no useful purpose was served by proving it again, it cannot be said that re-proving the death deprived defendant of any substantial right. The few substantive objections which were overruled elicited responses related to inconsequential matters not at issue, and therefore did not prejudice defendant.

We must conclude that the trial judge's evidentiary rulings did not constitute an abuse of discretion and did not deny defendant a fair trial. Thus, there is no merit to this assignment of error.

The third and last assignment of error questions the sufficiency of the evidence to support the conviction. Defendant does not claim he did not kill his wife, but does claim the evidence fails to demonstrate that he either premeditated or intended the killing.

In resolving the issue presented by this assignment, it must be remembered that 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 trier of fact, and a finding made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Moniz, post* p. 198, 397 N.W.2d 37 (1986); *State v. Ellis,* 223 Neb. 779, 393 N.W.2d 719 (1986); *State v. West,* 223 Neb. 241, 388 N.W.2d 823 (1986); *State v. Benzel,* 220 Neb. 466, 370 N.W.2d 501 (1985). See, also, *State v. Dondlinger,* 222 Neb. 741, 386 N.W.2d 866 (1986).

Premeditation, or the design and purpose to kill, exists when the intent to kill is formed before the act causing the death, and not merely simultaneously with that act. *State v. Jones*, 217 Neb. 435, 350 N.W.2d 11 (1984); *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978). However, no particular length of time is required in order for premeditation to exist; the time used in premeditating may be so short as to be instantaneous, and the intent to kill may be formed at any moment before the killing. *State v. Benzel, supra.*

The facts that defendant told Woodard he would rather see his wife dead than with another man, that he asked that his money be used to care for his daughter in the event both he and his wife died, and that he expressed the wish to be buried next to his wife certainly permit a rational finder of fact to conclude that defendant both premeditated and intended the killing. Defendant argues that what he wrote after the killing clearly demonstrates he "went nuts" and, presumably, acted without any thought at all. A rational, unbiased finder of fact, however, could well conclude that the note itself was a planned effort to obfuscate the premeditation and intent the other facts imply. The fact that defendant sounded normal to Loveless before the killing does not establish defendant was not harboring a plan to kill his wife at the time nor that such a plan did not come into existence after Loveless talked with defendant.

The question of premeditation was for the jury to determine, *State v. Benzel, supra*, as was the question of intent, *Ward v. State*, 58 Neb. 719, 79 N.W. 725 (1899). After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustains some rational theory of guilt. *State v. Moniz, supra; State v.*

Wilkening, 222 Neb. 107, 382 N.W.2d 340 (1986). See, also, *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983).

As the foregoing discussion demonstrates, there exists a rational theory of guilt; consequently, there is no merit to this last assignment of error.

AFFIRMED.

KRIVOSHA, C.J., concurring in the result.

I concur in the result reached by the majority in this case. I write separately, however, because I do not agree with the majority's view regarding the admissibility of evidence of other bad acts. As I read the record, Kern did not contend that he had not strangled his wife, but only that he had not done so with premeditation. I simply find it difficult to see how one may say that evidence that Kern attempted to suffocate a former wife 10 years ago or threatened to kill her could prove that a subsequent act was done with premeditation. The question as to whether premeditation exists is a fact question directly related to the specific case and not to previous behavior. It seems to me that the most that can be said is that the evidence was offered to show how Kern reacts to a particular situation; that is, to show that he acts in conformity with his character. That is specifically what Neb. Rev. Stat. § 27-404(2) (Reissue 1985) says cannot be shown.

The majority attempts to distinguish this case from our decision in *State v. Robb, ante* p. 14, 395 N.W.2d 534 (1986). I simply cannot see that distinction, or how this evidence was not offered simply to show that Kern acted in a way consistent with his character. I therefore believe that the evidence was inadmissible.

I concur, however, because I believe that no prejudice resulted from the introduction of this evidence. The evidence of guilt in this case was simply overwhelming. There was simply no question that Kern killed his wife by strangling her. He admitted to that fact. It is difficult to conceive how he could maintain that that was accidental under the facts of the case. He admitted placing his hands around his wife's throat and strangling her until she was dead. That establishes premeditation. See, *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983); *State v. Worley*,

178 Neb. 232, 132 N.W.2d 764 (1965). I therefore concur in the result reached by the majority.

COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEE, V. LYRIC COMPANY, INC., APPELLANT.

397 N.W.2d 32

Filed December 5, 1986. No. 85-960.

Employment Security Law: Independent Contractor. For the purpose of determining unemployment tax liability, the common-law definition of an independent contractor is superseded by the definition found in Neb. Rev. Stat. § 48-604(5) (Reissue 1984).

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed.

Lisa C. Lewis of Byrne, Rothery, Lewis, Bedel & Tubach, for appellant.

Jerry D. Slominski, for appellee.

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

WHITE, J.

This is an appeal from the Lancaster County District Court. The appellant, Lyric Company, Inc., was assessed unemployment taxes from September 1, 1983, through June 30, 1984. The unemployment insurance tax administrator found that Lyric did not meet the requirements for exemption from the payment of taxes set out under Neb. Rev. Stat. § 48-604(5) (Reissue 1984). Lyric appealed to the Nebraska Appeal Tribunal, which reversed the finding of the Department of Labor, holding that Lyric did meet the requirement for exemption from the payment of unemployment taxes. The Department of Labor appealed the decision of the Nebraska Appeal Tribunal to the Lancaster County District Court, which reversed the decision of the appeal tribunal and reinstated the decision of the Department of Labor. Lyric now appeals the decision of the Lancaster County District Court.

Lyric Company, Inc., is a wholesale costume jewelry and ladies' accessory business located in Omaha. Lyric has a local showroom and does some local business, but most of its business is done outstate as well as out of state by salespeople. The territories are fixed by Lyric for its sales staff and consist of a 300-mile area distant from the salesperson's focal point. The salespeople are hired in response to newspaper ads and are usually experienced, although they seldom have experience in the sale of jewelry. Lyric provides each salesperson with a set of samples, which remains the property of the company, and a list of customers in his or her territory. Lyric will, at the request of the salesperson, contact potential customers initially. Subsequent to the first season, the salesperson will be responsible for contacting customers and making appointments. No training or instruction is provided by Lyric.

Lyric does not require that its salespeople sell only its products. Salespeople may, and do, sell other products. Lyric places no limits upon the type of product which may be sold, and would permit its salespeople to sell jewelry or other ladies' accessories. The salespeople work out of their homes, and work on a straight commission basis. Limited amounts will be advanced on their commissions throughout the season. Should a customer fail to pay for an order, the commission of the salesperson will be reduced accordingly.

Lyric's business is seasonal. The first season runs from the first of January through the third week of April. The second season runs from the first of July through the second week in November. The samples are returned to Lyric at the end of each season, and the salespeople are provided with another set of samples at the beginning of the next season. Between seasons the salespeople are free to do whatever they want. The relationship may be terminated at any time by either party. If Lyric is unhappy with the performance of a salesperson, it simply will not provide that person with a new set of samples at the start of the next season. Lyric does not provide cars, gas, or any other expense. No taxes are withheld, nor is insurance paid by Lyric.

The appellant's assignments of error can be summarized as follows. First, that the district court failed to find that the

appellant, the Lyric Company, met parts A and C of the "ABC test" as set out in § 48-604(5). Secondly, the district court failed to follow the case of *State v. Saville*, 219 Neb. 81, 361 N.W.2d 215 (1985), which found that the ABC test can still be met despite the legislative narrowing of the exception. Finally, appellant finds error in the district court's refusal to limit the payment of unemployment taxes after February 11, 1984, the date on which the amended § 48-604(5) became effective.

Before we address the appellant's assignments of error, we note that in *Saville* we confined our analysis to the statutory definition set out in § 48-604(5). Here, too, we will adhere to the statutory definition, in view of the Legislature's statement that "[t]he provisions of this subdivision are not intended to be a codification of the common law and shall be considered complete as written."

Appellant's first assignment of error involves the failure of the district court to find that Lyric met parts A and C of the ABC test for exemption from unemployment taxes as set out in § 48-604(5). This statute defines what constitutes an independent contractor, as follows:

> Services performed by an individual for wages shall be deemed to be employment, unless it be shown to the satisfaction of the commissioner that (a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact, (b) such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and (c) such individual is customarily engaged in an independently established trade, occupation, profession, or business. The provisions of this subdivision are not intended to be a codification of the common law and shall be considered complete as written.

The Department of Labor concedes that part B of the test is met by the appellant; therefore, we may confine our analysis to parts A and C.

The two cases which are most clearly applicable to this case

and are relied heavily upon by the parties to this appeal are the cases of *State v. Saville, supra*, and *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). The independent contractors in *Saville* were retained by the Department of Social Services. These "service providers" were assigned to a recipient of the services by the Department of Social Services. The department retained no control over the method by which the services were performed, except to require that the work be done in a workmanlike manner. There, we found that part A of the ABC test had been met.

In the *Erspamer* case we also found that the salespeople in question were independent contractors. There, however, we used the common-law analysis in coming to our conclusion, which we now no longer use in view of the statutory definition set out by the Legislature as found in § 48-604(5). *Saville, supra.*

The cases from outside Nebraska cited to us by the appellant lend insight to its position. In *Industrial Com'n v. Farm and Home Food Service, Inc.*, 5 Ariz. App. 339, 426 P.2d 808 (1967), the salespeople involved were permitted to work for other companies, paid all of their own expenses, arranged their own financing, and could hire their own employees to sell the merchandise. Compare this case to the case of *Superior Cablevision v. Indus. Com'n*, 688 P.2d 444 (Utah 1984), in which the persons involved were clearly not independent contractors. Here, the relationship was contractual, weekly payment forms were required, and insurance was paid upon the installers. They were required to wear T-shirts bearing the company name and address and to drive a white van provided by Cablevision.

The district court in the instant case held that part A had not been met because the territory of the salespeople had been defined by Lyric and the prices were set by Lyric, and the district court found what it considered to be a de facto sales quota. We disagree, looking instead to the language of the administrative law judge who heard this case on appeal to the Nebraska Appeal Tribunal, with reference to part A:

> A finding of "independent contractor" status must be supported by three findings. The first test is "control".

> An independent contractor must be free from control both contractually and in fact. Lyric Company, Inc. did not exert an employee's [sic] control over these salespeople. The salespeople had no set hours, no set duties, no reporting responsibility, and very little instruction and training. They were left to sell or not sell, to exert effort or not, as they determined.

We disagree with one aspect of the appeal tribunal's analysis, in that we can find no evidence in the record of *any* training or instruction provided by Lyric to its employees. We find that the lack of control exerted by Lyric over its salespeople in light of the above-cited case law places them well within part A.

Moving next to part C of the ABC test, we note that the record makes apparent that the Lyric salespeople were permitted to work for whomever else they wanted. The record reveals that the Lyric salespeople did in fact sell goods other than those sold for Lyric.

The district court relied upon the following definition of part C as rendered by the Vermont Supreme Court in the case of *In re Bargain Busters, Inc.*, 130 Vt. 112, 119, 287 A.2d 554, 559 (1972):

> "The adverb 'independently' clearly modifies the word 'established', and must carry the meaning that the trade, occupation, profession or business was established, independently of the employer or the rendering of the personal service forming the basis of the claim. The present tense 'is' indicates the individual must be engaged in such independent activity at the time of rendering the service involved. . . ."

From this language the district court concluded that Lyric did not meet part C of the ABC test. It stated:

> It does not contemplate a case such as the present one where the business itself exists only by virtue of a contract drawn up by the company. It would be possible for a jewelry salespeson [sic] to be customarily engaged in an independently established business if he obtained the jewels from several different sources with no strings attached. Here, however, the salespersons did not even get possession of the goods, but instead forwarded orders of

the defendant, Lyric Company, Inc. . . . .

The district court appears to interpret § 48-604(5) somewhat differently than we have interpreted the section in the past. In *State v. Saville*, 219 Neb. 81, 87, 361 N.W.2d 215, 220 (1985), with reference to part C, we stated:

> And, finally, part C provides that "such individual is customarily engaged in an independently established trade, occupation, profession, or business." Oldfield may work exclusively for welfare recipients or may work in part for welfare recipients and in part for others. But with the simple restriction that Oldfield may not subcontract the work, there are no other restrictions as to how many "employers" she may have. Moreover, we are impressed by the fact that Welfare provides nothing to this individual, either by way of equipment or benefits, except the payment for services billed to Welfare, much in the same way as Welfare pays all other vendors of goods and services.

The facts of this case would fall well within the *Saville* interpretation; as we stated earlier, the salespeople were able to work for whomever else they pleased and, as in *Saville*, were provided with no benefits or aid from Lyric.

Finding that parts A and C of the ABC test are met, along with the parties' conclusion that part B is met, we find that Lyric's salespeople are independent contractors under the ABC test set out in § 48-604(5). In view of this finding we need not address the appellant's second and third assignments of error. We reverse.

REVERSED.

MICHAEL D. VITOSH, APPELLANT, V. CLARA M. VITOSH, APPELLEE.

397 N.W.2d 35

Filed December 5, 1986. No. 86-072.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

James G. Sharp of Everson, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellant.

James M. Kelley of Professional Legal Associates of Nebraska, P.C., for appellee.

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

PER CURIAM.

Michael D. Vitosh appeals a judgment of the district court for Gage County authorizing his former wife, Clara, to remove their daughter from the state and denying his application for a reduction in child support.

We have reviewed the record de novo, as we are required, to determine whether the district court abused its discretion. See, *Maack v. Maack*, 223 Neb. 342, 389 N.W.2d 318 (1986); *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986). Our review leads us to the conclusion that the district court did not abuse its discretion, and therefore the judgment entered by the district court should be affirmed.

The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF P.W., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. R.W. AND G.W., APPELLANTS.

397 N.W.2d 36

Filed December 5, 1986. No. 86-177.

Appeal and Error. Where the appellant's brief assigns no error or fails to make references to the record, the judgment of the lower court will be affirmed, absent any plain error the Nebraska Supreme Court may note.

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

Charles M. Meyer, for appellants.

Patrick Kelly, Sarpy County Attorney, and Lawrence D. Gendler, for appellee.

Lyn Ferer and, on brief, Deborah S. Ortman, guardians ad litem.

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

PER CURIAM.

The separate juvenile court adjudged the subject 15-year-old to be within the purview of Neb. Rev. Stat. § 43-247(3)(a) and (b) (Reissue 1984) and placed her care and custody in and with the Department of Social Services. The brief filed in this court by the appellant parents fails to make specific assignments of error as required by Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). The brief further fails to make any references to the record as required by Neb. Ct. R. of Prac. 9D(1)f (rev. 1986). Under either of those circumstances, the judgment of the lower court will be affirmed, absent any plain error this court may note. *Leisy v. Lisco State Bank,* 223 Neb. 946, 395 N.W.2d 517 (1986); *State v. Eckstein,* 223 Neb. 943, 395 N.W.2d 515 (1986). Accordingly, the judgment of the separate juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH P. MONIZ, APPELLANT.

397 N.W.2d 37

Filed December 5, 1986. No. 86-186.

1. **Criminal Law: Appeal and Error.** The factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
2. **Homicide: Self-Defense.** One who knows he or she may retreat with complete safety may not resort to the use of deadly force in self-defense.
3. **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 trier of fact, and a finding made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. _____: _____. A finding of guilt may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if that evidence sustains some rational theory of guilt.
5. **Homicide: Evidence: Proof.** In second degree murder cases malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Affirmed.

S.J. Albracht, for appellant.

Robert M. Spire, Attorney General, and Mark D. Starr, for appellee.

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

CAPORALE, J.

Following a bench trial, defendant, Joseph P. Moniz, was found guilty of second degree murder in violation of Neb. Rev. Stat. § 28-304 (Reissue 1985) and sentenced to life imprisonment. His three assignments of error raise two issues: (1) whether the killing was justifiable as having been committed in self-defense; and, if not, (2) whether the evidence supports a conviction for second degree murder. We affirm.

Defendant testified that he, an unemployed, disabled man suffering from back problems and emphysema, and decedent, Gerald Jump, a younger, robust individual, had been longtime

friends and had been standing at the bar of the Horseshoe Lounge in Walthill visiting and buying each other drinks. All at once decedent turned to defendant and said, "You ugly Son-of-a-Bitch, I'm going to whip you." Decedent continued "picking" on defendant and bragged about how he had "whipped" defendant's son and could "whip" any of the Monizes. Defendant then rejoined his daughter, Tracy Moniz, her boyfriend, Fred Appleton, and defendant's nephew, Frank Stabler, at a booth. Decedent went over to the booth on three separate occasions, "cussing" and "laughing" at defendant and sticking his fingers into defendant's drink. While this caused defendant to stand up so as to face decedent, there was no hitting or pushing, and defendant and Stabler ultimately left the lounge. However, because defendant had left the keys to his car at the booth, he beckoned through the picture window at the front of the lounge to his daughter to come outside so that he could retrieve his keys.

Once at home, defendant and Stabler decided they wanted more beer, so they drove back to the lounge. Although defendant expected no more trouble because he thought decedent would have left the lounge by that time, he nonetheless asked Stabler to go in the lounge and get the beer while he remained in the car. Decedent and his friend, Mark Morgan, then came out of the lounge. Decedent started toward defendant while defendant was still in the car, but Morgan pulled decedent back onto the sidewalk. Defendant, who had by this time gotten out of his car, was struck about the head several times by decedent. Becoming afraid decedent, who had a reputation for being a mean fighter, was going to cripple him, defendant took out his knife, an instrument with a 4- to 5-inch locking blade, and "just started cutting."

There was other evidence, however, from which the trier of fact could find that all was peaceful in the lounge for approximately 30 minutes after defendant returned to the booth. Defendant and decedent then began to argue with each other across the room. Decedent went over to defendant's booth at least twice, during which encounters some shoving occurred. The bartender, Donald French, his nephew, Tim French, and Morgan attempted to separate defendant and

decedent and stop the argument. Finally, at approximately 11 p.m., the bartender asked defendant to leave. By this time defendant and decedent had been at the lounge approximately 5 hours.

Once outside the lounge, defendant, as he passed in view of the large picture window in the front of the lounge, made a motion with his hands toward someone, presumably decedent, which suggested that defendant wanted decedent to come outside. No one responded, except that Tim French went outside to again ask defendant to leave because he did not want any more trouble at the lounge. French further testified that at this time defendant replied that there was going to be trouble because he was going to "gut" decedent. Defendant then walked toward his home, while decedent remained in the lounge and continued to drink.

Approximately 30 to 40 minutes later, defendant's son, "Young Joe" Moniz, went into the package area of the lounge. Tim French testified that Young Joe wanted decedent outside for a fight but that French restrained Young Joe from entering the bar area. By this time defendant and Stabler had returned in defendant's car and parked outside the lounge.

Decedent finished his drink, took off his glasses and possibly his hat, laid them on the bar, and started for the door. Decedent stated he was "going to have to take care of this matter." Morgan and the Frenches attempted to keep decedent from leaving the lounge, but decedent said he was going home and that they could not stop him from doing that. Morgan accompanied decedent as he left the lounge, and the bartender called the police.

A fight involving decedent, defendant, Morgan, Stabler, and Young Joe then began outside the lounge. The Frenches and Morgan testified that as decedent and Morgan exited the lounge, both defendant and Stabler got out of the car and started toward the two men. Although all of the men were bunched together in the scuffle, the first "challenge" appeared to have been between Young Joe and decedent. Defendant was struck on the face by decedent, perhaps as the result of defendant's stepping in front of a punch intended for Young Joe. Defendant then grabbed decedent by the collar and shoved

him toward a wall.

At some point in the scuffle defendant pulled out his knife. According to Morgan, defendant repeated two or three times to decedent, "I'm going to gut you," and when Morgan tried to take the knife from defendant, defendant repeated the same to Morgan. Decedent had no weapon. Morgan saw defendant strike decedent three times in the face with the knife. Defendant may also have stabbed decedent in the stomach. At some point after decedent had been cut, he uttered something to the effect, "This is not funny, Joe, quit it, I can hurt you too," or "You think that is funny, huh?" Finally, decedent fell into the doorway of the building.

Morgan testified that after decedent fell, Young Joe stated, "It is over with now." Defendant and Stabler then got into defendant's car and drove away.

Decedent died from the loss of blood which resulted from three stab wounds in the left chest, one stab wound beneath the right rib margin, and one stab wound in the back. Decedent also suffered face lacerations. Defendant suffered face abrasions and a cut inside his lower lip.

The sheriff testified that, in discussing the matter with him following his arrest, defendant admitted he had stabbed decedent and that he knew he had done wrong and had to pay for it. Defendant also told the sheriff that he was in his car when the decedent "started in" on him and that he asked decedent to leave him alone. When the decedent "popped him" in the mouth, defendant warned decedent he would "cut him."

The first issue, whether the killing was justifiable self-defense, rests upon Neb. Rev. Stat. § 28-1409 (Reissue 1985), which provides in part:

> (1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is

> necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
>
> . . . .
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . .

In reviewing this matter we must bear in mind that the factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. See, *State v. Williams, ante* p. 114, 396 N.W.2d 114 (1986); *State v. Goodon,* 219 Neb. 186, 361 N.W.2d 537 (1985); *Bordeau v. State,* 125 Neb. 133, 249 N.W. 291 (1933).

Defendant's own version of the occurrence provides ample basis for the trial judge's conclusion that the killing was not justifiable self-defense. Defendant himself testified that he was in his car when he saw decedent start toward him. Defendant also saw decedent being pulled back by Morgan, knew that he and decedent had spent 5 hours arguing with each other, and by his own words knew decedent was a mean fighter. Defendant also knew he could avoid the necessity of using force with complete safety by retreating as contemplated by § 28-1409(4)(b). All defendant would have needed to do to retreat was to lock and remain in his car or to drive away.

In a similar case, *State v. Kuntzelman*, 215 Neb. 115, 337 N.W.2d 414 (1983), this court concluded it was not error to refuse to instruct the jury as to the elements of self-defense. In *Kuntzelman* the victim and his companions had been harassing the defendant and a group of his companions. During the chain of events leading to the killing, the defendant and his friends had locked the doors of the van in which they were traveling and had fled from the victim and his friends. After concluding that another friend had been left behind and might be in danger, the defendant secured a shotgun and returned with the others to the earlier scene. The victim and his companions were still at the scene. The defendant discharged the shotgun twice into the air and shouted "get out of here." The victim then began advancing on the defendant, stating, "You haven't the courage to shoot me." Defendant proved the victim wrong by shooting him from a distance of 12 to 14 feet. In reaching its decision this court

relied in part on the fact that the defendant could have retreated to the safety of his van.

Since there is evidence to support a factual finding that defendant knew he could avoid the necessity of using force with complete safety by retreating, the trial judge's conclusion with respect to the first issue is not clearly wrong, and, thus, that issue is resolved adversely to defendant.

In connection with the remaining issue, defendant argues that while the evidence may establish he committed manslaughter, it falls short of establishing he committed murder in the second degree.

Section 28-304 provides that one commits murder in the second degree if he or she "causes the death of a person intentionally, but without premeditation." Neb. Rev. Stat. § 28-305 (Reissue 1985) provides that one commits manslaughter if he or she kills another "without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."

In making our analysis we are guided by the principle that 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 trier of fact, and a finding made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Kern, ante* p. 177, 397 N.W.2d 23 (1986); *State v. Baker, ante* p. 130, 395 N.W.2d 766 (1986); *State v. Borchardt, ante* p. 47, 395 N.W.2d 551 (1986). Further, a finding of guilt may not, as a matter of law, be set aside on appeal for insufficiency of the evidence if that evidence sustains some rational theory of guilt. See, *State v. Kern, supra; State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985). Thus, we concern ourselves not with whether the evidence would have supported a conviction for manslaughter but whether it supports a conviction for the degree of murder the trial judge as the trier of fact found to exist.

We have held that the essential elements in the crime of murder in the second degree are that the killing be done

purposely and maliciously. *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). Malice, in the context of second degree murder, has been said to denote that condition of mind which is manifested by the intentional doing of a wrongful act without just cause or excuse, *State v. Rowe, supra*, and to be " 'any willful or corrupt intention of the mind.' " *Housh v. State*, 43 Neb. 163, 168, 61 N.W. 571, 572 (1895).

In arguing that the evidence fails to show the killing of the decedent to have been purposeful and malicious, defendant overlooks the fact that these elements may be inferred from the evidence relating to the circumstances of the criminal act. See, *State v. Rowe, supra; State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979).

There is evidence that defendant made a conscious decision to "gut" decedent and did precisely that. That circumstance alone supports the conclusion that the killing was the intentional result of defendant's willful act of attacking decedent with a knife. Thus, the evidence supports a finding that the killing was done purposely and maliciously.

The judgment and sentence of the district court are therefore affirmed.

AFFIRMED.

GRANT, J., dissenting in part.

I agree with the holding of the court that defendant's act of killing was not justifiable as self-defense. I dissent from the holding of the court affirming the trial court's determination that defendant's act constituted second degree murder.

This court has stated that " 'malice and intent may be inferred from the evidence relating to the circumstances of the criminal act.' " *State v. Rowe*, 214 Neb. 685, 690, 335 N.W.2d 309, 313 (1983). The malice sufficient to support a finding of guilt in the second degree murder in the *Rowe* case was shown by the victim's fractured skull, a potentially lethal injury, which, however, did not cause death because the victim (Rowe's wife) bled to death from a large incision from below the breastbone to the pubic area and the partial amputation of the victim's left breast.

In *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977), cited in *State v. Rowe, supra*, a conviction of murder in the

second degree also was affirmed. In *Partee* the finding of defendant's malice was based on the fact that the victim (the wife of Partee) was "brutally and relentlessly beaten, and part of her scalp was torn away." 199 Neb. at 312, 258 N.W.2d at 639.

In this case the relationship of defendant and decedent as friends disintegrated, after 5 or 6 hours of drinking, into a drunken brawl resulting in this senseless killing. In my opinion, as a matter of law, the 62-year-old debilitated defendant displayed no more "malice" toward the 31-year-old robust decedent than that displayed by any participant in such an unevenly matched brawl or "sudden quarrel." Defendant did not display malice which would warrant a conviction of second degree murder.

In my opinion defendant was guilty of the crime of manslaughter and should have been sentenced accordingly.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. DAVIS, APPELLANT.

397 N.W.2d 41

Filed December 5, 1986. Nos. 86-291, 86-292.

1. **Trial: Evidence: Stipulations: Waiver.** An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted, so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.
2. _____: _____: _____: _____. A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact, binding on the party making the same as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.
3. _____: _____: _____: _____. Parties are bound by stipulations voluntarily made, and relief from such stipulations after judgment is warranted only under exceptional circumstances.
4. _____: _____: _____: _____. An accused may by stipulation waive the necessity of proof of all or any part of the case which the State has alleged against him and having done so, he cannot complain of evidence which he has stipulated into the record.

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Affirmed.

Frank Shoemaker, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

KRIVOSHA, C.J.

The appellant, James A. Davis, was charged in two separate informations with receiving or retaining stolen movable property belonging to another and having a value of more than $1,000, in violation of Neb. Rev. Stat. § 28-517 (Reissue 1985). The property in case No. 86-291 consisted of seven head of Holstein calves, while the property in case No. 86-292 consisted of a stock trailer. The sole issue as presented to us in this appeal by Davis is whether the property seized in each of the cases was obtained as a result of an illegal search and seizure in violation of Davis' rights under U.S. Const. amend. IV or Neb. Const. art. I, § 7. While our review of the record causes us to believe that the property was not illegally seized, because of action voluntarily taken by Davis at trial, we need not reach that issue in affirming the conviction and sentence.

During the week of June 4, 1984, 17 hogs and a stock trailer were stolen from a site in Phillips County, Kansas. The sheriff of Harlan County, Nebraska, received information to the effect that Davis had brought two of the stolen hogs into Orleans, Nebraska, to be butchered. On June 12, 1984, the sheriff contacted a member of the Nebraska State Patrol and relayed the information to him. On June 14, 1984, another member of the Nebraska State Patrol advised that he had driven past a farm located near Hendley, Nebraska, and had seen a blue stock trailer. The Nebraska State Patrol then contacted the sheriff of Furnas County, Nebraska, and advised him that there was a blue stock trailer located on property occupied by Davis and asked the sheriff to conduct a further investigation. The Furnas County sheriff drove west along the county road, past the Davis property. As he did so, he observed the trailer. He

turned around and parked on the side of the county road. Using a spotting scope to look for markings, he noticed there was no license plate on the trailer. He then pulled into the driveway and walked around to the east side of the house to where children were playing. He asked them if their parents were home, and, when they responded they were not, he walked around to the north side of the house. He then proceeded to the northwest, where he checked the trailer for identifying marks. Mrs. Davis then arrived. He told her he was "checking" the trailer because he believed it was stolen. The sheriff testified that Mrs. Davis disclaimed any knowledge of the trailer and told the sheriff to "do whatever [he] had to do."

The sheriff of Phillips County, Kansas, was summoned and asked to drive to the location in order to identify the trailer, which, by that time, had been pulled out near the road. When the sheriff of Phillips County, Kansas, arrived, he checked the trailer and, while doing so, mentioned to the Furnas County sheriff that calves in the fenced-in area in the southeast corner of the property were similar to those reported stolen in Kansas. The Furnas County sheriff informed Mrs. Davis that he was taking the trailer and that he would be back the next day because he believed the calves were stolen and he wanted the owner to identify them. He also testified that he asked Mrs. Davis if he could take the trailer and that she said he "could go ahead and take it because she had no knowledge of it."

On the following day the sheriff returned, accompanied by the Kansas sheriff, a brand inspector, and the owner of the calves. The Furnas County sheriff told the others to wait by the road while he went to the house and spoke to Mrs. Davis. He asked for permission to search. She asked what rights she had. He explained that she did not have to let them search; that he could get a search warrant. Following their conversation, Mrs. Davis signed a form granting the sheriff permission to search the property. The calves were then identified by the owner and taken from the premises. Davis was subsequently arrested and charged with each of the crimes.

On December 9, 1985, Davis appeared with counsel in the district court for Furnas County, Nebraska, and voluntarily waived trial to a jury. The charges in another case, involving the

theft of a lawnmower and a Rototiller, were dismissed, and the two remaining charges involved in this appeal were tried to the court.

Davis, through his counsel, renewed a motion to suppress which had previously been overruled by the district court. The court, once again, overruled the motion to suppress, and the case proceeded to trial on a stipulation of facts. None of the property seized was offered in evidence, but Davis did *stipulate* in open court that he had received the property identified, that the property had been stolen, that he knew the property was owned by others and was stolen, and that he lacked the intent to restore the property to its rightful owners. He further stipulated that the value of the property in each case was more than $1,000.

Specifically, in case No. 86-291 Davis stipulated that he "received the seven Holstein calves owned by Marvin VandeerVeen [sic] with the knowledge or belief that said seven Holstein calves were stolen and that James A. Davis lacked the intent to restore the Holstein calves to the said Marvin VandeerVeen [sic]." In case No. 86-292 he specifically stipulated that he "received the stocktrailer owned by Leo Goodale with the knowledge or belief that said stocktrailer was stolen and that James A. Davis lacked the intent to restore the stocktrailer to the said Leo Goodale." Additionally, he stipulated that the owners of the property identified the property which had been removed from their respective premises without their consent or permission.

As we have already indicated, we believe that the search and seizure can be held valid on a number of various grounds. We do not, however, reach that question in light of the record presented to us. Davis, having stipulated in open court, without objection, to all of the relevant facts necessary to convict him of the crimes charged cannot now claim error.

Based upon the stipulation made to the court, a prima facie case was made in each of the actions then pending before the court. There was nothing more for the court to do than to find Davis guilty of both charges. His guilt, however, was based upon the stipulation of facts and not upon any evidence acquired by reason of the alleged illegal search and seizure. As

noted by the eminent authority Wigmore in his work on evidence:

> An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it.

9 J. Wigmore, Evidence in Trials at Common Law § 2588 at 821 (J. Chadbourn rev. 1981). And in 31A C.J.S. *Evidence* § 381 at 923 (1964), the author notes:

> A concession or stipulation as to a fact made for the purpose of trial has the force and effect of an established fact binding on the party making the same, as well as on the court, unless the court in its reasonable discretion allows the concession to be later withdrawn, explained, or modified if it appears to have been made by improvidence or mistake.

None of the exceptions, of course, are applicable in the instant case.

This general authority is in accord with the law in this jurisdiction. In the case of *State v. Wells*, 197 Neb. 584, 249 N.W.2d 904 (1977), the petitioner appealed from a determination on an annual review that petitioner was still a sexual sociopath as defined by the law then in existence. In particular, he assigned as error evidence regarding a 1953 rape which he had earlier stipulated to during trial. In rejecting the argument we said at 591, 249 N.W.2d at 908:

> There is a compelling reason to uphold the 1953 rape conviction, if it were an issue herein, without further argument. Defendant's retained counsel in open court stipulated to that conviction when attention was called to the definition of a sexual sociopath in section 29-2909, R.R.S. 1943.

Although Davis had earlier reserved his objection to the court's ruling on his motion to suppress, when the court again overruled his motion at trial, he stipulated without objection to the facts upon which the conviction was based. He cannot have

it both ways. He cannot, on the one hand, admit to the facts and, on the other hand, maintain that the court should not have considered the facts. Such stipulations are binding on the parties.

In *Martin v. Martin*, 188 Neb. 393, 398, 197 N.W.2d 388, 391 (1972), we said: "Parties are bound by stipulations voluntarily made and relief from such stipulations after judgment is warranted only under exceptional circumstances."

Even if we were to hold that the search violated Davis' fourth amendment rights (which we do not do), we would be unable to afford Davis any relief in view of the fact that he was convicted not upon the evidence seized but, rather, upon his own voluntary stipulation as to the facts.

The Illinois Supreme Court, in a case not dissimilar to the instant case, reached a similar conclusion. In the case of *The People v. Hare*, 25 Ill. 2d 321, 324, 185 N.E.2d 178, 179 (1962), the court said:

> This court has held that an accused may by stipulation waive the necessity of proof of all or any part of the case which the People have alleged against him and that having done so, he cannot complain in this court of evidence which he has stipulated into the record. (*People v. Polk*, 19 Ill.2d 310; *People v. Pierce*, 387 Ill. 608; *People v. Malin*, 372 Ill. 422.)

A case nearly on point with the instant case is *People v. Sanders*, 55 Ill. App. 3d 178, 370 N.E.2d 1213 (1977). In the *Sanders* case the defendant was charged and convicted of armed robbery. Prior to trial, a hearing was held on his motion to suppress certain statements which he had made while in custody following his arrest. The motion was overruled, and the parties proceeded thereafter to trial. At the trial Sanders' counsel informed the court that Sanders had entered into a plea negotiation with the State, in which certain of the charges would be dropped if Sanders pled guilty to certain other charges. Before, however, accepting the plea, the defendant inquired whether his entry of a guilty plea would terminate his right to appeal from the trial court's denial of his suppression motion. A recess was called in order to explore the problem. When court reconvened, it asked defense counsel whether he

had "something that will preserve [the defendant's] right to appeal." The defense counsel responded in the affirmative, indicating that he and the defendant had discussed the matter and agreed that the prosecutor could "tender an offer of proof to the court." The prosecutor then stated that he "would offer, and [he] understood that the defense will stipulate [to] the evidence presented at the defendant's preliminary hearing, also the evidence presented at the motion to suppress that we had last week." Also presented was the statement of facts which the prosecutor had recited a few minutes before the recess was called.

At this point defense counsel volunteered that the prosecutor was correct and that the defense would stipulate to the State's proof in the case, waive trial by jury, and allow the court to accept the stipulation and testimony at the earlier proceedings "as evidence."

On appeal Sanders raised the issue regarding the suppression of evidence. After review the court held that the evidence had been obtained in violation of Sanders' fourth amendment rights. Nevertheless, the court refused to reverse the conviction, saying in *People v. Sanders, supra* at 185, 370 N.E.2d at 1218:

> The general rule is that an accused "may by stipulation waive the necessity of proof of all or any part of the case which the People have alleged against him and that having done so, he cannot complain * * * of evidence which he has stipulated into the record." [Citations omitted.] To allow the defendant to escape the application of this rule on the record herein would enable him to avoid the effect of the stipulation which he agreed to make on two of the charges against him, while accepting the benefit of the State's agreement to dismiss the other two charges. This would be an incongruous and unacceptable result. [Citation omitted.] We therefore apply the rule that the defendant is bound on appeal by the stipulation which he freely and knowingly entered into at trial, and hold that any error by the trial court in failing to suppress the statement which the defendant gave the detectives, Bland and Fegan, could not have affected the outcome of the case as presented and was, therefore, harmless error beyond any reasonable

doubt.

To the same extent, we believe that, by stipulating to the facts, Davis has waived any alleged error, and we therefore affirm the convictions and sentences.

AFFIRMED.

LESTER H. KAHL, APPELLANT, V. TED FREDERICK, SR., APPELLEE.
397 N.W.2d 46

Filed December 5, 1986. No. 86-333.

1. **Damages: Evidence.** The plaintiff must present sufficient evidence to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness.
2. **Courts: Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm.

Appeal from the District Court for Boyd County: EDWARD E. HANNON, Judge. Affirmed.

Thurman Gay of Strope, Gay & Krotter, for appellant.

Thomas M. Maher of Maher and Arendt, and Mark Kozisek of Palmer and Kozisek, for appellee.

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

PER CURIAM.

This case involves a controversy concerning a contract for the care and training of racehorses owned by the plaintiff, Lester H. Kahl, and placed in the care of the defendant, Ted Frederick, Sr.

In March 1984 the parties entered into a written contract which provided as follows:

> Agreement between ted Frederick & Les Khal [sic] owener [sic] of T.B. Horses to be trained by "me" & Bob assitant [sic] trainer Hauling to Nebr. all vet. Bills, shoeing

expenes [sic] on Hauling horses to race meets. Pro-rated Per Horse at 10 cents per mile. Fees are to be $10.00 Per Hd per day while at the ranch or $15.00 Per day at track Plus 10% of all Earnings. Stake race fees shall be Paid by Les. if "I" ted cripple more then [sic] three out of 15 head that are sound when brought to me we will not charge for those horses.

/s/OK L A Kahl /s/Ted Frederick
/s/Robert Frederick

On April 4, 1984, 12 horses were delivered to Frederick in Nebraska. Thirteen others were delivered on May 15, 1984. Following a disagreement over Frederick's June and July billings, Kahl refused to pay for any of the horses' training or maintenance subsequent to July 31, 1984.

After Kahl paid the July billing, nine of the horses in Frederick's possession were sent to a stud farm in Minnesota, at Kahl's direction.

On November 9, 1984, Rocket Pacer, a horse then in Frederick's possession, was destroyed after being injured in a race at Lincoln, Nebraska. On December 28, 1984, Frederick sent Kahl a certified letter demanding payment of $19,329.02, or the horses in Frederick's possession would be sold at public auction on January 21, 1985, in Platte, South Dakota.

The plaintiff then commenced this action to recover possession of the horses and damages for breach of contract. The case was tried to the court on the third amended petition, filed January 8, 1986, and an answer and counterclaim that does not appear in the record. At the end of the plaintiff's evidence, the trial court sustained the defendant's motion for a directed verdict as to the cause of action for breach of contract. At the close of the defendant's evidence, the trial court sustained the plaintiff's motion for a directed verdict as to the second cause of action of the counterclaim.

The trial court found that the plaintiff was entitled to relief on his first cause of action and that the defendant was entitled to recover $18,331.50 from the plaintiff.

The plaintiff has appealed and contends the trial court erred

in sustaining the defendant's motion for a directed verdict as to plaintiff's second cause of action.

The plaintiff alleged that in addition to the terms set out in the written agreement, there were certain oral agreements which the defendant had breached. The plaintiff sought $1 million in special damages as compensation for the death of Rocket Pacer, the horse which was destroyed, and general damages for the decrease in value of his horses due to the defendant's alleged breach of the contract.

In sustaining the defendant's motion for a directed verdict as to the second cause of action, the trial court stated:

> Well, in my opinion the person who agisters a horse is not the insurer of the horse, that there must be — you might debate on the standard of care required, but I don't think that just having moved a horse to Lincoln and assuming that it is wrongful would be the justification would impose liability for the death of the horse. That there is no proof of negligence. There is no proof of any other theory of liability and therefore I sustain the motion and direct the verdict in favor of the defendant and against the plaintiff on the second cause of action.

At the time the plaintiff rested and the motion for a directed verdict was sustained, the evidence consisted only of testimony by the plaintiff. A part of the plaintiff's burden was to introduce sufficient proof of damages to permit a recovery. The plaintiff must present sufficient evidence to allow the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness. *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985).

The only evidence as to damages introduced by the plaintiff related to Rocket Pacer, the horse that was destroyed after being injured in a race at Lincoln, Nebraska.

Although the plaintiff alleged that Rocket Pacer had a true market value of $1 million, no satisfactory evidence was presented on this issue. The closest the plaintiff came to giving an opinion on the horse's value was on cross-examination:

> Q. All right. And this is a horse that in your claim that you — you claim a $1,000,000.00 for apparently in the Petition, anyway, but you wouldn't even take a telephone

call on this so-called million dollar horse?

A. That has nothing to do with the value of the horse.

Later, in testimony on cross-examination about the horse's breeding, the plaintiff testified as follows:

Q. Okay. So this horse that you are saying is the greatest horse in the world, the greatest miler, you paid $3,500.00 (sic) for?

A. Yes.

Q. And you bred it to a $2,000.00 mare?

A. Yes.

Q. And all of a sudden the offspring is a $1,000,000.00 horse?

A. Nothing unusual about that.

No other witness was called to express an opinion as to Rocket Pacer's value.

Apart from the testimony on cross-examination, the plaintiff testified that Rocket Pacer was sired by "the fastest miler that ever ran." Further cross-examination showed that the highest the plaintiff had ever paid for a horse was $6,500. He also testified that one way to determine a horse's value is track performance, although "many horses are sold for over a million dollars that never ran at all because they have a full sister or a full brother who was a great horse." The plaintiff then went on to testify that Rocket Pacer was a full sister to a horse that finished last after breaking down in its first race.

On redirect the plaintiff testified pedigree is as important as winnings and that many yearlings without race records are sold for over $10 million strictly on the basis of pedigree. However, there is no support for an inference that Rocket Pacer was such a horse.

From this evidence the value of the horse was uncertain at best. For this reason the court did not err in directing the verdict against the plaintiff, as reasonable minds could draw but one conclusion, i.e., the evidence failed to show with reasonable certainty the extent of the plaintiff's damage.

"Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, the Supreme Court will affirm." *Sommerfeld v.*

City of Seward, 221 Neb. 76, 80, 375 N.W.2d 129, 132 (1985).

From our review of the record we conclude that the trial court did not err in sustaining the defendant's motion for a directed verdict as to the second cause of action. The judgment is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LOUIS J. LEE, APPELLANT.

397 N.W.2d 48

Filed December 5, 1986. No. 86-337.

1. **Constitutional Law: Appeal and Error.** There may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.
2. _____: _____. The only errors which require reversal of a cause are those prejudicial to the rights of the accused or which constitute the denial of a substantial legal right.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

Vincent M. Powers, for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

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

KRIVOSHA, C.J.

The appellant, Louis J. Lee, was charged by complaint in the county court for Saunders County, Nebraska, of driving while intoxicated, third offense, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). This is a Class W misdemeanor.

At a pretrial conference held on February 4, 1985, the county court entered, in part, the following order: "Defense counsel is ordered to identify, in writing, not later than 5:00 P.M., March 11, 1985, all of his intended witnesses by name and address and

all of his intended exhibits." Lee filed an objection to the pretrial order, maintaining that the court "cannot compel defense counsel to identify in writing all of the intended witnesses by name and address and all of his intended exhibits, absence [sic] of any reciprocal discovery order. The present order violates the defendants [sic] right to a fair trial."

The county court overruled Lee's objection to the pretrial order, and the case was ultimately tried to a jury, which found Lee guilty of driving while under the influence of alcohol. A subsequent enhancement hearing was held, at which time it was determined that this was Lee's third offense. He was then sentenced to 60 months' probation, 90 days in jail, and his license revoked for 60 months. Lee thereafter appealed to the district court for Saunders County, Nebraska, where the conviction and sentence were affirmed. It is from that order which he now appeals to this court.

Lee raises but a single issue. He maintains that the county court violated his constitutional right against self-incrimination by requiring him to list all of his witnesses and exhibits prior to trial, absent any request by Lee for discovery pursuant to Neb. Rev. Stat. §§ 29-1912 to 29-1921 (Reissue 1985). Because of events which occurred subsequent to the court's order requiring Lee to disclose the names of his witnesses, we do not reach that issue.

The record establishes conclusively that Lee did not comply with the court order, nor was he in any manner prevented from calling any witness to testify because he had not earlier disclosed his witnesses' names. As a matter of fact, the record discloses that Lee offered no evidence at the trial in the county court, though he was invited to do so. At the close of the State's case, the following discussion occurred:

> MR. WAGNER: Your Honor, the state rests.
>
> THE COURT: The state rests.
>
> MR. POWERS: The defense rests.
>
> THE COURT: The defense rests. And you are resting without presenting evidence, correct?
>
> MR. POWERS: Yes, sir.

Even assuming that the order of the court requiring Lee to disclose the names of his witnesses violated his constitutional

rights (a matter we do not decide in light of the record), it cannot be said that the order constituted prejudicial error entitling Lee to relief. That is so because Lee neither complied with the order nor sought to introduce witnesses who were then not permitted to testify. He was in no way prejudiced by the earlier court order.

Neb. Rev. Stat. § 29-2308 (Reissue 1985) makes it clear that not all errors entitle the defendant to a new trial. Section 29-2308 provides in part:

> No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.

The validity of such a statute was upheld by the U.S. Supreme Court in the case of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In doing so the U.S. Supreme Court said at 21-22:

> We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111. None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant

> and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

To the same effect see *Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969).

While we do not suggest for a moment that the issue as to whether the pretrial order entered by the court was proper is unimportant and insignificant, we do believe that under the facts in this case the issue becomes unimportant and insignificant. In view of the fact that Lee neither complied with the order nor was in any manner affected by the order, it is as if the order had not been entered. That is the fact which, for our purposes in this case, makes the issue unimportant and insignificant and not requiring reversal. As an example, in *State v. Packett*, 206 Neb. 548, 552, 294 N.W.2d 605, 608 (1980), we said:

> It is generally improper for counsel, during the pendency of a proceeding, to communicate with the judge as to the merits of the case. Code of Professional Responsibility, DR 7-110. It would appear that objections to, arguments about, or evidence affecting the limits of cross-examination ought to be made only in the presence of or after appropriate notice to opposing counsel. In this case, however, there is nothing in the record from which it may be reasonably inferred that prejudice resulted to the defendant. The record does not show that the defense was subsequently improperly restricted in either direct or cross-examination. The only errors which require reversal of a cause are those prejudicial to the right of the accused, or which constitute the denial of a substantial legal right.

And in the case of *State v. Goodloe*, 196 Neb. 381, 243 N.W.2d 69 (1976), the defendant was convicted of driving a motor vehicle while under the influence of alcoholic liquor and refusing to submit to tests. After the hearing in the county court, the county judge indicated a finding of guilty and inquired if defendant intended to appeal. It was made clear that if defendant were to forgo his right to appeal, he would be held guilty on only one of the two charges, but if he intended to appeal, he would be sentenced on both charges. While this was

obviously improper and a denial of the defendant's constitutional rights, we nevertheless affirmed the conviction, saying at 383, 243 N.W.2d at 70:

> This was an attempted bargaining as to the right of appeal and is conduct which tends to chill that right. Such conduct is beyond the power of the court and entirely improper. In this instance there is no prejudicial error as the defendant did appeal, had a trial de novo in the District Court, and was there resentenced. The error was harmless. See § 29-2308, R.R.S. 1943.

To the same extent in the instant case, Lee did not share any information with the prosecution because he chose to ignore the order; he was not prevented from calling witnesses, though he voluntarily elected not to present any evidence. The error, if any, was therefore clearly without prejudice and must be disregarded. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PETER WADE SUFFREDINI, APPELLANT.

397 N.W.2d 51

Filed December 5, 1986. No. 86-595.

1. **Pleas: Appeal and Error.** The withdrawal of a plea is a matter addressed to the discretion of the trial court, and the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion.
2. **Pleas.** A factual basis for a plea may be determined from the statements of the county attorney.
3. **Pleas: Sentences.** A sentencing judge is not required to inform a criminal defendant that a sentence which need not be imposed consecutively to any other may nonetheless, in the judge's discretion, be so imposed.
4. **Pleas.** After the entry of a plea of no contest but before sentencing, the trial court should allow a defendant to withdraw his or her plea for any fair and just reason, provided the prosecution would not be substantially prejudiced by its reliance upon the plea.
5. **Pleas: Sentences: Trial.** While a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, a defendant nonetheless has no absolute right to a reduced sentence because he

saves the State the expense of going to trial.

6. **Sentences: Appeal and Error.** Absent an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Kent E. Florom, Lincoln County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

CAPORALE, J.

Defendant, Peter Wade Suffredini, pled no contest to second degree murder in violation of Neb. Rev. Stat. § 28-304 (Reissue 1985), to robbery in violation of Neb. Rev. Stat. § 28-324 (Reissue 1985), and to the use of a firearm to commit a felony in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1985). The trial court found defendant guilty on each count, scheduled a sentencing hearing, and ordered a presentence investigation. At the sentencing hearing defendant moved to withdraw his plea. The motion was denied, and defendant was sentenced to life imprisonment on the murder charge, to imprisonment for not less than 15 nor more than 45 years on the robbery charge, to be served consecutively to the sentence for murder, and to imprisonment for not less than 5 nor more than 15 years on the use of a firearm charge, to be served consecutively to the other two sentences. Defendant assigns as errors the trial court's (1) failure to permit him to withdraw his pleas and (2) imposition of sentences which are claimed to be excessive. We affirm.

Defendant was originally charged with first degree murder in violation of Neb. Rev. Stat. § 28-303 (Reissue 1985), with the use of a firearm to commit a felony, and with "Theft by Receiving, value over $1,000," apparently as a violation of Neb. Rev. Stat. § 28-517 (Reissue 1985). As the result of a plea bargain, the charges were amended, and defendant pled as stated earlier.

Before accepting the defendant's pleas, the county attorney,

upon the trial judge's inquiry, stated that on April 27, 1986, the body of Samuel Coker was found immediately outside the door of the men's restroom at a rest area along the Interstate in Lincoln County, Nebraska. The victim had been shot five times.

A witness at the scene told law enforcement officers that a man in his early 20s had recently left the area in an automobile bearing a California license plate. An automobile matching the description of the one given by the witness was found at a motel, and a license plate check revealed that it had been stolen. A check of the registration at the motel disclosed that a man matching the description given by the witness had checked into the motel that evening. Officers entered the room registered to defendant and found him there. They discovered shoes in the room with blood on them which matched that of the victim. The officers also found a .22-caliber pistol with a small amount of blood on it under the mattress of the bed on which defendant was lying. While the amount of blood on the gun was not sufficient to positively identify it as that of the victim, there was sufficient blood to demonstrate it was of the same type as the victim's.

Further investigation developed that the victim had possessed a personalized billfold, made by his sister, on which the name "Sam" had been imprinted, and that the victim had been paid shortly before he was killed and would have been carrying between $180 and $240. Defendant had $188 in his possession when he was found by the officers and had paid approximately $20 in cash for the motel room. The cashless personalized billfold was found in Lincoln County. Located beside the billfold were five spent cases for .22-caliber ammunition. The Nebraska State Patrol subsequently determined that the .22-caliber cases found alongside the billfold had been fired from the weapon found in defendant's possession.

Defendant told the court he did not contest any of the foregoing statements.

Defendant's argument in connection with his first assignment of error, that he should have been permitted to withdraw his no contest pleas, rests on five grounds, each of

which was specifically found not to exist by the trial court. In reviewing this assignment of error we bear in mind that the withdrawal of a plea is a matter addressed to the discretion of the trial court and that the trial court's ruling will not be disturbed on appeal absent an abuse of that discretion. *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986).

The first ground asserted by defendant is that the pleas are not supported by the facts. Since there is no question but that a factual basis for a plea may be determined from the statements of the county attorney, *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), this assertion is without merit. The county attorney's uncontradicted recitation of the facts underlying the charges supports beyond a reasonable doubt the conclusions that defendant intentionally caused the victim's death as required for a violation of § 28-304, that defendant stole the victim's money by taking it through force, violence, or fear as required for a violation of § 28-324, and that defendant used a firearm to commit the foregoing felonies as required for a violation of § 28-1205.

Next, defendant asserts that he did not understand the ramifications of entering no contest pleas. The trial judge explained to defendant the elements the State was required to prove beyond a reasonable doubt in each crime charged and, by examining defendant, demonstrated that defendant understood the nature of the crimes with which he was charged, as well as his rights to the assistance of counsel, to confront the witnesses against him, to a trial by jury, and his privilege against self-incrimination. The possible penalties for each offense were read to the defendant, and, as we have already seen, there was a factual basis for the pleas. Thus, the arraignment at which the subject pleas were entered complies fully with the requirements of *State v. Irish, supra*. The record therefore establishes that defendant's no contest pleas were entered freely, intelligently, voluntarily, and understandingly.

Defendant's third ground rests on the claim that he did not understand that the sentences imposed on each count could be required to be served consecutively. It is to be noted that there is no requirement that a defendant be informed that a sentence which need not be imposed consecutively to any other may

nonetheless, in the sentencing judge's discretion, be so imposed. *State v. Irish, supra.* Whether a defendant has a right to be told of the mandatory consecutive nature of a sentence imposed for the use of a firearm to commit a felony, § 28-1205, need not be, and therefore is not, decided, for the trial judge did so advise this defendant. The trial judge carefully explained that while the murder and robbery sentences could, in his discretion, be imposed so as to run concurrently, they could also be made to "run one after the other," or "consecutively." The trial judge further explained that he, however, had no discretion but to impose the sentence on the use of a firearm charge so as to "run consecutive; in other words, after any sentence imposed" on the murder and robbery charges. Thus, the record once again gainsays defendant's claim.

Defendant's fourth ground is that the State made no concession in the plea bargain because it had "no case" of first degree murder. Not only does defendant not cite any authority which requires that a plea bargain be supported by a concession on the part of the State, but defendant's premise that he received no concession is wrong. One of the ways to commit first degree murder is to kill while in the perpetration of a robbery. § 28-303(2). The factual basis for the plea establishes beyond a reasonable doubt that such is exactly what happened. The penalty for first degree murder ranges from life imprisonment to death, Neb. Rev. Stat. §§ 28-105 (Reissue 1985) and 28-303; the penalty for second degree murder ranges from 10 years' imprisonment to life, §§ 28-105 and 28-304. Thus, the plea bargain removed the possibility that defendant would be sentenced to death. By any measure, that is no small concession, even if the State, under the original complaint, would have succeeded in proving only a Class I misdemeanor theft of more than $100 but less than $300 under the "Theft by Receiving" charge and thus subjected defendant to a maximum of 1 year's imprisonment on that count. Neb. Rev. Stat. §§ 28-106 and 28-518(3) (Reissue 1985).

As to the fifth and final ground in connection with the first assignment of error, defendant urges that the plea does not meet "the ends of justice." Such a claim is so vague and indefinite as to have no meaning. The controlling rule is that after the entry

of a plea of no contest but before sentencing, a court should allow the defendant to withdraw his or her plea for any fair and just reason, provided the prosecution would not be substantially prejudiced by its reliance upon the plea. *State v. Nearhood*, 223 Neb. 768, 393 N.W.2d 530 (1986); *State v. Dixon*, 223 Neb. 316, 389 N.W.2d 307 (1986); *State v. Copple*, 218 Neb. 837, 359 N.W.2d 782 (1984). As we have seen, defendant has not only not shown any "fair and just" reason to withdraw his plea, he has shown no reason at all. Under that circumstance it certainly cannot be said the trial court abused its discretion in refusing defendant's motion to withdraw his plea.

That brings us to defendant's second assignment of error, the claim that the sentence is excessive. Defendant argues that he should be treated leniently because he pled no contest. While it is true that a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, *State v. Winsley*, 223 Neb. 788, 393 N.W.2d 723 (1986), a defendant nonetheless has no absolute right to a reduced sentence because he saves the State the expense of going to trial. See, for example, *State v. Copple, supra*, wherein defendant's no contest plea did not disturb this court's longstanding maxim that a sentence imposed within statutory limits will not be disturbed on appeal, absent an abuse of discretion. *State v. Cain*, 223 Neb. 796, 393 N.W.2d 727 (1986).

Although the 26-year-old defendant has not previously been convicted of a felony, there are New York warrants outstanding against him for grand larceny, forgery, and falsifying business records as the result of the theft and sale of his girlfriend's automobile. However, irrespective of defendant's past record, the crimes which are the subject of this review were sufficiently senseless, violent, and brutal to more than justify the sentences imposed.

Since defendant's assignments of error are not sustained by the record, the judgments and sentences of the district court are affirmed.

AFFIRMED.

IN RE INTEREST OF D.J., T.J., L.W., L.W., AND M.J., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. L.H.W., APPELLANT, AND S.J., APPELLEE.

397 N.W.2d 616

Filed December 19, 1986. No. 85-787.

1. **Parental Rights: Appeal and Error.** An order terminating parental rights is reviewed de novo on the record in this court.
2. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence, and the primary consideration in such cases is the best interests of the children.

Appeal from the Separate Juvenile Court of Douglas County: JOSEPH W. MOYLAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Jarve L. Garrett of Garrett Law Office, for appellant.

Donald L. Knowles, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

Thomas C. Emery, guardian ad litem.

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

GRANT, J.

This is an appeal from an order of the separate juvenile court of Douglas County terminating the parental rights of L.H.W. (hereinafter referred to as appellant) to T.J., M.J., L.W., and L.W. The juvenile court action concerned the following five children. D.J., the oldest child, a male, was born in 1974. M.J. is the youngest, a female, and was born in 1983. T.J., a male, was born in 1975; L.W., a female, was born in 1978; and L.W., a female, was born in 1979. S.J. is the natural mother of all five children. All parties agree that appellant is not the father of D.J. There is no dispute in the pleadings and the evidence that appellant is the father of T.J., L.W. (born in 1978), and L.W. (born in 1979). While the petition does not specifically allege that appellant is the father of M.J., some 5 months after the petition was filed, appellant stipulated that he was the father of M.J.

A petition was filed in December 1984 in the separate juvenile court of Douglas County. The petition alleged that S.J. was the natural mother of all five children; that all the children came within the definition in Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982) because of the fault or habits of S.J., their mother; and that all the children came within the meaning of Neb. Rev. Stat. § 43-292(2) (Reissue 1984) because their mother had "substantially and continuously or repeatedly neglected said children, and refused to give said children the necessary parental care and protection . . . ."

The petition also alleged, in its original typewritten form, that T.J., L.W. (1978), and L.W. (1979) were children of appellant and were children within § 43-247(3)(a) by reason of the fault or habits of appellant and that T.J., L.W. (1978), and L.W. (1979) were children within § 43-292(4) because appellant, their natural father, "by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, conducts himself so as to be seriously detrimental to the health, morals or well-being of said children . . . ." At a time not shown by the record before us, the name of M.J. was inserted in the petition, in handwriting, in each of the general allegations concerning the status of the children with regard to appellant, thus alleging in amended form that M.J. was a child within the meaning of §§ 43-247(3)(a) and 43-292(4). The addition of the name of M.J. in those counts is explained by the fact that the court granted leave to add M.J.'s name to the status allegations of the petition. The juvenile court, however, did not grant the State's motion to add M.J.'s name to the prayer for termination of appellant's parental rights, nor was the petition so amended.

The prayer of the petition asked that the court make appropriate orders concerning the children; that the court terminate the parental rights of S.J. as to all the children; and that the court terminate the parental rights "between [appellant], natural father of [T.J., L.W. (1978), and L.W. (1979)], and [T.J., L.W. (1978), and L.W. (1979)]." The relief requested in the petition, as against appellant, did not mention M.J.

After preliminary matters were disposed of, adjudication

hearings were held on February 25, March 21, May 7, May 8, May 30, and June 19, 1985. At the conclusion of the adjudication hearings, the court found, by its order filed July 29, 1985, that S.J. was the natural mother of the five children; that appellant was the natural father of T.J., L.W. (1978), and L.W. (1979); that T.J., L.W. (1978), and L.W. (1979) were "children within the meaning of Section 43-247 (3a) and Section 43-292 (4) . . . Cum., Supp., 1982, insofar as their natural father, [appellant], is concerned." On September 24, 1985, the court entered its order terminating the parental rights of S.J. to all five children and terminating the parental rights of appellant to T.J., L.W. (1978), L.W. (1979), and M.J. S.J. did not appeal from this order; L.H.W. did appeal.

In this court appellant assigns six errors, which may be consolidated into three: (1) That the trial court erred in admitting the testimony of the minor children; (2) That the trial court erred in admitting into evidence the testimony of the police officers and the social workers, because such testimony was hearsay; and (3) That the court erred in finding that there was sufficient clear and convincing evidence to support the court's order terminating appellant's parental rights. We affirm the order of the juvenile court as to the oldest three children, T.J., L.W. (1978), and L.W. (1979). We reverse the order of the juvenile court as to the youngest child, M.J., and remand for further proceedings as to her.

We first note that an order terminating parental rights is reviewed de novo on the record in this court. *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986). Where the evidence is in conflict, we give great weight to the fact that the trial court observed the parties and witnesses and judged their credibility. *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). Such an order terminating parental rights must be supported by clear and convincing evidence, and the primary consideration in such cases is the best interests of the children. *In re Interest of A.L.N., supra.*

The record shows the following. S.J. had a long history of moving in and out of appellant's home. She always took her oldest child, D.J., and the baby, M.J., with her when she left, leaving the other three children in appellant's custody.

During one of her periodic stays with appellant, the mother informed the Omaha police on November 16, 1984, of her suspicions of sexual abuse of her daughter, L.W. (1979), by appellant. Officers investigated the report. As a result of the investigation, appellant was charged with three counts of first degree sexual assault. A preliminary hearing was held on these charges on December 10, 1985. At this hearing S.J. testified that L.W. (1978) and L.W. (1979) had told her, in detail, that appellant had assaulted each of the girls by sexual penetration and that D.J. had told her that appellant had made him perform sexual acts. At this hearing L.W. (1978) and D.J. each testified as to the sexual acts appellant had committed as to them. L.W. (1979) was called as a witness but did not respond audibly to any questions put to her by the county attorney or the court. At the conclusion of the hearing, appellant was bound over to district court for trial on two counts. The third count, apparently concerning L.W. (1979), was dismissed.

After the preliminary hearing S.J. told the lawyer representing appellant in the pending criminal case that she had lied to the police when she had first told them of appellant's sexual abuse of L.W. (1978) and that she had told the children to lie to the police and at the preliminary hearing concerning appellant's actions toward the children. Although the record is not clear, it appears that the criminal charges against appellant were dismissed without further action.

At the adjudicatory hearings in the juvenile court, D.J. testified that appellant had forced him to commit fellatio on appellant. T.J. testified he had witnessed one of the incidents in which D.J. was performing that act on appellant and that appellant had tied T.J. to a bed and whipped him with a belt. L.W. (1978) testified that appellant had placed his penis between her legs on many occasions and had done the same thing to L.W. (1979). L.W. (1979) testified to similar activities on appellant's part. Two police officers testified as to their investigation after S.J.'s first call to the police department concerning appellant's alleged sexual abuse of the children. Two social workers also testified as to their involvement in regard to the children. The physician who examined the children after S.J.'s first complaint about the sexual abuse of the children

testified that there was no evidence of abrasions or sexual penetration of the children, but testified that he did not have an opinion as to whether the children had been sexually abused. The doctor later testified that most sexual abuse of children can occur without sexual penetration.

Sharon Van Butzel, a hospital social worker, testified that she interviewed the mother, who said that the children had been sexually assaulted by the appellant.

Yolanda Herrera, a Child Protective Services worker, interviewed the children and the mother. Herrera testified that the mother told her that both L.W. (1978) and D.J. had said they were sexually abused by appellant, that the mother's relationship with appellant was frequently violent, that appellant had "busted her head with a bat" and had hurt the mother many times, and that appellant had tied the mother to a bed and beaten her with an electrical cord because she refused to go out and prostitute for him. Herrera testified that she talked with the four older children, who said they were afraid of the appellant. She further testified that D.J. told her that the appellant "did bad things to me like rape. He made me do things to him"; that T.J. told her he had been stripped, tied to a bed, and beaten and that he had observed his half-brother D.J. performing oral sex with the appellant; that L.W. (1978) had stated that the appellant humped her and she could not remember when he did not hump her; and that L.W. (1979) told her that the appellant "humped her and so did [D.J.]." The children's understanding of the word "humped" was set out in the record.

The appellant did not testify at the hearings. He was called as a witness but invoked his fifth amendment privilege. The thrust of his defense, as presented by his counsel, was that his children and their mother had fabricated the stories about sexual and physical abuse by the appellant.

At trial the four older children, then ages 10, 9, 6, and 5, were permitted to testify. Prior to the children's testimony, the trial court questioned each child to determine his or her ability to answer simple questions and to distinguish between the truth and a lie. Some of the testimony was inconsistent, but each child reported incidents of sexual or physical abuse by the

appellant.

S.J. was called as a witness by appellant. She testified to being a prostitute and to having sexual relations with her children D.J., L.W. (1978), and L.W. (1979). S.J. also testified that she had lied in her statements to the police and in the preliminary hearing on the criminal charges against appellant, and had coached the children to lie.

Regarding the first error assigned, appellant argues that the testimony of the children should not have been admitted into evidence because it was incompetent and inconsistent. The trial court determined after questioning each child that each was capable of answering simple questions and that each knew the difference between the truth and a lie. In our de novo review of that testimony, we conclude that each child responded satisfactorily, and all were competent to testify. Any inconsistency in the testimony of the children goes to their credibility as witnesses. The record does show that each child gave some inconsistent testimony about the incidents of sexual and physical abuse. There was testimony that the mother did tell the children what to say to the authorities when she reported the incident that initiated this action. However, the children also gave testimony of other sexual or physical abuse by appellant at times and places unrelated to this last occasion. Where the evidence is in conflict, we must give great weight to the fact that the trier of fact observed the parties and witnesses and judged their credibility. *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). We find no error in the trial court's admission of testimony by the children.

The second error assigned was that the testimony of the police officers and social workers was hearsay and should not have been admitted into evidence. The trial court overruled appellant's objection to admission of the testimony and determined that the testimony qualified under the exception to the hearsay rule in Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1985), which provides:

> (4) A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony

> and is offered to rebut an express or implied charge against him or recent fabrication or improper influence or motive . . . .

The declarants in the instant case were the children and their mother, S.J. All testified at both the preliminary hearing and at the trial. They were all subject to cross-examination at the trial in the juvenile court. The testimony by the police officers and social workers was consistent with the testimony of the children and consistent with S.J.'s testimony prior to her recantation, and was offered to rebut the appellant's assertion that the children had recently fabricated their testimony. Under the circumstances in this case, it is clear that the statements about which Officers Sundermeier and Claussen and social workers Van Butzel and Herrera testified were admissible. *State v. Gregory*, 220 Neb. 778, 371 N.W.2d 754 (1985).

The last error assigned is that the court erred when it found that the State met its burden of proof by clear and convincing evidence. Appellant argues that the record is devoid of any clear and convincing evidence necessary to support the allegations in the petition. He claims that he was made a victim of a vicious plot by S.J. Appellant maintains that S.J. became a truthful witness after she recanted her original charges against him.

In our de novo review of the record, we find that the majority of the evidence contained in the five volumes of testimony is consistent with the allegations of sexual and physical abuse of the children by both parents. The testimony of the children is consistent that they were sexually abused by the appellant. The testimony of the police officers and social workers refutes the claim that the children were fabricating the allegations. Several witnesses testified to sexual activity between the children as well.

The record shows that S.J. is an admitted prostitute and that she had sexual relations with her children D.J., L.W. (1978), and L.W. (1979). Although S.J. has not appealed from the order terminating her parental rights, we feel it necessary to state that that order of termination of her parental rights is fully supported by clear and convincing evidence, most of which was admitted by S.J. Appellant suggests that this court reverse the order of the trial court as to him on the basis of the testimony of

S.J. at the time she changed her testimony at the adjudication hearing. As stated earlier, this court has said that where the evidence is in conflict, great weight is given to the fact that the trial court observed the parties and witnesses and judged their credibility. *In re Interest of M.L.B., supra.*

The record in this case leads us to the conclusion that the evidence clearly and convincingly establishes that there was sexual and physical abuse of the four older children by the appellant, and conduct by the appellant which was seriously detrimental to the health, morals, and well-being of all the children. The record also shows that these children have been subjected to one of the most unhealthy and unwholesome environments that people in our society could imagine and that appellant permitted such environment to exist. The best interests of the children in this case demand that the parental rights of the appellant be terminated. We believe that the decision of the separate juvenile court of Douglas County was correct and must be affirmed as to T.J., L.W. (1978), and L.W. (1979).

We turn now to consideration of the case as it affects the youngest child, M.J. The issues in this consideration have not been presented, but this court, at its option, may note plain error. *State v. Christiansen*, 217 Neb. 740, 351 N.W.2d 67 (1984). In the petition filed on December 6, 1984, the prayer for relief did not ask for the termination of parental rights between M.J. and the appellant. The record indicates that at the outset of this case, on two separate occasions the court stated that only three of the children were the natural children of the appellant. The fact that M.J. is also appellant's natural child came to light during the trial when appellant stipulated that he was M.J.'s father.

Although the petition was apparently amended (by the interlineation referred to above) to add allegations concerning her status with regard to appellant, the petition was never amended to conform to the evidence as to M.J.'s alleged parentage, nor was the petition amended to seek the termination of appellant's paternal rights to M.J. Additionally, the record does not disclose any evidence of sexual abuse of M.J., although obviously there was a great deal of evidence of

neglect by appellant.

At the conclusion of the adjudicatory portion of the hearing, the juvenile court made specific findings as to the status of all of the children with regard to S.J., and specific findings as to the status of T.J., L.W. (1978), and L.W. (1979) with regard to appellant. No such findings were made with regard to appellant and M.J., and, indeed, the testimony reflects little as to the relationship between M.J. and appellant.

The appellant has not been given any notice of an action to terminate his parental rights to M.J., as is required under Neb. Rev. Stat. § 43-291 (Reissue 1984), although the juvenile court ordered termination of parental rights between M.J. and the appellant.

We affirm the action of the juvenile court in terminating appellant's parental rights as to T.J., L.W. (1978), and L.W. (1979). We reverse the order of the juvenile court terminating the appellant's parental rights to M.J. and remand for further proceedings for determination as to that issue.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF J.S., S.C., AND L.S., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. P.S. AND C.S., APPELLANTS, AND M.S., APPELLEE.

397 N.W.2d 621

Filed December 19, 1986. No. 85-937.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights is reviewed by this court de novo on the record.
2. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence and should be made only as a last resort when no reasonable alternative exists.
3. _____. The primary consideration in a parental rights termination case is the best interests of the child.
4. _____. A child should not be left suspended in foster care and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity.
5. **Appeal and Error.** Assignments of error not briefed are not considered.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

Michael J. Elsken, for appellant P.S.

Richard L. Kohn, for appellant C.S.

Michael G. Heavican, Lancaster County Attorney, and Jan W. Sharp, for appellee.

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

BOSLAUGH, J.

The father of J.S., S.C., and L.S. and the mother of S.C. and L.S. appeal from the order of the separate juvenile court of Lancaster County terminating their parental rights. The mother of J.S. did not appeal the order terminating her parental rights, and, as her parental rights are not at issue, the use of the term parents in the following discussion refers solely to the father and the other mother involved unless otherwise indicated.

The children are the offspring from two different marriages. The natural father, P.S., was initially married to M.S., and two children, R.J.S. and J.S., were born of the marriage. The marriage was dissolved on August 11, 1977, and P.S. was given custody of both children. P.S. subsequently remarried, and two more children, S.C. and L.S, were born. C.S. is the natural mother of S.C. and L.S.

A petition was filed on June 26, 1972, which alleged that R.J.S. was a neglected child. The trial court found both natural parents, P.S. and M.S., incapable of caring for R.J.S. and on June 30, 1972, placed the child in foster care. R.J.S. has remained in foster care since that time, and his disposition is not an issue in this appeal.

On June 15, 1977, a second petition was filed, alleging that J.S. lacked proper care due to the neglect of her natural parents, P.S. and M.S. Temporary legal custody was given to the Lancaster County Department of Public Welfare, and she was placed in foster care. On February 21, 1979, J.S. was returned to P.S. and his second wife, C.S., on a trial basis.

A supplemental petition was filed on August 12, 1981, alleging that J.S., S.C., and L.S. were neglected children through the faults of P.S. and C.S. Custody of all three children was given to the Lancaster County Department of Public Welfare, and the children were placed in foster care. When this disposition was reviewed on November 9, 1981, the trial court continued foster care because the parents had not corrected the problems leading to the removal of the children.

On March 9, 1982, the disposition was again reviewed, and a trial placement of the children with their parents was ordered. Additional review hearings were held every 6 months. On November 30, 1983, the trial court found the parents were unable to care for the children. The children were placed in foster care and have remained in foster care since that time.

When the disposition was reviewed on December 18, 1984, the trial court found the parents were still unable to assume the care of their children, and foster care was continued. The parents were ordered to demonstrate that they could provide for themselves and control their mental health problems so that they could provide for the children. Further, the court ordered the parents to demonstrate they could provide a home for themselves and their children and to budget their income so as to pay for transportation to visit the children.

The matter was again reviewed in June 1985. The State recommended that visitation by the parents be terminated, but the trial court found the evidence was insufficient to show that the visitation was injurious to the children. Custody of the children was continued in the Department of Social Services, and the court again set out a plan for the parents to follow in order to regain custody of their children. The plan required P.S. to continue, and C.S. to begin and complete, mental health counseling, for both parents to cooperate with and participate in services directed by their caseworker, for the parents to maintain an appropriate living situation and demonstrate their ability to provide a stable home for their children, and for the parents to sufficiently control their mental health problems so that they could care for the children.

The third supplemental petition, filed September 3, 1985, sought termination of all parental rights to the three children.

The petition alleged that P.S. and C.S. had failed to demonstrate their ability to budget money and provide for the necessities of life for themselves and the children; that both parents suffered from mental disorders which prevented them from being able to parent their children; that neither parent had followed through with mental health treatment directed by the therapists; and that because of the neglect of the parents the children had remained in foster care. The petition further alleged that the parents had substantially and continuously or repeatedly neglected their children and refused to give them necessary care. The petition sought a determination that the children were within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984) and that reasonable efforts to correct the problems, under the direction of the court, had failed. The petition further alleged that termination was in the best interests of the children; that the parents were unable to parent due to mental illness or mental deficiency; and that there were reasonable grounds to believe the conditions preventing them from parenting would continue for a prolonged and indeterminate period.

The matter came on for trial on October 8, 9, 25, and 28, 1985.

The trial court found that the State had proven by clear and convincing evidence that parental rights should be terminated. Specifically, the court found that the parents had not provided the necessities of life for their children; that both parents suffered from mental disorders which prevented them from being able to parent; that neither parent had followed through with mental health treatment directed by the therapists; and that both parents had substantially, continuously, and repeatedly neglected the children and refused to give them necessary parental care and protection. The court found the children were children as described in § 43-247(3)(a); that reasonable efforts to correct the problem under court supervision had failed; and that the parents were unable to parent due to mental illness or deficiency and would remain in such a condition for a prolonged and indeterminate period. This appeal followed.

Both appellants assign as error the trial court's finding that

the evidence presented was sufficient, clear, and convincing to support a finding of termination. Appellant C.S. also assigns as error the trial court's overruling of her objection to the testimony of Dr. William McNeil as to whether her mental illness affected the children and presented harm to them, and whether C.S. would be able to parent in the future.

An appeal from an order terminating parental rights is reviewed by this court de novo on the record. *In re Interest of A.L.N.*, 223 Neb. 675, 392 N.W.2d 780 (1986); *In re Interest of V.B. and Z.B.*, 220 Neb. 369, 370 N.W.2d 119 (1985). The order must be supported by clear and convincing evidence and issued only as a last resort when no reasonable alternative exists. *In re Interest of A.L.N., supra.* See, also, *In re Interest of P.F.*, 222 Neb. 44, 381 N.W.2d 921 (1986). The primary consideration in such a case is the best interests of the child. *In re Interest of A.L.N., supra.* As we stated in *In re Interest of D.*, 218 Neb. 23, 29, 352 N.W.2d 566, 570 (1984), "A child cannot be left suspended in foster care, and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity."

From our review of the record we find that the State presented clear and convincing evidence that the parents are unable to care for the children, that they will remain unable to do so for an indeterminate period of time, and that termination is in the best interests of the children. Although the parents have made some attempts to correct the problems which led to the placement of the children in foster care, the record shows a pattern of parental conduct that demonstrates that the parents will never be able to adequately care for their children.

P.S. has been involved with the State of Nebraska with regard to the parenting of his children since 1972. C.S. has been involved with the State since 1979. J.S. was first placed in foster care in July 1977, where she remained until February 1979, a period of almost 2 years. She was then returned to her parents and remained with them until August 1981. At that time she was again placed in foster care, where she remained until March 1982, a period of 7 months. She returned to her parents and remained there for 18 months, until September 1983, when she was again placed in foster care. She has remained in foster care

since 1983, a period of 3 years. Thus, J.S. has been in foster care over one-half of the time since 1977. S.C. and L.S. were first placed in foster care in August 1981. They were returned to their parents on a trial basis in March 1982, where they remained until September 1983, when they were again placed in foster care and have there remained. Thus, these two children have been in foster care more than one-half of the time since 1981.

Extensive testimony was presented at the hearing concerning the parents' ability to parent the children and whether the parents had followed the court-ordered plan of rehabilitation. There was some evidence that P.S. had sexually molested J.S. when she was a small child. Since 1977, the family has had a succession of caseworkers who have attempted to work with the family on housekeeping, maintaining contact with mental health professionals, and meeting the needs of their children.

A caseworker, Mary Osborne, testified that on her first visit with the family in September 1982, the house was adequately clean, but the parents stated they had missed an appointment with their mental health counselor because they overslept. Later that month, at a subsequent home visit, the house was not as clean as before but still adequate. During the home visits in October 1982, the condition of the house continued to deteriorate. The parents, however, did not feel the condition of the house was a problem. By November 1982 the house was very dirty, P.S. had moved out and C.S. was subsequently admitted to the Lincoln Regional Center, and the children had been placed in foster care.

The children were returned to their parents on April 7, 1983. For the next 7 months Osborne or another caseworker visited the family twice a month and testified that the condition of the house deteriorated rapidly. Osborne testified that in June 1983 there were "lots of cockroaches and insects in the home crawling the walls." Again, the parents did not recognize the condition of the home as a problem. In July 1983 the house was extremely dirty, the cockroach problem had worsened, and there was a very strong odor of urine in the house.

By August 1983 the situation had grown worse, the floors were extremely dirty, there were dog feces throughout the

house, the sheets on the boys' beds were "almost black," and there was a strong odor throughout the house. Further, the screens leading to the second-story roof had been pushed out, and toys were observed on the roof of the house. P.S. stated the children had been playing there. P.S. stated he did not realize the cleanliness of the house was "that bad." The bathroom was also very dirty. It was the caseworker's opinion that the house presented a health hazard at that time. The house remained in the same condition throughout August 1983. The caseworker informed C.S. that foster care placement was again indicated. Shortly thereafter, C.S. was committed to the Lincoln Regional Center and the children removed by the police.

On cross-examination Osborne testified that it was her opinion the parents have a pattern of behavior which led her to conclude that their parental rights should be terminated. The pattern, as she described it, is that when C.S. is initially released from intensive mental health treatment, the parents are able to establish an adequate home; but when the children are returned, the parents cannot sustain their mental health treatments or keep the house in an adequate condition.

Murial Lau, a foster parent for the children from December 1982 until April 1983, and from September 1983 until August 21, 1985, testified that P.S.'s personal hygiene was so poor that she requested his visits in her home be terminated. She testified that C.S. also did not have good personal hygiene. Lau testified that she observed behavioral problems in the children following visits with their parents, including destroying gifts given them by the parents, rebelliousness, fighting among the children, and soiling or wetting their pants. The behavioral problems began after the children returned to the Laus' residence in September 1983. The children also exhibited problems at school.

Dr. William McNeil, a psychologist employed by the Child Guidance Center, was a member of a team which evaluated all three children in May 1984. The children were tested individually, and the team then reviewed the data. The team was provided background information from Child Protective Services concerning the parents. The team concluded the children "had and were responding negatively to the parents' lifestyle." The children exhibited a great deal of anxiety related

to their physical safety and the meeting of their basic needs at home.

Although the children had formed a strong attachment to their parents, the nature of the attachment was one of insecurity and was viewed by the team as a negative rather than positive factor in the children's lives. The team concluded that it was important for the children to have permanency and stability in their lives and that the parents could not provide it. The team recommended that the parental rights be terminated and the children put in an adoptive situation.

The team also concluded that parental visitation was adverse to the children's interests. In light of their data compilation, the team concluded that it would be damaging to return custody of the children to their parents because the parents' past behavior evidenced their inability "to control themselves and to regulate their own lives, much less the lives of their children. They could not help the children organize the environment in a very clear, coherent way."

Dr. McNeil reviewed the documentation provided to him by various agencies regarding the parents and, based on that data, formulated an opinion concerning the parents' ability to care for the children. It was his opinion that while the parents had at times demonstrated positive parenting skills and maintained an adequate house,

> by and large these changes were not integrated into their lifestyle on a very consistent basis, that by and large the environment was often chaotic and that it did not look as if they had responded very well to the intervention of other people in the community over a fairly long period of time.

In his opinion the positive changes "have to become integrated and made part of the individual and part of a way of life." He did not find enough evidence in his review of the parents' records to indicate the positive changes were stable. Dr. McNeil also concluded that the family is "pretty resistant to change." Dr. McNeil's findings were later verified by Dr. Howard Halpern, who concurred in his conclusions.

Terri DeBuhr, a case aide for the Department of Social Services, testified that each time the parents moved, the house started out in good condition and became progressively worse.

Marilyn Schwebke, another case aide, testified that she had been involved with the family from early 1983 through August 1984. In her opinion, based on her experience with the family, neither parent was able to perceive and meet the emotional needs of the younger children.

C.S.'s uncle testified that he had observed filthy conditions in the appellants' homes beginning in 1978. He testified that the hygiene of the children and the parents was always poor when he visited them. In his opinion the parents were unable to care for themselves, much less their children.

Dr. William Stone testified that C.S. had told him she had been in the Lincoln Regional Center every year since 1980. He testified that she missed five of eight scheduled appointments with him. C.S. had indicated to him that she had no need to work on any mental problems, aside from getting other people to realize that she did not have any. Based on the results of tests administered to C.S., Dr. Stone concluded that C.S. had some "fairly serious emotional problems," had difficulty perceiving reality, and had hostility to authority figures.

Both parents missed so many appointments that Dr. Stone warned them that continued failure to appear would result in his refusal to see them. The parents missed the very next appointment, but Dr. Stone agreed to set up one more appointment to go over their test results, and the parents again failed to appear. Dr. Stone testified that his diagnosis of C.S. was that she suffers from chronic schizophrenic disorder. He concluded that in her case the condition would be present for a prolonged, indeterminate period. In his opinion C.S. would require supportive therapy over an indefinite period of time. Dr. Stone also testified that because of her mental condition C.S. would sometimes pose a danger to the children because her contact with reality would not allow her to care for them.

Dr. Stone further testified that P.S. had indicated he could not tolerate the children for extended periods of time and that he had been sexually involved with J.S. at one point. His diagnosis of P.S. was that P.S. was overtly psychotic, that his thinking was very confused and hostile, and that he was unable to perceive reality. It was Dr. Stone's opinion that P.S.'s condition would continue indefinitely. He also testified that, in

his view, it was unlikely the parents could provide care for and meet the needs of their children.

Linda Freeman, an assigned homeworker, testified that the parents missed half of their scheduled appointments with her and were uncooperative and unresponsive during the 2½ months she attempted to work with them in late 1982. Another caseworker, Charlie Bennett, testified that, in his experience with the parents, he observed a pattern of behavior with regard to the cleanliness of their homes: when the parents first moved into a new place, the housekeeping was adequate but then deteriorated.

Dr. Daniel J. Weber, the psychiatrist most recently involved with the parents, testified the two had missed quite a number of appointments. His prognosis was that P.S. may be better able to work on his emotional problems than C.S. because C.S. lacks motivation to do so. He also stated that his prognosis of C.S.'s being able to cope with her mental problems sufficiently to be able to parent was poor.

Lawrence Reznicek, a clinical social worker who has worked with the parents intermittently since 1981, testified that he had observed a pattern of deterioration in the parents' ability to cope with life.

Lorie Fink, the family's caseworker, testified as to the parents' poor personal hygiene, problematic parenting skills, and mental health problems. As recently as September 1985, only 1 month before the termination hearing, the mother still was not consistently participating in mental health counseling. Fink testified that she had informed the parents in April 1985 that a request for termination had been made, and the reasons why it had been recommended: the mental health problems, living skills, housekeeping, and inappropriate use of medications. Fink testified that she visited the parents at their apartment the morning before she testified at the hearing, on a scheduled visit, and found the home dirty and cluttered, flies in the refrigerator, and a strange odor throughout the apartment. The only food in the house was a box of powdered milk. Both parents told her they had not been seeing their mental health counselors.

C.S. testified that in her opinion there was no housekeeping

problem when Fink last visited; that she really did not have a mental health problem; and that she did not clean up after the dogs because that was not her job.

P.S. testified that in his opinion there had been no housekeeping problem on Fink's last visit and that the parents would be able to parent their children.

The evidence is clear and convincing that the parental rights of P.S. and C.S. to the three children should be terminated. There is extensive evidence concerning the parents' mental health problems, the effects of those problems, and the parents' consistent failure to obtain treatment over the past several years.

Further, there was an abundance of evidence of the parents' failure to comply with the various rehabilitation plans ordered by the court. It is clear that the parents are unable to care for their children and will be unable to do so in the foreseeable future. The children have spent the majority of their lives in foster care but are now in a potentially adoptive home which offers them permanence and stability. Like the child in *In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984), these children should not be left suspended in foster care or returned to a wholly inadequate home.

The assignment of error concerning C.S.'s objection to Dr. McNeil's testimony regarding the impact of her mental health problems on her ability to parent was not briefed. Accordingly, it will not be considered. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986).

The judgment of the juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL P. KANE, APPELLANT.
397 N.W.2d 628

Filed December 19, 1986. No. 86-268.

1. **Convictions: Directed Verdict.** Only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, will a trial court be justified in directing a verdict of not guilty.
2. **Convictions: Circumstantial Evidence.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt.
3. **Sentences: Probation and Parole.** The granting of probation as opposed to imposing a jail sentence is a matter left for the discretion of the trial court.
4. **Sentences: Appeal and Error.** Absent an abuse of discretion, this court will not disturb a sentence imposed within the statutory limits.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays, for appellant.

Robert M. Spire, Attorney General, and James H. Spears, for appellee.

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

GRANT, J.

The defendant, Michael P. Kane, appeals his conviction of one count of arson in the first degree in violation of Neb. Rev. Stat. § 28-502(1) (Reissue 1985). The defendant alleges the district court erred in denying the defendant's motions for directed verdict at the close of the State's case and at the conclusion of all the evidence. The defendant further alleges the district court abused its discretion in refusing to place the defendant on probation and imposing a sentence that was excessive and disproportionate to the severity of the offense, when considered with the defendant's background and prior record. For the reasons hereinafter stated we affirm.

The record shows the following. In an information filed on September 24, 1985, the defendant, Michael P. Kane, was

charged with one count of arson in the first degree. The defendant had been living in an apartment rented from Daniel Schroeder for approximately 1 year prior to September 5, 1985. During the early morning hours of September 5, 1985, a fire occurred in the apartment occupied by defendant. Ronald D. Peery, a fire investigator for the city of Lincoln, was called to investigate the fire at about 3 a.m. on September 5. Upon completion of his investigation Peery determined that the fire had two points of origin. Based upon this finding, Peery concluded the fire had been intentionally set. Defendant was arrested and charged with the crime.

The case was tried before a jury. The evidence presented to the jury was largely circumstantial. Prior to September 5, 1985, the defendant had several conflicts with the owner of the apartment building. These conflicts included defendant's failure to pay rent, flooding of the apartment below due to the overflow of the defendant's sink and bathtub, the removal of several light bulbs from the apartment, and the removal of all of the apartment numbers in the building. In August of 1985 the landlord asked the defendant to vacate the apartment. A formal eviction notice was sent to the defendant on August 12, 1985. The electrical service to the apartment had also been cut off.

Gloria Pulhamus, a witness for the State, testified that during the early morning hours of September 5, 1985, she and a companion were approached by defendant, who asked them to drive him to his apartment because defendant had been stopped for driving without a driver's license. Since Pulhamus and her friend needed a place to stay, they agreed to drive defendant to his apartment. Defendant indicated the two of them could sleep there. Pulhamus testified the apartment was a "mess." The electrical service had been discontinued. Defendant gave Pulhamus and her companion a large candle to provide light for them. Pulhamus testified that in response to her question concerning leaning the candle against the wall, defendant responded, "Well, it belongs to the landlord. Might as well just burn it down with the rest of it." In response to Pulhamus' questions regarding smoking in the apartment, the defendant told her to put the cigarettes out on the floor. Pulhamus

testified the defendant told her that, since he was evicted, it was about time that he burned something that belonged to the landlord. Pulhamus further testified that on the morning of the fire she was awakened by an unidentified individual who told her that the apartment was on fire. Pulhamus said she saw the defendant standing in the kitchen of the apartment with a smile on his face, walking around in the smoke as the apartment was burning. The defendant testified he had just returned from walking his dog when he noticed the apartment was on fire. The defendant stated he was in the kitchen looking for a fire extinguisher.

In addition to the testimony of Pulhamus, the evidence included a photograph of the wall in defendant's apartment. On the wall the phrase "Burn Baby Burn" was painted, with a line pointing toward the origin of the fire. The defendant testified this phrase was put on the wall a month prior to the fire and stated that it was just a political statement and was not meant to show that he intended to start the apartment on fire.

The defendant's first two assignments of error concern the failure of the district court to sustain defendant's motions for a directed verdict. It is the law in the State of Nebraska that only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, will a trial court be justified in directing a verdict of not guilty. *State v. Bridger*, 223 Neb. 250, 388 N.W.2d 831 (1986). The evidence in the case at bar was largely circumstantial. However, circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Ellis*, 223 Neb. 779, 393 N.W.2d 719 (1986); *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). It is not the responsibility of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. That is for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Ellis, supra*. See, also, *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985); *State v. Rolling*, 209

Neb. 243, 307 N.W.2d 123 (1981). We determine that the evidence in the case at bar, although largely circumstantial, is sufficient when taken as a whole to prove defendant's guilt beyond a reasonable doubt. The trial court did not err in refusing to sustain the defendant's motions for directed verdict.

The defendant further assigns as error that the sentence imposed was excessive and disproportionate "to the severity of the offense when considered with the Appellant's background and prior record" and that the district court erred in refusing to place the defendant on probation. Regarding the refusal to place the defendant on probation, we find no error. The granting of probation as opposed to imposing a jail sentence is a matter which is left for the discretion of the trial court. Absent the showing of abuse of discretion, this court will not disturb the trial court's denial of probation. *State v. Bovill*, 223 Neb. 764, 393 N.W.2d 715 (1986); *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984); *State v. Last*, 212 Neb. 596, 324 N.W.2d 402 (1982).

As to defendant's contention that his sentence was excessive, this court has consistently held that absent an abuse of discretion, this court will not disturb a sentence imposed within the statutory limits. Arson in the first degree is a Class II felony. § 28-502(3). As such, it is punishable by a maximum of 50 years' imprisonment and a minimum of 1 year's imprisonment. Neb. Rev. Stat. § 28-105(1) (Reissue 1985). The defendant was sentenced to imprisonment for an indeterminate period of 5 to 10 years. The presentence report, setting out defendant's prior record, shows that defendant, a 44-year-old man, was convicted of burglary in 1962, shooting with intent to kill, wound, or maim and carrying a concealed weapon in 1977, and was imprisoned for each of these felony convictions. In addition, defendant has numerous misdemeanor convictions, including a $100 fine imposed in connection with a charge of destruction of property on August 27, 1985, at the same location where the arson in this case was committed. Defendant's sentence in this case was well within the prescribed statutory limits and obviously not excessive. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF L.D., Z.D., N.D., AND D.D., CHILDREN UNDER 18 YEARS OF AGE.
ROBERT E. WHEELER, GUARDIAN AD LITEM, APPELLANT, STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. D.D., APPELLEE AND CROSS-APPELLANT, AND S.D., APPELLEE.

398 N.W.2d 91

Filed December 19, 1986. No. 86-310.

1. **Jurisdiction.** Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent.
2. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.
3. _____: _____. Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
4. **Minors: Statutes: Juvenile Courts.** The Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act.
5. **Pleadings: Words and Phrases.** A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief.
6. **Pleadings: Affidavits: Jurisdiction.** Verification of a pleading constitutes no part of a pleading and, ordinarily, is not necessary to vest jurisdiction in a court.
7. **Pleadings: Affidavits: Waiver.** As any other formal matter, an absence of, or defect in, verification is waived by failure to make a proper and timely objection.
8. **Minors: Appeal and Error.** An adjudication under Neb. Rev. Stat. § 43-247 (Reissue 1984) of the Nebraska Juvenile Code is an appealable order.
9. **Jurisdiction: Judgments: Appeal and Error.** If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed.
10. _____: _____: _____. Although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Reversed and remanded with direction.

Robert E. Wheeler, guardian ad litem, for appellant.

Curtis A. Sikyta, for appellee D.D.

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

SHANAHAN, J.

As authorized by the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), on August 7, 1984, the county attorney of Garfield County, in his signed but unverified petition in the county court as a juvenile court, alleged that certain juveniles, that is, L.D. (7 years), Z.D. (6 years), N.D. (4 years), and D.J.D. (19 months), were "subject to the jurisdiction of this Court under Section 43-247 (3)(a) and are currently in a situation injurious to the health and/or morals" of the named juveniles.

Section 43-247 states in part:

> The juvenile court in each county as herein provided shall have jurisdiction of:
>
> (1) Any juvenile who has committed an act other than a traffic offense which would constitute a misdemeanor or an infraction under the laws of this state, or violation of a city or village ordinance;
>
> (2) Any juvenile who has committed an act which would constitute a felony under the laws of this state;
>
> (3) Any juvenile (a) who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian; who is abandoned by his or her parent, guardian, or custodian; who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian; whose parent, guardian, or custodian neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; whose parent, guardian, or custodian neglects or refuses to provide special care made necessary by the mental condition of the juvenile; or who is in a situation or engages in an occupation dangerous to life or limb or injurious to the health or morals of such juvenile or (b)

who, by reason of being wayward or habitually disobedient, is uncontrolled by his or her parent, guardian, or custodian; who deports himself or herself so as to injure or endanger seriously the morals or health of himself, herself, or others; or who is habitually truant from home or school;

(4) Any juvenile who has committed an act which would constitute a traffic offense as defined in section 43-245.

Because we must determine the exact nature of certain actions taken by the juvenile court in this case, we examine and analyze the circumstances under which the juvenile court acted.

After the petition had been filed, on August 7 the children's parents, the father's attorney, and the county attorney attended a hearing in the juvenile court, where the father "submitted to the jurisdiction of the Court, admitting the need for Court intervention, but specifically not admitting any specific allegations or facts underlying the Petition." The court then appointed a guardian ad litem for all the children and an attorney for the father, but deferred appointment of counsel for the mother. The father filed a motion on August 31, requesting, among other items, visitation rights with his children. On September 25 the county attorney, the guardian ad litem, and the court-appointed counsel for the father appeared before the juvenile court, which ordered that psychological evaluations of all parties be completed within 45 days and the father's visitation of the children be supervised by the Department of Social Services. Although the father had never filed any pleading responsive to the petition, the father's attorney sought depositions from prospective witnesses.

Immediately before adduction of evidence at a hearing on April 30, 1985, the father's counsel expressed concern about safeguarding the father's privilege against self-incrimination and the possibility of criminal charges against the father for his acts involving the children. Regarding the hearing about to take place, counsel for the father stated: "[W]e need to back up and give [the father] a right to protect himself from the very beginning rather than going into disposition—going into these things on disposition." To expedite the pending proceedings in the juvenile court, the State expressed a willingness to extend

immunity to the father. The guardian ad litem remarked: "The whole issue is one of sexual abuse. If [the father] will not admit to the sexual abuse then I think the Court must make a determination of whether there was, otherwise we get rid of the case." Counsel for the mother commented that the hearing became necessary, since the father had denied any misconduct, and, therefore, the father's sexual abuse of his children had to be "proved to the satisfaction of the Court." In the presence of the parents, their lawyers, and the guardian ad litem, evidence was then adduced at the April 30 hearing before the juvenile court.

Nadine Folken, an employee of the Department of Social Services for the State of Nebraska, testified that she, in response to a report that the father had sexually abused his children, visited with the children, who described their sexual contacts with their father. One male child told Ms. Folken that his father had fondled the boy's genitals and, further, as the boy pointed to his genital area, informed Ms. Folken that "sometimes daddy hurts me." Another male child recounted to Ms. Folken an incident of sexual contact with his father and his father's semen. (We decline any further detailed elaboration of this particular incident.)

Dr. Thomas England, a clinical psychologist, testified concerning his interviews of the children in the fall of 1984. Two of the male children discussed incidents involving their father's fondling their genitals and his ejaculation in response to their "touching" him. Dr. England testified concerning the characteristics of a male individual involved in "incest or sexual molestation" and that he found such characteristics present in the father of the children. Dr. England concluded that there had been "sexual contact between [the father] and the children." Finally, Dr. England recommended that any visitation of the children by the father be supervised and that there should be counseling for "all parties."

One of the State's witnesses, a female first cousin of the children's father, testified that approximately 6 years before the hearing, when that witness was 13 years of age, the father of the children had "sexual intercourse" with the witness.

Called as a witness by the State, the children's father, age 34,

denied all sexual "incidents" with his children. The children's parents were divorced at the time of the hearing. The father did acknowledge that, when he was 12 years old, he had "closeness and simulation of sex but no penetration" of his 8-year-old sister. The father persisted in such relationship with his sister for a period in excess of 12 months. Also, the father admitted a "flashing" incident which had been publicly observed in the parking lot of a Grand Island mall in the fall of 1982, where the father performed a sexual act on himself "to relieve [his] tension." Later, after confrontation by the Grand Island police, who stated that "prosecution would be imminent if [he] did not take and get counseling and psychiatric evaluation," the father obtained psychiatric help.

Another psychologist, Dr. John Curran, testified for the State. Dr. Curran had interviewed L.D., Z.D., N.D., and their mother. As testified by Dr. Curran, the father had "little control over sexual impulses," one of the characteristics of "an abusing parent." Referring to the children's father and his relationship with his sister, Dr. Curran characterized that relationship "as a sexual abuse relationship; a predatory relationship." Dr. Curran pointed out two aspects of sexual abuse which indicate a chronic condition in an abuser: first, sexual abuse is highly rewarding to the abuser; and, second, sexual abuse usually is immediately rewarding to the abuser. In reference to the father in this case, and evaluating him in terms of those two aspects of the chronic sexual abuser, Dr. Curran concluded: "I would believe that [the father] is at risk for committing sexual abuse in the future, and I think that his children would likely be targets." Dr. Curran also testified that sexually abused children "start postulating that they were somehow responsible for these acts. Some of that leads to them thinking they are dirty, not worthwhile, and that the—this leads into further problems." As noted by Dr. Curran, immediate damage from sexual abuse to children includes distrust of adults, bed-wetting, and an excessive fear of being alone in the bathroom. Dr. Curran further testified regarding "long term damage characteristics" of sexually abused children, namely, a difficulty in formation of sound relationships with others, inappropriate sexual behavior, running away from home, and chronic depression.

Finally, Dr. Curran concluded that there had been "sexual abuse perpetrated upon [L.D.] by his father."

The children's mother testified that the children were elated when they learned that "daddy wouldn't be gettin' in bed" with them any more.

During the hearing on April 30, counsel for the father made several objections, including objections regarding hearsay, irrelevant evidence, testimony lacking foundation, leading questions, argumentative questions, and competency of witnesses; requested that certain evidence be stricken; stipulated to the qualifications of Drs. England and Curran as expert witnesses; called the court's attention to repetitious questions; and requested a ruling by the court when it appeared that the court had deferred ruling on or overlooked objections made by the father's counsel.

At conclusion of the evidence adduced at the April 30 hearing, the court remarked: "[B]efore we can order any counseling we've got to order—we've got to find sexual abuse otherwise we've got to just dismiss it [the petition and proceedings]." The court took the matter under advisement and, on May 6, "after carefully considering the evidence," found "there has been some evidence of sex abuse" and ordered that the father be permitted to visit his children, subject to supervision from the Department of Social Services. The court further ordered that the father "shall receive counselling for sex abuse, and that such supervision and counselling shall gradually diminish as the situation improves [and] that this matter shall be reviewed at the end of 3 months."

On May 9 the father filed a motion requesting clarification of the kind of counseling ordered by the court and specification of the "type of visitation" he might exercise regarding his children. In August the father filed another motion, informing the court about the unavailability of a psychologist for counseling and requesting a review as soon as possible.

There was never another hearing until October 18, when the court, on its own "Motion for Review Hearing" and without reception of additional evidence, found that "at the April 30, 1985 Dispositional Hearing, there was insufficient evidence to show sexual abuse and the matter is therefore dismissed."

The guardian ad litem, in his appeal to the district court, presented two contentions. First, the guardian ad litem alleged that, as a result of the adjudication hearing on April 30 and as reflected in the order of May 6, the juvenile court found that the father had sexually abused his children. Second, the guardian ad litem contended that, in view of the order of May 6, which was based on the evidence adduced at the April 30 hearing, the juvenile court improperly ordered the case dismissed on October 18.

In reaching its decision, the district court found two statutes were controlling, namely:

> The county attorney or any reputable person residing in the county, with the consent of the county attorney, having knowledge of a juvenile in his or her county who appears to be a juvenile described in subdivision (1), (2), (3), or (4) of section 43-247 may file with the clerk of the court having jurisdiction in the matter, a petition in writing specifying which subdivision of section 43-247 is alleged and setting forth the facts verified by affidavit. Allegations under subdivisions (1), (2), and (4) of section 43-247 shall be made with the same specificity as a criminal complaint. It shall be sufficient if the affidavit is based upon information and belief. . . .

§ 43-274; and:

> Except when the care of the juvenile is awarded to the Department of Social Services, together with termination of parental rights, or the juvenile has been legally adopted, the jurisdiction of the court shall continue over any juvenile brought before the court, or committed under the provisions of sections 43-245 to 43-2,129, and the court shall have power to order a change in the custody or care of any such juvenile, if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change.

§ 43-295.

According to the district court, the county attorney's unverified petition prevented the juvenile court's acquisition of jurisdiction, and § 43-295 authorized the juvenile court to change its May 6 order. For those reasons the district court

affirmed the October 18 order of the juvenile court, that is, dismissal of the proceedings, entered an order on costs, and awarded a fee of $200 to the guardian ad litem and to the court-appointed counsel for the father.

On appeal to this court the guardian ad litem contends (1) notwithstanding the unverified petition in the proceedings, the juvenile court adjudicated that the children were juveniles within the Nebraska Juvenile Code as the result of their father's sexual abuse of the children, and (2) the October 18 order of the juvenile court, vacating the order of May 6, is not authorized by law. The father has cross-appealed, claiming the district court erred in the amount allowed as an attorney fee for the services of the father's court-appointed counsel in the appeal to the district court.

We now cut the gordian knot binding the case before us.

First, we examine the district court's decision that, as the result of the unverified petition, the juvenile court never acquired jurisdiction. If the district court is correct in its decision that the juvenile court lacked jurisdiction for the hearing of April 30 and the order of May 6, the district court's further finding that the juvenile court was authorized to vacate its previous order is gratuitous.

"Litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent." *Coffelt v. City of Omaha*, 223 Neb. 108, 110, 388 N.W.2d 467, 469 (1986). See, also, *Riedy v. Riedy*, 222 Neb. 310, 383 N.W.2d 742 (1986). "Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter." *Glup v. City of Omaha*, 222 Neb. 355, 359, 383 N.W.2d 773, 777 (1986). "Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte." *Id.* Regarding the unverified petition in the juvenile court, the district court apparently applied the preceding principles regarding jurisdiction, as enunciated in *Coffelt, Riedy*, and *Glup*, inasmuch as the father has never

objected to the form of the petition, that is, absence of verification.

As expressed in § 43-247: "The juvenile court in each county as herein provided shall have jurisdiction of" any juvenile involved in the specific situations described in that statute. The Nebraska Juvenile Code further provides: "[The Nebraska Juvenile Code] shall be liberally construed to the end that its purpose may be carried out as provided in section 43-246." § 43-2,128. Hence, the Nebraska Juvenile Code must be liberally construed to accomplish its purposes serving the best interests of juveniles within the act. See, *Healey v. Johnson*, 188 Neb. 677, 198 N.W.2d 466 (1972); *State v. Randall*, 187 Neb. 64, 187 N.W.2d 586 (1971).

As a part of the Nebraska Juvenile Code, § 43-246 provides:

> Acknowledging the responsibility of the juvenile court to act to preserve the public peace and security, [the Nebraska Juvenile Code] shall be construed to effectuate the following:
>
> (1) To assure the rights of all juveniles to care and protection and a stable living environment and to development of their capacities for a healthy personality, physical well-being, and useful citizenship and to protect the public interest . . . .

Although an adjudication under subsections (1), (2), (3)(b), and (4) of § 43-247 must be based on "proof beyond a reasonable doubt," an adjudication under subsection (3)(a) of § 43-247 is based on "a preponderance of the evidence." § 43-279(2).

We note that § 43-279 (Cum. Supp. 1986), which became effective on September 6, 1985, now requires all adjudications under § 43-247 except an adjudication involving subsection (3)(a) to be "based upon proof beyond a reasonable doubt." We further note that § 43-279.01 (Cum. Supp. 1986), which governs an adjudication under subsection (3)(a) of § 43-247 and also became effective on September 6, 1985, no longer indicates applicable rules of evidence but does retain the requirement that proof be "by a preponderance of the evidence."

Thus, the quantitative proof required for an adjudication

based on subsection (3)(a) of § 43-247, as alleged in the present case, is a "preponderance of the evidence" and, therefore, is analogous to the standard of proof generally applicable in civil cases. In contrast, an adjudication under subsections (1), (2), (3)(b), and (4) of § 43-247 is based on "proof beyond a reasonable doubt" and in that regard is akin to cases brought under the Nebraska Criminal Code or other statutes specifying a criminal offense. An explanation for those different evidential requirements may be the particular conduct examined by a juvenile court, that is, subsections (1), (2), (3)(b), and (4) of § 43-247 relate to a juvenile's misconduct, whereas subsection (3)(a) of § 43-247 pertains to another's conduct inflicted upon or directed toward a juvenile. Also, conduct as a basis for terminating parental rights, see § 43-292, must be established by "clear and convincing evidence." *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 107, 368 N.W.2d 474, 479 (1985). However, in the case before us the State did not seek termination of parental rights, and the quantum of proof, as will develop in our opinion, is not an issue. Nevertheless, we find that an adjudication based on subsection (3)(a) of § 43-247 is analogous to a civil proceeding, which guides us in answering some of the questions presented in the case now under consideration.

Section 43-279(3) provides:

> If the court shall find that the juvenile named in the petition is not within the provisions of section 43-247 it shall dismiss the case. If the court finds that the juvenile named in the petition is such a juvenile, it shall make and enter its findings and adjudication accordingly, designating which subdivision or subdivisions of section 43-247 such juvenile is within; the court shall then proceed to an inquiry into the proper disposition to be made of such juvenile.

We arrive, then, at one of the questions raised in this appeal: Is verification of a petition necessary to vest jurisdiction in a juvenile court for an adjudication pursuant to § 43-247(3)(a)? A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief. See, *Paxton v. State*, 59

Neb. 460, 81 N.W. 383 (1899); *Brown v. Peters*, 127 Tex. 300, 94 S.W.2d 129 (1936); *Warren v. Roberts, Judge*, 144 W. Va. 741, 110 S.E.2d 909 (1959). Nebraska's civil procedure previously required verification of pleadings. See Neb. Rev. Stat. § 25-824 (1943): "Every pleading of fact must be verified by the affidavit of the party, his agent, or attorney." In 1969 the requirement of verified pleadings in civil cases was eliminated. See § 25-824 (Cum. Supp. 1969). Verification of a pleading, such as the petition in the case before us, constitutes no part of a pleading and, ordinarily, is not necessary to vest jurisdiction in a court. See, *Johnson v. Jones*, 2 Neb. 126 (1873); *Dorrington v. Meyer*, 8 Neb. 211 (1879); *Northup v. Bathrick*, 80 Neb. 36, 113 N.W. 808 (1907) (syllabus of the court) ("The verification of a pleading is not jurisdictional"); *In re Estate of Shaffer*, 203 Kan. 264, 454 P.2d 1 (1969); *Chandler v. Taylor*, 234 Iowa 287, 12 N.W.2d 590 (1944); *United Farm Workers v. Agr. Labor Relations*, 37 Cal. 3d 912, 694 P.2d 138, 210 Cal. Rptr. 453 (1985).

As expressed in *Preparatory Temple, etc. v. Seery*, 81 N.J. Super. 429, 433, 195 A.2d 900, 903 (1963): "[Verification] is a purely procedural direction which is formal but does not go to the essence of the law with regard to requirements for jurisdiction of the courts." Also, as any other formal matter, an absence of, or defect in, verification is waived by failure to make a proper and timely objection. See, *Woods v. Woods*, 177 Neb. 542, 542-43, 129 N.W.2d 519, 521 (1964) ("pleading over waived any objection as to verification"); *Emery v. Bennett*, 97 Kan. 490, 155 P. 1075 (1916); *Hite v. Reynolds*, 163 Ky. 502, 173 S.W. 1108 (1915); 61A Am. Jur. 2d *Pleading* § 349 (1981). In the case before us the father participated in proceedings and requested affirmative relief in an action commenced by the petition he now assails. If there were any deficiency of formalities in that petition, the father has waived his right to question any formal matters pertaining to that petition. Having considered some of the purposes of the Nebraska Juvenile Code and the construction to be given that act, we, therefore, hold that verification of a petition alleging a child to be a juvenile within § 43-247(3)(a) is not required to vest jurisdiction in a juvenile court. Nevertheless, it is the adjudication that a child is

a juvenile, as characterized in § 43-247, which vests subject matter jurisdiction in a juvenile court, not the petition by which an adjudication is requested in proceedings before a juvenile court.

Before addressing the propriety of the juvenile court's order entered on October 18, 1985, we must determine the nature of the hearing on April 30 and the order of May 6 in these proceedings. The father, on realizing he was about to enter a judicial evaluation of his conduct toward his children, asserted his right "to protect himself from the very beginning rather than going into disposition—going into these things on disposition." Such assertion by the father was obviously prompted by § 43-283, which provides: "Strict rules of evidence shall not be applied at any dispositional hearing." The manner in which evidence was presented to the juvenile court establishes that the hearing of April 30 was conducted under or governed by the "customary rules of evidence," see § 43-279(1), that is, adduction of evidence at the April 30 hearing was controlled by the Nebraska Evidence Rules, Neb. Rev. Stat. §§ 27-101 to 27-1103 (Reissue 1985). Clearly, the father wanted evidence at the April 30 hearing to be controlled by the Nebraska Evidence Rules rather than await a dispositional hearing, where evidence admitted under less stringent rules might make his rebuttal to the petition extremely difficult, if not impossible. When we take into account the remarks, statements, and comments by the parties immediately before the hearing of April 30, and when we consider the juvenile court's expression about the hearing, namely, "we've got to find sexual abuse otherwise we've got to just dismiss" the case, we can reach but one conclusion: The hearing on April 30 was intended to be, and was, an adjudication based on the father's conduct toward his children, or, more precisely, a determination whether the father had sexually abused his children. According to the petition filed in this case, the only subdivision of § 43-247 pertinent to the proceedings was (3)(a), that is, the children were in a situation which was "injurious to the health or morals" of those children. On May 6, after the juvenile court had found evidence of the father's sexual abuse of his children, the court did not dismiss the petition, see

§ 43-279(3), and, therefore, did adjudicate, albeit implicitly, that the father's misconduct brought the children within the purview of § 43-247(3)(a) as juveniles who were in a situation "injurious to the health or morals" of those juveniles. Thus, the order entered by the juvenile court on May 6, 1985, based on the evidence presented at the hearing of April 30, was an adjudication that the children were juveniles within the Nebraska Juvenile Code and that, therefore, the court had subject matter jurisdiction. An adjudication under § 43-247 of the Nebraska Juvenile Code is an appealable order. See, *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985); *In re Interest of Aufenkamp*, 214 Neb. 297, 333 N.W.2d 681 (1983); *State ex rel. Casselman v. Macken*, 194 Neb. 806, 235 N.W.2d 867 (1975).

We now address the issue of the propriety of the juvenile court's order entered on October 18, 1985, setting aside the adjudication made on May 6.

Neb. Rev. Stat. § 24-541.02 (Reissue 1985), pertaining to appeals from proceedings in the county court sitting as a juvenile court, provides in part: "(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 [statutory requirements omitted]."

If a lower court does not have subject matter jurisdiction and, therefore, has no power to entertain the proceedings or decide a question, an appellate court lacks jurisdiction to review or evaluate an evidentiary determination for an act outside the jurisdiction of the court whose judgment or order is appealed. See *Glup v. City of Omaha*, 222 Neb. 355, 383 N.W.2d 773 (1986). However, although an extrajurisdictional act of a lower court cannot vest the appellate court with jurisdiction to review or evaluate an evidentiary determination involved in such act, an appellate court has jurisdiction and, moreover, the duty to determine whether the lower court had the power to enter the judgment or final order sought to be reviewed. See *Glup v. City of Omaha, supra*.

No one appealed the juvenile court's order entered on May 6. In the absence of an appeal pursuant to § 24-541.02, the adjudication of May 6 became, and is, a final order, due to the

expiration of 30 days from rendition of that judgment and entry of such order. It is true that § 43-295 does allow a juvenile court to alter its previous order concerning "custody or care" of a juvenile. Section 43-295 is a statutory analog to Neb. Rev. Stat. § 42-351(1) (Reissue 1984) authorizing a district court's continuing jurisdiction involving "the custody and support of minor children" affected by proceedings for dissolution of a marriage. Cf. *Nimmer v. Nimmer*, 203 Neb. 503, 505, 279 N.W.2d 156, 158 (1979): "The decree of a District Court in an action for the dissolution of a marriage, insofar as minor children are concerned, is never final in the sense it cannot be changed. [Citation omitted.] Thus the court has continuing jurisdiction." Cf., also, *Nemec v. Nemec*, 219 Neb. 891, 367 N.W.2d 705 (1985). However, in the case before us, after an apparent reevaluation of the evidence underlying its May 6 judgment and order, which had become final, the juvenile court, on October 18, vacated its previous order and judgment because "there was insufficient evidence to show sexual abuse." Section 43-295 does not empower a juvenile court to review the evidentiary basis of its order which has become final as an adjudication of subject matter jurisdiction made under § 43-247. Under the circumstances of this case, the juvenile court lacked subject matter jurisdiction for its order of October 18, 1985, vacating the May 6 adjudication that the children were juveniles within the meaning of the Nebraska Juvenile Code. As a consequence of the juvenile court's lack of jurisdiction for its October 18 order, the district court had no jurisdiction to review any evidentiary determination made by the juvenile court without jurisdiction and should have set aside the juvenile court's order of October 18, which had dismissed the petition and proceedings brought by the county attorney. The district court committed error in failing to set aside the juvenile court's order of October 18, 1985.

Further, because the juvenile court's act setting aside its previous adjudication and final order of May 6 was beyond or outside the power of that court, the district court was without jurisdiction to enter an order awarding any fee for proceedings before the district court. Awarding a fee on account of the district court proceedings would be approbation and

enforcement of the juvenile court's action taken without jurisdiction. As far as shown by the record presented to us, the juvenile court still has jurisdiction for further proceedings consistent with the Nebraska Juvenile Code, and the matter of fees and costs may be considered by the juvenile court. The district court lacked jurisdiction to enter its order on fees and costs and, therefore, committed error in making such order.

Before remanding this matter to the district court, we are compelled to make certain observations about the proceedings in the juvenile court. We remind the juvenile court and counsel that this case involves impressionable children in their formative years, not impersonal flotsam and jetsam adrift on a sea of indecision or, much worse, societal insensitivity or apathy. According to the court stenographer's certificates, the proceedings in the juvenile court consist of 80,750 words. There is one additional word which characterizes what has happened to the children in this case. However, judicial restraint precludes use of that word. As noted by the district court, the fees and costs thus far incurred in the juvenile court exceed $19,000, but that sum does not begin to approach the price being paid by the children, languishing during labyrinthine litigation in the juvenile court while they await a dispositional determination of their best interests.

Recognizing that this case has been pending in the juvenile court since August 7, 1984, we make statements which cannot be misunderstood regarding further proceedings in this matter. On remand the district court shall vacate and set aside the juvenile court's order and judgment entered on October 18, 1985, thereby reinstating not only the order and judgment entered by the juvenile court on May 6, 1985, but all other unappealed orders reflected by the record brought to us in this appeal, as well. The district court is further directed to remand the matter to the juvenile court with directions to order the juvenile court to hold a dispositional hearing forthwith. At such dispositional hearing there shall be no relitigation, or attempted relitigation, of any question whether there has been misconduct on the part of the father toward his children. Existence of the father's misconduct toward his children has been established, and any attempt to retry that issue shall meet

with extreme disapproval by this court.

Consequently, we reverse the district court's judgment affirming the juvenile court's order and judgment of October 18, which had vacated and set aside the juvenile court's adjudication made and order entered on May 6, 1985, and we remand this matter to the district court with direction to vacate and set aside the order entered in the juvenile court on October 18, 1985, and remand the matter to the juvenile court with directions to hold a dispositional hearing forthwith.

The judgment of the district court is reversed, and this matter is remanded with direction.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. DESMOND D. DANIELS, APPELLANT.

397 N.W.2d 631

Filed December 19, 1986. No. 86-376.

Criminal Law: Courts: Probation and Parole. Motions to revoke probation must be filed in the sentencing court. Where a probationer was tried, convicted, and sentenced in the county court, it is the county court, not the district court which served in its appellate capacity, that has jurisdiction to hear a motion to revoke probation.

Appeal from the District Court for Loup County: RONALD D. OLBERDING, Judge. Reversed and remanded with directions to dismiss.

Gary G. Washburn, for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

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

WHITE, J.

The defendant appeals from an order of the district court for Loup County revoking his probation and sentencing him to 6

months in jail and a $500 fine, and revoking his driver's license for life on count I, driving while intoxicated, third offense, to run concurrently with a 6-month sentence for count II, resisting arrest. His first assignment of error is that the county court, and not the district court, was the "sentencing court" and that the district court was without jurisdiction to revoke probation. Second, he asserts that the district court erred in sentencing him with respect to count II, since he had already completed his sentence on that count. His third assignment seeks to limit the effect of the lifetime revocation of driving privileges to the territorial boundaries of the State of Nebraska. We reverse, as the district court was without jurisdiction to consider the motion to revoke probation.

On September 7, 1983, the appellant was convicted in the county court of driving while intoxicated, third offense, and resisting arrest. He was sentenced to a term of 18 months' probation on condition that he serve 7 days in jail, pay a $500 fine, and have his license suspended for 1 year. The court further sentenced defendant to 23 days in jail for resisting arrest, with credit for 1 day served.

The defendant appealed to the district court, which affirmed the judgment on October 30, 1984, and then appealed to this court. We affirmed the district court in *State v. Daniels*, 220 Neb. 480, 370 N.W.2d 179 (1985). On August 7, 1985, a mandate from this court was filed in the district court for Loup County, directing the district court to enter judgment in conformity with our decision. On November 20, 1985, the district court held a hearing to implement the mandate, and as a result the appellant was put on probation and ordered to serve his jail sentence starting December 20, 1985. The State concedes that appellant served his time for count II, resisting arrest.

On January 31, 1986, a motion to revoke probation was filed in the district court. The appellant subsequently filed an objection, asserting lack of jurisdiction, which the district court overruled. On April 16, 1986, the district court revoked the appellant's probation and on April 24, 1986, resentenced him as previously described. This appeal ensued.

Neb. Rev. Stat. § 29-2267 (Reissue 1985) provides in part that "[w]henever a motion or information to revoke probation

is filed, the probationer shall be entitled to a prompt consideration of such charge by the *sentencing court*." (Emphasis supplied.) The appellant argues that the county court tried and sentenced him and that the district court affirmed the county court in its capacity as an intermediate appellate court. Therefore, he argues, the district court could not be considered to be the sentencing court and lacked jurisdiction to hear the motion to revoke probation.

It appears that the issue of which forum is to be considered the "sentencing court" in cases such as this one has not previously been addressed by this court. Neb. Rev. Stat. § 29-109 (Reissue 1985) directs us to construe all words, terms, or phrases "in the sense in which they are understood in common language, taking into consideration the context and subject matter relative to which they are employed." The State argues that since the affirmance by the district court is considered to vacate the judgment of the county court, see Neb. Rev. Stat. § 24-541.06(3) (Reissue 1985), the district court became the "sentencing court" and properly heard the motion to revoke probation. This construction of the phrase is strained at best and disregards the principle that words in a statute are to be given their plain and ordinary meaning. *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985).

Looking at the role of the district court in appeals from county court, it is clear that the district court is considered to be an intermediate court of appeals and not a trial court. *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984); *State v. Ledingham*, 217 Neb. 135, 347 N.W.2d 865 (1984). District court review is limited to an examination of the record for error and abuse of discretion. *State v. Smith*, 199 Neb. 368, 259 N.W.2d 16 (1977). Issues cannot be addressed by the district court unless first handled by the county court. *State v. Ledingham, supra; State v. Ferris*, 216 Neb. 606, 344 N.W.2d 668 (1984). Under Neb. Rev. Stat. § 29-613 (Reissue 1985), a district court may affirm, modify, or vacate the judgment of the county court. Although the district court is empowered to review a sentence for error or abuse of discretion, *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986), there is no statutory authority giving it jurisdiction to sentence the

defendant anew. Further, it is clear that the sentencing process consists of more than an entry of judgment vacating a lower tribunal's judgment; the sentencing court must comply with Neb. Rev. Stat. §§ 29-2201 et seq. (Reissue 1985). Thus, the county court is the factfinding and sentencing forum; the district court's function is to review the record for error.

Giving the words their plain meaning and taking into consideration the context in which they are employed, the phrase "sentencing court" refers to the county court and not to the district court in its appellate capacity. See *People v. Collins*, 25 Mich. App. 609, 181 N.W.2d 601 (1970), which reached a similar interpretation. The district court lacked jurisdiction to hear the motion to revoke probation. Its judgment is reversed and the cause remanded with directions to dismiss the motion.

Having found the first assignment of error as to jurisdiction meritorious, there is no need to address the other issues raised.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. GARY D. FOSTER, APPELLANT.
398 N.W.2d 101

Filed December 19, 1986. No. 86-414.

1. **Prior Convictions: Right to Counsel.** The State's burden in proving valid prior convictions for enhancement purposes is only to show that the defendant had or knowingly and voluntarily waived counsel at the time of such convictions.
2. **Prior Convictions: Right to Counsel: Waiver.** A sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel for enhancement purposes.
3. **Records.** A checklist or other docket entry which is made by one authorized to make it imports verity, and unless contradicted it stands as a true record of the event.
4. _____. A checklist which is used as a substitute for a formal, written journal entry must be prepared with as much care and certainty as any record of a court in order to impart absolute verity.

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

John R. Brogan, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

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

BOSLAUGH, J.

Upon a plea of guilty to operating a motor vehicle while under the influence of intoxicating liquor, third offense (count I), the defendant, Gary D. Foster, was sentenced to jail for 90 days, fined $500, and his operator's license was permanently revoked. Upon a similar plea to resisting arrest (count II), he was sentenced to jail for 3 months, the sentence to run consecutively to the sentence on the first count. On appeal to the district court both judgments were affirmed.

On appeal to this court from the sentence on count I, the defendant makes two assignments of error: (1) The county and district courts erred in improperly enhancing the conviction to DWI, third offense; and (2) Since the conviction was improperly enhanced, the sentence imposed was improper.

The defendant contends that for purposes of enhancement proceedings, a checklist system of recording an arraignment is insufficient to show that an uncounseled defendant knowingly and intelligently waived the right to counsel. This question has previously been resolved against the defendant's position.

The State's burden in proving valid prior convictions for enhancement purposes is only to show that the defendant had or knowingly and voluntarily waived counsel at the time of such convictions. *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986); *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986).

In *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984), this court determined that a sufficiently complete checklist or other docket entry could establish a valid waiver of counsel for enhancement purposes. It was further stated: "A checklist or other such docket entry which is made by one authorized to make it imports verity, and unless contradicted it stands as a true record of the event." *State v. Ziemba, supra* at 628, 346 N.W.2d at 218.

In *State v. Ziemba, supra*, we further stated at 619-20, 346 N.W.2d at 213-14:

> In addition to satisfying the requirements set out in *State v. Tweedy, supra*, in regard to accepting pleas of guilty in misdemeanor cases, the enhancement proceeding must satisfy the requirements set out in § 39-669.07 and *State v. Smith, supra. State v. Prichard, supra.* The transcript of a judgment used to prove a prior conviction must show that at the time of the conviction the defendant was represented by counsel or waived his right to counsel. A defendant may, as in *State v. Smith, supra*, object to the admission of the record of a prior conviction on the basis that the record does not affirmatively establish that he was represented by counsel or waived his right to counsel. A transcript of judgment which does not contain such an affirmative showing is not admissible and cannot be used to prove a prior conviction. *State v. Smith, supra.*
>
> Section 39-669.07(3) now provides that "[t]he defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions."
>
> There is no requirement that the State prove a prior conviction by a transcript of the judgment if the defendant admits that he was in fact convicted as alleged in the complaint. However, in accepting such a waiver the trial court must address the defendant and ascertain that he was represented by counsel at the time of the prior conviction or waived his right to counsel.
>
> In either event the trial court is required to advise the defendant that he has a right to review the record of the prior conviction, bring mitigating facts to the attention of the court prior to sentencing, and object to the validity of the prior conviction as provided in § 39-669.07. The defendant, however, cannot relitigate the former conviction in the enhancement proceeding. *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983). After being advised of his rights under § 39-669.07, the defendant may waive

any or all of those rights. The trial court may then impose sentence or order that a presentence investigation be made.

At the enhancement proceeding in the county court on January 7, 1986, the State offered exhibits 1 and 2, which were received over the defendant's objections. Exhibit 1, a certified transcript from the county court for York County, shows the defendant pleaded no contest on February 27, 1978, to a charge of driving while intoxicated. The defendant objected to exhibit 1 on grounds that it failed to show he was represented by counsel, or knowingly waived that right, and that the checklist employed in making that record did not adequately show he was afforded or informed of his right to counsel. In receiving the exhibit the county court was correct in noting that exhibit 1 did comply with the requirements of law.

Exhibit 2, a certified transcript from the county court for Hamilton County, Nebraska, which was received over the same objections as exhibit 1, consists of a complaint, two checklist-type journal entries, and an order of probation.

The complaint was made on July 24, 1979, and contains an allegation that on that date the defendant committed second offense driving while under the influence. The first journal entry shows the defendant appeared before the Hamilton County Court on July 24, without counsel. The checklist indicates the defendant was informed, inter alia, of his right to retained or appointed counsel, and he knowingly, voluntarily, and intelligently waived that right and entered a plea of guilty to count I.

The county court entered checkmarks next to statements indicating that the defendant entered the plea knowingly and voluntarily and that a factual basis existed for the plea. The court did not, however, place a checkmark next to the statement: "( ) Whereupon the Court accepts the defendant's plea(s) and upon said plea(s) finds the defendant guilty as charged." The matter was set for sentencing July 31, 1979, and for arraignment on count II on that date.

The second journal entry, dated July 31, 1979, again indicates the defendant knowingly waived counsel. The checklist then shows the defendant entered a plea of not guilty

to count II, and the matter was set for trial on August 24, 1979. The nature of count II is unexplained, since the complaint previously referred to charged but one count.

The order of probation, in pertinent part, provides as follows:

> GARY D. FOSTER) ORDER OF PROBATION
> Defendant) (Misdemeanor)
>
> THIS MATTER came on for hearing this 24 day of August, 1979. The State of Nebraska appeared by Michael J. Owens County Attorney of Hamilton County, Nebraska, and the defendant appeared in person with his attorney, _____. The Court finds that the defendant herein entered his plea of not guilty (was found guilty) on the 7th day of July, 1979, to the charge of DWI 2nd offense.
>
> The Court being advised in the premises finds that said defendant is guilty of the said offense as charged in the Complaint.

Exhibit 2 is inadequate for enhancement purposes because it fails to show the defendant was represented by counsel or waived that right.

The July 24, 1979, journal entry shows the defendant waived counsel and pleaded guilty to count I, but it does not indicate that the county court accepted the plea or found the defendant guilty as charged. The order of probation, which is dated August 24, 1979, indicates that the court did in fact convict the defendant of second offense DWI, but fails to satisfy the checklist deficiency because the relevant dates and pleas do not match. The first journal entry shows the defendant pleaded guilty on July 24, 1979, while the probation order shows he pleaded not guilty on July 7, 1979. July 7 is 17 days prior to the date of the offense alleged in the complaint.

The July 31, 1979, journal entry also fails to show the presence of counsel or an intelligent waiver of counsel at the time of the conviction shown in the probation order. The journal entry shows the defendant pleaded not guilty to count II on July 31, 1979, while the order of probation gives July 7 as the date the relevant plea was entered. Thus, while exhibit 2

shows the defendant was convicted of DWI, second offense, the State has failed to prove that the defendant was either represented by counsel or validly waived that right at the time of the conviction. The county court abused its discretion in receiving exhibit 2 for enhancement purposes, over the defendant's objection, because the record failed to show affirmatively that the defendant was represented by counsel or had made a valid waiver of his right to counsel.

A checklist which is used as a substitute for a formal, written journal entry must be prepared with as much care and certainty as any record of a court in order to impart absolute verity.

The judgment on count I, the charge of driving under the influence of intoxicating liquor, third offense, is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. KEVIN C. POLYASCKO, APPELLANT.

397 N.W.2d 633

Filed December 19, 1986. No. 86-490.

1. **Motions for Continuance: Appeal and Error.** Absent an abuse of discretion, the decision of a trial judge on a motion for continuance will be upheld on appeal.
2. **Sexual Assault: Corroboration.** A victim need not be independently corroborated on the particular acts constituting a sexual assault, but must be corroborated on the material circumstances and facts tending to support the victim's testimony.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Patrick W. Meyer of Westergren, Hauptman, O'Brien, Wolf & Hadley, P.C., for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, Richard M. Jones, and David F. Smalheiser, for appellee.

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

WHITE, J.

This is an appeal from the district court for Douglas County which affirmed the judgment of the county court. Appellant, Kevin C. Polyascko, was charged with violating Omaha Mun. Code, ch. 20, art. IV, § 20-92 (1980), taking indecent liberties with a child, and third degree sexual assault in violation of Neb. Rev. Stat. § 28-320 (Reissue 1985). At the close of the testimony the county court found Polyascko guilty of violating the Omaha city ordinance, and he was sentenced to 60 days in jail and ordered to pay a fine of $300. This appeal followed.

The appellant was arrested on or about September 27, 1985, and a trial date was fixed for November 12, 1985, at 9 a.m. The date on which the trial was set is not shown by the record. On October 30, 1985, appellant's retained counsel asked permission to withdraw. Though notice to appellant of the filing of the motion is not shown, the appellant, on November 3, contacted other counsel, whom he first saw on November 9, 2 days after the first counsel was granted permission to withdraw by a county judge.

At 9 a.m. on November 12, 1985, appellant appeared in the county court and stated that he was not ready to proceed to trial. He informed the court that he had secured new counsel, but his attorney was not available for trial on that date. While the record is unclear as to how long before the date of the trial Polyascko knew of his counsel's desire to withdraw, the trial judge determined that at least as of October 30, 1985, appellant knew that his counsel wanted to withdraw. Polyascko admitted to receiving a copy of the motion to withdraw; however, he did not attend the hearing on the motion. The case was continued until 2 o'clock that afternoon to enable appellant to secure other counsel.

At trial appellant appeared with substitute counsel at 2 p.m., and the motion for continuance was not renewed. The victim and a police officer to whom the victim had related the details of the assault were called as witnesses. The appellant also testified.

Appellant assigns as error the failure of the trial court to grant a further continuance and the court's finding that the appellant was guilty of taking indecent liberties with a minor. We affirm.

As to appellant's first assignment of error, we note that this court has frequently stated that a motion for a continuance is addressed to the sound discretion of the trial court and will be upheld on appeal absent an abuse of discretion. *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985). Appellant contends that he was not given adequate time to prepare his defense. This issue has been addressed numerous times by this court. In *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986), the appellant moved for a continuance and the appointment of counsel because his attorney had filed a motion to withdraw previously. The appellant's counsel was not granted leave to withdraw, and appellant chose to proceed to trial without counsel. The trial was not completed on the first day, and appellant was able to secure counsel for the second and final day of trial. No prejudice or abuse of discretion was found to exist. In *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985), the appellant appeared at trial without an attorney, stating that he did not have the money to retain counsel. His motion for a continuance until the end of the month when the appellant expected to receive some money was denied on the ground that the appellant could have contacted the court at any time prior to the start of his trial and made arrangements for counsel to be provided. No prejudice or abuse of discretion was found to exist. In *Richter* we noted the language of the U.S. Court of Appeals for the Second Circuit in the case of *United States v. Arlen*, 252 F.2d 491, 494-95 (2d Cir. 1958), which reads:

> Although the right to assistance of counsel is absolute, United States v. Morgan, 2 Cir., 1955, 222 F.2d 673, the exercise of that right is subject to the necessities of sound judicial administration. Further, the right itself, being personal, may be waived. See Johnson v. Zerbst, 1938, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L.Ed. 1461. We think it clear that although a defendant able to retain counsel is entitled to a reasonable time to secure counsel, he may not

> indefinitely postpone trial by continued applications for more time to seek representation. Whether additional time should be granted is within the sound discretion of the trial court. Further, where a defendant able to retain counsel has been advised by the court that he must retain counsel by a certain reasonable time, and where there is no showing why he has not retained counsel within that time, the court may treat his failure to provide for his own defense as a waiver of his right to counsel and require such defendant to proceed to trial without an attorney. Such a waiver is similar in its consequences to an election made by an indigent defendant.

From these cases it is clear that the trial court's action did not constitute an abuse of discretion. Appellant has not demonstrated that he was prejudiced by proceeding with his trial. It is evident from the record that the appellant was aware of his counsel's desire to withdraw at least as early as October 30. Appellant made no effort to obtain a continuance prior to the date of trial and replaced his original counsel with an attorney who could not be in court on the date scheduled for appellant's trial. In view of the case law cited above and the facts of this case, we find this assignment of error to be without merit.

The appellant's second assignment of error, that the evidence presented at trial was insufficient to find the appellant guilty beyond a reasonable doubt of taking indecent liberties with a minor, is also without merit. We note that this court refrains from resolving conflicts in the evidence, and if, taking the view most favorable to the State, there is sufficient evidence to sustain the conviction, it will be upheld on appeal. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). In *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980), this court recognized that the only corroboration required in an instance of alleged sexual assault is corroboration as to the material facts and circumstances tending to support the victim's testimony about the principal fact at issue.

In *Wounded Arrow* a first degree sexual assault conviction was upheld on appeal based upon corroborating evidence which consisted of the facts told by the victim to his mother, a

jail administrator, and a police detective. In *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981), the defendant was convicted of sexually assaulting his minor stepdaughter. The only testimony corroborating the victim's testimony consisted of that of her mother as to the facts of the assault as related to her by her daughter, and the testimony of a police officer to whom the victim had also related her story. The judgment was affirmed on appeal.

In *Watkins* we stated that the prosecutrix may testify in chief on direct examination if, within a reasonable time under all the circumstances after the act was committed, she made a complaint to another concerning the facts and nature of the assault. Here, too, we stated that the prosecutrix's testimony need only be corroborated as to material facts and circumstances which tend to support her testimony.

Finally, in *State v. Evans*, 212 Neb. 476, 481, 323 N.W.2d 106, 109-10 (1982), the evidentiary issues raised by a case of alleged sexual assault were summed up as follows:

> The initial form of corroborative evidence of the testimony of the prosecutrix offered by the prosecution was the testimony of her mother and her sister regarding the details of the prosecutrix's May 4, 1980, complaint of the alleged assault. "The rule is well established in this state that in a prosecution for sexual assault, *the prosecutrix may testify* in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, *to the fact and nature of the complaint, but not as to its details;* and that *others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. State v. Chaney*, 184 Neb. 734, 171 N.W.2d 787 (1969); *Sherrick v. State*, 157 Neb. 623, 61 N.W.2d 358 (1953).
>
> "This court has also stated that *one to whom the complaining witness has complained may testify to the fact and nature of the complaint* if the complaint was made voluntarily and without unreasonable or inconsistent delay. See, *State v. Deardurff*, 186 Neb. 92, 180 N.W.2d 890 (1970); *Texter v. State*, 170 Neb. 426, 102 N.W.2d 655 (1960)." (Emphasis supplied.) *State v.*

Watkins, 207 Neb. 859, 863, 301 N.W.2d 338, 341 (1981).

Here, the victim made a timely complaint of the assault, which included the nature and facts of the assault. The victim testified that the appellant entered her room wearing only a blue knit shirt and underwear. The appellant sat on the victim's bed and asked her if she "wanted to play around." The victim then testified that she sat on a chair 3 to 4 feet from the bed. Next, the appellant knelt beside the victim and began to rub her foot. The victim testified that the appellant moved his hand up her thigh and touched her genitals through her clothing and asked the victim if he could "kiss [her] there." The victim testified that she said no, and the appellant next began to rub her ear. The victim testified at trial that the appellant asked her if she would tell anyone of the assault. The victim testified she said that she would not. The victim stated that the appellant next left the room but came back and began to rub the victim's ear again. He again asked if he could "kiss [her] there." The victim again said no, and the appellant left her room. The victim also testified that during the assault, the appellant asked her if she wanted to "kiss him there."

The next day, at school, the victim approached a counselor, told her what happened, and the counselor contacted the police. The victim related the facts of the assault to the police officer, who also testified at trial and corroborated the victim's account of the assault.

Taking the view most favorable to the State, we find that there is sufficient evidence to sustain the appellant's conviction. We find that the appellant's second assignment of error is also meritless. We affirm the conviction.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TERRY L. BEAN, APPELLANT.

398 N.W.2d 104

Filed December 19, 1986. No. 86-541.

1. **Rules of the Supreme Court: Appeal and Error.** Relief granted pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986) constitutes the disposition of a direct appeal on its merits.
2. _____: _____. In disposing of a case under Neb. Ct. R. of Prac. 3B (rev. 1986), the Nebraska Supreme Court examines the entire record, not only to resolve those matters which are specifically called to its attention by counsel but also to determine whether any possible errors exist.
3. **Rules of the Supreme Court: Postconviction: Appeal and Error.** Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when ruling on a motion filed pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986). Any such matter is not subject to relitigation in an action brought pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985).
4. **Postconviction.** In order to state a cause of action for postconviction relief, the motion must allege facts which, if proved, constitute an infringement of a prisoner's constitutional rights; allegations which are mere conclusions are not sufficient.
5. _____. When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Terry L. Bean, pro se.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

CAPORALE, J.

Defendant, Terry L. Bean, appeals from the denial of relief under the provisions of the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). He assigns as errors the failure of the district court to (1) find the evidence insufficient to sustain the conviction, (2) find that he should have been allowed to dismiss the deputy public defender assigned to him in the case leading to his conviction, (3) grant him an evidentiary hearing, and (4) find that he was denied the effective assistance of counsel. We affirm.

Pursuant to a plea bargain whereunder the State dismissed a habitual criminal charge and a use of a weapon to commit a felony charge, Bean pled guilty to first degree assault. Such assault is a Class III felony punishable by imprisonment of from 1 to 20 years or a $25,000 fine, or both such imprisonment and fine. Neb. Rev. Stat. §§ 28-308 and 28-105(1) (Reissue 1985). He was thereafter adjudged guilty and sentenced to imprisonment for a term of 3 to 5 years. After that conviction was appealed to this court, Bean's counsel moved to withdraw pursuant to Neb. Ct. R. of Prac. 3B (rev. 1986) on the ground that the appeal was "wholly frivolous and totally without merit." That motion was granted, and the judgment appealed from was affirmed. *State v. Bean*, 221 Neb. xxix (case No. 85-938, Jan. 23, 1986).

As pointed out in *State v. Sanders*, 220 Neb. 308, 369 N.W.2d 641 (1985), relief granted pursuant to rule 3B constitutes the disposition of a direct appeal on its merits, for in such a case this court examines the entire record, not only to resolve those matters which are specifically called to its attention by counsel but also to determine whether any possible errors exist. Therefore, any matter which can be determined from the record on direct appeal is considered when ruling on a motion filed pursuant to rule 3B and is not subject to relitigation in an action brought pursuant to the Postconviction Act.

Bean's first assignment of error, that the evidence was insufficient to support the conviction, and his second assignment of error, that the district court should have permitted him to dismiss the deputy public defender assigned to him, were considered in his direct appeal. Therefore, neither of those assignments is subject to relitigation or further discussion.

This brings us to Bean's third assignment of error, that he was denied an evidentiary hearing in this proceeding.

We begin our analysis of this issue by recalling that in order to state a cause of action for postconviction relief, the motion must allege facts which, if proved, constitute an infringement of a prisoner's constitutional rights; allegations which are mere conclusions are not sufficient. *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337 (1986); *State v. Williams*, 218 Neb. 618, 358

N.W.2d 195 (1984); § 29-3001.

Bean's argument in connection with this assignment rests principally on three contentions: (1) that the deputy public defender assigned to him refused to file certain motions Bean requested; (2) that said attorney failed to spend enough time with Bean and personally attend certain hearings; and (3) that said attorney's inadequate performance and conspiracy with the prosecutors in effect coerced Bean's plea.

The first contention fails because the allegations made, even if true, fail to allege facts from which it can be concluded that any such motion had merit, would have been sustained, and would have affected the outcome of the case leading to Bean's conviction. The second contention fails because there are no factual allegations from which it can be concluded that Bean's defense was prejudiced by the failure of his assigned attorney to spend more time with him or by the representation afforded by another member of the public defender's office during certain phases of the underlying case. In fact, Bean suggests at one point in his brief that the substituting attorney was more competent than the one assigned to him. The third contention fails not only because Bean fails to allege any facts from which it can be concluded his assigned attorney was engaged in a conspiracy with the prosecutors but because the record belies the claim that his plea was coerced. Before the district court accepted the plea, Bean assured the court that he was satisfied with his assigned attorney's performance, that he felt he had had enough time to discuss the matter with his attorney, and that, other than for the plea bargain, no one connected with law enforcement had made any threat or promise to induce the plea.

When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required. *State v. Apodaca*, 223 Neb. 258, 388 N.W.2d 837 (1986). This being such a case, the district court was correct in denying Bean an evidentiary hearing.

The foregoing analysis of Bean's third assignment of error disposes of his fourth assignment, that the district court erred in not finding that Bean had been denied effective assistance of counsel.

The judgment of the district court denying postconviction relief, being correct, is hereby affirmed.

AFFIRMED.

MARVIN R. HELMS, APPELLEE, V. MARY A. HELMS, APPELLANT.
397 N.W.2d 637

Filed December 19, 1986. No. 86-574.

Appeal from the District Court for Butler County: WILLIAM H. NORTON, Judge. Affirmed.

Virginia G. Johnson, for appellant.

Kent F. Jacobs of Blevens, Blevens & Jacobs, for appellee.

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

PER CURIAM.

The respondent wife, Mary A. Helms, appeals from the decree dissolving her marriage to the petitioner husband, Marvin R. Helms, on the basis that the trial judge erred in his treatment of the husband's military retirement and disability entitlements. Having reviewed the record de novo, as we are required to do, we conclude that the trial judge did not abuse his discretion in that regard.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES JESS PALMER, ALSO KNOWN AS CHARLES TINSLEY, ALSO KNOWN AS J. R. KIRKPATRICK, APPELLANT.

399 N.W.2d 706

Filed December 29, 1986. No. 84-733.

1. **Convictions: Circumstantial Evidence.** One charged in a criminal case may be convicted on the basis of circumstantial evidence.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury.
3. **Verdicts: Appeal and Error.** The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
4. **Criminal Law: Statutes: Sentences.** In a general sense an ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.
5. _____: _____: _____. Not all retroactive legislation is in violation of the prohibition against ex post facto laws.
6. _____: _____: _____. A legislature may not enact any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.
7. **Criminal Law: Statutes.** Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.
8. **Criminal Law: Trial: Pretrial Procedure.** No one has a vested right in a procedure; procedural matters can be changed at any time before trial and are binding on the defendant.
9. **Statutes.** In the absence of anything indicating the contrary, statutory language is to be given its plain and ordinary meaning.
10. **Criminal Law: Words and Phrases.** A "crime" is an act or omission for which one is subject to punishment by public authority.
11. _____: _____. "Violence" is the exertion of physical force so as to injure or abuse.
12. _____: _____. "Crime of violence" is an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority.
13. **Statutes.** Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.

14. **Double Jeopardy: Appeal and Error.** Retrial after reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute double jeopardy.
15. **Prosecuting Attorneys.** That a county attorney vigorously prosecutes one accused of a crime does not constitute prosecutorial misconduct.
16. **Evidence: Judges: Trial.** The receipt of evidence which may later be excluded because of a difficult or complicated rule of law does not constitute judicial misconduct.
17. **Witnesses: Hypnosis.** A witness is not rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case. Such a witness may testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.
18. **Convictions: Identification Procedures: Photographs.** Each case must be considered on its own facts, and convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.
19. _____: _____: _____. The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
20. **Death Penalty: Expert Witnesses.** The proportionality of a death sentence is for court determination and is not a subject for expert testimony.
21. **Rules of Evidence: Sentences.** 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.
22. **Death Penalty: Evidence: Aggravating and Mitigating Circumstances.** A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
23. **Constitutional Law: Death Penalty: Aggravating and Mitigating Circumstances.** The statutory aggravating circumstances set out in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) are not unconstitutionally vague.
24. **Constitutional Law: Criminal Law: Convictions.** A convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted.
25. **Constitutional Law: Death Penalty: Juries.** There is no constitutional requirement that the death penalty be imposed by a jury.
26. **Death Penalty: Statutes: Words and Phrases: Aggravating and Mitigating Circumstances.** Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or "manifest exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may

operate in conjunction with or independent of one another.

27. **Death Penalty: Aggravating and Mitigating Circumstances.** The presence of any of the components of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) will sustain a finding that aggravating circumstance (1)(d) exists.
28. **Death Penalty: Aggravating and Mitigating Circumstances: Words and Phrases.** The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
29. _____: _____: _____. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
30. _____: _____: _____. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim.
31. **Death Penalty: Supreme Court: Sentences: Appeal and Error.** The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

John A. Wolf and David A. Bush, for appellant.

Charles Jess Palmer, pro se.

Robert M. Spire, Attorney General, and J. Kirk Brown, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and BLUE, D.J.

PER CURIAM.

The defendant, Charles Jess Palmer, appeals from a jury verdict finding him guilty of felony murder under Neb. Rev. Stat. § 28-303(2) (Reissue 1985), and from a sentence imposed by a three-judge court ordering Palmer to be executed for the crime in accordance with the provisions of Neb. Rev. Stat. §§ 29-2521 et seq. (Reissue 1985). This case has twice before

been to this court. See, *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981) (*Palmer I*); *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983) (*Palmer II*). The relevant facts are as follows.

From August of 1977 to the time of the murder, the defendant and his wife lived and worked near Guide Rock, Nebraska. Their son, Jess, was born July 4, 1978. The victim, Eugene Zimmerman, operated a coin shop in his home in Grand Island, Nebraska.

The Palmers' first contact with the victim occurred in October of 1978. Mrs. Palmer telephoned Zimmerman and arranged a meeting. The Palmers intended to offer coins and silver objects for sale. The Palmers, with their baby, drove to the Zimmerman house, and the defendant waited in the truck while Mrs. Palmer negotiated the sale. In late December of 1978 Mrs. Palmer called Zimmerman and offered to sell additional coins and silver. On this occasion the defendant and the baby accompanied Mrs. Palmer into the Zimmerman residence. In late February of 1979 all three again went into the residence while Mrs. Palmer sold Zimmerman some silver baby spoons. When she asked him if he would be interested in buying two or three gold wedding bands, Zimmerman responded that he would. On March 5, 1979, Mrs. Palmer returned to sell Zimmerman the wedding rings. The defendant accompanied her into the house and walked around the office and the parlor adjacent to the business area while Mrs. Palmer conducted business. Mrs. Palmer asked Zimmerman if he would be interested in buying two antique rings. He replied that he would look at them, and arranged a meeting for the next afternoon.

On March 6, 1979, the day of the murder, the defendant, Mrs. Palmer, and their baby arrived at the Zimmerman house between 3 and 3:30 p.m. Zimmerman examined the rings and showed Mrs. Palmer how he could tell that her stones were imitation rather than real. He told her he would buy the settings from her if a test proved they were gold. Zimmerman rose from his desk, turned around, and picked a jar of solution from the cabinet. According to Mrs. Palmer, the defendant suddenly lunged at the victim while his back was turned and struck the victim's face. Zimmerman's glasses were dislodged. Defendant

and Zimmerman struggled, Zimmerman was thrown to the floor, and defendant demanded money from him. The evidence shows that, at the time, defendant was 40 years old, 6 feet 7 inches tall, and weighed approximately 245 pounds; the victim was 59 years old, 5 feet 11 inches tall, and weighed approximately 135 pounds. Zimmerman's face was bleeding. The defendant bound Zimmerman's hands, lifted him to his feet, and forced him up the stairs. Mrs. Palmer testified that the defendant remained upstairs alone with the victim for 15 minutes before she was to come upstairs. Upon entering the bedroom, she saw Zimmerman lying on a bed, his hands and feet tied. The defendant proceeded to search the upstairs. He told Mrs. Palmer to watch Zimmerman. The defendant then went downstairs and remained there for 20 minutes. During this time, the victim complained to Mrs. Palmer of stomach pain, and asked, "Why are you doing this to me?" Zimmerman then asked Mrs. Palmer to get him some medicine from his bathroom, which she did.

The defendant went back upstairs, wearing gloves, and sent Mrs. Palmer downstairs. She waited downstairs for him for 15 minutes, and testified that during this time she heard noises upstairs: "There was a — a lot of thumping noises. Thump, thump, thump, thump, and there was some kind of a — a guttural noise. I kept hearing a — a low, monotonous, almost a chant-like sound. A very deep and very throaty guttural type over and over, again." When the defendant returned downstairs around 4:30 p.m., the defendant, Mrs. Palmer, and the baby left, this being approximately 1 hour after they had arrived at the Zimmerman residence.

On March 7, 1979, the Palmers rented a storage unit in Hastings, Nebraska. After packing and making arrangements to have their employer's animals cared for, they left for Austin, Texas, approximately 2 weeks after the incident. Mrs. Palmer testified that the items stolen from the coin shop were placed in a diaper bag and accompanied them to Austin.

In Austin the defendant, using the name J.R. Kirkpatrick, contacted a coin dealer named Jesse Garza and sold him coins and jewelry. A few days later, Garza read a trade journal which covered the Zimmerman robbery and murder and cataloged the

stolen items. Garza recognized that several of the items he bought from the defendant were on the list, and called the police. When the defendant contacted Garza again, Garza arranged to meet him at an airport restaurant, where the police arrested defendant on March 27, 1979.

The victim's wife, Monica Zimmerman, returned home around 5 p.m. on March 6, 1979, and discovered that the coin shop had been looted. She called the police. The victim's body was found upstairs, with an electrical cord tied tightly around the neck, and coins, jewelry, money, and other valuables were discovered to be missing. A pathologist testified that the victim had a bruise below his left collarbone, a bruise over the right cheekbone, a bruised left eyebrow and eyelid, a scratch on the left side of his nose and under his left jaw, and a cut on his left temporal area. Those injuries preceded death. Mr. Zimmerman's windpipe and voice box were broken and evidenced bleeding. The time of death was fixed at 4:30; the cause of death was strangulation. In explaining the presence of the cuts, bruises, and abrasions, the pathologist testified that there were two possibilities: "One, if the head were thrown several times against an unyielding object or that the head received a blow in a number of different areas from one or more blunt objects."

The sentencing panel found that no mitigating circumstance existed to affect defendant's sentence, but found beyond a reasonable doubt that two statutory aggravating circumstances existed, namely, (1) that the murder was committed in an apparent effort to conceal defendant's identity as the perpetrator of the robbery, and (2) that while Zimmerman's murder was not "especially heinous, atrocious, cruel," it "manifested exceptional depravity by ordinary standards of morality and intelligence." § 29-2523(1)(b) and (d).

In each of the three trials, the State introduced circumstantial evidence tending to implicate defendant in the crime. In the first trial three witnesses who had undergone hypnosis were allowed to testify, leading this court to reverse and remand. See *Palmer I*. In the second and third trials the deceased's widow, Monica Zimmerman, was permitted to testify, although the trial judge limited the subject matter of her testimony. Additionally, in the

second and third trials Cherie Palmer was allowed to testify against her husband. It was her testimony in the second trial which we found to be contrary to the provisions of Neb. Rev. Stat. § 27-505 (Reissue 1979), and we accordingly set aside the conviction and remanded the cause for a third trial.

After our opinion in *Palmer II* was released, but before the third trial in this case was held, the Nebraska Legislature amended § 27-505, eliminating the provision which precluded one spouse from testifying against another in a criminal case except in limited circumstances not applicable to the instant case. See 1984 Neb. Laws, L.B. 696.

Defendant's counsel have filed a brief in this court alleging that some 27 errors were committed during the third trial, any one of which would entitle defendant to an order of this court reversing the decision and setting aside the sentence. Additionally, defendant has filed a pro se brief in which he has raised five specific assignments of error, all of which are essentially covered by his counsel's brief. These 32 assignments of error can be rephrased and reduced to 8, without in any way ignoring any issues raised by either defendant's counsel or defendant himself. These rephrased assignments are as follows: (1) That the evidence adduced at the trial during its various stages is insufficient to support the verdict. (2) That the action of the Legislature in amending § 27-505 with the passage of L.B. 696 is prohibited by the ex post facto clauses of both the U.S. and Nebraska Constitutions and that the trial court erred in permitting Cherie Palmer to testify against defendant. (3) That requiring defendant to stand trial a third time constituted placing him in double jeopardy, in violation of his federal constitutional rights. (4) That the district court erred in permitting Monica Zimmerman to testify regarding matters covered during her pretrial hypnotic interview. (5) That the district court erred in overruling defendant's motion to suppress the use of pretrial and in-court identifications of him. (6) That the district court erred in overruling defendant's motion to dismiss on the ground that he had been deprived of his right to a speedy trial under both Nebraska statute and the sixth amendment to the U.S. Constitution. (7) That the district court erred in overruling defendant's motion to suppress evidence

obtained from him at the time of his arrest in Austin, Texas. (8) That the district court erred in sentencing defendant to death. We shall discuss these issues in the order listed above.

(1) Sufficiency of the Evidence.

Defendant's first argument is that taking the evidence as a whole, it was insufficient to support the verdict finding him guilty of felony murder. When the evidence adduced at the trial is considered, the first assignment must be quickly overruled. To begin with, a person charged in a criminal case may be convicted on the basis of circumstantial evidence. See *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). Furthermore, in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. See, *State v. Wilkening*, 222 Neb. 107, 382 N.W.2d 340 (1986); *State v. Kakela*, 218 Neb. 843, 359 N.W.2d 786 (1984); *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984). The evidence, when viewed in light of these rules, is more than sufficient to justify the case's being submitted to the jury and more than sufficient for the jury to find the defendant guilty of felony murder. Therefore, unless some other error is found, the decision of the jury finding defendant guilty of felony murder must be affirmed.

(2) Amendment of § 27-505 and Cherie Palmer's testimony.

As we have already noted, in *Palmer II* this court held that § 27-505, as it was then constituted, prohibited Cherie Palmer from testifying against her husband. At that time § 27-505 provided as follows:

> (1) Neither husband nor wife can be examined in any case as to any confidential communication made by one to the other while married, nor shall they after the marriage relation ceases to [sic] be permitted to reveal in testimony any such communication while the marriage subsisted except as otherwise provided by law. This privilege may be waived only with the consent of both spouses. After the

death of one, it may be waived by the survivor.

(2) During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses.

(3) These privileges may not be claimed:

(a) In any criminal case where the crime charged is rape, adultery, bigamy, incest . . . .

Following our decision in *Palmer II* and before the subject trial, the Nebraska Legislature amended § 27-505, and in particular amended subsection (3) to provide as follows: "These privileges may not be claimed: (a) In any criminal case where the crime charged is a crime of violence, bigamy, incest . . . ." See § 27-505 (Reissue 1985). While defendant raises some issue as to the meaning of the amendment (a matter which we will later discuss), it nevertheless appears fairly clear that unless by adopting L.B. 696 and amending § 27-505, the Nebraska Legislature has adopted an ex post facto law and thereby violated defendant's constitutional rights, Mrs. Palmer was properly permitted to testify.

Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, clearly provide that no ex post facto law may be passed. What is not so clear, however, is what constitutes an ex post facto law.

The Latin phrase "ex post facto" means literally "a thing done afterward." Webster's Third New International Dictionary, Unabridged 802 (1981). In a general sense an ex post facto law is one which "renders an act punishable in the manner in which it was not punishable when it was committed." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138, 3 L. Ed. 162 (1810). The traditional justification for prohibiting retroactive laws is that such laws "are contrary to the first principles of the social compact, and to every principle of sound legislation." The Federalist No. 44, at 349 (J. Madison) (J. Hamilton ed. 1882). At first blush this would seem to prohibit anything from being done after an act is committed.

However, an examination of the history as it relates to the doctrine of ex post facto and the cases which have been decided from the earliest of times leads to the conclusion that not all retroactive legislation is in violation of the prohibition against

ex post facto laws. The clause, as it has been interpreted, applies principally, if not exclusively, to criminal laws or laws impacting criminal prosecutions. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798). The most frequently stated rendition of the ex post facto prohibition is that a legislature may not enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed . . . ." *Cummings v. The State of Missouri*, 71 U.S. (4 Wall.) 277, 325-26, 18 L. Ed. 356 (1867). Approximately a decade after the ratification of the Constitution, the U.S. Supreme Court was called upon to construe the ex post facto clause. See *Calder v. Bull, supra*. In doing so the U.S. Supreme Court held that a Connecticut resolution setting aside the decree of the probate court and granting a right of appeal where one had not previously existed did not offend the ex post facto clause. This ruling was somewhat modified by a later decision in *Kring v. Missouri*, 107 U.S. 221, 2 S. Ct. 443, 27 L. Ed. 506 (1883). The case most relevant, however, to the instant case is the case of *Hopt v. Utah*, 110 U.S. 574, 4 S. Ct. 202, 28 L. Ed. 262 (1884). Hopt was charged with first degree murder. At the time the crime was committed, the Utah criminal procedure act prohibited the admission of testimony of convicted felons. Prior to trial, the Utah Legislature repealed that provision, thereby removing any obstacle to the competency of convicted felons. At trial Emerson, a previously convicted accomplice, was allowed to testify. Following conviction, an appeal was ultimately taken to the U.S. Supreme Court. The Court held that the repeal of the felon competency rule after the commission of the offense but before trial was not an ex post facto law.

After discussing *Kring, supra*, the Court noted that Kring had been deprived of a substantial right possessed by him at the time the offense was committed. The Court went on to distinguish Hopt's situation, noting:

> But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach

> criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.
>
> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offence charged.

Hopt v. Utah, supra at 589-90.

Similarly, in the instant case nothing done by the Legislature in amending § 27-505 created any criminal act, nor altered the standard of proof necessary for conviction, nor altered the punishment prescribed for committing the crime. The decision in *Hopt, supra*, is wholly consistent with our holdings in this jurisdiction to the effect that no one has a vested right in a procedure and that procedural matters can be changed at any time before trial and are binding on the defendant. See, *State v.*

Shiffbauer, 197 Neb. 805, 251 N.W.2d 359 (1977); *Durousseau v. Nebraska State Racing Commission*, 194 Neb. 288, 231 N.W.2d 566 (1975).

The holding in *Hopt, supra*, was further affirmed by the U.S. Supreme Court decision in *Thompson v. Missouri*, 171 U.S. 380, 18 S. Ct. 922, 43 L. Ed. 204 (1898). *Thompson* was a case very similar to the case at bar. Thompson was charged with first degree murder. After conviction the Missouri Supreme Court reversed, holding the admission of certain writing samples for comparative purposes to be prejudicial error. Prior to his retrial, the Missouri Legislature enacted a statute allowing admission of such evidence. The same samples were then admitted in the second trial. Thompson was convicted, and the Missouri Supreme Court upheld the conviction.

On appeal the U.S. Supreme Court held that the subsequent legislative change of the rules of evidence regarding writing samples for comparative purposes did not violate the ex post facto prohibition of the federal Constitution. The Court admitted that a number of cases containing language supporting Thompson's "ex post facto" argument could be found, but, "[a]pplying the principles announced in former cases—without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined," 171 U.S. at 386, the U.S. Supreme Court held that the rights abrogated were not substantial enough to render retroactive application of the statute unconstitutional. In doing so the Court said at 387:

> If persons excluded, upon grounds of public policy, at the time of the commission of an offence, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offence was committed.

Four states have previously considered whether a change in the marital privilege statutes constitutes an ex post facto law,

and in each instance determined that it does not. See, *Huckaby v. State*, 262 Ark. 413, 557 S.W.2d 875 (1977); *State v. Clevenger*, 69 Wash. 2d 136, 417 P.2d 626 (1966); *Ritchey v. State*, 407 S.W.2d 506 (Tex. Crim. 1966); *Wester v. The State*, 142 Ala. 56, 38 So. 1010 (1905).

As part of his "ex post facto" argument, defendant raises two other related issues. He maintains that, in any event, L.B. 696 is unconstitutionally vague because there is no definition of "crime of violence." Furthermore, he argues that the exceptions adopted by L.B. 696 apply only in cases where the spouse or child is the other party.

The vagueness argument is controlled by the rule that in the absence of anything indicating the contrary, statutory language is to be given its plain and ordinary meaning. *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986). By that standard a "crime" is an act or omission for which one is subject to punishment by public authority. See Webster's Third New International Dictionary, Unabridged 536 (1981). By that same standard "violence" is the exertion of physical force so as to injure or abuse. *Id.* at 2554. Thus, "crime of violence" is an act which injures or abuses through the use of physical force and which subjects the actor to punishment by public authority. This court has said that robbery is a crime of violence. *Draper v. Sigler*, 177 Neb. 726, 131 N.W.2d 131 (1964). Certainly, then, murder is a crime of violence. *Com. v. Ferrer*, 283 Pa. Super. 21, 423 A.2d 423 (1980); *People v. Manns*, 12 Mich. App. 543, 163 N.W.2d 232 (1968). Accordingly, L.B. 696 is not vague.

Defendant's argument regarding the application of L.B. 696 is that the crimes described in § 27-505 apply only to cases where one spouse commits a crime against the other spouse. Therefore, according to him, L.B. 696 applies only where one spouse commits a crime of violence against the other spouse. We do not read either the history of the amendment nor the language itself to so limit § 27-505 as amended by L.B. 696. The clear meaning of the statute is that the privilege may not be claimed where the crime charged is "a crime of violence, bigamy, incest, *or* any crime committed by one against the person or property of the other." (Emphasis supplied.) Defendant's argument flies in the face of the clear meaning of

the statute. If defendant's argument were correct, there would have been no need for the enumeration of not only crimes of violence but those of bigamy and incest as well, crimes which cannot be committed except by one spouse against the other or upon some other member of the family. Nothing within L.B. 696, as it amended § 27-505, limits crimes of violence to acts committed by one spouse against the other spouse. The words are clear and require no interpretation. We have consistently held that where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. See *Palmer II*. See, also, *Kellogg Company v. Herrington*, 216 Neb. 138, 343 N.W.2d 326 (1984); *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). L.B. 696, as it amended § 27-505, is clear and unambiguous and applies to all crimes of violence, regardless of who the victim may be. This assignment of error is therefore without merit and must be overruled.

(3) Double Jeopardy.

Defendant next argues, both through his attorney and in his pro se brief, that the State's decision to try him a third time violated the double jeopardy clauses of both the federal and Nebraska Constitutions. Although the thrust of the arguments is not readily apparent, it appears to follow two separate tracks. One argument is based upon the notion that the evidence adduced at the earlier trial was insufficient to submit the case to the jury, and, therefore, a bar to further prosecution. The second argument, raised by defendant himself, appears to be to the effect that there was both prosecutorial and judicial misconduct which compelled defendant to seek a new trial, and, therefore, this bars the State from retrying him. Neither contention is valid.

In his first argument regarding insufficiency of the evidence, defendant relies upon the U.S. Supreme Court opinion in *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). In *Burks* the U.S. Supreme Court held that an appellate finding of insufficient evidence to convict is tantamount to an acquittal and, therefore, that the double jeopardy clause precludes a second trial once the reviewing

court has found the evidence legally insufficient. In reaching that conclusion, the Court set out its rationale precisely, saying at 16:

> Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

It is clear beyond question, however, that the decision in *Burks* does not give any support to the argument raised by defendant in the instant case. The Court specifically addressed that issue and distinguished a reversal based upon trial error from a verdict of acquittal based upon an erroneous decision.

In doing so the U.S. Supreme Court in *Burks, supra*, said at 15:

> Various rationales have been advanced to support the policy of allowing retrial to correct trial error, but in our view the most reasonable justification is that advanced by *Tateo*, supra, at 466: "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." See *Wilson, supra*, at 343-344, n. 11; *Wade v Hunter*, 336 U.S. 684, 688-689 (1949). In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e. g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

See, also, *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

In view of the fact that we have already held that there was sufficient circumstantial evidence to submit the case to the jury and sufficient circumstantial evidence from which the jury could find defendant guilty of felony murder, our reversal of *Palmer II* because of the trial court's error in permitting Mrs. Palmer to testify does not constitute double jeopardy so as to preclude the State from prosecuting defendant in the instant case.

Nor does defendant's contention that there was prosecutorial or judicial misconduct of such a nature as to bar a retrial have merit. The record in all three cases is devoid of any evidence to establish either prosecutorial or judicial misconduct. That a county attorney vigorously prosecutes one accused of a crime does not constitute prosecutorial misconduct. Nor does the fact that a trial court permits the introduction of evidence which may later be excluded because of a difficult or complicated rule of law constitute judicial misconduct. The argument raised by defendant is wholly unsupported by any evidence. Defendant was convicted in *Palmer II*. That conviction was reversed because of a procedural error considered to be prejudicial. Absent that procedural error, there was sufficient circumstantial evidence to submit the case to the jury and to convict him. Therefore, defendant was never placed in double jeopardy, and his assignment of error in that regard must be overruled.

(4) Matters Covered During Monica Zimmerman's Pretrial Hypnotic Interview.

The basis of defendant's assignment of error regarding the testimony of Monica Zimmerman is based almost totally upon our holding in *Palmer I*. However, *Palmer I* must be read in light of our subsequent decision in *State v. Patterson*, 213 Neb. 686, 331 N.W.2d 500 (1983), wherein we explained our holding in *Palmer I* and set out the rule as it was thereafter to be applied in Nebraska. Were we to subscribe to the argument made by defendant herein as to what he believes we said in *Palmer I*, a rule of ridiculous proportion would be reached. What we were seeking in *Palmer I*, as more clearly set out in *State v. Patterson, supra*, was to prohibit the introduction of testimony which came about for the first time after hypnosis. As we indicated in

Palmer I, our concern was preventing evidence which was hypnotically induced rather than hypnotically recalled. Where, however, the evidence is clear that the witness knew about the matters before being subjected to hypnosis, we can perceive of no rule which should preclude the witness from thereafter being permitted to testify. The district court was extremely careful in limiting Monica Zimmerman's testimony in the subject trial to those matters for which there was sufficient evidence to establish that she knew of the matters and had related them to another before being subjected to hypnosis. The rule in Nebraska as set out in *State v. Patterson, supra*, is that a witness will not be rendered incompetent merely because he or she was hypnotized during the investigatory phase of the case; rather, the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis, provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis.

Nowhere in *Palmer I* can it be found that we precluded Monica Zimmerman from testifying. In fact, we ordered reversal with instructions to the district court to determine what of her testimony was properly admissible. In making that determination the district court was required to consider our refinement of the rule as set out in *State v. Patterson, supra*. See, also, *State v. Shiffbauer*, 197 Neb. 805, 251 N.W.2d 359 (1977). There was no error committed by the district court in permitting Monica Zimmerman to testify.

(5) Pretrial and In-court Identifications of Defendant.

Defendant argues that the in-court identification of him was tainted by a photographic lineup which took place at the Austin, Texas, police department following his arrest and prior to his trial in *Palmer I*.

The record discloses that following a call from the Austin Police Department informing the Grand Island Police Department that articles stolen from the Zimmerman residence had been confiscated and a suspect arrested, a number of Nebraska investigators and Monica Zimmerman flew to Austin, Texas. Upon arriving in Austin the officer in charge of the Nebraska contingent determined that because of

defendant's unusual height it would be inappropriate to have Monica Zimmerman view him in a traditional lineup. In a purported effort to alleviate the height discrepancy between defendant and the officers chosen to fill the lineup group, the officers decided to individually photograph defendant and the four officers. All five were photographed standing in front of a white wall and positioned next to a doorframe. When shown the five photographs, Monica Zimmerman immediately identified defendant as being the customer whom she had reported to the police as looking suspicious.

Defendant now argues that the identification procedure used was unduly suggestive in that the relative heights of the subjects were readily determinable by reference to the strategically placed doorframe visible in each photograph. Defendant then argues that under the U.S. Supreme Court decision in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), and our decision in *State v. Sanchell*, 191 Neb. 505, 216 N.W.2d 504 (1974), this allegedly unduly suggestive procedure, coupled with the subsequent in-court identification made by Monica Zimmerman, abridged defendant's right to due process under both the U.S. and Nebraska Constitutions. We believe that the contention is without merit.

In *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), the U.S. Supreme Court addressed the issue of a photographic lineup. Approving the use of photographs, the Court said at 384:

> [W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Following its decision in *Simmons v. United States, supra*, the U.S. Supreme Court decided *Neil v. Biggers, supra*. *Neil* involved an eyewitness identification at trial following a police station showup of the defendant. After discussing its past due process cases, the U.S. Supreme Court determined that unnecessary suggestiveness alone does not require an exclusion

of identification evidence. The Court noted that the showup could have been better conducted but found that the "central question" was "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Neil, supra* at 199. The Court then stated at 199-200:

> As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

An examination of the photographs in this case fails to support defendant's contention that the presence of the doorframe was unduly suggestive and caused Monica Zimmerman to select defendant. In the first instance many courts have held that a suspect's distinctive appearance in a photographic display does not necessarily render the procedure suggestive. See, *United States v. Mefford*, 658 F.2d 588 (8th Cir. 1981) (suspect was the only man in the lineup who was within age range previously described by witnesses); *United States v. Smith*, 602 F.2d 834 (8th Cir. 1979) (suspect wearing blue overalls was only person matching description of robber); *United States v. Bostic*, 360 F. Supp. 1300 (E.D. Pa. 1973), *aff'd mem.* 491 F.2d 751 (3d Cir. 1973) (only suspect's photograph showed scar on forehead). It is impossible from viewing the photographs to determine how far from the wall and doorjamb each subject is standing, and, therefore, one viewing the photographs could not necessarily determine the height of the subject. Furthermore, there was testimony from one of the officers present during the photographic lineup that when Monica Zimmerman viewed the photographs, it took her only "one to two" seconds to eliminate from the array all of the photographs but that of the defendant. The officer's testimony was corroborated by a member of the Nebraska State Patrol who was also present. An examination of the totality of the circumstances makes it abundantly clear that the photographic

array was not unduly suggestive. This assignment of error is therefore overruled.

(6) Right to a Speedy Trial.

Defendant's argument that he was denied a speedy trial under either Nebraska statute or the sixth amendment to the federal Constitution is likewise without merit. The mandate in *Palmer II* was received by the district court on October 28, 1983. Voir dire for the subject trial began on March 5, 1984. In the time between the filing of the mandate and the beginning of the trial, more than 20 motions, the bulk of which went to evidentiary matters, were filed by defendant's attorneys or by defendant himself. Some of these motions were submitted on arguments alone, some were supported by affidavits, and some required full-blown evidentiary hearings. Even without tolling the period on account of defendant's pretrial motions, it is clear that the time required by Neb. Rev. Stat. § 29-1207 (Reissue 1985) had not expired. Section 29-1207(3) provides: "If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand." Trial must then be had within 6 months from that date.

Section 29-1207(4)(a) excludes from the computation of the 6-month period "the time from filing until final disposition of pretrial motions of the defendant . . . ." The subject trial began 17 weeks after the return of the mandate. If one disregards the time during which the pretrial motions were pending, there was only a period of approximately 3 days between the time that the pretrial motions were disposed of and the voir dire of the jury began. To therefore suggest that there was any violation of Nebraska's speedy trial act is wholly frivolous.

Defendant, however, maintains that under the sixth amendment to the U.S. Constitution he was not granted a speedy trial. In so arguing he relies primarily on the U.S. Supreme Court decision in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). In that case the U.S. Supreme Court set out the balancing test it thought was appropriate for the resolution of speedy trial issues under the U.S. Constitution. After noting that the speedy trial right "is

generically different from any of the other rights enshrined in the Constitution for the protection of the accused," *id.* at 519, the Court refused to define the nature of the right by reference to an arbitrary time period as, for instance, the 6-month period set out in § 29-1207. Instead, the Court stated that "[t]he approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.* at 530. The Court then set out four factors to be considered in this balancing process: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* Explaining this mechanism, the U.S. Supreme Court expounded on the first factor, saying:

> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Id. at 530-31. In our view a delay of 17 weeks from the return of the mandate to a trial does not constitute an unreasonable delay sufficient to cause the other factors to be triggered. We are not, therefore, required to examine any of the factors, finding that a delay of 17 weeks from return of mandate to trial is not unconstitutionally unreasonable. Defendant's assignment regarding lack of a speedy trial is without merit and is overruled.

(7) Motion to Suppress Evidence Obtained From Defendant at the Time of His Arrest in Austin, Texas.

Defendant next challenges the propriety of his arrest in Texas and the seizure of property allegedly stolen from Zimmerman at the time of his death. The evidence presented in the subject trial is identical to that presented in *Palmer I*. That issue was raised in *Palmer I*, and in that regard we said at 212, 313 N.W.2d at 652:

> In the case at bar the evidence establishes, and the defendant does not contest, that the officers had probable cause to arrest the defendant. A valid warrantless arrest was made under the laws of Texas, and the District Court properly overruled the motion to suppress the evidence seized from the person of the defendant at the time of the arrest.

The issue was properly resolved in *Palmer I*, and our holding therein is reapplied in this appeal.

(8) Imposition of the Death Penalty.

Defendant has raised a number of specific subissues with regard to the imposition of the death penalty. They will be considered in the same order in which they are raised.

A. *The overruling of defendant's motion to allow him to secure expert testimony regarding proportionality.*

Defendant maintains that he was entitled to be given sufficient public funds so that he might secure an expert, either at trial or in preparation for an appeal before this court, to produce testimony with respect to the imposition of the death penalty in the State of Nebraska. However, while either a defendant or the State may wish to adduce evidence before the sentencing judge or panel of any case in which the death penalty has been imposed but which has not yet been reviewed by this court, the question of proportionality is not for expert testimony; it is for court determination. See *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982). Thus, defendant's motion was properly overruled.

B. *The overruling of defendant's motion to quash the presentence investigation.*

Defendant maintains that a sentence of death may not be imposed, even in part, on the basis of information contained in a presentence investigation. Like many of the assignments of error raised by defendant, we have previously considered this issue and have rejected it. In *State v. Reeves*, 216 Neb. 206, 221, 344 N.W.2d 433, 444 (1984), we specifically addressed this issue and said: " '[T]he traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.' " Further, in *Reeves, supra* at 223, 344 N.W.2d at

445, we quoted from *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), saying:

> "We are unable to find any requirement in the law that a sentencing court may consider only information adduced at trial when exercising discretion in imposing sentence. Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court. Such a requirement goes far beyond any constitutional mandate."

See, also, *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984). For these reasons this assignment is overruled.

C. *The overruling of defendant's several objections to the imposition of the death penalty.*

While this assignment of error, as presented, is somewhat vague and does little to assist the court in determining any specific claim of error, defendant, in his brief, makes arguments about several specific factors which will be considered by us to have been included under this assignment of error. While, normally, such an assignment might not be considered by the court because of its vagueness, in view of the severity of the punishment imposed in this case, we address each of the items raised.

(i) *Whether the district court erred in not considering nonstatutory mitigating factors.*

Defendant argues that it has now been firmly established that in a capital case the sentencing authority must not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record, or any of the circumstances of the offense, citing *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), and *Bell v. Ohio*, 438 U.S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978). In *State v. Moore, supra*, this court specifically declared that the defendant could offer, on the issue of mitigation, any evidence, even though the mitigating factor was not specifically listed in the statute.

Defendant argues that the sentencing court did not consider nonstatutory mitigating circumstances concerning his

childhood when imposing the death penalty in this case. A closer examination of both the argument advanced by him and the record makes it clear that defendant's complaint is not that he was not permitted to present the evidence but, rather, that the trial court must have refused to consider the factors, otherwise the court would not have imposed the death penalty in this case. In essence, defendant merely asserts that he is disappointed that the sentencing panel was not persuaded by his evidence. The sentencing panel made specific reference to the evidence regarding his childhood and found that "such evidence does not give rise to a mitigating circumstance." There is nothing in the record to indicate that the court did not consider all of the mitigating evidence offered by defendant, but merely rejected it. The record in this case indicates that defendant's evidence was unconvincing.

(ii) *Whether the statutory aggravating circumstances set out in § 29-2523(1)(d) are unconstitutionally vague.*

This argument has previously been considered by this court and rejected. See, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977). It is again rejected in accordance with the later analysis of subissue G of this assignment of error.

(iii) *Whether placing the burden of proof upon defendant to establish mitigating circumstances is in violation of his constitutional rights.*

In effect, defendant argues that, absent proof that one or all mitigating circumstances are not present, the sentencing court must presume that *all* mitigating circumstances exist. Not only does that argument not make any sense on its face, but it has previously been specifically rejected by this court. In *State v. Moore, supra* at 480, 316 N.W.2d at 46, we said:

> 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. There is no evidence or claim that the State suppressed any favorable evidence. If there were any mitigating factors other than those shown,

the defendant is in the best position to know and reveal those factors.

The record does not sustain this alleged error.

(iv) *Whether a criminal defendant in a capital case must receive notice of the nature and extent of the aggravating charges to be offered in support of the death penalty.*

Defendant next argues that the district court erred in overruling his motion to require the State to specify upon which aggravating circumstances it intended to rely. In support of that position defendant argues that the sixth amendment to the U.S. Constitution, as well as Neb. Const. art. I, § 11, requires that the accused be informed or have the right to demand "the nature and cause of accusation," citing, further, *May v. State*, 153 Neb. 369, 44 N.W.2d 636 (1950), and *Kissinger v. State*, 123 Neb. 856, 244 N.W. 794 (1932). Defendant is in error in that regard. As we previously noted in both *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), as well as *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984), and *State v. Reeves, supra*, in the sentencing stage, since it occurs after the question of guilt has been established, the then-convicted defendant is not entitled to all of the same rights accorded one merely accused of a crime but not yet convicted. Furthermore, we note in the instant case that the record clearly establishes that both defendant and his counsel were informed on the record of the aggravating circumstances the State intended to rely upon. There is no merit in this alleged error.

D. *Whether the refusal to permit the jury to consider a lesser-included offense violated defendant's constitutional rights.*

Defendant first acknowledges that neither second degree murder nor manslaughter is a lesser-included offense of the charge of felony murder, citing *Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897), *Rhea v. State*, 63 Neb. 461, 88 N.W. 789 (1901), and *Wilson v. State*, 170 Neb. 494, 103 N.W.2d 258 (1960). He then argues, citing, however, no authority for the proposition, that because there is no lesser-included offense for the charge of felony murder, one who commits felony murder may not be sentenced to death. If, as in the present case, there is

no lesser-included offense to the crime charged, a defendant is not entitled to an instruction on a lesser-included offense. The fact, however, that a defendant is not entitled to such an instruction does not eliminate the penalty otherwise provided by statute. For these reasons all of these various miscellaneous objections raised by defendant in this regard are overruled.

E. *Whether the sentence of death must be set aside because it was not imposed, at least in part, by a jury.*

This issue, likewise, has been firmly established to the contrary by this court. In *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), we specifically addressed this issue and rejected the contention that a death penalty could not be imposed absent a jury. In doing so we specifically called attention to the U.S. Supreme Court decision in *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), *reh'g denied* 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158:

> "This [the U.S. Supreme] Court has pointed out that jury sentencing in a capital case can perform an important societal function, Witherspoon v. Illinois, 391 U.S. 510, 519, n.15, but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

State v. Simants, supra at 558, 250 N.W.2d at 887. We then went on to say at 559, 250 N.W.2d at 888:

> As we understand the federal and state constitutional provisions, they do not require or even suggest that jury sentencing is constitutionally required. Whatever the relative merits of sentencing by a judge or jury may be, we need not consider them. Our concern is the constitutionality of the Nebraska system, under the federal and state Constitutions. The relative merits of the one or the other is for legislative and not judicial determination. We find the sentencing procedure provided by the Nebraska statute does not violate either

the Nebraska or the federal Constitution.

See, also, *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981). This alleged error is overruled.

F. *The overruling of defendant's motion to recuse the members of the sentencing panel.*

While the assignment is raised, there appears to be no argument addressing that specific issue, and we are unable to determine what it is that defendant contends was error. For that reason the alleged error must be overruled.

G. *Whether the sentencing panel properly applied § 29-2523(1)(b) and (d) in sentencing defendant to death.*

After *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), wherein the U.S. Supreme Court held to be violative of U.S. Const. amends. VIII and XIV death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty, the Legislature of Nebraska revised certain statutes pertaining to capital punishment. In 1973 the Legislature enacted the following:

> 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. . . .

§ 29-2521. In 1973 and 1978 the Legislature also enacted:

> After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:
>
> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

§ 29-2522.

As the aggravating circumstances referred to in §§ 29-2521 and 29-2522, in 1973 the Legislature, in § 29-2523, specified:

> (1) Aggravating Circumstances:
>
> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;
>
> (b) 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;
>
> (c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;
>
> (d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;
>
> (e) At the time the murder was committed, the offender also committed another murder;
>
> (f) The offender knowingly created a great risk of death to at least several persons;
>
> (g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or
>
> (h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

As noted earlier, the sentencing panel found the existence of aggravating circumstances (1)(b) and (d). The evidence establishes that defendant was known to the Zimmermans due to their prior course of dealings. The defendant and his wife had been to the victim's home at least four times prior to the date of the murder. The victim clearly knew and could identify the defendant. The record therefore establishes that

Zimmerman was murdered in an effort to conceal defendant's identity. Thus, the existence of aggravating circumstance (1)(b) has been established beyond a reasonable doubt.

At approximately the time when the Nebraska Legislature was enacting §§ 29-2521 to 29-2523, the Supreme Court of Florida decided *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied* 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed. 2d 295 (1974). *Dixon* dealt with the aggravating circumstance "especially heinous, atrocious or cruel" found in the Florida statutes. In *Dixon* the court stated at 283 So. 2d at 9:

> The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Fla.Stat. § 921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

The U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), expressed the following:

> Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . .
>
> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious

action.

428 U.S. at 188-89.

> While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959) (emphasis in original). While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

428 U.S. at 193-95.

After noting existence of the Model Penal Code, which refers to aggravating circumstances to warrant imposition of the death penalty and uses the phrase "manifesting exceptional depravity" (now found in Model Penal Code § 210.6(3)(h) (1980)), the Court continued:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

428 U.S. at 195.

Gregg v. Georgia, supra, was followed by *Godfrey v.*

Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). Godfrey's wife and daughter lived with Godfrey's mother-in-law in her trailer. When reconciliation efforts were rebuffed by Godfrey's wife, Godfrey went to the trailer; fired a shotgun through the trailer's window, killing the wife instantly; proceeded into the trailer; and, inside, shot and instantly killed his mother-in-law. On conviction for the murders, Godfrey was sentenced to death by virtue of a statute authorizing capital punishment if evidence beyond a reasonable doubt showed that the murder "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-10-30(b)(7) (1982). The U.S. Supreme Court stated:

> In *Furman v. Georgia*, 408 U.S. 238, the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Gregg v. Georgia, supra*, reaffirmed this holding:
>
> > "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U.S., at 189 (opinion of Stewart, Powell, and Stevens, JJ.).
>
> A capital sentencing scheme must, in short, provide a " 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' " *Id.*, at 188, quoting *Furman v. Georgia, supra*, at 313 (White, J., concurring).
>
> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." [Citations omitted.] It must channel the sentencer's discretion by

"clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death." As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." 428 U.S., at 195, n. 46.

In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman."

446 U.S. at 427-29.

The petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. . . . [I]t "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

That cannot be said here. There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not. Accordingly, the judgment of the Georgia Supreme Court insofar as it leaves standing the petitioner's death sentences is reversed . . . .

446 U.S. at 433.

With the foregoing background regarding the appearance of *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied* 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed. 2d 295 (1974), *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), and

Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), this court has decided death penalty cases in reference to § 29-2523(1)(d) as an aggravating circumstance, that is, "[t]he murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." We note that the word *or* separates "especially heinous, atrocious, cruel" from "manifested exceptional depravity by ordinary standards of morality and intelligence." Thus, aggravating circumstance (1)(d) of § 29-2523 describes in the disjunctive at least two distinct components of an aggravating circumstance which may relate to a murder and which "may operate in conjunction with or independent of one another." *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982). See, also, *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984). The presence of any of the components will sustain a finding that aggravating circumstance (1)(d) exists. See *State v. Correll*, 148 Ariz. 468, 715 P.2d 721 (1986). See, also, *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983), *cert. denied* 461 U.S. 971, 103 S. Ct. 2444, 77 L. Ed. 2d 1327 (regarding "heinous, cruel, or depraved," such statutory expression is in the disjunctive, " 'so either all or one could constitute an aggravating circumstance' "). To the extent any of our previous cases such as *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), and *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), contain language which may be read to suggest that the components of aggravating circumstance (1)(d) are in the conjunctive rather than the disjunctive, such language is disapproved.

Among the crimes in which circumstance (1)(d) is frequently found are murders involving " 'torture, sadism, sexual abuse, or the imposition of extreme suffering. . . .' " *State v. Rust*, 197 Neb. 528, 538-39, 250 N.W.2d 867, 874 (1977). See, also, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

There is no arithmetical computation or formula required in a court's consideration of aggravating and mitigating circumstances under § 29-2523. Regarding an aggravating circumstance or a mitigating circumstance, there is no prescribed statutory method by which more or less weight is

assigned to each circumstance indicated in § 29-2523. Where one or more of the aggravating circumstances are established beyond a reasonable doubt concerning a murder, the death penalty may be imposed as a proper sentence unless mitigating circumstances approach or outweigh any aggravating circumstance or circumstances, thereby overriding the effect of such aggravation. See *State v. Dixon, supra*. Existence of an aggravating circumstance under § 29-2523(1) must be proved beyond a reasonable doubt. *State v. Simants,* 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Rust, supra.*

As a meaning for the words "especially heinous, atrocious, cruel" found in circumstance (1)(d) of § 29-2523, this court, in *State v. Simants, supra* at 566, 250 N.W.2d at 891, has adopted the definition utilized by the Florida court in *State v. Dixon, supra*, that is, especially heinous, atrocious, cruel is "directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim." See, *State v. Stewart, supra; State v. Moore, supra; State v. Reeves, supra*. See, also, *State v. Hunt, supra*.

"Torture may be found where the victim is subjected to serious physical, sexual, or psychological abuse before death." *Phillips v. State*, 250 Ga. 336, 340, 297 S.E.2d 217, 221 (1982). "A victim's uncertainty as to the ultimate fate can be significant in indicating mental suffering." *State v. Correll, supra* at 480, 715 P.2d at 733.

As did the U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), we note the existence of Model Penal Code § 210.6(3)(h) (1980), which is an aggravating circumstance for imposition of the death penalty and contains the phrase "manifesting exceptional depravity." In applying the "exceptional depravity" component of § 29-2523(1)(d), we have interpreted and construed that phrase to mean "totally and senselessly bereft of any regard for human life." *State v. Stewart, supra* at 523, 250 N.W.2d at 864; *State v. Rust, supra; State v. Holtan, supra; State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982).

In reviewing death penalty cases this court has determined

that "exceptional depravity," or an act "totally and senselessly bereft of any regard for human life," existed in several cases. Some of those cases are now set forth for illustrative purposes.

State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977): While robbing a bar, Holtan "herded" the bartender (Loder), the bartender's friend (Ulshafer), and bar patron (Christensen) into a restroom, where Holtan ordered Loder to tie the other two and, while the three victims were lying on the floor, then fired four shots, two striking and killing Loder, one wounding Ulshafer, and the fourth missing any victim. This court stated: "The defendant killed, and attempted to kill, unresisting victims of the robbery. The act was totally and senselessly bereft of any regard for human life." *Id.* at 547, 250 N.W.2d at 880.

State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977): Simants sexually abused three female victims, including first degree sexual assault on a 10-year-old female and sexual penetration of the child's corpse after Simants had shot and killed the child; sexual molestation of a 7-year-old female; and sexual molestation of the grandmother of the 10-year-old victim and a sexual "attack on her body after her death." *Id.* at 566, 250 N.W.2d at 891. The victims' deaths were caused by gunshot wounds inflicted by Simants. This court stated: "The use of the word 'exceptional,' however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence." *Id.* This court then determined that depravity was present in the murder of the three females, because (1) "[t]he sexual assault [on the 10-year-old] caused pain, and when the young girl cried out she was killed and there was a further sexual assault upon her after death"; (2) there were "bruises displayed on the inside of [the 7-year-old child's] thighs"; and (3) concerning the victim-grandmother, there was "the difference in the ages of the defendant and the victim, coupled with the attack on her body after her death." *Id.* at 565-66, 250 N.W.2d at 891.

State v. Peery, 199 Neb. 656, 261 N.W.2d 95 (1977): With a rope Peery tied his victim's feet and hands at the wrist behind the victim's back. The victim was gagged and offered no resistance ("totally helpless"). *Id.* at 675, 261 N.W.2d at 105. Peery inflicted three gunshot wounds on the victim, one

between the victim's eyes, one at the right temple of the victim, and the third inflicted while the firearm was thrust into the victim's mouth so that the bullet pierced the roof of the mouth and entered the victim's brain.

State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979): Otey told the victim he was going to rob and rape her. When the victim tried to resist, Otey slashed the victim's forehead with a knife and then sexually assaulted the victim. After the sexual assault Otey took the victim to another part of a building where Otey sought the victim's money and inflicted several deep knife wounds on the victim, hit her in the head with a hammer, and, finally, strangled the victim.

State v. Harper, 208 Neb. 568, 304 N.W.2d 663 (1981): When his girlfriend declined to marry him and married another, Harper tested a carcinogen, dimethylnitrosamine, on his parents' pets. Dimethylnitrosamine induces cancer and disrupts blood clotting. After the pets had died as a result of the dimethylnitrosamine, Harper entered his ex-girlfriend's residence and put the dimethylnitrosamine in beverages later ingested by his girlfriend's husband and an 11-month-old child, causing the deaths of the two victims. This court, after noting that each victim had "died a slow and agonizing death" and experienced "extreme suffering" as a result of the dimethylnitrosamine, stated: "[T]he murders of [the two victims] were so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life." *Id.* at 576, 304 N.W.2d at 668.

State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982): Moore devised a plan to rob Omaha cabdrivers. From a telephone booth in downtown Omaha, Moore called a cab and waited to see how quickly the cabdriver responded to that call. If the responding cabdriver was suitable for Moore's plan, that is, "an older man" rather than a young man, Moore planned to shoot the cabdriver and take the driver's money. Pursuant to his plan, Moore shot and killed one cabdriver on August 22, 1979, and another on August 26, 1979. This court held at 471, 316 N.W.2d at 41:

> We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly

> bereft of regard for human life: (1) The murders here were coldly planned as a part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years is less valuable than a younger life.

State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984): After a struggle with the victim and during the course of a first degree sexual assault, Reeves stabbed his victim seven times in her chest. The cuts on the victim's hands "showed that she tried to defend herself from the defendant's brutal attack." Before dying, the victim experienced "extreme suffering." *Id.* at 227, 344 N.W.2d at 447.

The foregoing Nebraska death penalty cases involving the "exceptional depravity" component of aggravating circumstance (1)(d) are clear-cut, specific examples which demonstrate the meaning of the phrase "exceptional depravity." Other courts have held that "depraved" means "marked by debasement, corruption, perversion or deterioration." *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983), *cert. denied* 461 U.S. 971, 103 S. Ct. 2444, 77 L. Ed. 2d 1327. See, also, *State v. Morehouse*, 120 N.H. 738, 424 A.2d 798 (1980). Therefore, the finding concerning this component of aggravating circumstance (1)(d) must be not only that the murderer manifested depravity but that the murderer manifested "exceptional depravity." The word "exceptional" sets the defendant's act apart from the usual or norm of first degree murder cases and requires "a consciousness materially more 'depraved' than that of any person guilty of murder." *Godfrey v. Georgia*, 446 U.S. 420, 433, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). In this manner "exceptional depravity" is not a catchall phrase or provision for imposition of the death penalty in first degree murder cases where none of the aggravating circumstances otherwise apply to the murder under examination.

The phrase "exceptional depravity" in § 29-2523(1)(d) refers and pertains to "the state of mind of the actor." *State v. Moore, supra* at 470, 316 N.W.2d at 41. See, also, *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985). Depravity, as a murderer's state of mind, may be proved by or inferred from the defendant's conduct at or near the time of the offense. See, *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977); *State v. Martinez-Villareal, supra.*

The Supreme Court of Missouri made the following observation in *State v. Preston*, 673 S.W.2d 1, 11 (Mo. 1984), *cert. denied* 469 U.S. 893, 105 S. Ct. 269, 83 L. Ed. 2d 205:

> In following the mandate of *Godfrey* to establish "clear and objective standards" as to what types of murders constitute "depravity of mind," this Court, while not expressly adopting a precise definition, has noted the following factors to be considered in finding "depravity of mind": mental state of defendant, infliction of physical or psychological torture upon the victim as when victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse and the nature of the crime. [Citations omitted.]

In *State v. Gretzler, supra*, the Supreme Court of Arizona provided a list of specific factors which may lead to a finding of depravity, namely, (1) the apparent relishing of the murder by the killer, (2) the infliction of gratuitous violence on the victim, (3) the needless mutilation of the victim, (4) the senselessness of the crime, and (5) the helplessness of the victim. See, also, *State v. Wallace,* 151 Ariz. 362, 728 P.2d 232 (1986).

By use of objective factors, such as those suggested by the Supreme Court of Arizona in *State v. Gretzler, supra*, there is a "principled way to distinguish" a death penalty case from those cases where the death penalty is not imposed, see *Godfrey v. Georgia*, 446 U.S. at 433, and, in the imposition of the death penalty, to control discretion " 'by clear and objective standards so as to produce non-discriminatory application,' "

Gregg v. Georgia, 428 U.S. 153, 198, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Therefore, for the purpose of § 29-2523(1)(d) as an aggravating circumstance in determining whether the death penalty may be imposed, we hold that "exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. As we have previously mentioned in reference to "heinous, atrocious, cruel" and "exceptional depravity" as disjunctive components of the aggravating circumstance at § 29-2523(1)(d), the five factors which will support a finding of "exceptional depravity" are also stated in the disjunctive. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity" concerning a first degree murder. Further, we observe that one or more of those five factors or circumstances, listed above, were present in those cases where "exceptional depravity" was found to exist as an aggravating circumstance in the illustrative Nebraska cases involving "exceptional depravity," which we have previously mentioned in this opinion, namely, *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979), *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981), *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), and *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

Thus, both the phrase "especially heinous, atrocious, cruel" and the phrase "manifested exceptional depravity by ordinary standards of morality and intelligence" provide objective standards in imposing the death penalty, and neither phrase is unconstitutionally vague. Cf. *State v. Simants, supra*.

We emphasize that we do not state, nor do we imply, that "exceptional depravity" may not exist independent of "especially heinous, atrocious, cruel," although existence of a

murder which is "especially heinous, atrocious, cruel" may well establish "exceptional depravity," such as a murderer's relishing the victim's murder or infliction of gratuitous violence. See, *State v. Cooper*, 718 S.W.2d 256 (Tenn. 1986); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983); *Hance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980).

The sentencing panel did not find Zimmerman's murder to be "especially heinous, atrocious, cruel," although the evidence would have supported such a finding beyond a reasonable doubt. The facts of this case show that the murder of Zimmerman was a "conscienceless or pitiless crime" which was unnecessarily torturous to the victim. Defendant physically abused Zimmerman by beating him, causing bruises, cuts, and scratches. Zimmerman's physical and mental pain are shown by the testimony of Cherie Palmer and found in the appreciable period of time endured by Zimmerman while he awaited his death at defendant's hands. Zimmerman's stress and fear very likely grew to immense proportions as he lay bound and helpless before the murder.

The murder of Zimmerman also "manifested exceptional depravity" on the part of defendant. With Zimmerman bound and helpless on the bed, there was no obstacle to defendant's absconding with Zimmerman's property. Defendant's physical abuse of Zimmerman, who was bound on the bed, was unnecessary to complete the robbery. In murdering Zimmerman defendant inflicted gratuitous violence upon a helpless victim.

The record establishes beyond a reasonable doubt that Zimmerman's murder "manifested exceptional depravity" and that aggravating circumstance (1)(d) exists beyond a reasonable doubt.

Section 29-2523 also specifies seven mitigating circumstances as required by § 29-2522.

Section 29-2523(2)(a) states: "The offender has no significant history of prior criminal activity." The defendant's prior convictions include a 1959 conviction for breaking and entering, a 1970 conviction for two violations of the Mann Act, a 1974 conviction for buying, receiving, or aiding the concealment of stolen property, and a 1975 conviction for

interstate transportation of forged and altered securities. In view of the defendant's significant history of criminal activity, this mitigating circumstance does not exist.

The defendant was not under unusual pressure, influence, or under the domination of another person. Therefore, the record does not establish the existence of the mitigating circumstance set out under § 29-2523(2)(b).

Section 29-2523(2)(c) provides: "The crime was committed while the offender was under the influence of extreme mental or emotional disturbance." The record does not support the existence of this mitigating circumstance.

At the time of the crime the defendant was 40 years old. The mitigating circumstance set out under § 29-2523(2)(d), which provides for the mitigating factor of youth or extreme age, does not exist.

Mitigating circumstance (2)(e) exists when the offender was an accomplice in the crime committed by another and the offender's participation was relatively minor. Mitigating circumstance (2)(f) exists when the victim was a participant in the defendant's conduct or consented to the act. The record establishes that defendant alone did the killing and did not act as an accomplice whose participation was relatively minor. Neither does the record establish that Zimmerman either participated in or in any way consented to any act. Therefore, there is nothing in the record which would support a finding that either mitigating circumstance (2)(e) or (2)(f) exists.

Finally, the issue of the defendant's capacity to appreciate the wrongfulness of his actions or his ability to conform his conduct to the law has not been questioned. Therefore, the mitigating circumstance of mental illness, mental defect, or intoxication at the time of the murder does not exist as provided for under § 29-2523(2)(g).

The record reveals no other mitigating circumstances.

H. *Proportionality of the death penalty.*

Finally, the defendant argues that the sentence of death in this case is erroneous because it is "greater than those imposed in other cases with the same or similar circumstances," and therefore is disproportionate in violation of § 29-2521.03.

Sections 29-2521.01, 29-2521.02, and 29-2521.03 provide

that this court shall review and analyze all cases involving *criminal homicide* committed on or after April 20, 1973, and determine the propriety of the sentence in each case involving a criminal homicide "by comparing such case with previous cases involving the same or similar circumstances." The expressed purpose is to ensure that the death penalty should be applied uniformly and not arbitrarily.

It is apparent that the statutes cannot be enforced as they were written. The term *homicide* includes all crimes involving "the killing of a person by another." Neb. Rev. Stat. § 28-302(1) (Reissue 1985). A death sentence may be imposed only in cases involving a Class I felony. Neb. Rev. Stat. § 28-105(1) (Reissue 1985).

In *State v. Williams*, 205 Neb. 56, 76, 287 N.W.2d 18, 29 (1979), we noted that to interpret the language of the statute literally "would create insurmountable constitutional problems." We further noted that cases construing a similar Georgia statute reflected the obvious fact that it was a practical impossibility to make a meaningful comparison of a death sentence in a first degree murder case with a sentence imposed for another crime for which the death sentence was not authorized.

In the *Williams* case we construed the word "sentence" in § 29-2521.03 to mean a sentence of death and that the provisions requiring a comparison with previous cases were applicable only to cases in which a sentence of death had been imposed. Finally, we concluded in the *Williams* case that the sentence imposed was not excessive or "disproportionate to the death penalties imposed in the other death penalty cases." 205 Neb. at 77, 287 N.W.2d at 29-30.

In *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), we delineated some of the reasons why a literal application of the statute would unconstitutionally encroach upon the judicial function. In the *Moore* case we stated at 473-76, 316 N.W.2d at 42-44:

> Neb. Const. art II, § 1, provides: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these

departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." A similar division of powers, under the U.S. Constitution, is held to exist by implication. Corwin's The Constitution and What It Means Today at 6-7, 204 (14th ed. H. Chase & C. Ducat 1978); *Hampton & Co. v. United States*, 276 U.S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928); *Hayburn's Case*, 2 Dall. 409, 2 U.S. 409, 1 L. Ed. 436 (1792).

The separation of powers doctrine imposes restrictions upon the legislative branch to limit the judicial functions of the courts. The Legislature cannot, by subsequent legislation, divest rights which have vested by virtue of a judgment. *City of Wayne v. Adams*, 156 Neb. 297, 56 N.W.2d 117 (1952). It cannot enact legislation to retroactively open or vacate a judgment. *Mooney v. Drainage District, on rehearing* 134 Neb. 192, 278 N.W. 368 (1938), *cert. denied* 305 U.S. 622, 59 S. Ct. 84, 83 L. Ed. 398 (1938). The limits of the jurisdiction conferred upon the Supreme Court by the Constitution may not be increased or extended by legislative enactment. *State ex rel. Wright v. Barney*, 133 Neb. 676, 276 N.W. 676 (1937); *Miller v. Wheeler*, 33 Neb. 765, 51 N.W. 137 (1892); *State v. Hall*, 47 Neb. 579, 66 N.W. 642 (1896). It cannot change procedures established by the Constitution. *State ex rel. v. Ellis*, 156 Or. 83, 66 P.2d 995 (1937). It cannot interfere with the judicial function of adjudicating the fact of an acquittal. *In re Johnston*, 3 Cal. 2d 32, 43 P.2d 541 (1935). It may not reverse a judgment. *Roberts v. The State*, 160 N.Y. 217, 54 N.E. 678 (1899). It may not direct the disposition of a case in which jurisdiction has attached. *State v. Costen*, 141 Tenn. 539, 213 S.W. 910 (1919). *It is to be clearly implied from the foregoing principles that the Legislature cannot direct the disposition of one case by the factual determinations in another.*

It is apparent from the language of § 29-2521.01(5) and § 29-2521.02 that the Legislature attempts to impose a mandate upon this court to look behind prosecutorial judgments concerning the charges to be filed, jury verdicts

determining the particular degree of homicide, and then, based upon our independent findings of the facts in those adjudicated cases, to determine the penalty in the case before us.

We must examine the constitutional import of the foregoing legislative purpose. In examining prosecutorial discretion we would of necessity have to independently gather evidence. The gathering of evidence is not a judicial function but one of the executive. We would then determine what charges we think should have been filed. Again, this is an executive function of the prosecutor. We would make a judgment about the chances of a conviction as against an acquittal, again an executive function. We would need to weigh the advisability of a plea bargain to secure a conviction on a lesser charge in order to avoid a likely acquittal of all charges. These are all clearly executive and not judicial functions.

It must be borne in mind that not all homicide convictions result in appeals to this court. The following illustrates the Legislature's intrusion into the judicial function under L.B. 711. If a person is charged with murder in the first degree but convicted of a lesser degree of homicide, and if L.B. 711 is to be applied literally, we would then, for purposes of reviewing the case before us, disregard the factfindings of the jury in the so-called "analogous" case. Such a procedure would be constitutionally objectionable for a number of reasons. First, it would require this court to find facts in a case not before it. Secondly, it would constitute an attempt by the Legislature to make the factfindings of one case determinative of the sentence in another case on review. It is plain that under the principles we have earlier cited, that legislation which attempts to achieve such results is an intrusion on the judicial function, contrary to the separation of powers doctrine, and thus violates article II, § 1.

Another effect of L.B. 711 would be to unconstitutionally restrict the appellate review powers of this court under Neb. Const. art. I, § 23, as that

> legislation attempts to bind this court by requiring it to apply sentences imposed in some "analogous" case in a district court. It is clear that applying such a standard would restrict a defendant's right to an independent review by this court under article I, § 23, of the Bill of Rights of our Nebraska Constitution. This section provides: "In all cases of felony the defendant shall have the right of appeal to the Supreme Court; and in capital cases such appeal shall operate as a supersedeas to stay the execution of the sentence of death, until further order of the Supreme Court."
>
> Upon this closer review of L.B. 711, it is clear the Legislature in that act attempts to exercise the judicial function in violation of the Constitution. Sections 2 and 3 of L.B. 711 must be restricted in their application to a comparison in this court of only those cases in which the defendant in the District Court has been convicted of murder in the first degree.

(Emphasis supplied.)

In his brief the defendant cites a number of cases in which a sentence to life imprisonment was imposed. He then argues that the cited cases involved the same or similar circumstances as this case and that the sentence imposed in this case is, therefore, excessive and disproportionate.

One of the cases cited by the defendant is *State v. Floyd*, a Hamilton County, Nebraska, case in which no appeal was taken to this court. In *State v. Moore*, 210 Neb. 457, 477, 316 N.W.2d 33, 44 (1982), in reference to an exhibit relating to the *Floyd* case, we said: "Although not specifically argued, it clearly appears the apparent purpose of introducing the exhibit was to raise the issue of whether an isolated case in which the death penalty perhaps should have been imposed, but was not, becomes the standard which governs all capital cases before this court." We rejected the argument, largely upon the basis that it was impossible to tell from the limited record before us whether Floyd should have been sentenced to death. However, we concluded also that an isolated case should not be the standard by which all other sentences must be judged.

Evenhandedness in sentencing is a goal for which all courts

strive. We do not perceive, however, that it was the purpose of the Legislature to eliminate all discretion in sentencing and ensure that the death penalty be imposed in every case in which it is a possible sentence or that the penalty not be imposed in cases in which it is appropriate because in certain other cases it was not imposed, although it might have been an appropriate sentence. We think the dominant purpose of the statute is best expressed by the provision in § 29-2521.03 that "[n]o sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances."

It would be possible to construe the statute so that cases in which the death penalty was not imposed, although upon reflection it could be said that the death penalty might have been imposed, would be the standard against which all future death penalty cases would be compared. By a process of "attrition" this would result in a substantial narrowing of the group of cases in which the death penalty would be a possible sentence and, eventually, for all practical purposes, could amount to a repeal of the death penalty. We do not understand that the Legislature intended the statute to effect a repeal of the death penalty. We take judicial notice of the fact that the Legislature has considered bills to repeal the death penalty many times in recent years, but a repeal has never become law. Most recently, a legislative bill for that purpose (L.B. 70, 89th Leg., 1st Sess.) was indefinitely postponed by the Legislature's adjournment on April 16, 1986.

Whatever cases are examined, the final act of review which this court must perform is to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." § 29-2522(3). In order for this court to perform that function, that section also requires that when the trial court imposes the death sentence, the determination must be in writing with reference to the aggravating and mitigating circumstances involved. There is no similar requirement when the sentence is life imprisonment.

Accordingly, there is no way of this court's knowing whether any aggravating or mitigating circumstances were present in a given case unless the sentence was death. Therefore, no other

case but a death sentence case can be said to be a case similar to that under review.

In *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), the U.S. Supreme Court held that the U.S. Constitution does not require a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases, although requested to do so by the prisoner. In death cases the proportionality requirements of the U.S. Constitution are satisfied by the procedure for identifying aggravating and mitigating circumstances and meaningful appellate review.

In *Pulley* the Court stated at 54:

> *Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in Furman. As we have acknowledged in the past, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.' "* *Zant v. Stephens*, 462 U.S., at 884, quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion).

(Emphasis supplied.)

In *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the Court stated: "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."

In some of our prior decisions we have indicated that the proportionality review in all death penalty cases is a comparison of the facts and circumstances in all first degree murder cases, whether the penalty imposed was death or life imprisonment. Upon further consideration of this question we have concluded that the review should include only those cases in which the death penalty was imposed. Since there is an automatic appellate review in all such cases, we have before us records upon which we can rely in making the analysis and comparison.

An important distinguishing factor that is present in all death penalty cases is an adjudication that there are one or more aggravating circumstances which are not outweighed by any

mitigating circumstances. Although the existence of an aggravating circumstance does not ensure that the death penalty will be imposed, the absence of an adjudication that at least one aggravating circumstance exists prevents the death penalty from being imposed.

The Supreme Court of South Carolina has determined that the proportionality review which it makes in death cases under a similar statute should be limited to other cases in which the death penalty was imposed. In *State v. Copeland*, 278 S.C. 572, 586-87, 300 S.E.2d 63, 71-72 (1982), *cert. denied* 460 U.S. 1103, 103 S. Ct. 1802, 76 L. Ed. 2d 367 (1983), that court stated:

> Appellant Copeland attacks the constitutionality of the South Carolina death penalty regime on the basis of this Court's interpretation of § 16-3-25(C) of the Code. . . .
>
> The General Assembly of South Carolina has clearly made the policy determination that proportionality review by this Court shall be accorded capital defendants who actually receive a sentence of death. The language of § 16-3-25(C) puts three questions before this Court for review in a given case:
>
> 1. Whether sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> 2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 16-3-20, and
>
> 3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> It is the third inquiry which constitutes proportionality review in South Carolina. Under the statute, the task of defining "similar cases" and with it the scope of any comparative analysis is plainly and properly left to this Court. As indicated below, both the statutory language and the nature of the task give rise to perplexity. There is, after all, some logic to the view that the heinous crime is *sui generis*, simply beyond comparison.

Then, after discussing the absence of any federal constitutional requirement of a proportionality review, the

court stated at 590-91, 300 S.E.2d at 74:

> We conclude from the foregoing that the contours of proportionality review, where it exists, have been left to state determination since the U.S. Supreme Court has declined to impose any specific model of review upon the states. § 16-3-25(C) of the Code represents an act of legislative grace by the General Assembly which we are required to interpret in accordance with sound rules of statutory construction.
>
> In our view, the search for "similar cases" can only begin with an actual conviction and sentence of death rendered by a trier of fact in accordance with § 16-3-20 of the Code. We consider such findings by the trial court to be a threshold requirement for comparative study and indeed the only foundation of "similarity" consonant with our role as an appellate court.
>
> We recognize that in some jurisdictions and commentaries it is felt that the reviewing court should compare a given death sentence with a "universe" of cases which includes sentences of life imprisonment, acquittals, reversals and even mere indictments and arrests. Under such a regime, the reviewing court could only determine the size of its sample or "universe" by some arbitrary device. Fact findings of the trial court, by contrast, provide a fundamental line of demarcation well recognized in and even exalted by our legal tradition. The decisive importance of such findings is evidenced by the language of Article V, section 5, South Carolina Constitution, which limits our review to "correction of errors at law" in all but equity cases.
>
> To expand the notion of a "universe" would also entail intolerable speculation by this Court. Under the South Carolina statute, a jury is not required to state its reasons for failing to recommend a sentence of death. In a given case, the alleged aggravating circumstance may not have been proven to the satisfaction of the jury, while in another "similar case" (expansively defined) the statutory mitigating circumstances or some mitigating factor "otherwise authorized or allowed by law" may have

deterred imposition of the death sentence.

This Court would enter a realm of pure conjecture if it attempted to compare and contrast such verdicts with an actual sentence of death. They represent acts of mercy which have not yet been held to offend the United States Constitution. Moreover, they reflect the emphasis upon individualized sentencing mandated by the United States Supreme Court. We will not subject these verdicts to scrutiny in pursuit of phantom "similar cases," when a meaningful sample lies ready at hand in those cases where the jury has spoken unequivocally.

Similarly, in *State v. Nash*, 143 Ariz. 392, 694 P.2d 222 (1985), the Arizona Supreme Court limited its proportionality review to cases in which the death penalty had been imposed and the sentence affirmed or reduced.

It must be recognized that no two death cases are the same. The facts vary greatly from case to case, and the cases cannot be "color-matched." The comparison of the facts in any death case with the facts in previous cases in which the death penalty has been imposed can at best be general in nature.

From our review of the record in this case, and the review of the records in all cases in which the death sentence was imposed for offenses committed on or after April 20, 1973, we have concluded that the penalty imposed in this case is neither excessive nor disproportionate to the penalty imposed in the earlier cases, considering both the crime and the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., concurring.

This court has struggled to apply the provisions of Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1985) since their passage. The difficulties, both constitutional and semantic, have been extreme, as is well pointed out in the majority opinion. I agree that to compare a case in which there is a finding of guilt of first degree murder with a conviction of a lesser homicide is not only difficult, it is impossible. Any case where the requisites of either felony murder or intentional, premeditated murder have not been found is as different as night to day from a case where such requisites are judicially determined, if for no other reason than

the fact of judicial determination of the requisite facts in one case and not the other.

We must adhere to our role as an appellate court. The findings of fact by a jury or a judge in a jury waived case or on the acceptance of a plea are binding on us. We do not have the authority to determine that the crime was of a higher degree. We may not, in a matter so vital as the imposition or nonimposition of the death penalty, speculate as to decisions of the executive branch in not seeking conviction of a higher degree of homicide, nor by our decision question the factual determination of the fact finder.

I do not, however, agree that the only reasonable or possible application of § 29-2521.01 is to limit the comparison to cases in which the death penalty has been imposed. The penalty for first degree murder is either life imprisonment or death. That sentence decision is considered in all convictions for first degree murder. It seems to me that the rejection of a sentence of death by the judge or panel of judges is as important to proportionality as the imposition of such a penalty. The task of comparison, though difficult, is neither impossible nor constitutionally prohibited, and, therefore, we are commanded to make that comparison. I state further, however, that comparing all first degree murder cases with the subject case, the sentence is not disproportionate. I therefore concur in the result.

SHANAHAN, J., joins in this concurrence.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I concur in the opinion as adopted by the majority insofar as it concludes that no error was committed in finding Palmer guilty of first degree murder. I am unable to agree in all respects with the majority's analysis of the penalty and must therefore concur in part and in part dissent.

In reaching that decision I am quick to acknowledge that the law is an art and not an exact science, and therefore honest disagreements may exist even among members of a court.

I further wish to point out, before undertaking an analysis of our differences, that my conclusions are not in any manner affected by personal views but, rather, are controlled by honest

disagreements as to the meaning of the law as adopted by the Legislature of the State of Nebraska. What I may think about the law is totally irrelevant to the decision, and the decision may not reflect my personal views. All that matters is what I think the law thinks about the matter. In that respect the majority and I may honestly disagree without either injecting our personal views in the making of our respective decisions.

Obviously, I am not, nor could I as a matter of law be, opposed to the death penalty. See *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), and *State v. Joubert, post* p. 411, 399 N.W.2d 237 (1986), cases in which I either wrote the majority opinion for the court or concurred in the opinion of the majority in upholding the imposition of the death penalty. Furthermore, even in those cases in which I have dissented on the basis that I do not believe the penalty was imposed in accordance with Nebraska statutes, I have voted with the majority in subsequent postconviction cases when the issues presented to us involved legal questions other than whether the death penalty had been imposed in accordance with the law as enacted by the Legislature. See, *State v. Holtan*, 216 Neb. 594, 344 N.W.2d 661 (1984); *State v. Harper*, 214 Neb. 911, 336 N.W.2d 597 (1983); *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982); *State v. Peery*, 208 Neb. 639, 305 N.W.2d 354 (1981).

My disagreement with the majority in this case is a disagreement over the meaning of the law and does not involve questions of ethics or morality. As I have earlier stated in my dissent in *State v. Williams*, 205 Neb. 56, 79-80, 287 N.W.2d 18, 31 (1979):

> I totally reject the contention made by some that the imposition of the death penalty is either immoral or unethical when imposed by a society pursuant to its criminal code and subject to the further requirement that the defendant be afforded due process of law. We find the imposition of capital punishment in an appropriate case provided for as early as the Mosaic Code and perhaps even before. I have difficulty concluding that that which is embodied in the Mosaic Code can be either unethical or

immoral.

> It is true that some societies, through the ages, have discriminated in the manner in which capital punishment has been administered or have imposed it in a barbaric manner. Neither of those actions can be condoned. But the mere fact that a society prescribes the imposition of the death penalty in an appropriate case does not cause it to be either immoral or unethical.

I therefore do not believe that the death penalty itself violates the eighth amendment to the U.S. Constitution. I do, however, believe that the majority in this case is in error in its interpretation of certain provisions of Neb. Rev. Stat. §§ 29-2523 and 29-2521.02 to 29-2521.04 (Reissue 1985). I shall now attempt to point out wherein I believe the majority is in error.

The majority has concluded that the provisions of § 29-2523(1)(d) contain two separate prongs which are disjunctive. The first prong, according to the majority, is that the murder was "especially heinous, atrocious, cruel," while the second prong is that the murder "manifested exceptional depravity by ordinary standards of morality and intelligence." This language is not language created by the court; rather, it is the language of the statute as adopted by the Legislature in § 29-2523(1)(d).

Then, in an effort to avoid an attack that the second prong is invalid because it is too vague, the majority has very properly attempted to refine the meaning of the second prong by setting out five factors, any one of which it says may be sufficient to establish the second prong of (1)(d). It is here where I have difficulty. It appears to me that the majority has defined the second prong of (1)(d) either in terms of the first prong or in terms which I believe are no more precise than the statutory words of the second prong itself.

As I have already indicated, I have no quarrel with the majority in attempting to redefine the second prong of (1)(d) in order to give it certainty. The Legislature, having failed to sufficiently define either the first prong or the second prong of (1)(d) with constitutional sufficiency, has left the court with no other choice.

As noted by the majority, the U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 188-89, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), held in part:

> Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . .
>
> *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

The majority in this case then further observes that thereafter the U.S. Supreme Court held in *Godfrey v. Georgia*, 446 U.S. 420, 427-28, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980):

> A capital sentencing scheme must, in short, provide a " 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' " *Id.*, at 188, quoting *Furman v. Georgia, supra*, at 313 (White, J., concurring).
>
> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." [Citations omitted.] It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death." As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." 428 U.S., at 195, n. 46.

The sum and substance of all of this is that in order for a

statute such as § 29-2523(1)(d) to pass constitutional muster, it may not be so vague that it is meaningless or so broad that it may be used in an arbitrary fashion. If reasonable minds can honestly disagree as to its meaning, the statute fails to satisfy its constitutional requirement. That is to say, the standards may be in fact no standard simply because of their language.

I am of the opinion that the majority's effort in defining what it has described as the second prong of (1)(d), though made with the best of intentions, fails to define the act with the requisite clarity or do anything more than redefine the first prong of (1)(d). The second prong of (1)(d) cannot, therefore, standing alone, justify the imposition of the death penalty as prescribed by the Legislature. I shall now attempt to point out where I believe the effort of the majority in that regard fails.

The majority has said that the second prong of (1)(d) may be established if one or more of five factors, either alone or together, are established by the evidence beyond a reasonable doubt. The five factors are: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; and (5) helplessness of the victim.

According to both the U.S. Supreme Court and the majority, the purpose of defining the second prong in definite terms is to provide a " 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' " *Gregg v. Georgia, supra* at 188.

And as further noted by the majority: "The word 'exceptional' sets the defendant's act apart from the usual or norm of first degree murder cases and requires 'a consciousness materially more "depraved" than that of any person guilty of murder.' " In my view the five factors which the majority now says establish the second prong of (1)(d), which is separate and apart from the first prong of (1)(d), are either too broad to satisfy the requirement that they narrow the cases in which the death penalty may be imposed or are nothing more than a repeat of the definition of the first prong and therefore cannot stand alone.

I turn first to factor (4), the "senselessness of the crime," and factor (5), the "helplessness of the victim." As to factor (4), I am

unable to envision any murder which makes sense. It occurs to me that, at a minimum, nearly all, if not all, murders are senseless, as that term is commonly understood. At best, this factor creates an honest but substantial difference of opinion. Therefore, factor (4) must fail either because it is all-encompassing or because it is too vague. In any event it certainly is not evidence of an "exceptional" act. Even if one can conjure up a few cases in which the murder "makes sense," a fact with which I am unable to agree, the definition of factor (4) will be the norm rather than the exception. The majority, therefore, has read the word "exceptional" out of the act and made the second prong merely evidence of a "depraved mind" rather than an "exceptionally depraved mind." The word "exceptional" is not the court's word but, rather, the Legislature's word.

And, in any event, a factor defined in terms of the "senselessness of the crime" is no more precise than our earlier definition of the second prong of (1)(d) to the effect that the murder manifests "exceptional depravity" if it is "totally and senselessly bereft of any regard for human life." In either case, the words of the second prong, as defined by the majority, are not "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Nor, in my view, do they provide the sentencer with " 'clear and objective standards' " for " 'specific and detailed guidance' " and " 'make rationally reviewable the process for imposing a sentence of death.' " *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

In my view factor (5), likewise, offers no better limiting standard than does factor (4). In few, if any, cases will the victim be other than helpless. It is usually this helplessness which, unfortunately, results in the murderer's being able to complete his or her act. What I have set out in some detail regarding factor (4) can be applied to factor (5). In view of the fact that the majority has declared that not only is the second prong of (1)(d) disjunctive from the first but that all five factors are themselves disjunctive, it would appear that the death penalty could be imposed if the evidence established beyond a

reasonable doubt that the "murder was senseless" or that the "victim was helpless." That cannot, in my view, establish an "*exceptionally* depraved mind." I am therefore of the opinion that, on this basis alone, the second prong, as now defined by the majority, is constitutionally invalid.

However, I believe that an examination of the history which led to the adoption of (1)(d), including the creation of a definition for the first prong, convincingly establishes that in fact (1)(d) consists of only one prong and that the phrase "or manifests exceptional depravity" is nothing more than a further explanation of the phrase "especially heinous, atrocious, cruel." In order to make my point on this issue, it is necessary to review some of the history regarding the "especially heinous" phrase.

The Model Penal Code, from which much of our act, and in particular § 29-2523(1)(d), was taken, was somewhat different from what was ultimately enacted by our Legislature. Model Penal Code § 210.6(3)(h) (1980) reads: "The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity." How or why the word "or" between "atrocious" and "cruel" was moved between "cruel" and the second prong is not anywhere explained. But when one considers how we have defined "especially heinous" and how we have defined "exceptionally depraved," it seems to me that factors (1), (2), and (3) define one and the same prong.

In a long line of cases, apparently having its inception in *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied* 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed. 2d 295 (1974), most, if not all, courts which have been given statutes by their legislatures using "especially heinous" as an aggravating factor have held that before the murder may be considered to be "especially heinous" the evidence must establish that it was "conscienceless or pitiless" and "unnecessarily torturous to the victim." *Id.* at 9. That has become the accepted legal meaning of the phrase "especially heinous, atrocious, or cruel."

Furthermore, an examination of just some of the cases makes the definition as set out above even clearer.

In *State v. Goodman*, 298 N.C. 1, 24-25, 257 S.E.2d 569, 585 (1979), the North Carolina court said:

G.S. 15A-2000(e)(9) states that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the "capital felony was especially heinous, atrocious, or cruel." While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. *State v. Stewart, supra; State v. Rust, supra; State v. Simants*, 197 Neb. 549, 250 N.W. 2d 881, *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed. 2d 158 (1977).

The Florida provision concerning this aggravating factor is identical to ours. Florida's Supreme Court has said that this provision is directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950 [sic], 40 L.Ed. 2d 295 (1974); *see also, State v. Alford*, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed. 2d 1221 (1976). Nebraska has also adopted the Florida construction of this subsection. Both Florida and Nebraska have limited the application of this subsection to acts done to the victim during the commission of the capital felony itself. *State v. Rust, supra; Riley v. State*, 366 So. 2d 19 (Fla. 1979). We too believe that this is an appropriate construction of the language of this provision. Under this construction, subsection (e)(9) will not become a "catch all" provision which can always be employed in cases where there is no evidence of other aggravating circumstances.

And in *State v. Monroe*, 397 So. 2d 1258, 1274-75 (La. 1981), the Louisiana Supreme Court, in a murder case, said:

Although the jury found the instant offense to have been committed in an "especially heinous, atrocious or cruel manner," this finding cannot stand. It is true that the murder was brutal—the victim lost over two quarts of

> blood, her lungs were punctured and one of her ribs was severed. Her death was not instantaneous, and she lived long enough to call out for her daughter and reach for the telephone.
>
> Nonetheless, in order for a murder to be "especially heinous," there must exist *evidence* that there was "torture or the pitiless infliction of unnecessary pain on the victim." *State v. English*, 367 So.2d 815, 823 (La.1979). *State v. Clark*, 387 So.2d 1124 (La.1980), provides an example of what is meant by "especially heinous." In that case the defendant stabbed the victim thirty-five times before shooting him with a gun. In the instant case, the "wounds were inflicted to kill, not to maim or to inflict pain." *State v. Culberth*, supra, at 851. While there is some evidence in this case that the offense was heinous and cruel, it was not proved beyond a reasonable doubt that the instant offense was *especially* heinous.

(Emphasis supplied.)

In *Hopkinson v. State*, 632 P.2d 79 (Wyo. 1981), the defendant, tried under a statute nearly identical to the Nebraska statute, argued that a jury could find any murder to be especially heinous, atrocious, or cruel and therefore could conclude that this aggravating circumstance is present in all cases. He contended that it, therefore, gave the jury a free rein to decide to sentence a person to death in every case and, thus, in effect, abolished the requirements previously established by the U.S. Supreme Court for imposing the death penalty. In rejecting that argument the Wyoming court said at 153-54:

> We disagree with appellant's conclusion. The statute does *not* fail to properly channel the jury's sentencing decision and does *not* grant it unfettered discretion to impose the death penalty for arbitrary and capricious reasons. First, the statute requires the jury to find the murder to have been "especially heinous, atrocious or cruel." Webster's Third New International Dictionary defines heinous as "hatefully or shockingly evil." Thus the term "especially heinous" is more than just hatefully or shockingly evil. The murder, to be so classified, must

> demonstrate that the consciencelessness of the defendant is not only an outrage but also a dangerous and unrestrainable threat to society. Only when this is found can the murder properly be categorized as especially heinous. Since very few murders can be regarded in this manner, the term is *not* impermissible and vague.

The view of the Wyoming court is in accord with that of the U.S. Supreme Court. In *Proffitt v. Florida*, 428 U.S. 242, 255, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), *reh'g denied* 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158, Justices Stewart, Powell, and Stevens, in the Court's plurality opinion, said:

> In particular, the petitioner attacks the eighth and third statutory aggravating circumstances, which authorize the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons." §§ 921.141(5)(h), (c) (Supp. 1976-1977). These provisions must be considered as they have been construed by the Supreme Court of Florida.
>
> That court has recognized that while it is arguable "that all killings are atrocious . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Tedder v. State*, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

The necessary distinction to be made between what is simply heinous and what is especially heinous is pointed out by the Alabama court in *Berard v. State*, 402 So. 2d 1044 (Ala. Crim. App. 1981), in which the trial court found that the homicides were "brutal" and therefore ordered the imposition of the death penalty. In discussing that matter the Alabama court said at 1050: "That the homicides were 'brutal' fails to conform to § 13-11-6(8) which requires a finding that the crime was '*especially* heinous, atrocious or cruel.' (Emphasis supplied.) The crime was in fact brutal, but the statute requires more."

Later, in the case of *McCray v. State*, 416 So. 2d 804 (Fla.

1982), the Florida Supreme Court again reviewed its statute, nearly identical to Nebraska's, and reversed a sentence of death because it found that the crime was not especially heinous, atrocious, or cruel, as previously defined by the Florida court. The facts of *McCray* indicated that a murder in which the victim died from three bullets to the stomach did not meet the statutory definition.

Similarly, in *Clark v. State*, 443 So. 2d 973, 977 (Fla. 1983), the Florida court again said:

> Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous, atrocious, or cruel. *Kampff v. State*, 371 So.2d 1007 (Fla.1979). Although Mr. Satey testified that he heard his wife moan after being shot, there was no evidence of whether she was conscious after being shot, not [sic] did the medical examiner indicate how long Mrs. Satey survived or what degree of pain, if any, she suffered. Although the helpless anticipation of impending death may serve as the basis for this aggravating factor, there is no evidence to prove that Mrs. Satey knew for more than an instant before she was shot what was about to happen to her. Similarly, as pitiable as were Mr. Satey's vain efforts to dissuade his attackers from harming his wife, it is the effect upon the victim herself that must be considered in determining the existence of this aggravating factor.

The following year, Mississippi, in the case of *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), considered the "especially heinous, atrocious or cruel" provision of its statute, saying at 464:

> [W]hat is intended by the words "especially heinous, atrocious or cruel", "are those capital crimes where the actual commission of the felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies—*the consciencelessness* [sic] *or pitiless crime which is unnecessarily tortuous* [sic] *to the victim*."

During that same year, Florida, in *Gorham v. State*, 454 So. 2d 556 (Fla. 1984), held that where one shot penetrated the victim's heart, causing death within 10 seconds, and where the evidence disproved any possibility of prolonged and torturous captivity and there was no evidence whatsoever that the victim

apprehended certain death more than moments before he died, the aggravating circumstance in support of the death penalty that the murder was especially heinous, atrocious, and cruel, being based as it was upon the victim's having been thereafter shot twice in the back, could not be sustained.

In doing so the Florida court said in *Gorham, supra* at 559: "While the murder was, of course, a cruel and unjustifiable deed, there is nothing about it to 'set the crime apart from the norm of capital felonies.' " The evidence indicated that the victim was already dead when the next two shots were fired. The Florida court's position was not based upon its notion that the murder was not terrible or even heinous but that, in order for the statute to be constitutional and not permit the imposition of the death penalty in every case, the aggravating circumstance "especially heinous" must be interpreted to be limited to those few cases in which the murder was committed in such a manner as to cause torture to the victim before death in a conscienceless and pitiless way. This distinction is made not because the courts are without sensitivity but, rather, because the death penalty may not be imposed unless clear, rigid standards are first met. See, *Thompson v. State*, 456 So. 2d 444 (Fla. 1984); *Rembert v. State*, 445 So. 2d 337 (Fla. 1984); *State v. Wilson*, 467 So. 2d 503 (La. 1985).

In arriving at its conclusion that the second prong of (1)(d) is disjunctive and consists of five separate factors, the majority has relied upon similar action taken by the Arizona Supreme Court, and, in particular, its decision in *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983), *cert. denied* 461 U.S. 971, 103 S. Ct. 2444, 77 L. Ed. 2d 1327, wherein the Arizona Supreme Court set out the five factors now adopted by this court as the definition of the second prong of (1)(d).

As I see it, the difficulty with that analysis is that Arizona appears to make no distinction between "especially heinous" and "especially depraved," as does the majority herein.

To begin with, the Arizona statute is not the same as Nebraska's. Ariz. Rev. Stat. Ann. § 13-703F.6. (Supp. 1986) reads: "The defendant committed the offense in an especially heinous, cruel or depraved manner."

Furthermore, the Arizona Supreme Court uses the five

factors not only to define "depraved" but to define "heinous" as well.

In *State v. Smith*, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985), the Arizona Supreme Court said:

> "Heinous" and "depraved" are characteristics reflecting the mental state and attitude of the perpetrator of the crime. *State v. Gretzler*, 135 Ariz. at 51, 659 P.2d at 10. In *Gretzler*, we listed several factors which may lead to a finding of *heinousness or depravity*: (1) the apparent relishing of the murder by the killer; (2) the infliction of gratuitous violence on the victim beyond the murderous act itself; (3) the needless mutilation of the victim; (4) the senselessness of the crime; and (5) the helplessness of the victim. *Id.* at 52, 659 P.2d at 11.

(Emphasis supplied.) See, also, *State v. Clabourne*, 142 Ariz. 335, 690 P.2d 54 (1984); *State v. Lambright*, 138 Ariz. 63, 673 P.2d 1 (1983).

In my view the Arizona Supreme Court opinion supports my assertion that there is only one prong and not two, as suggested by the majority.

With that background in mind I now examine what the majority has created as factors (1), (2), and (3) of the second prong: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; and (3) needless mutilation of the victim. It seems to me that no matter what gloss is placed upon factors (1), (2), and (3), they constitute a murder which is conscienceless or pitiless, and was unnecessarily torturous to the victim. Therefore, if I disregard factors (4) and (5) because of vagueness, I appear to be left with nothing more than a definition of "especially heinous" for "especially depraved." It is for these reasons I am unable to join with the majority in concluding that there are two distinct prongs to § 29-2523(1)(d). I believe that there is only one, and I would so hold.

That leads me to the second area in which I am unable to agree with the majority. I do not believe that the majority is correct in limiting the proportionality review required by the provisions of §§ 29-2521.02 to 29-2521.04 to only that pool of Nebraska cases in which the death penalty has been imposed

since April 20, 1973. I believe that the majority opinion in that regard is incorrect for at least three reasons: (1) The plain language of the act does not permit such a review; (2) The clear intent of the Legislature is contrary to the majority view; and (3) Common sense, in light of the objective sought to be accomplished by the Legislature as expressed in the act itself, is contrary to the majority view. For reasons which I will detail more fully hereafter, I believe that we are required to compare the case on appeal with all other cases of homicide involving the same or similar circumstances without regard to the penalty imposed.

The current Nebraska statutes prescribing when the death penalty is to be imposed are a combination of two separate acts, one passed in 1973 and the other in 1978, the acts having been slightly modified in 1978 and 1982. See, 1973 Neb. Laws, L.B. 268; 1978 Neb. Laws, L.B. 711; 1978 Neb. Laws, L.B. 748; 1982 Neb. Laws, L.B. 722.

The principal reason for adopting this series of statutes is clear. In 1972, in the now famous case of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the U.S. Supreme Court held that absent standards which prevent a state from imposing the death penalty in an arbitrary and discriminatory manner, statutes authorizing the use of the death penalty violate the eighth amendment to the U.S. Constitution. In an apparent effort to solve that problem, the Nebraska Legislature, in 1973, adopted L.B. 268. Specifically, L.B. 268 (codified as Neb. Rev. Stat. § 29-2519 (Reissue 1975)) set out the intent of the Legislature and provided:

> The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death; that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28-[303] fails to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Legislature therefore determines that the death penalty should be imposed *only* for the crimes set forth in

> section 28-[303] and, in addition, that it shall *only* be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524.

(Emphasis supplied.) This may be contrary to the view held by some that anyone who kills should be put to death, but it is the will of the Legislature as expressed in its enactment of L.B. 268.

The Legislature then adopted a list of aggravating circumstances and mitigating circumstances to be considered first by the sentencing court and thereafter by the Supreme Court on appeal, the appeal to the Supreme Court being automatic. See Neb. Rev. Stat. § 29-2525 (Reissue 1985). The death penalty is not to be imposed unless the aggravating circumstances outweigh the mitigating circumstances. Neb. Rev. Stat. § 29-2522 (Reissue 1985).

A second step, however, was added to the Supreme Court's review procedure in 1978 when the Legislature adopted L.B. 711. See 1978 Neb. Laws, L.B. 711. In adopting L.B. 711 the Legislature made further specific legislative findings which became a part of the law. Neb. Rev. Stat. § 29-2521.01 (Reissue 1985) provides:

> The Legislature hereby finds that:
>
> (1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;
>
> (2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;
>
> (3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;
>
> (4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and
>
> (5) *In order to compensate for the lack of uniformity in*

> *charges* which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze *all* criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

(Emphasis supplied.)

To carry out that legislative mandate, the Legislature then imposed upon *only* the Supreme Court an obligation to, within a reasonable time after July 22, 1978, review and analyze *all* cases involving criminal homicide committed on or after April 20, 1973. Section 29-2521.02 provides: "Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) *the charges filed*, (3) the crime for which defendant was convicted, and (4) *the sentence imposed*. Such review shall be updated as new criminal homicide cases occur." (Emphasis supplied.)

Using this compilation of cases, the Supreme Court is required, upon appeal, to determine "the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances." § 29-2521.03.

The plain language of the act seems to make it clear that *all* criminal homicide cases are to be reported to the Supreme Court and that the Supreme Court, in conducting its review, is to look at *all* of these cases and to then compare the case on appeal with those other cases having same or similar *circumstances*, not penalties, to determine whether the imposition of the death penalty in the case on appeal is more severe than that imposed in other cases having same or similar circumstances. As pointed out in our opinion in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), that is no easy task. We said in *Williams, supra* at 77, 287 N.W.2d at 29: "It would be virtually impossible to find two murder cases which are the same in all respects." Nevertheless, difficult as the task may be, unless we declare the act unconstitutional, we are duty-bound to follow it.

In that regard it should be noted that the U.S. Supreme Court does not require a proportionality review to be conducted before imposing the death penalty. As noted by the majority, in the case of *Pulley v. Harris*, 465 U.S. 37, 42-45, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984), the U.S. Supreme Court held:

> At the outset, we should more clearly identify the issue before us. Traditionally, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime. Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime. . . .
>
> . . . .
>
> . . . In *Furman*, the Court concluded that capital punishment, as then administered under statutes vesting unguided sentencing discretion in juries and trial judges, had become unconstitutionally cruel and unusual punishment. The death penalty was being imposed so discriminatorily, *id.*, at 240 (Douglas, J., concurring), so wantonly and freakishly, *id.*, at 306 (Stewart, J., concurring), and so infrequently, *id.*, at 310 (White, J., concurring), that any given death sentence was cruel and unusual. In response to that decision, roughly two-thirds of the States promptly redrafted their capital sentencing statutes in an effort to limit jury discretion and avoid arbitrary and inconsistent results. . . .
>
> Four years after *Furman*, this Court examined several of the new state statutes. We upheld one of each of the three sorts mentioned above. See *Gregg v. Georgia, supra; Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). Needless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensable. We take statutes as we find them. To endorse the statute as a whole is not to say that anything different is unacceptable. . . .

> Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement.

The U.S. Supreme Court went on to say at 50-51:

> There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Indeed, to so hold would effectively overrule *Jurek* and would substantially depart from the sense of *Gregg* and *Proffitt*. We are not persuaded that the Eighth Amendment requires us to take that course.

Nevertheless, the Nebraska Legislature has not repealed that portion of its statutes which requires this court to conduct a proportionality review, and, therefore, this court must abide by the requirements of the statute or declare it unconstitutional.

The majority has chosen a middle ground. It has suggested that if we follow the language as it is written by the Legislature, the act will be rendered unconstitutional; therefore, we shall interpret it by changing the language in order to declare the act constitutional.

While the effort by the majority is commendable, I do not believe it judicially proper. Judicial activism, regardless of the result, is still judicial activism and should not be undertaken by a court. It is our function to interpret the law and, if ambiguous, give it meaning. It is not our function, however, to redraft an act which is clear and unambiguous. As we observed in *State v. Roth*, 222 Neb. 119, 124, 382 N.W.2d 348, 352 (1986): " 'Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.' " And in *State v. Carlson*, 223 Neb. 874, 394 N.W.2d 669 (1986), we said: "In the absence of anything indicating the contrary, statutory language should be given its plain and ordinary meaning. Where words of a statute are plain and unambiguous, no interpretation is necessary to ascertain the meaning of language in a statute." (Syllabus of the court.)

The language of § 29-2521.03 is clear and unambiguous and, thus, requires no interpretation by this court. To read meaning into the statute by limiting the review to be conducted by this

court to those cases in which the death penalty has been imposed is to rewrite the statute. One need only read the statement of intent set out in § 29-2519 and the legislative findings set out in § 29-2521.01 to recognize that this court is to compare the case on appeal not only with those in which the death penalty has been imposed but, more importantly, also with those in which the death penalty has not been imposed. The legislative findings clearly require that by providing in part:

> In order to compensate for the lack of uniformity in *charges* which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

(Emphasis supplied.) § 29-2521.01(5).

Moreover, an examination of § 29-2521.02 further makes it clear what it is we are to do. That section requires the Supreme Court, within a reasonable time, to review and analyze *all* cases involving criminal homicide. It would not have been difficult to limit the language of § 29-2521.02 if the review was to be limited to those few cases in which the death penalty had been imposed. There would be little reason to review and analyze, as required by § 29-2521.02, "(1) the *facts* including mitigating and aggravating circumstances, (2) the *charges* filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed" (emphasis supplied), or to require that "all" homicide cases be forwarded to the Supreme Court, or to require the Supreme Court to review *all* homicide cases if the ultimate review is limited to those few cases where the death penalty is imposed. The language of the act simply will not, absent painful distortion, permit a finding that the review is to be limited to only cases in which the death penalty had been imposed.

In 1977, in the case of *State v. Simants*, 197 Neb. 549, 563-64, 250 N.W.2d 881, 890 (1977), we told the Legislature:

> The Supreme Court has indicated in its opinions that meaningful appellate review may be required to insure that the death penalty is not applied in an arbitrary or

> capricious manner. . . . While we do not have the Georgia provision for proportional review, every capital case where there can be the slightest question will be considered in comparison with other capital cases. In other words, we will compare each capital case under review with those previous cases in which the death penalty *has or has not been imposed* under the new statute. By this means review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case.

(Emphasis supplied.)

While *Simants* was decided even before the adoption of L.B. 711, the legislative history of L.B. 711, as will be shown, indicates that it was adopted in part to codify what this court had said it was already doing.

We then decided *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), wherein the majority now claims we said that, in conducting the proportionality review required by § 29-2521.02, we would examine only cases in which the penalty of death has been imposed. However, we attached to our opinion in *Williams* an addendum indicating the cases that had been analyzed and reviewed as of November 1, 1979. There were 32 cases. The death penalty had only been imposed in six such cases, the balance receiving life sentences. To therefore suggest that *Williams* stands for the proposition that we were limiting our review to cases in which the death penalty had been imposed is simply not supported by the record.

We followed *Williams* with *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), and then with *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), which we have now overruled in this case. In *Moore* and *Reeves* we held that we were comparing *all first degree* murder convictions, whether the death penalty was imposed or not. While the rationale of *Moore* and *Reeves* makes somewhat more sense than the rationale of *Williams*, there is nothing in the statute which limits the comparisons to first degree murder cases, and such a limitation appears contrary to the words and the intent of the statutes.

In *Moore* this court held that the proportionality review, to be constitutional, must be limited to cases in which the

defendant had been convicted of first degree murder. The court reasoned that any additional review would violate the separation of powers between the judicial and executive branches because such a review would, of necessity, require the court to gather evidence and examine prosecutorial decisions in filing charges.

While I do not agree with the conclusion that if we were to follow the statutes, as directed by the Legislature, the act would be unconstitutional, if, in fact, one accepts that view, we have no choice but to declare the act unconstitutional and cannot remedy alleged unconstitutional defects by redrafting the statutes and deleting words. As we said in *Metropolitan Utilities District v. City of Omaha*, 112 Neb. 93, 101, 198 N.W. 858, 861 (1924), "when a legislative act clearly violates a specific constitutional declaration the court has no recourse, but to declare the act invalid."

It seems somewhat of an anomaly for us, on the one hand, to say that if we do what the Legislature has directed us to do, it will constitute a violation of the doctrine of separation of powers, and, on the other hand, to seek to remedy what we declare to be a constitutionally defective statute by invading the province of the Legislature and redrafting the act will not constitute such a violation. How following the act violates the doctrine regarding the separation of powers, but redrafting the act, clearly a legislative function, does not, escapes me. If the act is unconstitutional, let us say so and declare it to be invalid.

I do not, however, believe that such declaration is either necessary or proper. Rather, I believe that the act is constitutionally drafted. It may not be constitutionally required, but, having been adopted by the Legislature, it should not now be rewritten by us. In my view the position set out in the majority opinion in *Moore, supra*, is flawed. I now examine the underlying reasons given by the *Moore* decision, one by one.

I. *The Legislature cannot, by subsequent legislation, divest rights which vested by virtue of a judgment.* L.B. 711, as adopted by the Legislature, does not divest any rights which have been vested. We are not permitted to change the judgment in any case we are comparing. Our authority is limited solely to the case on appeal.

II. *The Legislature cannot enact legislation to retroactively open or vacate a judgment.* L.B. 711, as adopted by the Legislature, does not retroactively open or vacate a judgment. The cases which we compare are final and binding and cannot be affected by anything we do in the case on appeal. We do not change anything in those cases. We only compare the present case with the final results in those other cases. The function we perform is no different whether we use cases in which the death penalty has been imposed or whether we use cases in which the death penalty has not been imposed.

III. *The limits of the jurisdiction conferred upon the Supreme Court by the Constitution may not be increased or extended by legislative enactment.* L.B. 711, as adopted by the Legislature, does not increase or extend our jurisdiction. Our jurisdiction is to examine the case on appeal. What we compare that case with is not prescribed by constitution. If we can compare it to cases in which the death penalty has been imposed, we can constitutionally compare it to cases in which the death penalty has not been imposed.

IV. *The Legislature cannot change procedures established by the Constitution.* L.B. 711, as adopted by the Legislature, does not change procedures established by the Constitution. There is no constitutional procedure for reviewing a case in which the death penalty has been imposed.

V. *The Legislature cannot interfere with the judicial function of adjudicating the facts of an acquittal.* L.B. 711, as adopted by the Legislature, does not interfere with the judicial function of adjudicating the facts of an acquittal. The acquittal is not before us for adjudication, only for comparison with the case we are to review. Nothing done by virtue of L.B. 711 can affect an acquittal once rendered. It is not the comparison cases we rule upon, but only the case being examined on appeal.

VI. *The Legislature may not reverse a judgment.* L.B. 711, as adopted by the Legislature, does not permit the court to reverse any other decision except the case on appeal. Obviously, we have authority to reverse a case on appeal.

VII. *The Legislature may not direct the disposition of a case in which jurisdiction has attached.* L.B. 711, as adopted by the Legislature, does not *direct* a disposition. It merely prescribes

the standards we are to use in exercising our judgment. Notwithstanding anything contained in L.B. 711, we may still uphold the imposition of the death penalty in a proper case. Nothing about L.B. 711, as currently enacted, requires the court to reach any directed specific decision. All it requires of us is to use all homicides before imposing the death penalty. In my view the Legislature has clear authority to do that. Courts do not have inherent authority to impose the death penalty. Absent a statute enacted by the Legislature, neither a crime nor a punishment may exist. See, *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986); *Kinnan v. State*, 86 Neb. 234, 125 N.W. 594 (1910). If the Legislature, then, can, within its power, prescribe whether the death penalty may be imposed in the first place, it seems to me it can prescribe the conditions under which it may be imposed. Our function is merely to examine the evidence to determine that the prerequisites established by the Legislature have been met.

Contrary to the position taken by the majority, either in *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), or in this case, I do not believe we are asked to gather evidence or look behind prosecutorial discretion. The evidence is to be brought to us, just as all evidence is brought to us, and we are to accept on their face the decisions of the prosecutors. This is precisely what we do when we examine any sentence pursuant to Neb. Rev. Stat. § 29-2308 (Reissue 1985) to determine whether the sentence imposed is excessive.

An examination of the legislative history underlying the adoption of both L.B. 268 in 1973 and L.B. 711 in 1978 unequivocally establishes the fact that the Legislature did not intend to limit the examination to those cases in which the death penalty had in fact been imposed. In introducing L.B. 711 the sponsor, Senator Ernie Chambers, filed a statement which began as follows: "The following constitute my reasons for this bill and the purposes sought to be accomplished thereby:" Statement of Purpose, L.B. 711, Judiciary Committee, 85th Leg., 2d Sess. (Jan. 24, 1978). Senator Chambers then proceeded to explain the various reasons for his bill. He concluded by saying: "Now, for convenience and clarity, I shall set out crucial propositions in the form of numbered items."

Thereafter followed 12 numbered items. Number 10 reads as follows: "If review and comparison are limited to cases where death is *actually imposed*, the base is too narrow and fails to take any cognizance of the multitude of similar cases (like those mentioned above) where the perpetrator of the homicide never faces the *risk* of death because of the action by the prosecutor in not charging 1st degree." Number 11 reads as follows: "If review of all criminal homicides (regardless of the charge filed or the punishment imposed) reveals that the death case before the Court carries a sentence which is different from that in similar homicide cases, the penalty will not stand." *Id.*

In a statement at the public hearing before the Judiciary Committee, Senator Chambers said in part:

> The Nebraska Supreme Court already recognizes a limited version of this proposal and mentioned it in the Simants decision which it handed down February 2, 1977. "While we do not have the Georgia provision for proportional review, we will compare each capital or death case under review with those previous cases in which the death penalty has or has not been imposed under the new statute." You'll see from this provision that the only cases that the State Supreme Court in Nebraska will review, are those where death has actually been pronounced. In this situation, that means five cases: Holtan, Ruse [sic], Stewart, Simants, and Peery. Those are the only cases. It's a very small circle and it does not provide the basis for the type of review the court itself indicates it's interested in. Now I'll go back to the statement. The Supreme Court limits its review to capital cases but completely ignores homicides where the facts and circumstances may have justified filing of a capital or death penalty charge, but for some reason, none was filed. This means that the Supreme Court's stated purpose for reviewing and comparing cases is effectively defeated in the vast majority of instances. . . . If in past cases, prosecutors have shown by the charge they filed that they rejected the death penalty or judges who received pleas of guilt to first degree murder or convictions of first degree murder and they rejected the death penalty by not imposing it, those cases nevertheless

> should be reviewed to determine whether the circumstances would have warranted the death penalty, if in the case before the court now, the circumstances were similar and death was pronounced as a sentence.

Judiciary Committee Hearing, L.B. 711, 85th Leg., 2d Sess. 33-34, 36 (Jan. 24, 1978). The statement makes it clear that the intent of the act was to expand the cases to be included in the review.

Furthermore, an examination of the floor debate discloses what the Legislature, or at least those who voted in favor of L.B. 711, had in mind. Senator Clark asked Senator Chambers:

> SENATOR CLARK: Does not the Supreme Court, at the present time, review the case after the death penalty has been imposed by the district court?
>
> SENATOR CHAMBERS: They review the individual case but they don't compare them with the cases where the death penalty *was not imposed.* They do not make a comparison of case against case. They review the case itself.

(Emphasis supplied.) Floor Debate, L.B. 711, Judiciary Committee, 85th Leg., 2d Sess. 7377 (Mar. 8, 1978).

Senator Chambers then further said in part:

> The State Supreme Court under this bill will not merely review an individual case to see whether errors were committed in that case but it will compare the cases of criminal homicide throughout the state to see just what kind of cases ought to carry the death penalty and which kind ought not. And if a person who commits a crime in Scottsbluff [sic] County will escape the death penalty because he or she lives in that county, while for the same thing being sentenced to death in Douglas County, then the death penalty is not a state law. The death penalty is broken up into 93 different laws interpreted solely and only in the discretion of the individual prosecutor. I am saying that the Supreme Court should be authorized to compare all of these cases where criminal homicide has occurred and rectify some of the disparities, some of the differences, radical differences, which have occurred as a result of the difference in attitude among prosecutors.

> This bill, remember, causes a comparison among cases. Currently an appeal merely reviews an individual case. So it might be like you have a hundred people in this room. You give each one a physical to see whether he or she is healthy. Then you compare all of them with each other to see which is the healthiest. One is an individual review. The other is a comparison. 711 adds the concept of the comparison and I think only through a procedure such as this can the arbitrariness be taken away, and Senator Clark, when I say arbitrariness, I am saying that similar circumstances do not result in a similar result in this state, and if you review the cases of people on death row, there are others in the penitentiary who have confessed to crimes far more atrocious than those committed by the ones who are currently awaiting death and those who are not on death row naturally will not die and I think that is not proper and the purpose of this law is to bring about uniformity.

Id. at 7378.

Reading the clear meaning of the statutes in light of the debate leads one to the conclusion that the comparison review must encompass *all* cases involving homicide, whether the death penalty was imposed or not.

Finally, in my view, common sense dictates that no other rational conclusion can be reached. The purpose of L.B. 711 was to ensure that persons were not being arbitrarily sentenced to death. To therefore suggest that we look only at those individuals who may have been discriminated against to determine whether or not they have been discriminated against is an exercise in futility. If one wants to determine whether individuals are being discriminated against in public transportation, one does not merely look at those who are required to sit in the back of the bus and conclude that since everyone in the back of the bus looks alike, there is no discrimination. One, of necessity, must look at who is riding in the front of the bus as well in order to determine whether the persons in the back are being discriminated against. So, too, there is no way that we can determine whether those who are sentenced to death are being discriminated against if we do not

examine those cases having the same or similar circumstances which, for whatever reason, did not result in the imposition of a death sentence.

I have attached to this concurrence and dissent a list of 185 cases in which individuals have been involved in the killing of another and have been convicted or have pleaded guilty to either first degree murder, second degree murder, or manslaughter or less. Of that number only 13 resulted in the imposition of the death penalty. The percentage of times the death penalty has been imposed in Nebraska since 1973 as compared to the total of such murders is 7 percent. While that may be justified, to limit the comparison we make pursuant to L.B. 711 to 7 percent of the cases is to totally ignore the obvious intent and purpose of the act. I believe we have no other choice but to review all homicide cases having the same or similar circumstances. One may argue that there may be other cases wherein homicides were committed but charges less than first degree murder, second degree murder, or manslaughter were filed. That may be true, but under the record currently before us, and in view of the few cases in which the death penalty has been imposed as compared to the total number of known homicide cases having the same or similar circumstances, the absence of those additional cases, whatever they may be, can only further exacerbate the result of the review in this case. There is nothing about those cases which will be helpful in determining whether there is discrimination in this case.

I would interpret L.B. 711 to require that the Supreme Court must review all homicide cases having the same or similar circumstances, the records of which are filed with the court pursuant to §§ 29-2521.02 and 29-2521.04, regardless of the penalty imposed, and would not limit the review to those cases in which the death penalty was imposed, as has been done by the majority. Using this broader standard of review, I believe a review of all of those cases, in light of the mandates imposed upon the states by the U.S. Supreme Court, leads to the conclusion that the imposition of the death penalty in this case is arbitrary and discriminatory and cannot stand. The decision has nothing to do with what is morally appropriate; only with what is legally permitted. A state's authority to execute must be

strictly interpreted and fully complied with before the sentence may be carried out.

Of the 185 cases set out in the attached list, it would appear that 57 of them involved robberies and murders. Those cases are identified in the list by placing an asterisk in front of the name of the case. Of that total number only six of the robbery/murders resulted in the imposition of the death penalty. In 51 of the cases a sentence of life imprisonment or less was imposed. This means that the death penalty was imposed in only 10.5 percent of the cases involving the same or similar circumstances, while in 89.5 percent of the cases the death penalty was not imposed. As we have already recognized, it is not easy to determine whether one murder is the same as or similar to another. At a minimum, all of the cases involved a situation in which the defendant attempted to or did in fact rob the victim as well as kill the victim.

A closer look at the facts of some of these cases reveals that many of these 51 cases involving a robbery and a murder where a sentence of life imprisonment or less was imposed have not only similar but nearly identical fact patterns to the instant case. For example, in *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978), the defendant robbed a gas station. He ordered the attendant to lie down. When the defendant suspected that the victim was moving behind the counter to get something, the defendant hit him with his gun. The gun went off, and the victim eventually died from a gunshot wound to the heart. Defendant was sentenced to life in prison for first degree murder.

In *State v. Domingus*, Lincoln County District Court, Docket 92, Page 31, the defendant pleaded no contest to first degree murder. The record discloses that the victim was viciously beaten by the defendant, sustaining a considerable amount of bruising in the area of the eyes and nose. In the opinion of the pathologist, the victim was alive when she sustained the facial injuries. She ultimately died of massive head injuries after she was beaten with a wooden board. The defendant was convicted of first degree murder and was sentenced to life imprisonment, plus up to 20 additional years for the beating death of the woman.

And in *State v. Suffredini, ante* p. 220, 397 N.W.2d 51 (1986), the defendant pleaded no contest to second degree murder. The facts disclose that the defendant murdered the victim immediately outside the door of a men's restroom at a rest stop along Interstate 80. The victim was shot five times, and between $180 and $240 was stolen from him. The defendant was sentenced to life imprisonment for the murder, plus not less than 15 nor more than 45 years on the robbery and not less than 5 nor more than 15 years on the use of a firearm, all of the sentences to be served consecutively.

In *State v. Marshall*, Lancaster County District Court, Docket 48, Page 262, the defendant robbed the owner of a Lincoln flower shop. In the course of the robbery, the defendant struck and killed the owner with a metal bar. The defendant was convicted of first degree murder and sentenced to life imprisonment.

In *State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985), the defendant robbed a music store and shot the victim when the victim attempted to phone the police. Again, the defendant, charged with first degree murder, was sentenced to life imprisonment.

These cases, though not an inclusive list of all Nebraska cases with the same or similar circumstances as the instant case, clearly exemplify that what Palmer did, while morally repugnant and deserving of the maximum punishment permitted by law, was really no different from what many others have done and for which they received a life sentence. In Palmer's case there are no significant factors different from those in the 56 other cases listed, and, therefore, a comparison with the 56 cases seems appropriate.

Even if we exclude from this number those cases in which the defendant was less than 18 years of age at the time the robbery/murder was committed (identified by placing the letter *m* following the asterisk on the attached list), we still find that there are a total of 47 cases involving a robbery and a murder. Of that number only six resulted in the imposition of the death penalty. That means that, disregarding those cases in which the defendant was less than 18 years of age, the death penalty for murdering an individual while attempting to or in fact robbing

the individual was imposed in only 12.8 percent of the cases, while life imprisonment or less was imposed in 87.2 percent of the cases. Therefore, it appears to me that, absent additional aggravating factors, a sentence of death in this case is disproportionate. The selection of six to be executed, including Palmer, is arbitrary and capricious and, therefore, in violation of the eighth amendment to the U.S. Constitution. As the U.S. Supreme Court said in *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980): "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."

One of the factors suggested as to why this case falls into the limited category is that this is an example of a case in which the victim was bound before being murdered. There is some brief testimony to that effect. The testimony comes solely from the defendant's wife, Cherie Palmer, who testified, in response to a single question, as follows:

> Q. What did you observe?
>
> A. Mr. Zimmerman was lying on his back on one of the beds . . . . His hands and his feet were tied.

There is, however, much evidence to contradict that statement. One of the police officers who was called to the scene testified as follows:

> Q. . . . Was Mr. Zimmerman's hands or legs bound when you observed him?
>
> A. No.
>
> Q. . . . You weren't the first one up there to see him, isn't that right? You weren't the first person —
>
> A. No, I was not.
>
> Q. But you have determined that he was not bound at the time he was found, is that —
>
> A. That's definitely correct.

This testimony is supported by the pathologist, who, likewise, testified as follows:

> Q. Did you observe any abrasions or bruises around the hands or the wrists of the decedent?
>
> A. No, sir.
>
> Q. Did you examine them for those?

A. Yes, sir.

Q. Did you make an examination as to whether or not the decedent had been tied up in the hands area then?

A. There were no findings that would suggest to me that that had taken place, sir.

While that testimony is not intended to minimize the horror of the murder, for, indeed, it does not, it is intended to point out that the murder in this case was not significantly different from most other cases having the same or similar circumstances in which the death penalty has not been imposed.

In the original case of *Furman v. Georgia*, 408 U.S. 238, 309, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), Justice Stewart said: "[I]t is equally clear that these sentences are 'unusual' [in the eighth amendment sense] in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare." He went on at 309-10 to say:

> For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

It was this very fact that prompted the Supreme Court of the United States to declare the death penalty in the *Furman* decision to be in violation of the federal Constitution, and that apparently prompted the Nebraska Legislature to adopt L.B. 711. This is not a case in which the court is passing upon the morality of the death penalty but, rather, a case wherein, as required by statute, we are to proportionately review the imposition of the death penalty in this case as compared to those criminal homicide cases having the same or similar circumstances. It occurs to me, therefore, that we have no alternative, so long as we are required to make a proportionality review, but to conclude that the imposition of the death penalty for the murdering of an individual in the commission of a robbery, under the facts of this case, is

arbitrary and capricious and cannot stand. This is not a pleasant choice to have to make. Nevertheless, doing what the law requires of a court is sometimes not pleasant, but always required. If the Legislature, indeed, wishes us not to follow the rule it has adopted for us, all it need do is repeal L.B. 711 which requires this court to engage in a proportionality review.

For these reasons I believe that the sentence of death in this case cannot stand and that Palmer, having been convicted of the murder, should be resentenced to a term of imprisonment for the balance of his natural life, never to be released from prison or permitted to be free again.

ANALYSIS OF CRIMINAL HOMICIDE CASES FOR USE IN COMPARING DEATH PENALTY CASES UNDER L.B. 711

I. FIRST DEGREE MURDER CONVICTIONS—DEATH PENALTY IMPOSED.

**State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

Date of Sentence: October 30, 1975.

On February 21, 1975, defendant and Ronald Ell robbed a Hinky Dinky Store in Omaha, Nebraska. The store manager and several employees pursued the robbers. The getaway car was intercepted by a policeman in a cruiser, who also chased the robbers. Shots were exchanged, and the robbers fled the getaway car. They were pursued by several officers and by a civilian, Michael Kellogg, who had armed himself and was attempting to capture Rust and Ell. Kellogg was shot four times and killed by Rust. Rust was later apprehended.

**State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977).

Date of Sentence: February 9, 1976.

Defendant robbed a bar in Omaha, Nebraska, after tying up certain persons then in the bar, including some customers. Holtan then put a gun to the head of one of the individuals. The individual's boyfriend yelled, "Oh, my God, no," at which point Holtan shot the boyfriend and the girlfriend. The boyfriend died as a result of the gunshot wounds.

**State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977).

Date of Sentence: June 24, 1976.

Defendant robbed a coin shop in Lincoln, Nebraska. He

tightly bound the owner's wrists behind her, and also bound her ankles. He then shot her three times at close range, once in the right temple, once between the eyes, and once through the roof of the mouth, directly into the brain, and robbed the store of rare coins and watches.

State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979).

Date of Sentence: June 20, 1978.

Defendant was walking home after a night out drinking. Through a window, he saw the victim sleeping on a sofa on the first floor of her house. He entered through the back door, took her stereo, and carried it outside. He reentered, and the victim was awakened. He told the victim he was going to rob and rape her. She fought back, and defendant cut her across the forehead with his knife. He then raped the victim and inquired if she had any money. He forced her upstairs to get the money, leaving a trail of blood droplets behind her. Defendant stated that while he was starting to stab her, she pleaded for him to kill her. He then hit her four or five times over the head with a hammer and strangled her with a belt.

State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979).

Date of Sentence: June 23, 1978.

On August 11, 1977, defendant came to the home of one of the victims, Patricia McGarry, a close personal friend. They argued over a gun which Williams had purchased, presumably to commit suicide. A friend of McGarry's, Catherine Brooks, arrived and became involved in the incident. During this time, Williams shot McGarry and Brooks three times each in or about the head. The autopsy of Brooks' body also evidenced sexual contact, although Williams denies this. After these murders defendant went to the apartment of an acquaintance and asked to use the telephone. She admitted him, and he then told her he needed to stay for a while. She suggested that he stay in the storage room area of the apartment complex, whereupon Williams drew a revolver and raped her as many as six times. He then left and traveled through Iowa, where he sexually assaulted and shot and killed a woman, and then made his way to Minnesota, where he shot and raped another woman.

State v. Anderson and Hochstein, 207 Neb. 51, 296 N.W.2d 440 (1980).

Date of Sentence: August 24, 1978.

The defendant Anderson was an employee of Commercial Realty, owned by one Abboud. The other defendant, Hochstein, was a close friend of Anderson. Anderson was upset with some of Abboud's business practices and apparently felt that he was not getting the correct commission checks that he was owed. Anderson discussed with Hochstein several alternative ways of getting rid of Abboud, including hiring someone to kill Abboud, using a knife and explosives. About a week before the murder, Anderson and Hochstein, along with Lon Reams, began seriously discussing the murder of Abboud. Hochstein offered to execute Abboud for $1,500. Anderson agreed, and the three then planned the actual murder. Hochstein inveigled Abboud to meet him at 168th and Q Streets in Omaha. This location was chosen because it was property listed with Abboud's company and because it was out of the way. The murder was postponed, however, because Abboud had several other people in the car during this meeting. The second meeting was arranged for the next day, whereupon Hochstein shot Abboud three times, once in the head, once in the neck, and once in the back. Both Anderson and Hochstein were sentenced to death.

State v. Harper, 208 Neb. 568, 304 N.W.2d 663 (1981).

Date of Sentence: November 7, 1979.

Harper was involved in an emotional relationship with Sandra Johnson in 1973 and 1974. The relationship deteriorated, and Sandra told Harper that she intended to marry a Duane Johnson. The marriage did in fact take place, and Harper threatened to kill them both when Sandra refused to annul the marriage. In 1975 Harper fired a shotgun at a group gathering outside Sandra's mother's home and was arrested and sentenced to serve time in the penal complex for shooting with intent to kill, wound, or maim. Upon release, he was employed by the Eppley Research Institute in Omaha, from which he took some lethal carcinogenic drugs and put them in the milk and lemonade in the refrigerator at Sandra Johnson's home. Various family members drank the milk and lemonade. Five became ill and two of the five (Sandra's husband and her 11-month-old nephew) died.

**State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982).

Date of Sentence: June 20, 1980.

On August 22, 1979, Moore robbed and killed an elderly cabdriver. His motive was simply robbery, and he made several calls for cabs and waited until an older cabdriver arrived. Four days later he repeated this scheme, killing and robbing another cabdriver.

State v. Reeves, 216 Neb. 206, 344 N.W.2d 433 (1984).

Date of Sentence: September 11, 1981.

Defendant entered victim's house by way of a back window and proceeded to the second floor bedroom. He ripped the telephone cord out in an effort to isolate the victim from the outside world. He stabbed her seven times in the chest in perpetration of or attempt to perpetrate a sexual assault. A second victim, a girlfriend and guest staying overnight with the first victim, was also found stabbed inside the doorway to the victim's bedroom. Both women were killed by stabbing.

**State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

Date of Sentence: September 6, 1984.

Defendant and his wife robbed a coin shop in Grand Island, Nebraska. The victim was struck on the head and tied up. He was then taken upstairs to a bedroom, where he was watched by defendant's wife while defendant robbed the shop. Defendant then came upstairs and sent his wife downstairs. While downstairs, she heard thumping noises and a low, throaty, chant-like sound. The victim was found dead upstairs, having been strangled with an electrical cord.

State v. Joubert, 224 Neb. 411, 399 N.W.2d 237 (1986).

Date of Sentence: October 9, 1984.

Defendant kidnaped a young paperboy on September 18, 1983. He bound his hands and feet, taped his mouth, and put him in the trunk of defendant's car. He later removed all of his clothes except for his undershorts, though he did not sexually molest the child. The child was stabbed 11 times. On December 2, 1983, the defendant kidnaped another young boy, whom he forced to lie down in the front of the automobile. When the body was found, it too was clad only in undershorts, though the victim had not been sexually molested. He had been stabbed

seven times and roughly grabbed around the neck. Joubert confessed to the killings and pleaded guilty. He admitted that despite the pleas of the young boys, he drove to secluded places, told them to get out of the car, and coolly stabbed both of them to death because he was curious about how people died.

*_State v. Bird Head_*, appeal pending.

Sheridan County District Court, No. C1802.

Date of Sentence: March 18, 1986.

Defendant bound, beat, sexually assaulted, and murdered the victim in her home. When apprehended, he was intoxicated and was driving the victim's automobile.

II. FIRST DEGREE MURDER CONVICTIONS—SENTENCED TO LIFE IMPRISONMENT.

State v. Andersen, no written opinion.

Dawson County District Court, No. 14391.

Date of Sentence: July 26, 1973.

Defendant and his wife resisted arrest by a patrolman, and in the struggle in the police car the patrolman was shot and killed.

*_State v. Kennedy_, no written opinion.

Lancaster County District Court, Docket 37, Page 72.

Date of Sentence: September 26, 1973.

Defendant was in need of money and decided to rob someone. He first attempted to rob a home but, because of a barking dog, was unable to do so. He shot the dog with a 12-gauge shotgun and left. He then returned to Kramer Lake, where he had been earlier fishing, and approached a victim, who was also fishing. The defendant shot the fisherman in the back and proceeded to rob him. The victim was still alive, so the defendant shot him three more times.

*_State v. Casper_, 192 Neb. 120, 219 N.W.2d 226 (1974).

Date of Sentence: December 13, 1973.

Defendant and several friends spent the evening at several Omaha bars. They were later joined by the victim, who promised them a night on the town. Defendant was aware that the victim had two $100 bills on his person. Defendant maintained that the victim pulled a knife on the others, fearing that he, the victim, was going to be robbed. A struggle ensued

between one of the parties and the victim. The other party got the knife away from the victim. He then ordered the victim to hand over the money. Defendant admitted that he joined in the robbery attempt. At some point the victim ended up in the river. It was not clear from the testimony whether he fell down the riverbank or was pushed. Both defendant and the other party maintain that the victim was unharmed and standing in shallow water when they left him. His body was found several days later, floating in the Missouri River.

**State v. Wilson*, 192 Neb. 435, 222 N.W.2d 128 (1974).

Date of Sentence: January 4, 1974.

Same facts as in *State v. Casper*, above.

State v. Nokes, 192 Neb. 844, 224 N.W.2d 776 (1975).

Date of Sentence: March 22, 1974.

Defendant and his wife had entered into an adulterous relationship with the daughter of the victims. The relationship became estranged, and the difficulty led to verbal and physical altercations between the defendant and the victims' daughter. The victims became aware of the situation and thought defendant was blackmailing their daughter. Defendant and his wife went to the victims' residence to settle the misunderstanding. Defendant took a gun with him. Later, the four went to defendant's home and down to the basement. While in the basement, defendant shot and killed the father of the daughter involved in the relationship. When the mother screamed and tried to run up the stairs, defendant shot her in the back. Defendant and his wife then dismembered the bodies, wrapped the pieces in butcher paper, and later disposed of the bodies in a nearby lake.

**State v. Brown*, no written opinion.

Douglas County District Court, Docket 88, Page 625.

Date of Sentence: March 25, 1974.

Defendant gave the victim, an acquaintance, a ride. They stopped near the Carter Lake area and got out of the car. After telling the victim that defendant did not get the job he had hoped to get, he struck the victim and robbed her of $82. She died from the beating, with massive contusions to the neck, and five cracked ribs.

State v. Russell, 194 Neb. 64, 230 N.W.2d 196 (1975).

Date of Sentence: May 31, 1974.

The victim, a young boy, was a friend of defendant's younger brother. Defendant, a teenager, and victim went shopping together. They then entered an abandoned apartment. Once inside, they talked, ate doughnuts, drank coffee, and engaged in homosexual activity for a brief period of about 5 minutes, apparently at the victim's request. Defendant claimed that victim started calling him names and also made derogatory statements about defendant's grandmother. Defendant got mad, cut the cord off the telephone, and strangled the victim. The victim's face turned red and his eyes bulged. Defendant left victim there, gasping for air. The victim was 8 years of age, and the defendant was 17 years of age.

*[m]*State v. Harris*, 194 Neb. 74, 230 N.W.2d 203 (1975).

Date of Sentence: June 26, 1974.

The victim, an 81-year-old woman, was walking home from the bus stop after attending church. She was encountered by the defendant and a codefendant, who attempted to snatch her purse. A struggle ensued, and the woman was knocked down and kicked several times. She was taken to the Douglas County Hospital by a rescue squad. She sustained a number of serious injuries, including a broken hip. She died 2 months later as a result of complications secondary to the injury.

*[m]*State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975).

Date of Sentence: June 26, 1974.

Same as facts in *State v. Harris*, above. At the time of the assault Harris was 16 years of age and Lytle was 17 years of age.

*[m]*State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976).

Date of Sentence: June 16, 1975.

On the evening of July 3, 1974, the defendant and two other youths were driven by a mother of one of the youths to a liquor store so that they could buy beer. Defendant was, at that time, 16 years old. Later that evening, defendant was informed that a car belonging to defendant's older brother had been hit. Defendant and his friend went outside and viewed the car. The victim was standing nearby, and there was a discussion between defendant and the victim as to whether the victim had hit the car. Defendant and his friend then went to the friend's trailer and got a gun and disassembled it. There was conflicting

testimony, but either the defendant or his friend hit the victim over the head. The two then stuffed the victim into the trunk of his car, stole his wallet, and shut the lid. The car was later set on fire. The defendant's friend testified that defendant went back to the car and, later, returned, stating that he had set the car on fire. The victim was found dead in the trunk by firefighters, who were called to the scene by a policeman who saw the burning car.

State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977).

Date of Sentence: August 20, 1975. Initially sentenced to death, but sentence reduced by Supreme Court.

The defendant was 16 years old at the time of the commission of the murder. He had developed a relationship with two drug dealers, who were supplying him with marijuana. He fell behind in his payments and was threatened by the dealers if he did not pay. Defendant advised the dealers that he needed 2 pounds of marijuana so that he could sell it and make a sufficient profit to pay the drug dealers. It was during this attempted transaction that the murder occurred. The dealers picked up Stewart in a van. The plan was to take Stewart to the house of the buyer so that the transaction could take place. Stewart actually had no buyer, and planned to steal the marijuana from the dealers. He had on his person his father's pistol and a can of gasoline. He told the dealers the gas was for a friend. While in the van, the defendant shot both dealers in the back of the head. One died immediately, but the other survived and witnessed the defendant pour gas all over the inside of the van and ignite it. After the defendant left, the injured dealer escaped from the burning van, and later testified.

State v. Sims, 197 Neb. 1, 246 N.W.2d 645 (1976).

Date of Sentence: September 19, 1975.

Defendant and the victim were involved in a near accident, which resulted in defendant's having words with the victim. After a brief conversation the defendant returned to his automobile. A short time later, the defendant returned to the area where the victim's car was parked. The passenger in the defendant's automobile stepped out of the car and fired a pistol in the air. The defendant removed a shotgun from the car and walked rapidly in the direction of the deceased, who was

standing against his car. The defendant stopped when he was about 10 feet away from the deceased and fired one shell, which struck the deceased in the abdomen, causing his death.

**State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976).

Date of Sentence: November 10, 1975.

This is a companion case to *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). Because the evidence indicated that Rust did the actual shooting, Ell was sentenced to life imprisonment, being convicted of felony murder.

**State v. Record*, 198 Neb. 530, 253 N.W.2d 847 (1977).

Date of Sentence: July 2, 1976.

Defendant, 18 years of age, and another were driving in an automobile when they decided to rob anyone who next came along. They drove to approximately 180th and Dodge Streets in Omaha and parked on a side road, waiting for someone to drive by so that the defendant could shoot and rob someone. At approximately 3 a.m. a car driven by the victim passed their parked car, proceeding east on Dodge Street. With the other party driving, the victim's car was pursued. As their car drove alongside the victim's as if to pass, the defendant fired a shot, breaking the glass and killing the driver.

State v. Beans, 199 Neb. 807, 261 N.W.2d 749 (1978).

Date of Sentence: January 20, 1977.

Defendant and his wife (the victim) had concluded a bitter divorce and child custody proceedings. Defendant went to the victim's home to talk with her, taking his gun along with him. The victim had a gun in her purse. They argued, and defendant fired a shot into the wall. After the victim pulled the gun from her purse, the defendant attempted to knock it out of her hand; in the process the defendant's gun went off and the victim was killed with one shot to the abdomen.

**State v. Scott*, 200 Neb. 265, 263 N.W.2d 659 (1978).

Date of Sentence: May 6, 1977.

The defendant entered the home of William and Bertha McCormic in Omaha, Nebraska, and demanded money at gunpoint. A scuffle ensued, and Mr. McCormic, who was 92 years of age, was shot twice and died. Mrs. McCormic, who was 83 years old, was shot twice and wounded. The defendant was 18 years of age.

*_State v. Prim_, 201 Neb. 279, 267 N.W.2d 193 (1978).

Date of Sentence: July 8, 1977.

Defendant robbed a gas station. He ordered the attendant to lie down. When defendant thought the victim was going behind the counter to get something, defendant hit him with his gun, and it went off. Defendant took the money and fled. The victim died from a gunshot wound to the heart. The defendant was 24 years of age.

*_State v. Simpson_, 200 Neb. 823, 265 N.W.2d 681 (1978).

Date of Sentence: September 16, 1977.

The defendant, his sister, and his sister's child were hitchhiking and were picked up by the victim. They had formed a plan whereby they would get the driver to stop the car and defendant's sister would pull a gun and rob him. They stopped the car, but nothing happened. As they got back on the road, defendant's sister pulled the gun and told the driver to keep his hands on the wheel and stop the car. The driver turned to disarm her, and she shot him in the back. The victim was paralyzed, so they dragged him from the car into a borrow pit off the Interstate and took his billfold. The defendant fired two more shots to the head of the victim. The defendant was 20 years of age.

*[m]_State v. Schaeffer_, no written opinion.

Hall County District Court, Docket 28, Page 279.

Date of Sentence: September 30, 1977.

The defendant, a 16-year-old, together with a friend, forced the manager of the Ace Hardware Store in Grand Island into their car at gunpoint, where, after robbing him, they shot him 17 times.

*_State v. Roewert_, no written opinion.

Platte County District Court, No. 2805.

Date of Sentence: December 8, 1977.

The defendant and some friends were drinking at a bar in Norfolk, Nebraska, and planned to rob and kill the victim. They determined they would kill the victim so as not to be identified. The defendant went and got some knives and lured the victim out of the bar by inviting him to a party. They drove him out to a country road, where they took his billfold. While the victim was passed out from being intoxicated, the defendant

cut his throat and then decapitated him. The defendant then disemboweled the victim, rolled the body over, and cut it about the back. The defendant was 23 years of age.

State v. Beers, 201 Neb. 714, 271 N.W.2d 842 (1978).

Date of Sentence: December 16, 1977.

Defendant and his wife were separated. After drinking he went home and put a double-barreled shotgun in his car. He then found his wife with another man and threatened to kill her. She fled to the home of one Steve Gruber. The defendant continued to drive about Nebraska City looking for his wife. Meanwhile, Gruber reported to the police that the defendant had made threats. Two officers proceeded to look for the defendant. Upon spotting one of the officers the defendant did a U-turn in the alley where he was and came back to the rear of the police station. The defendant stepped out of his pickup truck with his shotgun in hand. When he was ordered to put the gun down, he began firing, and a gun battle ensued. The defendant shot both officers, killing one of them. He then fled and was caught at a rest stop near York, Nebraska.

**State v. Marshall*, no written opinion.

Lancaster County District Court, Docket 48, Page 262.

Date of Sentence: March 13, 1978.

The defendant, a 20-year-old, working in a flower shop in Lincoln, Nebraska, robbed the owner, and in the course of the robbery struck the owner in the head several times with a metal bar, from which blows the victim died.

State v. Hatcher, no written opinion.

Douglas County District Court, Docket 101, Page 321.

Date of Sentence: April 14, 1978.

The defendant, being pursued by a police officer, engaged in a struggle with the police officer, and as the officer struggled with the defendant the officer's gun went off twice, the second time hitting the officer in the head.

**State v. Floyd*, no written opinion.

Hamilton County District Court, Docket 24, Page 196.

Date of Sentence: May 16, 1978.

Defendant, 37 years old, attempted to rob a filling station. The attendant advised the defendant that he knew kung fu, did a kung fu scream, and jumped into a kung fu stance. Defendant

shot the attendant three times in the head.

State v. Nielsen, 203 Neb. 847, 280 N.W.2d 904 (1979).

Date of Sentence: May 26, 1978.

Defendant returned from a hunting trip, during which time he consumed a great deal of alcohol. Upon returning home he engaged in an argument with his wife. He left for a while, and when he returned, found that his wife was gone. He then went to her parents' home to look for her and got into an argument with them. The defendant called his father-in-law an obscene name and shot once at the wall to show them that his gun worked. Defendant and his father-in-law stepped outside, where defendant then shot the father-in-law. The mother-in-law screamed, and was also shot when she went outside. The father-in-law died of a gunshot wound to the head, and the mother-in-law died of a gunshot wound to the neck and left upper posterior thorax.

**State v. Bennett*, 204 Neb. 28, 281 N.W.2d 216 (1979).

Date of Sentence: July 27, 1978.

While there was some dispute in the evidence, it appears that the defendant sought to rob the victim while on a public street. He struck the victim with a large rock, and then apparently became scared and called the rescue squad. He later went to the hospital to check on the victim's status. The victim died as a result of the head wounds inflicted by the rock.

*[m]*State v. Anderson*, no written opinion.

Douglas County District Court, Docket 102, Page 85.

Date of Sentence: September 25, 1978.

The defendant, a 15-year-old, together with his brother and a friend, decided to rob someone. The three were in one car and followed a man in another car until he stopped at a stop sign. Defendant got out of the car and pulled a gun on the victim, telling him to move over. The friend drove the victim's car, and the victim was placed in the passenger seat. Defendant got into the back seat. They drove around for several minutes and parked off the highway. They took the victim's billfold at gunpoint. When the victim started to struggle, the defendant shot him in the head.

State v. Robbins, 205 Neb. 226, 287 N.W.2d 55 (1980).

Date of Sentence: February 16, 1979.

The victim and his wife were separated. The victim was under the impression that his wife was having an affair with the defendant. Actually, the defendant was living with the wife's 16-year-old daughter. Defendant and a friend went to the victim's house, apparently to straighten out the misunderstanding. A fight ensued, and the defendant shot the victim six times. Defendant and his friend later returned and took money from the victim's wallet.

State v. Ditter, 209 Neb. 452, 308 N.W.2d 350 (1981).

Date of Sentence: November 15, 1979.

Defendant and his wife, the victim, were separated. Defendant went to his wife's apartment, where he broke in. He ordered a girlfriend of the victim to remove the parties' two minor children, and then ordered his wife to disrobe. While requiring his wife to beg for her life, he fired four shots into her body. Shots were fired at different intervals. When the police broke in, the victim was still alive, but died before the rescue squad arrived.

**State v. Thornton*, no written opinion.

Douglas County District Court, Docket 105, Page 263.

Date of Sentence: January 3, 1980.

The defendant entered the victim's apartment through a boarded-up doorway in the basement. His intent was to break and enter for the purpose of burglarizing the home. He took money, drugs, and a radio while the victim was asleep on the sofa. She was awakened by the noise of the defendant. She screamed, and the two struggled. Defendant strangled her with a gag.

**State v. Bussard*, no written opinion.

Red Willow County District Court, No. 11,542.

Date of Sentence: February 22, 1980.

The defendant, defendant's brother, and two friends were shooting pool at a bar. They met the victim at the bar, and the group decided to go for a ride and shoot rabbits. They rode in the victim's car and stopped first at defendant's home to get a gun. They then drove out of town and stopped to shoot at some lights. The defendant told one of his friends that he was going to shoot and rob the victim because the victim was an undercover drug agent. They turned off the road and decided to

shoot at a beer can. Defendant then shot the victim in the nose. When the victim hollered, the defendant fired several more shots into the victim's head from close range. They then took off the victim's clothes and stole his billfold. They dumped the body over a fence and returned to town. They then returned to the scene, where they buried the body and set the car on fire. The defendant was 24 years of age.

State v. McGee, no written opinion.

Sarpy County District Court, Docket 38, Page 170.

Date of Sentence: April 14, 1980.

This defendant, together with several others, was part of a social "family." The defendant was told that if he wanted to get in good with the family he would have to kill the victim, another member of the family, or else he himself would be killed. On the night of the murder a party was held at the home of one of the family members. Most were drinking and took drugs. The victim was given a drink which was drugged. Later, while defendant and two others went upstairs to load a gun, the victim was downstairs with another. The others came down, handed the defendant the gun, and told him to kill the victim, which he did, shooting him 15 or 16 times. The body was thrown in a creekbed in Iowa, where it was found a week later.

State v. Boyer, 211 Neb. 139, 318 N.W.2d 60 (1982).

Date of Sentence: April 14, 1981.

Defendant had an argument with his parents the evening prior to the murder and spent the night sleeping in his car. A neighbor saw him return home in the morning and called defendant's mother, the victim, at work, as the neighbor had been instructed to do by the victim. The defendant was locked out of his home but broke a window to gain entrance. He went upstairs to his bedroom, locked the door, and loaded his shotgun. The victim came home from work and demanded entrance to defendant's bedroom. The defendant opened the door, and the two quarreled. The victim told the defendant to pack his suitcase and leave the house. At that time the defendant retrieved the gun from under his bed and shot her. He then called 911 and told them that his mother had fallen.

State v. Pope, 211 Neb. 425, 318 N.W.2d 883 (1982).

Date of Sentence: June 23, 1981.

The victim and the defendant had been together at a bar. The victim wanted to hire someone to kill his wife, so the two were discussing the transaction. A third party may have been present. They stopped the automobile they were in so they could relieve themselves along a country road. The victim pulled out a large roll of bills, and defendant shot him in the back of the head. The defendant then took the money and dragged the body away to where it was found several days later.

*[m]*State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982).

Date of Sentence: July 16, 1981.

The defendant, 17 years of age, desired to rob someone in order to get money to buy marijuana. The defendant tried unsuccessfully to gain entry into one house. After this failure he obtained a gun from the codefendant, Juan Bradley, and went up to the victim's house. When the victim opened the door, the defendant shot the victim and fled.

*[m]*State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982).

Date of Sentence: July 17, 1981.

This is a companion case to *State v. Hubbard*, above. The defendant was 17 years of age.

State v. Scott, 212 Neb. 625, 324 N.W.2d 670 (1982).

Date of Sentence: October 14, 1981.

The defendant and the victim had been living together for approximately 4 years. The victim had two children with the defendant and one more with a previous boyfriend. On the evening of the murder the defendant had gone out with a friend and the victim had gone out with a girlfriend and left the children with a neighbor. When the victim returned at about 10:30 p.m., she found the defendant at the door of her apartment. He was furious with her for leaving the children out past 10 p.m. The victim's girlfriend felt that it was her fault that he was angry and attempted to calm him down. After 20 minutes with him she felt that he had calmed down. At 3 a.m. the next morning the police received a 911 call for a rescue squad. The call was made by the defendant. When the rescue squad arrived, the defendant stated that it was his fault and that he had pushed the victim down the stairs. The apartment was in disarray. There was a coffee table overturned with two legs missing. It was later determined that the body had been beaten

with a leg from the table and with a leather belt, and kicked with steel-toed shoes.

State v. Lamb, 213 Neb. 498, 330 N.W.2d 462 (1983).

Date of Sentence: October 29, 1981.

The defendant shot and killed his wife, who apparently was suffering from many physical ailments.

*[m]*State v. Tucker*, 215 Neb. 636, 340 N.W.2d 376 (1983).

Date of Sentence: July 19, 1982.

Defendant and his brother entered the International House of Pancakes restaurant for the purpose of committing a robbery. The brother asked the waitress/cashier (victim) for change for a dollar. Defendant then pulled his gun and said it was a stickup. The defendant shot the victim once in the upper right chest. The victim was 18 years of age, and the defendant was 21.

*[m]*State v. Tucker*, no written opinion.

Douglas County District Court, Docket 111, Page 465.

Date of Sentence: July 28, 1982.

This is a companion case to *State v. Tucker*, 215 Neb. 636, 340 N.W.2d 376 (1983). The only difference is that, here, the defendant did not actually pull the trigger.

**State v. Blackbonette*, no written opinion.

Lancaster County District Court, Docket 59, Page 108.

Date of Sentence: August 23, 1982.

The defendant knocked on the door of the victim's home. The victim was an elderly woman. The defendant showed her a picture ID and told her he was a police officer. When she then let him in, he tried to make his story believable by checking out the windows, as if observing someone. He told her to go up to her room in case the men broke down the door. He then located a knife and went upstairs. He asked the victim for money. When she said she had none, he stabbed her twice in the stomach. He then strangled her with a cord, which he had apparently cut from some drapery. He then stole her radio, which he later sold for $5. The defendant was 35 years of age.

State v. Searles, 214 Neb. 849, 336 N.W.2d 571 (1983).

Date of Sentence: November 26, 1982.

The defendant was a resident of a state-licensed residential care facility. In this custodial foster home 90 percent of the

residents require medication for psychiatric disorders. The defendant shared an apartment with five others, including the victim. The defendant and the victim had often argued over the use of the TV. On the day of the killing the defendant was told by the proprietor that he was going to have to be moved. The defendant took a knife out of the kitchen, went out to the balcony where the victim was, and stabbed her several times. The defendant admitted the killing, stating, "I stabbed her good; I hope I killed her."

State v. Lynch, 215 Neb. 528, 340 N.W.2d 128 (1983).

Date of Sentence: December 16, 1982.

The victim, a 57-year-old man, was out driving and "looking for some action." He picked up the defendant, age 20, who was a hitchhiker. The defendant explained that he was down on his luck and needed some money. The victim responded to this by saying, "I could get you some money if you will be my friend for a while." The defendant agreed, and the two proceeded back to the victim's apartment. The victim offered the defendant a drink, and the two went into the bedroom. There, the victim disrobed and made homosexual advances toward the defendant. The defendant refused, and the victim persisted. The victim came close to the defendant, and at this point the defendant pulled a pocketknife out and stabbed the victim several times. A struggle ensued, in which the victim was stabbed several more times in the throat area. The cause of death was hemorrhaging from the stab wounds.

State v. Lee, 216 Neb. 63, 341 N.W.2d 600 (1983).

Date of Sentence: January 24, 1983.

The defendant had, on the day on which the murder occurred, driven in from Kansas City with his girlfriend, Bonnie Welker, and Sue Welch. The three were drinking beer and smoking marijuana. That evening the defendant and Welker were using Welker's gun to do some target practice. They later bought additional shells at K-Mart. Just by chance, the defendant and Welker met the victim, Wilbert Swick, and one Gregory Powell at the intersection of 84th and L Streets at approximately 1:20 a.m. Powell was driving Swick's Corvette, and Welker was driving a white Continental, with defendant in the passenger seat. Swick yelled to Welker something like,

"How is it going, baby?" When defendant learned of this he became angry. He made Welker stop the car, got out with the gun, and approached Swick in the Corvette. He told Swick, "Don't be flirting with my girl." He then shot Swick at close range.

*[m]*State v. Nollen*, no written opinion.

Washington County District Court, No. 8982.

Date of Sentence: January 24, 1983.

The defendant, 17 years of age, and a companion broke into a doughnut shop in Blair, Nebraska, for the purpose of robbing it. They encountered the young manager, who was in the process of closing the store. They stole $200 and abducted the victim against her will. They had a knife, and drove around in the victim's car. The defendant sexually assaulted her while they were in the back seat. They tied her hands behind her back. While she was alive in the car, they ran the car off the dock into the river, causing her to drown.

State v. Krimmel, 216 Neb. 825, 346 N.W.2d 396 (1984).

Date of Sentence: April 21, 1983.

The defendant, 20 years of age, did odd jobs for the deceased, who was an elderly (84-year-old) man. On the morning of November 4, 1982, the defendant went to the victim's residence to collect some money for jobs he had done. The victim only had $5 to give him. The defendant became enraged because he felt he was being cheated out of money owed to him. He jumped the victim as the victim was on his way to the bathroom. The defendant put a choke hold on the victim and began stabbing him in the neck and back. The coroner's report indicated 25 stab wounds on the victim.

State v. Meis, 217 Neb. 770, 351 N.W.2d 79 (1984).

Date of Sentence: May 2, 1983.

While inside a local tavern, the defendant made vulgar comments towards the victim's friend. The defendant and the victim stepped outside, where they were involved in a fight. The victim pinned the defendant on a car and then returned to the bar. The defendant subsequently reentered the bar, aiming his revolver at victim's section of the bar. The defendant also harassed others. While the bar owner was telephoning the police, defendant left. The bar was closing, so the victim left

also. The victim died from a single gunshot wound to the front part of his lower chest.

State v. Jones, 217 Neb. 435, 350 N.W.2d 11 (1984).

Date of Sentence: June 13, 1983.

The victim and the defendant had had an ongoing dispute, the defendant maintaining that the victim had fired shots into the defendant's house, nearly hitting a child. Several days later, the defendant entered a north Omaha after-hours club. He saw the victim and asked for an apology. The victim responded by saying it was the defendant that owed him, the victim, the apology. The victim was seated at a table playing cards and the defendant was standing. The victim leaned over the table to gather his money. When the victim went for his pocket to put the money into it, the defendant, fearing that the victim had a gun, shot the victim twice. The victim fell to the floor, but was not yet dead. The defendant went around the table, got on top of the victim, and shot him three more times. The defendant's gun clicked several times after this.

**State v. Rehbein*, no written opinion.

Douglas County District Court, Docket 113, Page 475.

Date of Sentence: June 13, 1983.

The defendant used a penknife to cut the screen and enter victim's apartment in an attempt to perpetrate a robbery. The victim woke up, and the defendant feared being identified. The defendant beat up the victim with his fists and a hatchet. The victim died from multiple stab or cutting wounds to the head, neck, and upper body, as well as multiple lacerations of the scalp and forehead, inflicted by a blunt object.

**State v. Massey*, 218 Neb. 492, 357 N.W.2d 181 (1984).

Date of Sentence: July 8, 1983.

The defendant and an accomplice lured the victim up to a hotel room at the Ramada Inn and robbed him, after hitting him over the head with a vodka bottle. A scuffle ensued, and the victim and Massey ended up in the elevator. After reaching the lobby, Massey shot the victim at close range in the side, and then ran off.

State v. Lopez, no written opinion.

Douglas County District Court, Docket 114, Page 521.

Date of Sentence: August 25, 1983.

One Maxine Wells and the defendant had been drinking at Mitchell's Game Room early on the morning of March 19, 1983. Wells advised the defendant she was going to solicit someone to get some money. The defendant told her that there was a possible customer across the street. She went across the street to a restaurant, where she began talking to the victim as he entered his car. The defendant then came up from behind the victim and beat him on the head with a club.

**State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986).

Date of Sentence: December 12, 1983.

The defendant and several other individuals robbed the landlord of a house where defendant's sister lived. The robbery was in progress when defendant arrived on the scene. The landlord was stabbed a number of times and then thrown into a trunk of a car and taken out to the country, where he was then thrown into a ditch. He was stabbed again and his throat cut so severely that he was nearly decapitated.

**State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985).

Date of Sentence: January 4, 1984.

The defendant, a prostitute in Omaha, Nebraska, together with three other prostitutes, kidnaped a fifth prostitute who had solicited many "dates" that night. The four decided to rob her instead of trying to rob someone else. The victim was verbally and physically assaulted, including being forced to perform an act of oral sex on one of the prostitutes. The victim was then robbed of $25. Later, she was taken out of the car and beat to death with a stick and a bat.

**State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985).

Date of Sentence: April 3, 1984.

This is a companion case to *State v. Bradford*, above. This defendant actually instituted the robbery and stabbed the victim a number of times.

State v. Jones, 218 Neb. 713, 358 N.W.2d 765 (1984).

Date of Sentence: April 13, 1984.

The defendant murdered the victim, Ann Speese, and her 12-year-old daughter, Tina. Ann's body was dismembered by a saw or other mechanical means. Ann's death was due to multiple head wounds inflicted by a blunt instrument, and Tina died of asphyxiation. Autopsy reports indicated that Tina may

have been sexually assaulted, but that was not clearly established.

**State v. Crisp*, 219 Neb. 265, 361 N.W.2d 544 (1985).

Date of Sentence: June 6, 1984.

The defendant had escaped while participating in the Douglas County work release program and stole the victim's car so he could leave town. Defendant stated to investigators that he struck her, knocked her out, tore her clothes off, grabbed her by the breast, stuck his hand in her vagina, and tried to "pull her insides out." He admitted stabbing her. He threw her out of the car, and her partially decomposed body was found 1 month later in a field behind an Omaha manufacturing plant. Following the killing, he stole her purse and her car. The defendant was 23 years of age.

**State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985).

Date of Sentence: June 12, 1984.

Loray Smith was one of the participants in the beating death of Laura LaPointe, a prostitute. For fuller details see *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985), and *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985).

**State v. Ware*, 219 Neb. 594, 365 N.W.2d 418 (1985).

Date of Sentence: June 20, 1984.

The defendant robbed a music store and shot the victim when the victim attempted to phone the police.

State v. Benzel, 220 Neb. 466, 370 N.W.2d 501 (1985).

Date of Sentence: October 29, 1984.

The defendant and another went to the home of the victim to purchase some drugs. Once inside the house, the defendant began to beat up on the party who had accompanied him (a female). The victim told them to leave. The defendant apparently disputed whether or not payment had been made for the drugs and grabbed the victim's girlfriend and put a gun to her head. The victim went to his bedroom for a gun, and when he returned, the defendant shot the victim once in the mouth. He then attempted to shoot the girlfriend by pointing the gun at her from a distance of about 5 feet. He attempted three or four shots, but the gun misfired.

**State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985).

Date of Sentence: November 29, 1984.

This individual was another involved in the beating death of a prostitute. For full details, see *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985).

State v. Haselhuhn, no written opinion.

Lancaster County District Court, Docket 65, Page 96.

Date of Sentence: December 11, 1984.

Clement Rolenc and his former wife, the victim, were involved in a dispute about the provisions in the decree of dissolution of their marriage. Rolenc hired Robin Burchett to kill her. Rolenc and Burchett had met at a truckstop in Lincoln to arrange the murder. The day of the killing, Rolenc took his former wife to breakfast at the truckstop. There, the couple met Burchett and a third party, who was unknown to the couple. This was the defendant. Rolenc and the victim drove to the country in a car followed by Burchett and the defendant, who were in Burchett's car. The two cars stopped, and the defendant, who in turn had been hired by Burchett to actually perform the killing, transferred cars. Sitting in the back seat behind the victim while the victim's husband drove the car, the defendant slipped a belt around the victim's neck and choked her to death. Burchett and the defendant then carried the victim's body into the trunk of Burchett's car. Rolenc removed the victim's ring and took her purse. Rolenc paid Burchett for doing the job, and drove off. Burchett and defendant drove to a creek, where they tied the hands and feet of the body, attached three large pieces of concrete to it, and allowed it to sink into the water.

State v. Norfolk, 221 Neb. 810, 381 N.W.2d 120 (1986).

Date of Sentence: December 19, 1984.

The defendant went to his aunt's home, where he obtained a butcher knife. After removing his clothing he went to his aunt's bedroom and stabbed her three or four times. He then placed his arm around her neck and squeezed until she died. After that he attempted to have intercourse with her dead body.

State v. Burchett, 224 Neb. 444, 399 N.W.2d 258 (1986).

Date of Sentence: January 2, 1985.

This is a companion case to *State v. Haselhuhn*, above. Burchett was hired by Clement Rolenc to kill Rolenc's former wife. Burchett in turn hired Wayne Haselhuhn to actually do

the killing. After the woman was strangled by Haselhuhn, Burchett and Haselhuhn removed her body from the car and drove to a creek, where they then weighed the body down and threw it into the creek.

**State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

Date of Sentence: June 17, 1985.

The defendant forcibly entered the victim's home. The victim, an elderly lady, was apparently lying on the kitchen floor, trying to use the phone to call for help. The defendant grabbed the phone and ripped it from the wall. The defendant then ransacked the house, going through closets and drawers. The victim was discovered the next day, lying dead on the floor. It was extremely cold in the house, and death was apparently due to exposure to cold caused by the breaking of a window to gain access.

State v. Hunt, 220 Neb. 707, 371 N.W.2d 708 (1985).

Date of Sentence: October 11, 1985.

The defendant knocked on the victim's door and, when the victim opened the door, forced his way in at gunpoint. He then told her to lie on the floor, and she complied. He tied her arms and legs and stuffed panties in her mouth. He took a nylon stocking and strangled her to death, then untied her, removed her clothing, and masturbated over her body. Believing that she still had a pulse, although, in fact, she was dead, he carried the body to a bathtub, where he placed the body in the water. The phone rang, and he then fled the premises, later having his wife call the police and report the murder.

**State v. Domingus*, appeal pending.

Lincoln County District Court, Docket 92, Page 31.

Date of Sentence: November 10, 1986.

The defendant was convicted of killing a 35-year-old female, who died of massive head injuries after she was beaten with a board. The medical testimony indicated that the victim was alive when much of the beating was inflicted. Much of her head and skull were damaged.

III. SECOND DEGREE MURDER CONVICTIONS—LIFE SENTENCE IMPOSED.

State v. Deckard, no written opinion.

Douglas County District Court, Docket 87, Page 382.

Date of Sentence: April 25, 1974.

Defendant maintains that he was with a friend who took him over to the victim's house. The friend and the victim were having an argument over money and drugs, and defendant pulled out his gun and ordered the victim to stop fighting. The victim bumped into the gun, and it discharged accidentally. Death was caused by a bullet wound to the temple.

State v. Goldsberry, no written opinion.

Lancaster County District Court, Docket 39, Page 219.

Date of Sentence: October 7, 1974.

The defendant was 18 years old at the time of the crime. On the morning of November 11, 1973, he observed the victim walking by his home on her way to school. He misrepresented to her that he had mail in his home belonging to her. Once she entered the house, she realized he was attempting to hold her there, and sought to leave. He did not let her go, and she began to scream. Defendant pushed her back as the victim resisted. He then used both hands to choke her. She fell to the ground and was rendered unconscious shortly thereafter. He described her face as being blue and her mouth as foamy. Defendant wrapped the body in a blanket and put a green trash bag over the body. He then placed the body in a station wagon and took it to a pasture near Table Rock, Nebraska. There, the body was undressed and the clothes put in the trash bag. He returned home and threw away the clothes, along with her purse and book. The body apparently was ravaged by coyotes, and the skull was found several months later. The bones of the body were scattered throughout a pasture, apparently by the coyotes.

**State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974).

Date of Sentence: December 20, 1974.

The defendant, though only 15 years of age, was married with a child. He had been drinking all day with friends and decided to use a public phone to call his wife. He changed his mind and decided to use a phone in a home. After walking several blocks he went into a home and began looking around to see if there was anything he could steal. He grabbed a knife from the kitchen for protection in case someone was home. The victim, a 2½-year-old boy, woke up and made a noise.

Defendant tried to cover the victim's mouth with his hand and finally stabbed him twice in the chest to prevent him from getting out of bed.

State v. Taylor, no written opinion.

Douglas County District Court, Docket 91, Page 592.

Date of Sentence: June 16, 1975.

Defendant picked up a hitchhiker at 31st and Dodge Streets in Omaha, Nebraska. After arriving at the victim's home, defendant removed a sawed-off rifle from his waistband in his coat, took the safety off, and placed it against the victim's left temple area and pulled the trigger just as the victim was about to leave the car. Defendant drove around for a while with the body in the car. He then stopped, pushed the body out of the car, searched all the pockets, to make it look like a robbery, and shot the victim one more time in the back of the head.

State v. Braasch, no written opinion.

Adams County District Court, Docket 61, Page 285.

Date of Sentence: August 15, 1975.

The victim in this case was the defendant's supervisor in Hastings, Nebraska. Defendant had worked for the company for the past 6 1/2 years and received much of his early education and training from the victim. The defendant had hard feelings towards the victim for several years because the defendant felt he was not getting credit for the work he did.

State v. Walker, 197 Neb. 314, 248 N.W.2d 759 (1976).

Date of Sentence: March 24, 1976.

Defendant and his wife, the victim, were separated. Defendant intercepted her as she was leaving her place of employment in an automobile operated by her brother. Apparently, a fight developed between defendant and his brother-in-law, during which time a gun of the defendant's discharged, striking and killing the victim. Defendant maintained that he was not aware that the victim had been shot until the next morning, when he turned himself in to authorities.

State v. Hoppes, 202 Neb. 383, 275 N.W.2d 608 (1979).

Date of Sentence: June 3, 1976.

Defendant's wife had recently moved out after an extended period of quarreling with defendant. On the evening of the

murder the defendant consumed a bottle of wine and then purchased a second bottle, which he took to his wife. She accepted the bottle and let him into her residence. The two began to argue about getting back together, and a verbal argument turned into a physical battle. Defendant claims that he swung at his wife, aiming for her face, but missed and hit her in the neck. He states that she flew backwards and hit the wall, fell, and eventually died. Defendant maintains that he attempted to call for an ambulance, but when he discovered the phone was not working, he placed his wife's body in his van and went home. The next day, after driving for some time, he decided to dispose of the body. He cut a hole in some ice, tied a wheel to the body with a log chain, and dumped the body into the lake. The autopsy disclosed that the wife died of strangulation and not by reason of a blow to the neck.

State v. Cole, no written opinion.

Otoe County District Court, Docket 27, Page 68.

Date of Sentence: August 3, 1976.

The defendant entered the home of the victim and fatally stabbed her with a hunting knife. He also stabbed the victim's 11-year-old daughter. There was evidence that after stabbing the victim the defendant sexually assaulted her. She was stabbed once in the throat and twice in the chest. It was the wounds to the chest which caused her death. The defendant then carried the victim's body over his shoulder to the rear door, where he dropped it and left.

State v. Robinson, 198 Neb. 785, 255 N.W.2d 835 (1977).

Date of Sentence: August 27, 1976.

The defendant and the victim were close friends. On the day of the murder the defendant took the victim, his girlfriend, and her children from Omaha to Lincoln in his automobile. The defendant had a $50-per-day heroin habit, which he supported by stealing checks out of mailboxes. Later in the evening, the victim requested the defendant to return him, his girlfriend, and her children to Omaha. The defendant refused to do so, though, on several occasions, he promised he would. The two ultimately got into a fight, and the victim approached the defendant. Defendant warned the victim to get back, then pulled the gun out and shot the victim in the head.

State v. Scott, no written opinion.

Cass County District Court, No. C-7 52.

Date of Sentence: September 7, 1976.

Defendant was living with his girlfriend. The victim was also a friend of theirs, who was romantically inclined toward the defendant's girlfriend. On the night of the incident the defendant had a gun and had consumed much alcohol. The girlfriend and her children were staying in the victim's trailer. Defendant suspected she was there, and he wanted to get her and bring her home. He went to the door, and the victim answered. The victim shoved the defendant away and said the girlfriend would come home when the victim brought her home. The victim returned to bed and told the girlfriend that he was not going to let the defendant in at that time of the night. The girlfriend got up and was going out to talk to the defendant, when she heard a shot. She walked out of the bedroom into the hallway to find the defendant, who had sneaked into the trailer without anyone's knowledge and who then shot the victim.

State v. Thompson, 199 Neb. 67, 255 N.W.2d 880 (1977).

Date of Sentence: December 10, 1976.

Defendant went to a party at his sister's home. During the evening, an argument developed and a fight broke out. One of the guests threatened the defendant, saying he would kill the defendant the next time he saw him. The next day, the defendant, after drinking alcohol and smoking marijuana, purchased a rifle and ammunition. He then went over to his sister's house to talk to her about what had happened the night before. He walked in with a loaded gun and pointed it at her and several other persons. The victim, a longtime friend of the defendant, was in the house. The victim pushed or knocked defendant against the wall in an effort to disarm him. There was a brief conversation between the two, and, as the victim began to walk away, defendant shot him. The bullet entered in the chest near the right shoulder.

State v. Bogan, no written opinion.

Lancaster County District Court, Docket 47, Page 7.

Date of Sentence: March 11, 1977.

The defendant was in the lounge of a hotel, drinking with

friends. The victim, a friend of the bartender, was advised that the defendant owed the bar some money. The victim confronted the defendant about it, and the defendant became angry, pulled out his gun, and shot the victim in the head. A witness to the shooting stated that the victim did not strike the defendant and was unarmed.

**State v. Womack*, no written opinion.

Keith County District Court, No. 6860.

Date of Sentence: December 16, 1977.

The defendant and two codefendants were on their way to Montana to live in the mountains. They had stolen guns in Texas and were involved in a series of robberies along the way. They pulled off at a truckstop, with plans to rob a trucker. One of the codefendants knocked on the driver's door, and the victim, who was sleeping inside the truck, raised up from the sleeper. The defendant shot once through the windshield and once through the driver's window. The defendant was approximately 10 feet away. They then took the victim's billfold and a CB radio.

**State v. Fort*, no written opinion.

Douglas County District Court, Docket 100, Page 423.

Date of Sentence: January 12, 1978.

The account of the murder comes from the defendant. He maintains that he met the victim approximately 10 days before the homicide. On the night in question they drove to Carter Lake, Iowa, for the purpose of smoking marijuana. While at the lake, defendant maintains, the victim suggested that they engage in homosexual activity. The defendant refused, but the victim continued to make advances. At that point the defendant removed a pistol he carried in a shoulder holster and shot the victim three times in the head. He then disposed of the body by burying it in a shallow grave near Glenwood, Missouri, and stole the victim's credit cards, which he then proceeded to use.

State v. Price, 202 Neb. 308, 275 N.W.2d 82 (1979).

Date of Sentence: March 20, 1978.

The victim, an infant, was pronounced dead on arrival at a hospital. She had sustained numerous injuries about her body, and the only fresh wound was a large bump on the back of her head, along with some blood coming from her left ear. The

defendant, who was living with the child's mother, was the only one with the baby at the time she allegedly fell down the stairs.

State v. Sell, 202 Neb. 840, 277 N.W.2d 256 (1979).

Date of Sentence: May 26, 1978.

Defendant admitted that he first hit the victim and then took her out to the country, where he killed her. He inflicted two deep puncture wounds, one in the neck and one in the right side of the chest. There were also 15 to 20 small cuts around the neck and many bruises in the vaginal area.

State v. Barnett, 204 Neb. 655, 284 N.W.2d 573 (1979).

Date of Sentence: February 13, 1979.

The defendant had been married to the victim for about 2½ years. During the course of this marriage, the defendant discovered that his wife had worked as a prostitute. On the evening before the murder the defendant and his wife had consumed large amounts of beer. In the late evening and early morning, they began to argue about various things, ranging from the defendant's past involvement in the military to the fact that he did not have a job. The defendant attempted to vent his anger by throwing a flowerpot. The next thing the defendant could recall was standing by a window with a gun in his hand. He had shot his wife 15 times with his .22-caliber rifle, which held 15 rounds. He attempted to revive her, but he could not because she was obviously dead. He called 911 and informed them that he had shot his wife.

State v. Myers, 205 Neb. 867, 290 N.W.2d 660 (1980).

Date of Sentence: June 5, 1979.

The defendant killed his father by shooting him in the head while in their home. Defendant maintained that he shot his father because his father was an alcoholic.

**State v. Thornton*, no written opinion.

Douglas County District Court, Docket 105, Page 265.

Date of Sentence: February 1, 1980.

This is apparently a companion case to *State v. Thornton*, Douglas County District Court, Docket 105, Page 263. The first case involved a life sentence for felony murder, while this one was a life sentence for second degree murder.

State v. Wredt, 208 Neb. 184, 302 N.W.2d 701 (1981).

Date of Sentence: May 28, 1980.

The defendant, along with his stepmother, planned to kill his father. The defendant had discussed with his stepmother who would get the insurance money and the personal property of the deceased. The plan was to make the shooting look like an accident. The defendant took his father's .45-caliber revolver and waited for him to come home. When the victim arrived, the defendant shot him once, causing the victim's death.

State v. Branch, 209 Neb. 279, 307 N.W.2d 512 (1981).

Date of Sentence: June 27, 1980.

The defendant and the victim had lived together for 3 years. They were arguing about credit cards and had a fight. The victim was going to hit the defendant with her shoe while the defendant was lying on the bed. Defendant reached up and grabbed her by the neck with his hand to hold her off. He held her against the wall and she choked to death.

*[m]*State v. Moore*, 209 Neb. 88, 306 N.W.2d 183 (1981).

Date of Sentence: August 15, 1980.

Defendant was a codefendant in the case of *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), and participated in the robbery and murder of an Omaha cabdriver. Defendant was 14 years old at the time.

State v. Hardin, 212 Neb. 774, 326 N.W.2d 38 (1982).

Date of Sentence: June 5, 1981.

Defendant and victim were husband and wife and had been separated for several months. On the evening in question defendant went to his wife's home, ostensibly to obtain some clothing which was stored there. The parties had an argument. The defendant walked back to where his car was parked, got in, and drove the car through the house, aiming at what would be the victim's bedroom. The defendant then emerged from the car, uninjured, withdrew his weapon, and fired five times. His wife later died from four bullet wounds received from the shooting.

**State v. Randall*, no written opinion.

Saunders County District Court, No. 1845.

Date of Sentence: December 10, 1981.

The defendant and two friends were hitchhiking. They obtained a ride from the victim. They later went into a bar with the victim, where they drank. They next went to the home of a

friend of the victim. At the end of the night the victim was giving the three a ride home when one of them asked him to pull over so he could relieve himself. This was part of a scheme to rob the victim. The victim stopped the car and literally fell out of the car because he was so intoxicated. One of the three punched him and kicked him until the victim was unconscious. His unconscious body was then put in the trunk of the car. Defendant drove and dropped one of the others off. The defendant and the remaining friend then proceeded to a place west of the Elkhorn River. They got out and heard the victim pounding on the trunk. The defendant hit him with his fists and then struck him over the head with a metal bar. They then robbed him, took his clothes, and threw him over the edge into a ditch creek. The victim was found dead either of asphyxia from drowning or of massive head injuries.

*_State v. Davis_, no written opinion.

Saunders County District Court, No. 1846.

Date of Sentence: December 10, 1981.

This is a companion case to _State v. Randall_, and the facts are identical. John Davis was the other party involved in the murder.

State v. Isherwood, 213 Neb. 592, 330 N.W.2d 495 (1983).

Date of Sentence: April 23, 1982.

The defendant, then age 18, was living with a man and his 4-year-old son. Defendant was in charge of caring for the 4-year-old while the father was away at work. On the day in question she had given the child a shower and dressed him in pajamas for an afternoon nap. When the defendant later checked on the boy, he was playing with the window air-conditioner instead of sleeping. Defendant spanked the boy five or six times, whereupon the boy told her he hated her and his father. Defendant proceeded to beat the boy brutally, and then strangled him with either her hands or a television cord, or both.

State v. Hunt, 214 Neb. 214, 333 N.W.2d 405 (1983).

Date of Sentence: August 16, 1982.

On March 23, 1982, the defendant flew to Kansas City, Missouri, where he planned to steal an automobile and drive it to a "chop shop" in Waukegan, Illinois, where he intended to

sell it for $10,000. Upon arriving in Kansas City the defendant, over the next several days, staked out cars. On the 25th of March he abducted a cabdriver at knife-point from the Kansas City airport. The defendant ordered the cabdriver to pick up a hitchhiker, and the three of them proceeded on I-29, eventually ending up near Nebraska City, Nebraska. Defendant then stabbed the cabdriver in the back. The cabdriver fell down an embankment and began running across a creekbed. The defendant chased him, and they engaged in a struggle for the knife. The defendant then proceeded to stab the cabdriver 14 more times and slashed his throat 5 times. During all of this time, the cabdriver pleaded for his life.

State v. Clark, no written opinion.

Douglas County District Court, Docket 114, Page 465.

Date of Sentence: September 16, 1983.

The defendant and his brother, a codefendant, were entering a local bar. The brother noticed keys in the ignition of a truck. The brother got into the truck and began backing the truck out, when he hit another vehicle. The brother then left the scene. The victim, a part owner of the truck, learned that defendant's brother was responsible for the damage. The owner of the truck then went to the Clark home to discuss the matter. As the owner was about to leave, he attempted to shake hands with the brother, who responded by beating and kicking the owner of the vehicle. The defendant then joined in. The victim was apparently beaten into unconsciousness and his body placed in a trash dumpster, where he died of injuries sustained from the beating.

State v. Clark, no written opinion.

Douglas County District Court, Docket 114, Page 464.

Date of Sentence: September 16, 1983.

The facts of this companion case are identical to the facts in the preceding case of *State v. Clark*.

State v. Crawford, no written opinion.

Douglas County District Court, Docket 114, Page 837.

Date of Sentence: January 6, 1984.

The defendant and the victim had had a number of altercations because the victim had sexually assaulted the defendant's 17-year-old sister. On the day of the murder both

the defendant and the victim were at a large, annual gathering at Carter Lake, Iowa. There were between 4,000 and 7,000 at the park. The occasion was the Fourth of July. The defendant and the victim had a chance encounter. The two had some words, and the defendant pulled his gun out and shot the victim once in the chest and once in the leg. The victim died of the wounds.

**State v. Honeycutt*, no written opinion.

Otoe County District Court, Docket 31, Page 153.

Date of Sentence: April 24, 1984.

Although the defendant pleaded guilty to second degree murder, he refused to give any statement concerning how the murder occurred. Further investigation disclosed, however, that the defendant and the victim were friends. Apparently, the defendant needed money and beat the victim to death by hitting him a number of times in the face with a brick. When apprehended, the defendant was in possession of the victim's car and television. The body of the victim was beaten beyond recognition.

State v. Harrington, no written opinion.

Lancaster County District Court, Docket 65, Page 170.

Date of Sentence: August 10, 1984.

The defendant and the victim were in a car driven by a friend of the defendant. The car was pulled over to the side of the road, and the defendant and the victim got out of the car. The driver observed the defendant hit the victim with a baseball bat and saw blood splatter on the windows of the car. Defendant returned to the car with bloodstains on his person. He then pushed the body down the hill toward a creek.

State v. Rolenc, no written opinion.

Lancaster County District Court, Docket 64, Page 263.

Date of Sentence: January 9, 1985.

The defendant and his former wife, the victim, were involved in a dispute about the provisions in the decree of dissolution of their marriage. The defendant met with Robin Burchett and arranged to have him kill his former wife. The day of the murder, the defendant took his former wife to breakfast at a truckstop. There, the couple met Burchett and Wayne Haselhuhn, who was unknown to either defendant or the

victim. Defendant and the victim drove to the country in a car followed by the killers, who were in a second car. At a particular point the car stopped and one of the killers transferred into the back seat of the defendant's car behind the victim. He slipped a belt around her neck and choked her to death. The defendant then removed the victim's ring and took her purse. The two killers put her body in the trunk of their car, drove to a creek, and, after attaching three large pieces of concrete to the body, allowed it to sink into the water.

State v. Moss, no written opinion.

Hall County District Court, Docket 32, Page 37.

Date of Sentence: March 13, 1985.

The defendant, a 67-year-old man, shot and killed his grown son. He and his son had been having a disagreement for some time over a number of matters, including a matter involving defendant's wife, not the victim's mother. The defendant fired four shots into his son's head as his son lay sleeping in a trailer.

State v. Eggers, 220 Neb. 862, 374 N.W.2d 36 (1985).

Date of Sentence: December 21, 1985.

Defendant severely beat a minor child of his girlfriend, causing her death. He attempted to revive her and could not. When he realized she was dead, he panicked and attempted to make the death look like an accident by placing the body in a bathtub and then calling 911.

**State v. Suffredini*, 224 Neb. 220, 397 N.W.2d 51 (1986).

Date of Sentence: June 30, 1986.

The defendant robbed and murdered a man outside the door of the men's restroom at the rest area along Interstate 80 in Lincoln County, Nebraska. The victim was shot five times with a .22-caliber pistol. Between $180 and $240 was taken from him by the defendant.

IV. SECOND DEGREE MURDER CONVICTIONS—TERM OF YEARS.

State v. Taylor, no written opinion.

Lincoln County District Court, Docket 68, Page 23.

Date of Sentence: March 21, 1974.

Sentence: 20 years.

The defendant, who had been drinking most of the day, sold his bike to buy gun shells with the intention of committing suicide. He returned home and engaged in an argument with his wife, the victim. She had hidden his gun at a neighbor's house. They both went over and retrieved the gun. Upon returning home and discussing the fact that the victim had filed for divorce, defendant shot her and then shot himself in the mouth. The bullet passed through his upper lip and only wounded him.

State v. Hampton, no written opinion.

Douglas County District Court, Docket 88, Page 179.

Date of Sentence: April 1, 1974.

Sentence: 10 to 20 years.

The only evidence in the case comes from the defendant himself. According to the story he tells, he was invited into the victim's home when he asked to use the phone. Once in the house, he maintains that the victim, a female, for no apparent reason shot once at him. He charged her with a knife and stabbed her three times. After she fell he ransacked the house.

State v. Bautista, 193 Neb. 476, 227 N.W.2d 835 (1975).

Date of Sentence: July 23, 1974.

Sentence: 20 years.

Defendant and the victim's son engaged in a fight outside a bar. After the minor disturbance the defendant left the bar to take his nephew home. He then returned to the bar some 10 to 25 minutes later, carrying a rifle. He went over to the table of the victim and asked where the victim's son was, saying, "Look what he did to me," and pointing to his face. He then said to the victim, "How would you like it if I got you here and now?" or words to that effect. The victim began to get up from his chair, and defendant shot him in the heart.

State v. Barajas, 195 Neb. 502, 238 N.W.2d 913 (1976).

Date of Sentence: August 13, 1975.

Sentence: 25 years.

The defendant and his girlfriend were at a bar when they met the victim. The victim was interested in the defendant's .22-caliber pistol, and the three went to try it out at a target practice site. At the victim's request they left the bar in defendant's car. On the way the victim made several advances toward defendant's girlfriend, putting his arms around her and

brushing her leg with his hand. She told defendant, who became angry, stopped the car, and ordered the victim to get out. Outside the car, an argument ensued that developed into a fight. Defendant shot and wounded the victim, and then killed him with two shots to the left cheek. Defendant then fled to Mexico, where he was later arrested and returned for trial.

State v. Shonka, no written opinion.

Butler County District Court, Docket 26, Page 36.

Date of Sentence: February 5, 1976.

Sentence: 10 years.

The defendant, a 33-year-old female, was married to the victim, age 63. On October 31, 1975, the defendant took her husband to Columbus, Nebraska, to work, and then went to a bar to drink. Later that evening, she went to Surprise, Nebraska, to continue drinking. Upon leaving the bar she pulled out a gun and waved it around. She felt she was being pushed around. She then apparently went back to her trailer home in Rising City, Nebraska, and shot her husband. While she does not recall the episode, she was found in the trailer with a gun. The body of her husband was found outside the trailer. Several witnesses stated that she said she should have shot the victim between the eyes.

State v. Pigue, no written opinion.

Douglas County District Court, Docket 94, Page 378.

Date of Sentence: July 28, 1976.

Sentence: 10 years.

The defendant returned home from work on February 13, 1976, and found that her husband (the victim) had left with her car. The victim did not return until February 18. He apparently also lived with another woman. There had been difficulties between them for several years. Prior to the 18th, the defendant had purchased a gun, and when the victim attempted to enter the house on that date, the defendant told him she would kill him if he came in, fearing that he would beat her up. When the victim entered the house, the defendant shot him three times.

State v. Yarbrough, 199 Neb. 41, 255 N.W.2d 874 (1977).

Date of Sentence: September 28, 1976.

Sentence: 50 years.

The defendant went to Fairbury, Nebraska, with several

friends. Once in Fairbury, they stopped at the victim's residence and had her join them. The entire group then went to a beer party at a local tavern in Fairbury. At around midnight the defendant had an argument with one of the members of the group and was taken back to the victim's residence. The victim then took the defendant to a local hotel. The two of them lay down on a bed, and the defendant strangled the victim. After killing her he then had sexual intercourse with her body. The defendant fell asleep and then, when he awoke in the morning, had intercourse again with the victim's body. When he saw blood around her face, he became scared and hitchhiked back to Lincoln, Nebraska. The victim was later discovered by the hotel employees.

State v. Victor, no written opinion.

Douglas County District Court, Docket 95, Page 308.

Date of Sentence: November 15, 1976.

Sentence: 20 years.

The defendant and the victim were friends and next-door neighbors. Defendant maintains that he was invited into the victim's home and asked to engage in sexual intercourse with her. When he refused, she asked whether he knew where she could get some marijuana. He again replied in the negative. At this point the defendant maintains the victim grabbed his arm and he stabbed her as he was attempting to get away.

State v. Denney, no written opinion.

Knox County District Court, Docket 33, Page 58.

Date of Sentence: April 7, 1977.

Sentence: 15 years.

The defendant and some friends had been drinking all day. The defendant and the victim got into a fight about Indian culture. The victim had a gun and threatened defendant. The defendant then went upstairs and got a gun, came back down, and, as the victim stood up and began to move toward the defendant, the defendant shot him once in the abdomen.

State v. Johnson, 200 Neb. 760, 266 N.W.2d 193 (1978).

Date of Sentence: June 30, 1977.

Sentence: 20 years.

The defendant and a friend spent several hours drinking beer and driving around York, Nebraska. They encountered

defendant's younger sister and her friends and offered them a ride home. In the car on the way home, the defendant offered alcohol to one of the minor girls. Once home, the defendant's mother reprimanded him for offering alcohol to a juvenile. An argument followed, in which both parties slapped each other in the face. Defendant's mother reported the matter to his brother, who notified the police after hearing shots while on the phone talking to his mother. Defendant had grabbed a gun, ran outside toward a local church, and fired five shots through the living room window. Defendant's mother phoned the police after defendant was seen by her to be in the area of the church. The victim, a police officer, went to the church parking lot across the street. Shortly after he stepped out of his car, the defendant shot him once in the chest, causing his death.

**State v. Brick*, no written opinion.

Cheyenne County District Court, No. 9179.

Date of Sentence: September 20, 1977.

Sentence: 40 years.

This is a companion case to *State v. Simpson,* 200 Neb. 823, 265 N.W.2d 681 (1978), in which a life sentence for first degree murder was imposed. The defendant, her child, and her brother decided to hitchhike to California because they had no money. They got a ride with a trucker, who gave them $20. In addition, they stole a gun belonging to the trucker. The three then got another ride, this time with the victim, who offered to take them all the way to California. Along the way, the defendant and her brother determined to rob the victim and take his car. On a signal from her brother, the defendant pulled out the gun they had stolen and placed it against the victim's head. She ordered him to stop, but he resisted. She shot him in the back of the head twice, which caused the victim to be paralyzed but not dead. The defendant and her brother then pulled the body into a borrow pit off of Interstate 80 near Kimball, Nebraska. The defendant's brother shot the victim two more times, and then the two left for California.

State v. Hander, no written opinion.

Cedar County District Court, No. 6528.

Date of Sentence: November 17, 1977.

Sentence: 15 years.

Defendant and his wife separated, and a mutual friend of the parties moved in with the wife. Defendant became angry and ordered him out. The two scuffled, and defendant said to the victim that if the victim did not move out he, the defendant, would kill him. Later, the defendant saw his wife with the victim and became angry. He obtained a .22-caliber rifle and followed the victim. When the victim parked his automobile and got out of the car, the defendant shot and killed him. Defendant maintained he thought the victim was going for a weapon.

**State v. Forster*, no written opinion.

Platte County District Court, No. 2820.

Date of Sentence: December 8, 1977.

Sentence: 35 years.

This is a companion case to *State v. Roewert,* Platte County District Court, No. 2805, in which a life sentence for first degree murder was imposed. The defendant and some friends were drinking at a bar in Norfolk, Nebraska, and planned to rob and kill the victim. They determined they would kill the victim so as not to be identified. The victim was lured out of the bar by inviting him to a party. They drove him out to a country road, where they took his billfold. While the victim was passed out from being intoxicated, Roewert cut his throat and then decapitated him. He then disemboweled the body, rolled it over, and cut it about the back. The defendant willingly participated in the robbery and later disposed of the wallet in a trash receptacle.

**State v. Brown*, 201 Neb. 536, 270 N.W.2d 318 (1978).

Platte County District Court, No. 3839.

Date of Sentence: December 9, 1977.

Sentence: 35 years.

The individual here was involved in the same case as *State v. Roewert* and *State v. Forster.*

**State v. Denman*, no written opinion.

Keith County District Court, No. 6886.

Date of Sentence: February 10, 1978.

Sentence: 25 years.

This is the same fact situation as is involved in *State v. Womack*, Keith County District Court, No. 6860, in which a life sentence for second degree murder was imposed.

State v. Stofer, no written opinion.
Saline County District Court, No. 1058.
Date of Sentence: March 6, 1978.
Sentence: 40 years.

The defendant, who had been drinking, returned home, picked up a gun, and shot and killed his mother while she was in bed sleeping.

**State v. Epp*, no written opinion.
Gage County District Court, No. J-70.
Date of Sentence: June 8, 1978.
Sentence: 50 years.

The victim, who owned a liquor store and lived close to it, one night heard his security alarm go off. He took a shotgun and went to investigate. Defendant was there and had gone up to the door of the liquor store to rob it, but the door was locked. Defendant shot the victim once, after the victim inquired what the defendant was doing there and told defendant to leave. After the shooting the defendant drove away in his car.

State v. Coleman, no written opinion.
Douglas County District Court, Docket 102, Page 250.
Date of Sentence: July 25, 1978.
Sentence: 20 years.

The defendant and the victim argued over some money that the defendant owed the victim. The victim then went to a phone in the tavern where the argument took place and, when he returned, told the defendant that he had called for help. Defendant had had trouble with the individuals the victim had called, so he left. He later went over to the victim's home to talk it over. He took his nephew with him. They had a 12-gauge shotgun and a .38-caliber revolver. When the defendant confronted the victim, a second argument ensued, and, subsequently, the shotgun went off, killing the victim.

State v. Marteney, 210 Neb. 172, 313 N.W.2d 449 (1981).
Date of Sentence: March 23, 1979.
Sentence: 12 years.

The victim entered a local bar in DuBois, Nebraska, and went behind the bar to get a glass of water. Shortly after the victim entered the bar, the defendant entered, carrying a rifle. The defendant walked near to where the victim was standing

and mentioned something about leaving his daughter-in-law alone. Apparently, the defendant believed that the victim was having an affair with his daughter-in-law. He then raised the rifle and shot the victim in the chest.

State v. Samuels, 205 Neb. 585, 289 N.W.2d 183 (1980).

Date of Sentence: April 5, 1979.

Sentence: 13 years.

According to the statement given by the defendant, the victim had taken money from the defendant's friend. The defendant went to see the victim, and the victim pulled a gun on the defendant. Defendant was alongside the victim's car when he shot the victim three times, and then ran from the scene because he was scared.

State v. Morris, no written opinion.

Douglas County District Court, Docket 106, Page 203.

Date of Sentence: January 9, 1980.

Sentence: 20 years.

The defendant, who had been drinking heavily and who had just lost his job of 22 years as a baker, shot and killed his second wife, who had filed for divorce.

State v. Paulson, 211 Neb. 711, 320 N.W.2d 115 (1982).

Date of Sentence: June 3, 1980.

Sentence: 15 years.

The defendant and several others were members of a social "family." A codefendant was told that if he wanted to get in good with the family he would have to kill the victim, another member of the family, or he would be killed. Defendant was apparently one of the organizers of the plan. On the night of the murder a party was held at the home of one of the family members. Upon signal the codefendant shot the victim. The body was thrown into a creekbed in Iowa, where it was found a week later.

State v. Stranghoener, 208 Neb. 598, 304 N.W.2d 679 (1981).

Date of Sentence: June 3, 1980.

Sentence: 20 years.

This is a companion case to *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982). Defendant here was a member of the "family" and one of the organizers of the murder.

State v. Green, no written opinion.

Buffalo County District Court, No. 6177.
Date of Sentence: July 25, 1980.
Sentence: 25 years.

The defendant and his wife, the victim, were separated. After the wife filed for a divorce, the couple attempted several counseling sessions, which failed. On the day of the crime the defendant visited his wife at their home to discuss the payment of certain bills. Defendant asked to use the bathroom. He came out of the bathroom, went to the kitchen, got a drink of water at the sink, and shot his wife three times.

State v. Herren, no written opinion.
Scotts Bluff County District Court, No. 28207.
Date of Sentence: September 26, 1980.
Sentence: 35 years.

The defendant, after drinking heavily and using cocaine, LSD, and barbiturates, attacked his girlfriend and stabbed her a number of times. She lived only by feigning death. Upon leaving the girlfriend's apartment defendant went to the home of an alcohol and drug detoxification program leader who had been involved in aiding the defendant. The leader was killed by reason of multiple stab wounds inflicted by the defendant, including several after death.

State v. Jackson, no written opinion.
Douglas County District Court, Docket 107, Page 500.
Date of Sentence: November 21, 1980.
Sentence: 25 years.

Defendant and the victim were involved in an altercation on a public street, each being in his respective automobile. The victim refused to yield the right-of-way to the defendant, and also delivered racial remarks. At a stop light the victim got out of his car and walked over to the defendant's car. The defendant got his gun from under his seat and shot the victim three times.

State v. Payne, no written opinion.
Dodge County District Court, Docket 71, Page 169.
Date of Sentence: November 24, 1980.
Sentence: 17 years.

The defendant and the victim lived in the same trailer park. The victim was a drug dealer. There were apparent ill feelings between the two. The defendant took a record book of drug

sales and some money from the victim's trailer and may have been returning them when the murder occurred.

State v. Stocker, no written opinion.

Douglas County District Court, Docket 109, Page 62.

Date of Sentence: February 27, 1981.

Sentence: 12 years.

The victim in this case was a neighbor of the defendant. He was an auto mechanic and towed junk cars to the street in front of both homes. The victim then worked on the cars, often into the late hours of the evening. Friction arose between the defendant and the victim over the cars that were left on the street. Defendant made repeated calls to the Omaha Police Department, but the situation went on unresolved. On the day in question the defendant, who had been drinking at a bar, came home to find the victim outside working on a car. It was late, so the defendant asked the victim to shut off the lights and cease working. The victim responded with vulgar language and continued working. Defendant retrieved his gun from his house and pulled the trigger twice, but there was no discharge. He injected another shell and shot the victim once from a distance of 15 to 20 feet.

State v. Kemp, no written opinion.

Douglas County District Court, Docket 109, Page 441.

Date of Sentence: September 29, 1981.

Sentence: 25 years.

On February 22, 1981, the Omaha Police Department received a call from defendant, at which time defendant advised the police that he had shot his girlfriend. The police were directed to the scene and found the victim shot three times in the head with a .22-caliber pistol. She died the following day.

State v. Brown, 213 Neb. 68, 327 N.W.2d 107 (1982).

Date of Sentence: December 14, 1981.

Sentence: 25 years.

Defendant maintained that he and the victim had an argument and that the victim pulled out a knife. Defendant claims that he retreated out of the building where the argument began but that the victim pressed on. Finally, the defendant said he pulled a revolver from his pocket, fired a warning shot into the ground, and when that did no good, he fired approximately

five more shots into the victim. When the victim was found, the knife was beside the victim, but was closed. There was contrary evidence indicating that the victim never opened the knife.

State v. Harton, no written opinion.

Lancaster County District Court, Docket 59, Page 5.

Date of Sentence: March 31, 1982.

Sentence: 35 years.

The defendant and the victim were both residents of a city mission in Lincoln, Nebraska. Defendant, after a day of drinking, returned to the mission. He remembered that he had loaned a radio to the victim and went to the victim's room to retrieve the radio. The victim maintained that he did not have the radio. The two got into a quarrel and began fighting, pulling out knives. The defendant eventually stabbed and killed the victim.

State v. Rowe, 214 Neb. 685, 335 N.W.2d 309 (1983).

Date of Sentence: July 29, 1982.

Sentence: 25 years.

The defendant murdered his wife. The body was discovered by firefighters who were called to the scene by neighbors who reported a fire at the defendant's residence. The body was found partially burned and wrapped in blankets in one of the second floor bedrooms. The autopsy report revealed that one of the victim's breasts had been removed and that there was an incision in the trunk of the victim extending from below the breastbone to the pubic area and into the vagina and the rectum. The victim also had suffered a depressed skull fracture and broken ribs.

State v. Rife, 215 Neb. 132, 337 N.W.2d 724 (1983).

Date of Sentence: August 19, 1982.

Sentence: 30 years.

The defendant and victim were coworkers at a motel. Defendant entered the victim's apartment and asked if she wanted to "mess around." The victim started playing with the buttons on defendant's shirt, and when defendant started to unbutton victim's blouse, she said, "No, I don't want to." Defendant took a pottery vase and hit her about the head and face three or four times. He then struck her once with a mug. He went to the kitchen for a butcher knife and cut her throat.

State v. Rush, no written opinion.
Douglas County District Court, Docket 114, Page 115.
Date of Sentence: February 16, 1983.
Sentence: 15 years.
Defendant shot and killed his wife during a fight over an alarm clock.

State v. Klinginsmith, no written opinion.
Hall County District Court, Docket 31, Page 201.
Date of Sentence: May 12, 1983.
Sentence: 50 years.
The defendant killed his former wife. On the night of the murder he was sitting with his children. When his former wife returned home, a struggle ensued over a gun which the defendant had in his possession. Following the struggle, his ex-wife succeeded in getting the gun away from him and informed him that she was leaving. The defendant then obtained a knife from the house and tried to get the gun back. A second struggle ensued, which culminated in the defendant's shooting his ex-wife with the handgun.

State v. Jones, no written opinion.
Douglas County District Court, Docket 115, Page 509.
Date of Sentence: June 8, 1984.
Sentence: 12 years.
The defendant killed the victim, who was dating his former girlfriend. The killing was accomplished with a knife.

State v. Voskamp, no written opinion.
Saunders County District Court, Docket 7, Page 231.
Date of Sentence: July 30, 1984.
Sentence: 15 years.
The victim had moved in with the defendant's wife while the defendant was away driving an over-the-road truck. Upon return from his trip the defendant found the defendant's belongings in his car with a note from his wife. It told him not to return because she was seeking a divorce. The defendant took a gun and went to his wife's house. He kicked in the back door, and when the victim came running at him, the defendant shot twice, killing the victim.

State v. Valerio, no written opinion.
Banner County District Court, No. 1164.

Date of Sentence: October 18, 1984.

Sentence: 35 years.

The victim was engaged in a fight with the defendant. During the fight, the defendant cut the victim's face with his knife and apparently held him hostage. Later, the victim was taken out into the country, where he was tied up with baling twine and a gunnysack placed over his head. He was then placed in the back of a pickup truck with the defendant. At this point the defendant and possibly some of the others stabbed the victim to death. There were 18 stab wounds in all.

V. CASES INVOLVING CHARGES OF MANSLAUGHTER OR LESS.

State v. Jackson, Dakota County District Court, No. 8803. Date of Sentence: October 12, 1973. Sentence: 10 years for manslaughter.

State v. Andersen, Dawson County District Court, Docket 45, Page 296. Date of Sentence: October 26, 1973. Sentence: 3 to 9 years for manslaughter.

State v. Ralls, Lancaster County District Court, Docket 37, Page 125. Date of Sentence: February 5, 1974. Sentence: 3 to 8 years for manslaughter.

State v. Long, Dakota County District Court, No. 8934. Date of Sentence: March 25, 1974. Sentence: 2 to 7 years for manslaughter.

State v. Kinghorn, Douglas County District Court, Docket 90, Page 318. Date of Sentence: February 10, 1975. Sentence: 3 years' probation for manslaughter.

State v. Johnson, Douglas County District Court, Docket 89, Page 664. Date of Sentence: July 21, 1975. Sentence: Youth Development Center during minority.

State v. Sherman, Fillmore County District Court, No. 7726. Date of Sentence: November 4, 1975. Sentence: 10 years for manslaughter.

State v. Abbott, Richardson County District Court, Docket 6, Page 75. Date of Sentence: May 6, 1976. Sentence: 2 to 10 years for manslaughter.

State v. Rice, Lancaster County District Court, Docket 45, Page 121. Date of Sentence: September 23, 1976. Sentence: 2

years for manslaughter.

State v. Honorable, Douglas County District Court, Docket 95, Page 317. Date of Sentence: October 19, 1976. Sentence: 10 years for manslaughter.

State v. Ralls, Lancaster County District Court, Docket 47, Page 1. Date of Sentence: May 23, 1977. Sentence: 10 years for manslaughter.

State v. McGaughey, Keith County District Court, No. 6850. Date of Sentence: October 28, 1977. Sentence: 5 years for manslaughter.

State v. Lashley, Douglas County District Court, Docket 100, Page 276. Date of Sentence: February 2, 1978. Sentence: 1 year for manslaughter.

State v. Wright, Sarpy County District Court, Docket 30, Page 293. Date of Sentence: March 6, 1978. Sentence: 5 years' probation for manslaughter.

State v. Welsh, Lancaster County District Court, Docket 48, Page 86. Date of Sentence: March 20, 1978. Sentence: 10 years for manslaughter.

State v. Williams, Douglas County District Court, Docket 101, Page 246. Date of Sentence: May 12, 1978. Sentence: 2 to 4 years for manslaughter.

State v. Coleman, Douglas County District Court, Docket 102, Page 251. Date of Sentence: July 25, 1978. Sentence: 10 years for manslaughter.

State v. Denbo, Chase County District Court, No. 4121. Date of Sentence: August 2, 1978. Sentence: 18 months to 4 years for manslaughter.

State v. Ellis, Lancaster County District Court, Docket 52, Page 6. Date of Sentence: August 24, 1979. Sentence: 10 years for manslaughter.

State v. Meegan, Sarpy County District Court, Docket 38, Page 148. Date of Sentence: June 2, 1980. Sentence: 18 months to 5 years for accessory to a felony.

State v. Thomas, Sarpy County District Court, Docket 38, Page 147. Date of Sentence: June 2, 1980. Sentence: 15 months to 4 years for accessory to a felony.

State v. Leander, Sarpy County District Court, Docket 38, Page 151. Date of Sentence: June 3, 1980. Sentence: 5 to 15

years for conspiracy to commit first degree murder.

State v. Schommer, Fillmore County District Court, No. 8001. Date of Sentence: October 7, 1980. Sentence: 20 years for manslaughter.

State v. Warford, Gage County District Court, No. J-171. Date of Sentence: March 5, 1981. Sentence: 6 to 12 years for manslaughter.

State v. Ihm, Lancaster County District Court, Docket 56, Page 160. Date of Sentence: May 1, 1981. Sentence: 5 years' probation for manslaughter.

State v. Gilbert, Hamilton County District Court, No. 7812. Date of Sentence: May 29, 1981. Sentence: 10 years for manslaughter.

State v. Rath, Douglas County District Court, Docket 110, Page 213. Date of Sentence: January 25, 1982. Sentence: 6 2/3 to 20 years for manslaughter.

State v. Beverly, Douglas County District Court, Docket 112, Page 64. Date of Sentence: May 4, 1982. Sentence: 6 to 20 years for manslaughter.

State v. Alexander, Lancaster County District Court, Docket 58, Page 128. Date of Sentence: November 17, 1982. Sentence: 6 years 8 months to 20 years for manslaughter.

State v. Armour, Douglas County District Court, Docket 115, Page 677. Date of Sentence: June 19, 1984. Sentence: 4 to 7 years for manslaughter.

State v. Carr, Douglas County District Court, Docket 114, Page 787. Date of Sentence: June 29, 1984. Sentence: 1 year for accessory to a felony.

State v. Denby, Lancaster County District Court, Docket 66, Page 284. Date of Sentence: December 17, 1985. Sentence: 6 years 8 months to 20 years for manslaughter.

STATE OF NEBRASKA, APPELLEE, V. JOHN J. JOUBERT, APPELLANT.

399 N.W.2d 237

Filed December 29, 1986. No. 84-842.

1. **Pleas.** The standard for accepting a plea of guilty is that it must represent a voluntary and intelligent choice among the alternative courses of action open to the defendant, is made understandingly, and has a factual basis.
2. _____. Before accepting a plea of guilty the trial court should examine the defendant sufficiently to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea.
3. **Sentences: Aggravating and Mitigating Circumstances.** Any serious assaultive or terrorizing criminal activity committed by the accused prior to the time of the offense may properly be considered when deciding the applicability of Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 1985).
4. _____: _____. A defendant may offer any evidence on the issue of mitigation, even though the mitigating factor is not specifically listed in Neb. Rev. Stat. § 29-2523(2) (Reissue 1985).
5. _____: _____. The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors.
6. _____: _____. Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), that a murder be "especially heinous, atrocious, cruel" or manifest "exceptional depravity by ordinary standards of morality and intelligence," describes in the disjunctive at least two distinct components of the aggravating circumstance which may operate in conjunction with or independent of one another.
7. _____: _____. The presence of any of the components of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) will sustain a finding that aggravating circumstance (1)(d) exists.
8. _____: _____. The words "especially heinous, atrocious, cruel," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), mean a conscienceless or pitiless crime which is unnecessarily torturous to the victim.
9. _____: _____. The phrase "exceptional depravity," as used in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), refers and pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
10. _____: _____. For the purpose of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985), "exceptional depravity" exists when the act is totally and senselessly bereft of any regard for human life as shown by the presence of the following circumstances, either separately or collectively: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. Consequently, where one or more of those five factors are present, there may be a finding of "exceptional depravity."
11. **Sentences: Appeal and Error.** The proportionality review made under the requirements of Neb. Rev. Stat. §§ 29-2521.01, 29-2521.02, and 29-2521.03 (Reissue 1985) is limited to a comparison of the facts and circumstances of the

death penalty-imposed case under review with those of all applicable cases in which the death penalty was imposed.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Thomas J. Garvey, Sarpy County Public Defender, Owen A. Giles, Special Assistant Public Defender, and, on brief, James P. Miller, for appellant.

Robert M. Spire, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

PER CURIAM.

The appellant, John J. Joubert, entered a plea of guilty to two counts of first degree murder in violation of Neb. Rev. Stat. § 28-303 (Reissue 1985). Each murder count is a Class I or Class IA felony, punishable by either life imprisonment or the imposition of the death penalty. A three-judge panel was convened pursuant to the provisions of Neb. Rev. Stat. § 29-2520(2) (Reissue 1985). The panel held a hearing and concluded that a sentence of death should be imposed on each count. Joubert appeals to this court, raising issues with regard both to his conviction as well as to his sentence. We affirm.

The facts of the case are distressing at best, but must be related in some detail for an understanding of the case. While delivering newspapers in Bellevue, Nebraska, early on the morning of Sunday, September 18, 1983, Danny Joe Eberle, 13 years of age at the time, disappeared. Following a widespread search of the area conducted by local and area law enforcement personnel with the aid of the FBI, young Eberle's body was found several miles south of Bellevue, Nebraska, during the late morning hours of September 21, 1983. When his body was recovered, both his hands and feet were bound together. His mouth was covered with tape, and he was wearing only a pair of undershorts. A number of stab wounds appeared on his body, including one to the back of his neck. Additionally, a photograph in the record disclosed a gaping wound covering the full length of the back of the left thigh and approximately 11

inches wide, which appeared as if the flesh had been cut away clear to the bone. Although an investigation continued for some time, Danny Joe Eberle's murderer was not then apprehended.

A second young boy, Christopher Walden, then 12 years of age, in the early morning hours of Friday, December 2, 1983, also disappeared. His body was subsequently found by hunters during the late afternoon hours of December 5, 1983, in a small wooded area located at the intersection of Giles and Cornhusker Roads in Sarpy County, Nebraska. He, too, was clad only in a pair of undershorts. His body exhibited a number of stab wounds. Also, his throat was slashed, and the full length and breadth of his chest and abdomen was covered with what looked like a representation of a large plant, including the stem and seven leaves. This figure appeared to have been rather carefully and deliberately carved into the skin and flesh with a sharp knife. Further investigation continued, and still no one was apprehended.

Then, on the morning of January 11, 1984, at approximately 8:30 a.m., a teacher at the Aldersgate Preschool in northeast Sarpy County was preparing for the day. She observed a car driven by a person she would later identify as Joubert approach close to the windows of the school. He stopped momentarily, looked at the teacher, and then turned around and drove off. Several minutes later, she noticed he had driven back. He did not drive up to the window this time but, rather, sat a short distance from the school, looking at her for a few seconds.

Concerned, she wrote down the license plate number of the vehicle and watched it drive away. A few minutes later, the vehicle returned and drove up to the building again. Joubert got out of the vehicle and came to the door of the school, asking for directions. She gave him the directions he requested. Claiming he could not understand her directions, he asked to use the phone. She said there was no phone inside the school. At that time he pushed her back inside the room and said to her, "Get back in there or I'll kill you." The teacher pushed Joubert out of her way and ran by him down the street to a nearby home where she called the police.

She gave the police the license number of the car she had seen

and also indicated that the person in the car looked like the composite sketch of the suspected killer of both young boys that had appeared for approximately a month in the local newspaper.

The police conducted a preliminary investigation and, by matching license numbers, picked up Joubert, a member of the U.S. Air Force, at Offutt Air Force Base located in Sarpy County.

Initially, the officials who questioned Joubert talked to him only about the incident at the Aldersgate Preschool. Soon thereafter, however, Joubert made some spontaneous admissions to those questioning him concerning the Eberle/Walden homicides. Eventually, Joubert gave a tape-recorded confession in which he filled in those facts of the Eberle and Walden slayings that the investigators had been unable to find.

Joubert told the officers that he was driving around Bellevue in his personal car, a 1979 Chevrolet Nova, in the early morning hours of September 18, 1983. He pulled up to a convenience store to get something to drink. At the time, it was still dark. He was leaning against his car, sipping his drink in the parking lot of the store, when he noticed a young boy fixing his newspapers for the day. When the boy left the parking lot, Joubert followed him. He drove past the boy and parked in a parking lot two blocks further. He got out of his car, carrying rope, some tape, and a knife, and hid behind a car or tree, where he waited. As Eberle was walking back to his bike after delivering a paper, he spoke to Joubert, who returned the greeting. Then, as Eberle turned his back on Joubert to get on his bike, Joubert grabbed him, put his hand over his mouth and a knife to his throat, and told him to come with him and not to make any sounds. Eberle did not struggle and returned to the parking lot with Joubert. Joubert ordered Eberle to lie down on his stomach next to the car. It was still dark and no one could see them. When Eberle lay down, Joubert tied his hands behind his back and then tied his feet together and placed some tape over his mouth. When all of this was done, Joubert picked Eberle up and placed him in the trunk of the car and closed the top. He then drove off.

Joubert told the officers he then drove to a somewhat

secluded place south of Bellevue, where he took Eberle out of the trunk and laid him in a ditch on the side of the road. After closing the trunk of the car, Joubert carried Eberle about 10 or 20 feet off the road into a cornfield. He told Eberle to roll over on his stomach. When Eberle did so, Joubert untied Eberle's hands, told him to remove his shirt, and told him to roll over on his back. Joubert then untied Eberle's feet and took his pants off. At this time the tape was beginning to come off of Eberle's mouth, just enough for him to talk. Joubert again pulled out the knife, and Eberle pleaded, "Don't, please don't kill me." Eberle struggled a bit, so Joubert stabbed him in the back. At this point Eberle told Joubert that if he, Joubert, would take Eberle to the hospital, Eberle would not say anything. Joubert said he did not believe Eberle, and, so, at that time he stabbed him again a couple of times. He then sliced the back of Eberle's neck. When Eberle ceased moving, Joubert, to make sure that he was dead, sliced the back of Eberle's left leg. The leg did not bleed. Joubert dragged Eberle's body a few yards away from the road and concealed it in the weeds. He wiped the knife clean with Eberle's shirt, returned to his car, and went back to his barracks, where he napped.

Dr. Blaine Roffman, a pathologist, conducted the autopsy on Danny Joe Eberle. He testified that there were a total of 11 stab wounds on Eberle's body. Eight of those wounds were penetrating stab wounds, three less deep. More importantly, however, Dr. Roffman testified that 9 of the 11 wounds were inflicted before death. Dr. Roffman was certain that death was not instantaneous. In addition, there was some hemorrhaging on the top of the skull, which must have resulted from some type of traumatic blow to the head. This very likely occurred when Eberle was being jostled about in the trunk of Joubert's car.

Dr. Roffman concluded, "I think he was aware — the victim was aware of the circumstances, and in my opinion, that was undue pain and suffering."

The record further discloses that Joubert additionally related to the investigating officers that on the morning of December 2, 1983, he again left his barracks between 6 and 6:30 a.m. and began cruising in his car. He had taken from his locker the same

knife with which he had murdered Danny Joe Eberle.

He first drove around bus stops, looking for people. Not finding anyone alone, he began to drive past the neighborhood schools. In the area of the Pawnee school, he spotted Christopher Walden walking to school. He parked his auto at the intersection of 48th and Margo and waited until Walden had walked very close to his car. Joubert then got out of the car, walked toward Walden, and got behind him. When he was very near to Walden, he called to him and told him to stop for a minute. There was no one else around. Joubert showed Walden his knife but did not pull it out. Joubert told Walden to come with him and to be quiet or Joubert would kill him. When Walden looked uncertain for a moment, Joubert put his hand on Walden's shoulder and led him to the car. When they got to the car, another car passed, so Joubert pretended that he and Walden were having a conversation. At that point Joubert told Walden to get into the car and to lie down on the floor in the front passenger seat. As Joubert started to drive off, Walden began crying. Joubert related to the investigators, "I was driving down Margo and I was thinking about letting him go . . . . He was on the floor in the front passenger seat. I just figured that if I did let him go he would probably tell someone and then what would happen to me."

Joubert drove Walden to another isolated, secluded spot. After making sure there was no one else in the area, he ordered Walden out of the car. It was cold and there was snow on the ground. They began walking along some railroad tracks. Joubert promised Walden that if Walden just followed orders and did everything that Joubert told him to do, nothing would happen to him. He told Walden to strip down to his underwear and lie down on his back. Evidently, because of the snow, Walden balked at this command, and, so, according to Joubert, he placed his hands on Walden's shoulders, around his neck, and "encouraged" him to lie down on his back. When he had done that, Joubert knelt on Walden's chest and started strangling him. Walden began struggling and, according to Joubert, looked like he was in pain. At that point, as Walden struggled to get away, Joubert took out his knife and stabbed Walden a couple of times in the back and then sliced his throat.

When Joubert thought that Walden was dead, he sliced Walden's stomach a couple of times just to make sure. Joubert then left the area, drove straight to the barracks, threw the knife into a dumpster, and went back to his room, where he went to sleep.

Dr. Jerry Wilson Jones, another pathologist, conducted the autopsy on Christopher Walden. According to Dr. Jones, Walden was stabbed a total of seven times. Two of the wounds had penetrated deeply, five had not. Dr. Jones testified that death did not occur instantaneously but that Walden was alive and cognizant for a period of time and then gradually lapsed into a coma and eventually died. In Dr. Jones' opinion, Walden could have been tortured in the manner in which he was killed. He further believed that Walden suffered during this period of time.

Joubert contends that three errors were committed by the district court prior to sentencing and that six errors were committed by the sentencing panel following his plea of guilty. With regard to the first group of assigned errors, Joubert maintains, in essence, that his pleas of guilty were not made freely, voluntarily, and knowingly in that he was induced by the district judge to enter pleas of guilty. The errors allegedly committed by the sentencing panel were (1) in finding, with respect to the Walden murder, that Joubert had a substantial history of serious assaultive or terrorizing criminal activity; (2) in finding that both murders were committed in an effort to conceal his identity; (3) in finding that both murders were "especially heinous, atrocious, cruel, and [sic] manifested exceptional depravity by ordinary standards of morality and intelligence"; (4) in finding sufficient aggravating circumstances existed to justify the imposition of the death penalty; (5) in failing to find mitigating circumstances sufficient to outweigh the aggravating circumstances; and (6) in limiting the mitigating effects of Joubert's guilty pleas when considering aggravating and mitigating circumstances.

We turn first to the questions involving whether the pleas made by Joubert and accepted by the court were made freely, voluntarily, and knowingly and whether the district court made promises which misled Joubert regarding either the pleas or the

sentences. The law regarding the requirements which must be met before a guilty plea in a criminal case can be accepted is clear and uncontroverted. In *State v. Turner*, 186 Neb. 424, 427, 183 N.W.2d 763, 766 (1971), in discussing the necessary standard for accepting a plea of guilty, we said: " 'The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " The record must show that a plea of guilty was made intelligently, voluntarily, and understandingly. Further, the plea must be based upon sufficient facts to justify the court's finding the defendant guilty beyond a reasonable doubt. When that appears, the court may accept the plea.

In *State v. Jackson*, 220 Neb. 656, 658, 371 N.W.2d 679, 681 (1985), we recently observed: " 'Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea.' "

In the instant case Joubert argues that, sometime before entering his pleas, the trial court promised him a hearing on a motion to suppress and failed to keep that promise. Therefore, Joubert argues, he is entitled to have his pleas withdrawn and the case remanded for trial. Our close examination of the record fails to support Joubert's contention as to what in fact took place and indicates beyond question that Joubert freely, voluntarily, and intelligently entered his pleas of guilty to the two charges of murder.

The record discloses that after pleas of not guilty were entered, Joubert's attorney filed a motion to suppress the statements previously given by Joubert to the authorities. The district court deferred hearing the motion and advised Joubert's attorney on the record that "any hearings on alleged statements or confessions would be deferred until such time as a jury in the case would be empaneled and sequestered." Apparently, the district court was concerned that holding a suppression hearing before the jury was empaneled and sequestered would result in undue pretrial publicity and would interfere with Joubert's opportunity for a fair trial. Joubert's lawyer was somewhat concerned about delaying the hearing and indicated that fact to

the district judge. Apparently, his concern was that he felt he could not encourage Joubert to consider any plea agreement until he knew whether the statements would be admitted or suppressed. The district court advised Joubert's attorney, on the record, that

> if in fact there is ever a plea agreement that you may enter into where a plea of guilty to some charges or lesser charges is offered, at that point in time what I would do is not receive it, but consider your motion to suppress in conjunction with the hearing on the underlying facts to support the plea agreement.

The district court also advised Joubert's attorney that if, at such a hearing, the court determined that the statements should be suppressed, Joubert would be permitted to withdraw his pleas. Though Joubert's attorney appeared to be reluctant, he ultimately agreed with the district court that such procedure could be followed.

Joubert argues that this, in some way, was a promise relating to a plea bargain and was intended to induce Joubert to enter pleas of guilty. The record does not support that contention. The district court was not encouraging Joubert to do anything, but merely was advising his counsel that if Joubert stayed with the entry of pleas of not guilty and a jury trial was required, a hearing on the motion to suppress would be held after the jury had been selected and sequestered. If, however, Joubert waived the jury trial and tendered pleas of guilty pursuant to a plea bargain, before the pleas of guilty would be accepted by the district court a hearing on the suppression motion would be conducted. The district court's explanation of the procedures to be followed was clearly in the alternative and was intended to explain what would be done, depending upon what Joubert elected to do. The choices were still clearly Joubert's, and the explanation by the district court cannot be said to have been a promise conditioned upon pleas of guilty. Joubert was told he could have a hearing on the suppression motion before trial, regardless of what pleas he entered.

The record discloses that subsequently, on July 3, 1984, pursuant to a plea bargain whereby the State dismissed two kidnaping charges and two counts of using a knife to commit a

felony, Joubert pleaded guilty to the first degree murder charges then pending. The decision to plead guilty was clearly Joubert's, and nothing in the record suggests that Joubert's decision had anything to do with earlier statements made by the district court regarding the suppression hearing.

In any event the record discloses that, before accepting the pleas of guilty, the district court examined Joubert at great length with regard to both the pleas and the pending motion to suppress. The record discloses that the district court asked Joubert a series of questions necessary to ascertain whether the pleas were being made freely, voluntarily, intelligently, and knowingly. The district court further advised Joubert that, by tendering the pleas of guilty, Joubert would waive any technical defects in the proceedings up to the time of the pleas and would further waive any pending motions that might have been of benefit to Joubert. Specifically, the court said:

> THE COURT: All right. And now more specifically, Mr. Joubert, let me ask you, do you understand there is a motion pending to suppress statements or confessions that you had allegedly made at the time of your arrest? Do you understand that if I accept the pleas of guilty, that that motion likewise is gone and you can never raise that again as an issue?
>
> MR. JOUBERT: I understand.

Neither Joubert nor his counsel in any way indicated to the court that he did not intend to waive the motion to suppress or desired at that point to have a hearing on the motion before the court accepted the pleas of guilty.

The record further reflects that the State established a factual basis for Joubert's pleas. In particular, the State described in detail the facts from the time of Joubert's apprehension up until the time of his confession. No objections were made by Joubert or his counsel to any of the facts recited by the State. When the State completed advising the court of the facts, the district judge again asked Joubert several questions. In particular, he asked:

> THE COURT: Okay. I touched earlier, Mr. Joubert, upon the various motions that you would waive if I accept the plea of guilty, and then Mr. Wellman related fully and I

have marked in evidence and received Exhibits 32 and 33, which as recited and then related in substance, that those are full confessions to police officers relating to the murders of these two boys. Are you satisfied in your own mind that you gave those statements to the officers voluntarily?

MR. JOUBERT: Yes, Your Honor.

THE COURT: Did they make any promises to you before you gave those statements?

MR. JOUBERT: No, Your Honor.

THE COURT: Did they indicate that you were under suspicion or under arrest for these crimes and that you had the right to have counsel present?

MR. JOUBERT: Yes, they did.

THE COURT: And did they indicate to you that if you could not afford counsel, the Court would appoint one for you before there would be any further questioning?

MR. JOUBERT: Yes, they did.

THE COURT: Did they indicate to you that you had a right to remain silent and not answer any of their questions?

MR. JOUBERT: Yes.

THE COURT: And prior to the time they even spoke with you did they identify themselves as law enforcement officers, be it police, sheriff's officer or FBI?

MR. JOUBERT: Yes, they did.

Further, the district court asked Joubert's counsel whether he was satisfied that the statements or confessions or admissions that had been made by Joubert were voluntarily made and that Joubert was accorded his constitutional rights prior to making those. Counsel answered, "Yes, Your Honor. I think they're clearly admissible." It was only then that the district court accepted each plea of guilty and found Joubert guilty of murder in the first degree on both counts.

Joubert's argument that there was some promise of a hearing which induced him to enter pleas of guilty to murder or that the alleged promises made by the district court which induced him to enter his pleas were unfulfilled is without any basis in fact. Not only does the record make it clear that Joubert freely and

voluntarily waived the right to a hearing on the motion to suppress, it is also clear that, though Joubert had an opportunity to present evidence to the district court regarding the confessions, he freely and voluntarily admitted that the confessions were constitutionally obtained and knowingly and voluntarily given. Had Joubert or his counsel wished to have a separate *Jackson v. Denno*-type hearing concerning the admissibility of the confessions, he was obligated to advise the court when the district court inquired as to Joubert's understanding of the guilty pleas. It is inconsistent for Joubert, on the one hand, to admit the confessions were freely and voluntarily given while, on the other hand, maintaining that a hearing to suppress the confessions would have been successful.

It is difficult to imagine what evidence could have been presented to the district court which would have caused the district court to suppress the confessions in light of the statements and admissions made by both Joubert and his attorney regarding the confessions. There is no basis for this assignment, and it is overruled.

Joubert further argues that the district court promised him life sentences in return for his pleas of guilty, and failed to fulfill that promise. Again, the record does not support that contention. The record discloses that *after* Joubert tendered his pleas of guilty and before the district court accepted the pleas, the district court said:

> THE COURT: You understand . . . that *some* consideration would be given by myself or the sentencing judges to the money-saving expense of trial . . . that comes with any pleas of guilty. . . .
>
> MR. JOUBERT: Yes.

(Emphasis supplied.) The words themselves do not appear to have been a promise or an inducement in any manner to the previous tender of guilty pleas; the plain meanings of the words provide nothing more than a statement that "some consideration" would be given. While it may have been better had the district court not attempted in any manner to advise as to the factors to be considered, in view of the fact that the hearing on sentencing had not yet been held, advising counsel

and Joubert that "some consideration" would be given by reason of the pleas of guilty falls far short of any suggestion of a promise or inducement to enter the pleas of guilty. The record clearly establishes that Joubert's pleas of guilty were made freely, voluntarily, intelligently, and understandingly and free of any promises or inducements.

Furthermore, the record discloses that the sentencing panel did consider that Joubert's pleas of guilty were mitigating factors and did give "some consideration" to that fact. The sentencing panel, after giving some consideration to the pleas of guilty, found that the mitigating circumstances did not approach or outweigh the aggravating circumstances. Any purported agreement was kept. The pleas were properly accepted, and the motion to withdraw the pleas was properly denied.

That leaves us with the errors relating to the sentences of death. As we earlier indicated, Joubert has raised six alleged errors in connection with the sentences. We shall address them individually in the order in which they are raised.

Neb. Rev. Stat. § 29-2522 (Reissue 1985) requires the sentencing court to proceed as follows:

> After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:
>
> (1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;
>
> (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> . . . .

Neb. Rev. Stat. § 29-2525 (Reissue 1985) requires the Supreme Court to review all cases in which the death penalty has been imposed.

What are aggravating and mitigating circumstances is, to a

large extent, prescribed by statute, although, as noted above, the courts are required to consider any evidence in mitigation. See *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982). Furthermore, the aggravating circumstances must be proved beyond a reasonable doubt. See, *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986); *State v. Reeves,* 216 Neb. 206, 344 N.W.2d 433 (1984). What constitutes aggravating circumstances is not left to the discretion of either the sentencing court or the Supreme Court but, instead, is set out by statute in detail. Neb. Rev. Stat. § 29-2523(1)(Reissue 1985) defines aggravating circumstances as follows:

> (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;
>
> (b) 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;
>
> (c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;
>
> (d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;
>
> (e) At the time the murder was committed, the offender also committed another murder;
>
> (f) The offender knowingly created a great risk of death to at least several persons;
>
> (g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or
>
> (h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

The mitigating circumstances, as defined by § 29-2523(2), are as follows:

> (a) The offender has no significant history of prior criminal activity;
>
> (b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) 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.

These guidelines exemplify the type of standards which must be followed in order to avoid the indiscriminate application of the death penalty. Absent such guidelines, the imposition of the death penalty in a particular case must be set aside as being in violation of the U.S. Constitution as declared by the U.S. Supreme Court. See, *State v. Palmer, supra; Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

With that background we review the record to determine whether the aggravating circumstances were established by evidence beyond a reasonable doubt.

The sentencing panel found that with regard to the Eberle crime, count I, there existed aggravating circumstances (1)(b) and (1)(d) and mitigating circumstances (2)(a) and (2)(c). The sentencing panel further found that because Joubert entered a plea of guilty, there existed an additional mitigating circumstance. With regard to the crime involving the Walden youth, count II, the panel found existing aggravating circumstances (1)(a), (1)(b), and (1)(d) and mitigating circumstance (2)(c), plus, again, the fact that Joubert pleaded guilty.

Once the existence of one or more aggravating circumstances has been found to exist, § 29-2522 requires not a mere counting of aggravating and mitigating circumstances but, rather, a reasoned judgment as to what factual situations require the imposition of death and which of those can be satisfied by life

imprisonment in light of the totality of the circumstances present. See, *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986); *State v. Reeves,* 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Stewart,* 197 Neb. 497, 250 N.W.2d 849 (1977). In reviewing and balancing the aggravating circumstances against the mitigating circumstances, the sentencing panel concluded that the aggravating circumstances outweighed the mitigating circumstances and that Joubert should be sentenced to death for both murders.

In that regard Joubert maintains first that the evidence was insufficient to establish beyond a reasonable doubt the existence of aggravating circumstance (1)(a) in connection with the Walden murder (the second of the two), in that Joubert had a substantial history of serious assaultive or terrorizing criminal activity. The record establishes beyond a reasonable doubt that, at the time of the Walden murder, Joubert had "a substantial history of serious assaultive or terrorizing criminal activity."

The facts in this case with regard to this issue are nearly identical to the facts in *State v. Moore,* 210 Neb. 457, 316 N.W.2d 33 (1982). In that case Carey Dean Moore was charged with the murders of two Omaha cabdrivers, 5 days apart. We held that the fact that Moore had killed someone prior to the murder for which he was sentenced to death was sufficient to establish the existence of an aggravating circumstance found in § 29-2523(1)(a) and that the sentencing panel properly considered this earlier murder in accordance with our prior interpretation in both *State v. Rust,* 197 Neb. 528, 250 N.W.2d 867 (1977), and *State v. Holtan,* 197 Neb. 544, 250 N.W.2d 876 (1977).

Joubert next maintains that the evidence was insufficient to establish beyond a reasonable doubt the existence of aggravating circumstance (1)(b) in either case. Section 29-2523(1)(b) provides: "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." We believe that the record establishes beyond a reasonable doubt that, in addition to whatever other reasons Joubert may have had for murdering, Joubert murdered both Eberle and Walden to conceal his identity as the perpetrator of the crime of

kidnaping. The evidence is overwhelming in that regard.

With regard to the Eberle boy, Joubert admitted that after he had first stabbed Eberle in the back, Eberle asked that he be taken to a hospital and that if Joubert would take him to the hospital, he, Eberle, would not say anything. Joubert said, "I didn't believe him so I stabbed him again a couple of times." Obviously, he did not believe that Eberle would not disclose Joubert's identity; therefore, it is clear that, despite any other reasons which may have been involved, one of the reasons for committing the murder was to conceal his identity as the perpetrator of the crimes of kidnaping and assault.

To the same effect, when speaking of the Walden murder, Joubert stated:

> As I started up the car and I started driving off he started crying. I was driving down Margo and I was thinking about letting him go. . . . He was on the floor in the front passenger seat. I just figured that if I did let him go he would probably tell someone and then what would happen to me.

Again, this is clear evidence that Joubert concluded that he could not let Walden go for fear that he would be identified, and, therefore, the murder was to conceal his identity as a murderer and kidnaper. It is clear that the panel was correct when it found that aggravating circumstance (1)(b) existed in both murders.

Next, Joubert maintains that the sentencing panel erred in finding that both components of § 29-2523(1)(d) applied, in that these murders were neither "especially heinous, atrocious, cruel" nor "manifested exceptional depravity by ordinary standards of morality and intelligence." In support of his position Joubert argues that this case is identical to *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), wherein this court held that the murder was not "especially heinous, atrocious, cruel." To argue that the murders in the present case were identical to the murder in *Hunt* is to ignore the facts. The facts in the present case are clearly otherwise.

The sentencing panel in this case found with regard to § 29-2523(1)(d):

> The murder was especially heinous, atrocious, cruel, or

manifested exceptional depravity by ordinary standards of morality and intelligence. (Section 29-2523(l)(d)).

This aggravating circumstance describes in the disjunctive two separate situations which may operate in conjunction with, or be independent of, one another. The first is where the murder is especially heinous, atrocious, or cruel. In short, the first situation must be looked upon through the eyes of the victim and should be applied to cases where torture, sadism, or the imposition of extreme suffering exists. State v. Stewart, 197 Neb. 497, 250 N.W. 2d 849; State v. Rust, 197 Neb. 528, 250 N.W. 2d 867; and State v. Moore, 210 Neb. 457, 316 N.W. 2d 33.

Upon his abduction, Danny Joe Eberle's hands and feet were tightly bound, surgical tape was placed over his mouth and he was put in the trunk of defendant's automobile. He was then transported to the actual scene of the homicide several miles away and removed from the trunk of the automobile to face his abductor. His hands and feet were untied, and then retied in sequence in order for him to follow the defendant's instructions on removing his outer clothes. It was during this period of time that the surgical tape covering the victim's mouth had worked loose, and he asked the defendant if he was going to die. When the defendant replied, "Yes", Danny attempted to roll away, the only means left to resist or escape. Defendant then inflicted the first stab wound. The victim then asked the defendant to take him to a hospital, and he (Danny) would not tell anyone. Defendant did not believe this statement, and proceeded with his murderous plan.

Danny Joe Eberle's death resulted from loss of blood caused by one or more of nine antemortem stab wounds. Two additional wounds, one a deep wound to the left thigh, and one a deep wound to the left shoulder, were inflicted postmortem by the defendant. Dr. Roffman expressed an opinion that Danny Joe's death could have been directly caused by either the stab wounds in the left chest portion, or the slicing type wound to his neck. He further testified that death was not instantaneous, but the

victim would have been aware and lived at least three to four minutes. Dr. Roffman was of the further opinion these wounds caused undue pain and suffering to Danny Joe Eberle.

Christopher Walden was abducted as he walked to school on the morning of December 2nd. He was forced into defendant's car, and told to lie on the floorboard. He began to cry, and defendant thought of releasing him. Defendant realized if he released Christopher it would cause him, the defendant, trouble. He then determined to carry out his plan as quickly as possible and immediately drove several miles to the area where Christopher's body was found three days later. Upon arriving, defendant made Christopher walk to the murder site, and disrobe to his undershorts.

He then had the boy lie down and he began to manually strangle him. When he was unable to complete his gruesome task in this manner, he drew his knife and commenced a most horrid final assault.

Christopher Walden died from loss of blood caused by one or more of seven stab wounds and a large cutting wound on his neck. There were six or seven additional cutting wounds inflicted upon Christopher Walden's body postmortem, across the chest and stomach. Of the seven stab wounds inflicted antemortem, Dr. Jones, the pathologist conducting the autopsy, pointed out that five of these did not penetrate deeply, yet the body tissue was not thick at those areas. Dr. Jones' opinion was that Christopher's death was not instantaneous, but that because of these five shallow stab wounds, he could well have been tortured. Dr. Kentsmith testified in his opinion both of these young boys would have been quite humiliated by undressing in front of the defendant at his direction, and further testified upon their abduction they would have felt an intense sense of terror, overwhelming fear, helplessness, anxiety, and a sense of impending doom that they would not survive. He testified this would be an overwhelming and very painful psychological event in a person's life.

> With respect to the second clause of this aggravating circumstance, the crime must be viewed to determine the defendant's state of mind as manifested by his conduct. The manifestation of "exceptional" depravity by ordinary standards of morality and intelligence indicates a state of mind "totally and senselessly bereft of any regard for human life". State v. Holtan, 197 Neb. 544, 250 N.W. 2d 876; State v. Peery, 199 Neb. 656, 261 N.W. 2d 95; State v. Otey, 205 Neb. 90, 287 N.W. 2d [36]; State v. Harper, 208 Neb. 568, 304 N.W. 2d 663; and State v. Moore, 210 Neb. 457, 316 N.W. 2d 33.
>
> The defendant herein planned these abductions and murders far in advance, with the only missing element the actual identity of the victims. The murders were to be repetitive, presumably continuing as long as the defendant felt a need to satisfy his intellectual or sexual curiosity or urges, and the victims selected by the defendant would, by his fantasized standards, be somewhat defenseless and consist of prepubescent boys or women fitting the pictorial description gleaned from detective magazine covers. . . . In short, the evidence is overwhelming that each of these murders were [sic] "totally and senselessly bereft of any regard for human life".
>
> We recognize that all murders may be characterized as atrocious and cruel, and further recognize there must, of necessity, be some interval of time between even the most savage of knife attacks and a resulting death. We, nevertheless, conclude this aggravating circumstance is applicable with respect to both clauses, recognizing the evidence and factors on the second clause of the aggravating circumstance far outweigh those under the first clause.
>
> We conclude and find beyond a reasonable doubt this aggravating circumstance exists in both crimes for which the defendant is to be sentenced.

We agree with each of the factual findings made by the three-judge panel as set out above. We also agree with the conclusions of law as to the construction of § 29-2523(1)(d).

As we stated in *State v. Palmer, ante* p. 282, 314, 399

N.W.2d 706, 728 (1986):

> We note that the word *or* separates "especially heinous, atrocious, cruel" from "manifested exceptional depravity by ordinary standards of morality and intelligence." Thus, aggravating circumstance (1)(d) of § 29-2523 describes in the disjunctive at least two distinct components of an aggravating circumstance which may relate to a murder and which "may operate in conjunction with or independent of one another." *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (1982). See, also, *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984). The presence of any of the components will sustain a finding that aggravating circumstance (1)(d) exists. See *State v. Correll*, 148 Ariz. 468, 715 P.2d 721 (1986). See, also, *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983), *cert. denied* 461 U.S. 971, 103 S. Ct. 2444, 77 L. Ed. 2d 1327 (regarding "heinous, cruel, or depraved," such statutory expression is in the disjunctive, " 'so either all or one could constitute an aggravating circumstance' ").

The evidence establishes beyond a reasonable doubt that each of the murders in this case was a "conscienceless or pitiless crime which [was] unnecessarily torturous to the victim" and, thus, that each of the murders was "especially heinous, atrocious, cruel" as required by § 29-2523(1)(d). *State v. Palmer, supra* at 315, 399 N.W.2d at 729.

The evidence further establishes beyond a reasonable doubt that each of the murders in this case "manifested exceptional depravity by ordinary standards of morality and intelligence."

As stated in *State v. Palmer, supra* at 320, 399 N.W.2d at 731-32:

> "[E]xceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim. . . . Consequently, where one or more of those five factors are present, there may be a finding of

"exceptional depravity" concerning a first degree murder.

In this case the evidence establishes beyond a reasonable doubt that the defendant committed each murder with relish, inflicted gratuitous violence on the victim beyond that necessary to inflict death, the crimes were utterly senseless, and the victims were completely helpless.

Additionally, the murders were coldly planned as part of a repetitive program of self-gratification, involving immature victims selected on the basis of their availability at a time when the likelihood of detection was slight. See *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982).

Defendant's urge for self-gratification was described by the psychiatrists as his need to satisfy his intellectual or sexual curiosity. In an interview with Dr. Kentsmith, Joubert stated that he wanted to know "what it was like to see someone die."

The intellectual approach defendant took to the two murders involved is typified by several facts. Joubert told each of the psychiatrists in the case that, as he expressed the facts to Dr. Kentsmith, he frequently "had set my alarm clock to get up in the morning and to go out and do it [commit a murder]." Joubert told Dr. Kentsmith that 9 out of 10 times, after his alarm clock went off, Joubert would turn the alarm off and go back to sleep. He indicated that on some occasions he would get up and go looking for possible victims.

Dr. Kentsmith concluded that the psychological testing of Joubert shows a personality type which operated in an "amoral style" with an "inability to postpone gratification." Dr. Kentsmith concluded that Joubert killed for "intellectual curiosity," not for "sexual pleasure."

The circumstances in this case demonstrate beyond a reasonable doubt that the murders "manifested exceptional depravity by ordinary standards of morality and intelligence." *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986).

The remaining assigned errors may be considered together. They are, in effect, that the mitigating circumstances outweigh the aggravating circumstances.

The record establishes no mitigating circumstances in either murder other than those found by the sentencing panel. However, we examine in some further detail the finding by the

panel that mitigating circumstance (2)(c) existed as to each murder.

As set out above, § 29-2523(2)(c) defines as a mitigating circumstance the fact that "[T]he crime was committed while the offender was under the influence of extreme mental or emotional disturbance." While we agree that subsection (2)(c) may be considered as established for purposes of sentencing, the weight to be given it is sharply diminished by the testimony of Dr. Kentsmith. Dr. Kentsmith testified that Joubert was not acting under such an influence that he could not have changed his behavior at the last moment before he actually killed the two boys.

Dr. Kentsmith testified that if Joubert had such an uncontrollable impulse, his actions "would be something that he would not plan out, that it would be something that under the influence of such strong emotion that it would occur at such a random, bizarre fashion that he would do it without any planning, without any premeditation, without any thought; just do it."

At another point Dr. Kentsmith testified:

> Well, an irresistible impulse is something that has to do with a person who is acting at the moment and behaving in such a way that even if a policeman was standing beside him, that he would go ahead and do what he's intending to do. I have not been able to see anything in the examination or any of the reports that have been given to me to indicate that he wasn't able to carefully plan and orchestrate what he was doing to some degree. That doesn't mean that he couldn't do it, that he still didn't want to do it then, but the point was that he was able to control that.

We find Dr. Kentsmith's analysis to be convincing. We therefore determine that while some weight should be given to (2)(c), that weight must be considered in the light of Dr. Kentsmith's finding that Joubert could control the mental stress he had.

The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors. As we observed in *State v.*

Stewart, 197 Neb. 497, 518, 250 N.W.2d 849, 862 (1977), quoting from *State v. Dixon*, 283 So. 2d 1 (Fla. 1973):

> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all."

From our examination of the aggravating circumstances and the mitigating circumstances, we conclude that the aggravating circumstances which were proven to exist so far outweighed the mitigating circumstances that the imposition of the death penalty was appropriate and not arbitrary. Sufficient aggravating circumstances existed to justify the imposition of sentences of death, and the mitigating circumstances did not approach or exceed the aggravating circumstances.

The assignments of error raised by Joubert in regard to the sentences by the sentencing panel are, therefore, overruled.

That leaves us with but one final act to perform, the proportionality review required by the provisions of Neb. Rev. Stat. § 29-2521.03 (Reissue 1985). This statute requires the Supreme Court to determine the propriety of the death sentence in a case in which it has been imposed by comparing the sentence with previous cases involving the same or similar circumstances.

We have determined that the purpose of that statute is to

ensure that no sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances and that the review should include only those cases in which the death penalty was imposed. *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986).

We have compared the facts and circumstances of this case with those of all the applicable cases in which the death penalty was imposed, as required by *State v. Palmer*. We find that the sentences imposed in this case are no greater than nor disproportionate to the sentences imposed in any other case with the same or similar circumstances.

The judgments are affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in the result.

I concur in the result reached by the majority in this case. I believe, beyond question, that the facts of this case satisfy the requirements of Nebraska law and justify the sentencing panel's sentence of death. I am not, however, able to adopt in its entirety all of the language of the majority, and for that reason I concur separately.

As observed by the majority, Joubert maintains that the sentencing panel erred in finding that Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1985) applied, in that these murders were not "especially heinous, atrocious, cruel, and [sic] manifested exceptional depravity by ordinary standards of morality and intelligence." In support of his position Joubert argues that this case is identical to *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985), wherein this court held that the murder was not especially heinous and that, therefore, the death penalty could not be imposed.

Joubert, like so many, misread our holding in *State v. Hunt, supra*, and fails to understand the distinction to be made between this case and *Hunt*. The language of the specific aggravating circumstance § 29-2523(1)(d) reads as follows: "The *murder* was *especially* heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." (Emphasis supplied.) Why the Legislature chose to add the word "especially" to modify "heinous" is not clear. However, a number of other

jurisdictions, including Alabama, Arizona, Florida, Louisiana, Mississippi, North Carolina, and Wyoming, have used virtually identical language in their death penalty statutes, and states such as Georgia have used similar language. The critical words, as noted by the U.S. Supreme Court and several state courts, as well as by this court, are "murder" and "especially." As we noted in *State v. Hunt, supra* at 725, 371 N.W.2d at 721: "In order for aggravating circumstance (1)(d) to be present, the method of killing must entail something more than the ordinary circumstances which attend any death-dealing violence." As limited by the Legislature, the *murder* must not only be *heinous*, which means horrible, but it must be "especially" heinous, which means horribly horrible. There is no requirement in the Constitution which requires this exact standard. Nevertheless, the Legislature has imposed such a standard upon the courts, and we are duty-bound to follow the limitation. The Legislature alone prescribes the conditions under which the death penalty may be imposed.

State v. Hunt, supra, was certainly not the first or only case to use this definition of "especially heinous," and it, in fact, reflects the nearly unanimous position taken by courts which have considered the question. Its holding is consistent with our earlier holding in *State v. Reeves*, 216 Neb. 206, 227, 344 N.W.2d 433, 447 (1984), wherein we held that aggravating circumstance (1)(d) was not present where a murder was achieved "swiftly and suddenly." Nor was it present in *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), under similar, but even more gruesome, circumstances.

This view, moreover, is consistent with national precedent. In the case of *Godfrey v. Georgia*, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), the U.S. Supreme Court reviewed the Georgia statute which required that before the penalty of death may be imposed the sentencing panel must find that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 17-10-30(b)(7) (1982).

The facts of *Godfrey, supra* at 425, as disclosed by the opinion, were that the defendant

> got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.

The jury imposed sentences of death and found beyond a reasonable doubt that " 'the offense of murder was outrageously or wantonly vile, horrible and inhuman,' " as required by statute. *Id.* at 426. In reversing the death penalty the U.S. Supreme Court said at 428-29:

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." *Gregg v. Georgia, supra*, at 196, n. 47. . . .
>
> . . . A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman."

In then concluding, however, that this ordinary sensibility was not sufficient to establish the aggravating circumstance required by the Georgia statute, the U.S. Supreme Court said at 446 U.S. at 433:

> The petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. His victims were killed instantaneously. They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. These factors certainly did not remove the criminality from the petitioner's acts. But, as was said in *Gardner v. Florida*, 430 U. S. 349, 358, it "is

> of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

Similarly, a number of state courts have passed upon the meaning of this aggravating circumstance. Their examination provides great assistance in applying it in the instant case. In *State v. Goodman*, 298 N.C. 1, 24-25, 257 S.E.2d 569, 585 (1979), the North Carolina court said:

> G.S. 15A-2000(e)(9) states that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the "capital felony was especially heinous, atrocious, or cruel." While we recognize that every murder is, at least arguably, heinous, atrocious, and cruel, we do not believe that this subsection is intended to apply to every homicide. By using the word "especially" the legislature indicated that there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection. *State v. Stewart, supra; State v. Rust, supra; State v. Simants*, 197 Neb. 549, 250 N.W. 2d 881, *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed. 2d 158 (1977).
>
> The Florida provision concerning this aggravating factor is identical to ours. Florida's Supreme Court has said that this provision is directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950 [sic], 40 L.Ed. 2d 295 (1974); *see also, State v. Alford*, 307 So. 2d 433 (Fla. 1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed. 2d 1221 (1976). Nebraska has also adopted the Florida construction of this subsection. Both Florida and Nebraska have limited the application of this subsection to acts done to the victim during the commission of the capital felony itself. *State v. Rust, supra; Riley v. State,* 366 So. 2d 19 (Fla. 1979). We too believe that this is an appropriate construction of the language of this provision. Under this construction, subsection (e)(9) will

not become a "catch all" provision which can always be employed in cases where there is no evidence of other aggravating circumstances.

And in *State v. Monroe*, 397 So. 2d 1258, 1274-75 (La. 1981), the Louisiana Supreme Court said:

> Although the jury found the instant offense to have been committed in an "especially heinous, atrocious or cruel manner," this finding cannot stand. It is true that the murder was brutal—the victim lost over two quarts of blood, her lungs were punctured and one of her ribs was severed. Her death was not instantaneous, and she lived long enough to call out for her daughter and reach for the telephone.
>
> Nonetheless, in order for a murder to be "especially heinous," there must exist *evidence* that there was "torture or the pitiless infliction of unnecessary pain on the victim." *State v. English*, 367 So.2d 815, 823 (La.1979). *State v. Clark*, 387 So.2d 1124 (La.1980), provides an example of what is meant by "especially heinous." In that case the defendant stabbed the victim thirty-five times before shooting him with a gun. In the instant case, the "wounds were inflicted to kill, not to maim or to inflict pain." *State v. Culberth*, supra, at 851. While there is some evidence in this case that the offense was heinous and cruel, it was not proved beyond a reasonable doubt that the instant offense was *especially* heinous.

(Emphasis supplied.)

In *Hopkinson v. State*, 632 P.2d 79 (Wyo. 1981), the defendant, tried under a statute identical to the Nebraska statute, argued that a jury could find any murder to be especially heinous, atrocious, or cruel and therefore could conclude that this aggravating circumstance is present in all cases. He contended that it, therefore, gave the jury a free rein to decide to sentence a person to death in every case and, thus, in effect, abolished the requirements previously established by the U.S. Supreme Court for imposing the death penalty. In rejecting that argument the Wyoming court said at 153-54:

> We disagree with appellant's conclusion. The statute

> does *not* fail to properly channel the jury's sentencing decision and does *not* grant it unfettered discretion to impose the death penalty for arbitrary and capricious reasons. First, the statute requires the jury to find the murder to have been "especially heinous, atrocious or cruel." Webster's Third New International Dictionary defines heinous as "hatefully or shockingly evil." Thus the term "especially heinous" is more than just hatefully or shockingly evil. The murder, to be so classified, must demonstrate that the consciencelessness of the defendant is not only an outrage but also a dangerous and unrestrainable threat to society. Only when this is found can the murder properly be categorized as especially heinous. Since very few murders can be regarded in this manner, the term is *not* impermissible and vague.

The view of the Wyoming court is in accord with that of the U.S. Supreme Court. In *Proffitt v. Florida*, 428 U.S. 242, 255, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), *reh'g denied* 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158, Justices Stewart, Powell, and Stevens, in the Court's plurality opinion, said:

> In particular, the petitioner attacks the eighth and third statutory aggravating circumstances, which authorize the death penalty to be imposed if the crime is "especially heinous, atrocious, or cruel," or if "[t]he defendant knowingly created a great risk of death to many persons." §§ 921.141(5)(h), (c) (Supp. 1976-1977). These provisions must be considered as they have been construed by the Supreme Court of Florida.
>
> That court has recognized that while it is arguable "that all killings are atrocious . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Tedder v. State*, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

The necessary distinction to be made between what is simply heinous and what is especially heinous is pointed out by the

Alabama court in *Berard v. State*, 402 So. 2d 1044 (Ala. Crim. App. 1981), in which the trial court found that the homicides were "brutal" and therefore ordered the imposition of the death penalty. In discussing that matter the Alabama court said at 1050: "That the homicides were 'brutal' fails to conform to § 13-11-6(8) which requires a finding that the crime was '*especially* heinous, atrocious or cruel.' (Emphasis supplied.) The crime was in fact brutal, but the statute requires more."

Later, in the case of *McCray v. State*, 416 So. 2d 804 (Fla. 1982), the Florida Supreme Court again reviewed its statute, nearly identical to Nebraska's, and reversed a sentence of death because it found that the crime was not especially heinous, atrocious, or cruel, as previously defined by the Florida court. The facts of *McCray* indicated that a murder in which the victim died from three bullets to the stomach did not meet the statutory definition.

Similarly, in *Clark v. State*, 443 So. 2d 973, 977 (Fla. 1983), the Florida court again said:

> Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous, atrocious, or cruel. *Kampff v. State*, 371 So.2d 1007 (Fla.1979). Although Mr. Satey testified that he heard his wife moan after being shot, there was no evidence of whether she was conscious after being shot, not [sic] did the medical examiner indicate how long Mrs. Satey survived or what degree of pain, if any, she suffered. Although the helpless anticipation of impending death may serve as the basis for this aggravating factor, there is no evidence to prove that Mrs. Satey knew for more than an instant before she was shot what was about to happen to her. Similarly, as pitiable as were Mr. Satey's vain efforts to dissuade his attackers from harming his wife, it is the effect upon the victim herself that must be considered in determining the existence of this aggravating factor.

The following year, Mississippi, in the case of *Billiot v. State*, 454 So. 2d 445 (Miss. 1984), considered the "especially heinous, atrocious or cruel" provision of its statute, saying at 464:

> [W]hat is intended by the words "especially heinous, atrocious or cruel", "are those capital crimes where the

> actual commission of the felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies—*the consciencelessness* [sic] *or pitiless crime which is unnecessarily tortuous* [sic] *to the victim*."

During that same year Florida, in *Gorham v. State*, 454 So. 2d 556 (Fla. 1984), held that where one shot penetrated the victim's heart, causing death within 10 seconds, and where the evidence disproved any possibility of prolonged and torturous captivity and there was no evidence whatsoever that the victim apprehended certain death more than moments before he died, the aggravating circumstance in support of the death penalty that the murder was especially heinous, atrocious, and cruel, being based as it was upon the victim's having been thereafter shot twice in the back, could not be sustained.

In so holding, the Florida court said in *Gorham, supra* at 559: "While the murder was, of course, a cruel and unjustifiable deed, there is nothing about it to 'set the crime apart from the norm of capital felonies.' " The evidence indicated that the victim was already dead when the next two shots were fired. The Florida court's position was not based upon its notion that the murder was not terrible or even heinous but that, in order for the statute to be constitutional and not permit the imposition of the death penalty in every case, the aggravating circumstance "especially heinous" must be interpreted to be limited to those few cases in which the murder was committed in such a manner as to cause torture to the victim before death in a conscienceless and pitiless way. This distinction is made not because the courts are without sensitivity but, rather, because the death penalty may not be imposed unless clear, rigid standards are first met. See, *Thompson v. State*, 456 So. 2d 444 (Fla. 1984); *Rembert v. State*, 445 So. 2d 337 (Fla. 1984); *State v. Wilson*, 467 So. 2d 503 (La. 1985).

One may question why Supreme Courts are, in a sense, required to serve as "legal pathologists" who must, in a ghoulish fashion, dissect murders in order to separate the "especially heinous" from the merely "heinous," with nothing more than a word gauge which measures when a murder ceases being merely horrible and brutal and becomes "conscienceless,

pitiless, and unnecessarily torturous to the victim." That question must, however, more appropriately be directed to the legislatures which established the standards and not to the courts upon which the duty is imposed.

The lesson of all these cases is simply that before a court can find that the murder was "especially heinous," evidence must be adduced by the prosecution that more than a murder occurred. For a murder to satisfy the aggravating circumstance created by § 29-2523(1)(d), the evidence which is relevant for purposes of determining whether the murder was "especially heinous" must establish beyond a reasonable doubt that the victim, while alive, was tortured. What occurs to the body after death may often be even more reprehensible. Yet it does not, under the law, fall within the standards established by our Legislature for determining the presence of an "especially heinous" murder.

The evidence in this case is overwhelming that both young men were horribly tortured while still alive. Their murders were clearly conscienceless and pitiless, and Joubert is most deserving of a penalty of death within the meaning of the law.

Because of reasons more detailed by me in my concurrence and dissent in *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986), I need not here discuss my view of the phrase "exceptional depravity" as used in § 29-2523(1)(d). Unlike the majority, I do not believe that there are two separate prongs, but simply one, and that in the instant case this murder was especially heinous, atrocious, and cruel. That it "manifested exceptional depravity" is merely a further factor in establishing that it was especially heinous, atrocious, and cruel. My point of disagreement with the majority is not the result reached by the majority, but the path taken in arriving at that conclusion.

Further, for reasons more fully set out in my concurrence and dissent in *State v. Palmer, supra*, I do not agree with the majority that only cases in which the death penalty has been imposed are to be used when conducting the proportionality review required by Neb. Rev. Stat. §§ 29-2521.01 to 29-2521.03 (Reissue 1985). I do, however, believe that the facts and circumstances in this case are so unique that there are no other cases with which a comparison can be made and that regardless

of which cases are used to conduct the review, one ultimately reaches the conclusion that the penalty of death in this case was properly imposed under the standards established by the Nebraska Legislature.

STATE OF NEBRASKA, APPELLEE, V. ROBIN K. BURCHETT, APPELLANT.

399 N.W.2d 258

Filed December 29, 1986. No. 85-137.

1. **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.
2. **Convictions: Proof.** A criminal conviction may be based upon the uncorroborated statements of an accomplice.
3. **Juror Qualifications: Death Penalty: Constitutional Law.** Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) held constitutional.
4. _____: _____: _____. Prospective jurors who are unable to fairly determine guilt because of their opposition to capital punishment are not a cognizable group.
5. **Juror Qualifications: Homicide: Death Penalty.** In a prosecution for first degree murder, the State may use peremptory challenges to remove jurors who are opposed to the death penalty.
6. **Criminal Law: Marriage: Witnesses: Evidence: Rules of Evidence.** In a prosecution for a crime of violence, the defendant's spouse may be called to testify against the defendant as to any matter, including confidential communications. Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1985).
7. **Criminal Law: Evidence: Witnesses: Plea Bargains.** An accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain.
8. _____: _____: _____: _____. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility.
9. _____: _____: _____: _____. Generally, it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion.
10. **Trial: Evidence: Witnesses: Appeal and Error.** Determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.

11. **Criminal Law: Homicide: Indictments and Informations.** Prosecutions for felonies, including murder, may be had on informations filed by the county attorney.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Roger C. Lott, for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

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

PER CURIAM.

The defendant was charged with first degree murder in the death of Juana Lea Rolenc. He was found guilty by the jury and sentenced to life imprisonment.

Upon appeal he has made seven assignments of error, including the contention that the evidence was insufficient to support the verdict.

In reviewing the sufficiency of the evidence to sustain a conviction in a jury trial,

> this court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is within a jury's province for disposition. 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. Fleming, 223 Neb. 169, 176, 388 N.W.2d 497, 502-03 (1986) (quoting *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986)).

Juana Rolenc's body was discovered in a creek north of Lincoln, Nebraska, on May 11, 1983. Several large pieces of concrete had been tied to her body. The cause of death was either a spinal injury or strangulation.

The victim was married to Clement Rolenc in 1967. The marriage was dissolved in 1981, and at the time of her death, Juana was attempting to have the original decree of dissolution, which provided her with no alimony or support, set aside.

Clement Rolenc was a patron of a bar in Gresham, Nebraska, owned by defendant Burchett. On several occasions, beginning in October of 1981, Rolenc asked Burchett if he would get rid of a body for $5,000. Burchett testified that he had not taken Rolenc seriously, although on occasion he was paid not to discuss the proposal with anyone else.

Regular contact between the two men ended in March of 1982 when Burchett closed the Gresham bar.

On May 8, 1983, Rolenc contacted Burchett at his home in Grand Island, Nebraska. During the course of the conversation, Burchett advised Rolenc that he planned to go to Lincoln on May 11, 1983. Rolenc asked Burchett to call him because he might have some farmwork for the defendant to do. Burchett did call Rolenc, and a meeting at a truckstop in Lincoln was arranged. Burchett testified that Rolenc wanted him to load rabbit hutches in Lincoln.

On May 10, 1983, Burchett asked Wayne Haselhuhn to go to Lincoln with him. Haselhuhn testified that Burchett offered him $200 for doing so, without disclosing the details of what he had to do to earn the money. The two men left for Lincoln in Burchett's car sometime after 8 the next morning. Burchett, as well as Tammie Davis, Haselhuhn's roommate, testified that the purpose of the trip was to buy drugs.

Upon arriving in Lincoln, Burchett and Haselhuhn met the Rolencs at a local truckstop. Haselhuhn, at some point, got in the Rolenc car and seated himself behind Juana, who was in the front passenger seat. Haselhuhn then strangled the victim as Rolenc drove down a country road.

Haselhuhn and Rolenc then relocated Burchett. Haselhuhn and Burchett proceeded to dispose of the body. All three men were eventually arrested and charged.

A thorough review of the record shows uncontradicted evidence that Clement Rolenc asked the defendant on several occasions if he would be interested in disposing of a body, presumably the victim's, for $5,000. The defendant admitted this was a topic of conversation between himself and Rolenc on May 8, 1983, 3 days before the murder. Burchett also admitted to asking Edwin Tierney if he would like to earn $200 by riding with him to Colorado to deliver a gunnysack. This conversation

occurred shortly before the murder. He also admitted that he had arranged to meet Rolenc at a Lincoln truckstop on May 11, 1983. At Burchett's suggestion, Wayne Haselhuhn accompanied the defendant to Lincoln on that date. When the pair arrived in Lincoln, they met Rolenc at the truckstop. At some point, Haselhuhn, who had never met Clement Rolenc before, climbed into the backseat of the Rolenc vehicle and strangled the victim.

The defendant admits that he helped dispose of the body, but claims that he did so because he was threatened by the other two men.

According to Haselhuhn, he was unaware of how he was to earn the $200 promised by Burchett, until Burchett and he had gone from the truckstop to a location southwest of Lincoln. At that point, Haselhuhn testified, the defendant told him to take the defendant's belt, sit in the Rolenc car behind the victim, and choke her. Haselhuhn testified that he complied with this directive.

Burchett, in his testimony, indicated that his only purpose in meeting Rolenc in Lincoln was to assist Rolenc in loading rabbit hutches; that the overall purpose of the trip was to purchase marijuana. When he arrived in Lincoln, Burchett testified, he did not feel like moving the hutches because he was high from smoking marijuana. Haselhuhn allegedly expressed interest in taking Burchett's place. According to Burchett, Haselhuhn agreed, at the truckstop, to help Rolenc move the hutches. It was agreed that Burchett would meet the other two men in an hour at Yankee Hill brick company. Burchett then left Haselhuhn with the Rolencs and proceeded to his in-laws' (the Tierneys') home. Terry Tierney, the defendant's brother-in-law, corroborated Burchett's testimony that he visited the Tierney residence alone.

When he later met with Rolenc and Haselhuhn near Yankee Hill brick company, Burchett testified that Rolenc was armed and ordered him to open the trunk of his (Burchett's) car. After the victim was transferred to Burchett's trunk, Rolenc ordered the other two men to take her to the Missouri River. Burchett testified that he complied with the order to dispose of the body because he was afraid of the other two men. When Haselhuhn

got in the car, he had two envelopes full of money, one of which he threw on the dashboard and which, according to Burchett, was for taking the victim to the river.

En route to the creek where the victim's body was left, the defendant made two stops where he had the opportunity to flee. The first was at a gas station in Lincoln. As the defendant filled his vehicle with gasoline, Haselhuhn used the restroom. Burchett testified he was too frightened to flee. The second stop was at a store because, according to Burchett, Haselhuhn wanted to get rope to tie rocks to the victim's body. Burchett went in to purchase the rope as Haselhuhn waited in the car. Again, Burchett testified that he took no action to escape as he was "scared" and thought he was just as involved as the others at this point.

Basically, the defendant's assignment is an attack on the credibility of Haselhuhn's testimony. It is true that Haselhuhn's testimony was contradicted in several respects by the independent testimony of other witnesses. The most significant of these is Haselhuhn's testimony that he and Burchett stopped at a Lincoln home after they had disposed of the body. The description of the house did not match that of the Tierney residence, nor did Haselhuhn's testimony coincide with Terry Tierney's testimony that Burchett was at the Tierney residence alone.

The defendant claims that Haselhuhn's credibility is eroded by the fact that he made several false statements, after which he was pushed by law enforcement authorities, until he reached his final statement. There was also evidence that Haselhuhn was a convicted felon with severe alcohol and drug problems. In fact, the evidence showed that Haselhuhn used large amounts of alcohol and drugs on both the evening of May 10 and the early morning and daytime hours of May 11, 1983.

A criminal conviction may be based upon the uncorroborated statements of an accomplice. *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985); *State v. Huffman*, 214 Neb. 429, 334 N.W.2d 3 (1983).

Haselhuhn's testimony was corroborated in many respects. Much of the defendant's own testimony corroborates Haselhuhn's statement of the basic facts. His testimony is also

supported by that of the State's rebuttal witness, Victor Harrod, who testified that Burchett admitted to hiring Haselhuhn to kill the victim. According to Harrod, this statement occurred while he and Burchett were cellmates in the Lancaster County jail.

The evidence contradicting Haselhuhn's testimony was before the jury, which had the duty to weigh the evidence and determine the credibility of the witnesses. Although Haselhuhn had much to gain by agreeing to testify against his codefendants, his credibility was a matter for the jury.

Taking the view of the evidence most favorable to the State, the evidence was sufficient for the jury to find beyond a reasonable doubt that Wayne Haselhuhn killed the victim after being hired by the defendant to do so.

In pretrial motions Burchett moved (1) to dismiss the information for lack of presentment or indictment of a grand jury, (2) to preclude "death qualification" of the jury, (3) to preclude the use of peremptory challenges to exclude persons opposing the death penalty, (4) to declare Neb. Rev. Stat. § 29-2006(3) (Reissue 1985) unconstitutional, (5) to prohibit the State from compelling his wife, Bonnie, to testify against him, and (6) to preclude Haselhuhn's testimony. All of these motions were overruled.

Three of the defendant's assignments of error relate to "death qualification" of the jury. Initially, Burchett argues that the trial court erred in overruling his amended motion to preclude "death qualification" of the jury.

Prospective jurors in this case were questioned by the court as follows:

> I have a question for you. The charge against the defendant which I previously read from the Information is an accusation of murder known in the law as murder in the first degree. The law provides that if anyone is found guilty beyond a reasonable doubt by a jury, of first degree murder, the judge or panel of judges then must decide what the penalty is going to be. One possible penalty for first degree murder is life imprisonment and another possible penalty is capital punishment, the death penalty. The jury in this case that will decide whether or not the

> defendant is guilty of murder in the first degree will be instructed that if the defendant is convicted, the jury has nothing whatever to do with the punishment and must not consider punishment in arriving at a verdict as to whether the defendant is guilty. Knowing then that the judge, not the jury, must impose the sentence in the event of the conviction of the defendant, do you have any reservations, feelings or convictions about the death penalty which would prevent you from making an impartial decision as to the defendant's guilt?

The essence of the defendant's argument is that death qualification results in a jury which is not representative of a fair cross-section of the community and is conviction-prone. See, U.S. Const. amend. VI; Neb. Const. art. VI, § 1. Burchett relies upon *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd* 758 F.2d 226 (8th Cir. 1985), which has since been reversed in *Lockhart v. McCree,* 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), for the proposition that death penalty opponents are a distinct group, the exclusion of which creates a conviction-prone jury in violation of the defendant's constitutional rights.

The question faced by the Court in *McCree, supra* at 165, was whether the Constitution prohibited "the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial." The death qualification issue in *McCree* differs from that before us because in Nebraska the judge rather than the jury is responsible for sentencing upon conviction in a capital case. See Neb. Rev. Stat. § 29-2520 (Reissue 1985).

Section 29-2006(3) provides that a prospective juror may be challenged for cause where "in indictments for an offense the punishment whereof is capital . . . his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death." While a prospective juror's attitudes about capital punishment are irrelevant to sentencing in Nebraska, they may be relevant to his ability to fairly determine the defendant's guilt or innocence. Prospective jurors who are

excused because they are unable either to fairly determine guilt or to fairly impose a sentence because of their opposition to capital punishment are both subsets of the group of death penalty opponents which the defendant maintains is a cognizable group. The U.S. Supreme Court rejected the cognizable group claim in *McCree, supra*, and we do the same.

In *McCree* the Court had before it much of the social science evidence which is present in the record of this case. In *McCree, supra* at 1764, the Court held that even assuming studies prove that a "death-qualified" jury is more conviction-prone than one not so qualified, "the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." See, also, *State v. Peery*, 223 Neb. 556, 391 N.W.2d 566 (1986); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986). The decision is based on the conclusion that the fair cross-section requirement has never been used to invalidate for-cause or peremptory challenges or to require that petit juries mirror the composition of the community at large. Even assuming the fair cross-section requirement does extend to petit juries, the Court concluded that "groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors . . . are not 'distinctive groups' for fair cross-section purposes." *McCree, supra* at 1765. The prospective jurors excluded in *McCree* were viewed as a nondistinct group because their exclusion did not contravene the purposes of the fair cross-section requirement. Also, death qualification, unlike the wholesale exclusion of a race, sex, or nationality, "is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case . . . ." *McCree, supra* at 1766.

In the present case, as in *McCree*, persons excluded as the result of "death qualification" were excluded because of their inability to serve as impartial jurors and not to defeat the protections of the fair cross-section requirement. As such, we do not view the group as distinct.

Burchett also contends that § 29-2006(3) is unconstitutional to the extent that it permits questioning beyond a juror's admission that his opposition to capital punishment is so strong

as to prevent him from fulfilling his obligations as a juror. He does not cite us to instances in the record where this has occurred, but maintains that such questioning results in a "process effect." The "process effect" is defined by the defendant's expert witness, Dr. Bronson, as the effect that results from "death-qualifying" procedures. The process is said to negatively affect juror attitudes about the defendant. We have previously questioned the validity of the Haney "process effect" studies relied upon by Dr. Bronson in forming his opinion. *State v. Peery, supra.*

Nevertheless, any argument that a "death-qualified" jury is partial or biased, which is the essence of this claim, must fail because "an impartial *jury* consists of nothing more than '*jurors* who will conscientiously apply the law and find the facts.' " *Lockhart v. McCree,* 476 U.S. 162, 178, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). The statute in question serves to ensure that the petit jury is in fact impartial. The statute as such is constitutionally sound. See, also, *State v. Peery, supra; State v. Rust, supra.*

Burchett next contends that the trial court erred in overruling his motion to prevent the use of peremptory challenges by the State to remove all or most of the jurors who oppose the death penalty.

We addressed this issue in *State v. Peery, supra.* There, the defendant claimed that the State had used its peremptory challenges to deprive him of a fair and impartial jury by striking jurors who opposed the death penalty. The record indicated that one juror with some concern about the death penalty was excused on a peremptory challenge by the State, while another with similar attitudes was seated as a juror.

In determining that there was no constitutional violation, we noted that one inference to be drawn from *McCree* "is that the U.S. Supreme Court does not view the U.S. Constitution as doing away with peremptory challenges." *State v. Peery*, 223 Neb. 556, 563-64, 391 N.W.2d 566, 572 (1986). We reasoned further that while it is an equal protection violation for the State to use its peremptory challenges to exclude members of the defendant's race solely on racial grounds under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69

(1986), "[t]hat holding . . . does not prevent the use of peremptory challenges to exclude from a jury a venireperson who holds a point of view inimical to that espoused by the State." *State v. Peery, supra* at 564, 391 N.W.2d at 572.

In the present case four jurors who expressed some opposition or uncertainty in their views as to the death penalty were passed for cause, then stricken by the State through peremptory challenges. Another, who stated that she could act impartially so long as she did not have to pass sentence, was seated as a juror. Under *State v. Peery, supra*, the challenges were constitutional.

The defendant contends the trial court erred in allowing his wife to testify against him. Prior to trial, Burchett filed a motion in limine to preclude the State from adducing evidence against him from his wife, Bonnie Burchett. The motion was sustained on the ground that application of Neb. Rev. Stat. § 27-505 (Reissue 1985), as amended by 1984 Neb. Laws, L.B. 696, to conversations prior to the effective date of the bill would amount to an ex post facto law. The legislative bill amended the statute to eliminate the husband-wife testimonial privilege "in any criminal case where the crime charged is a crime of violence." § 27-505(3)(a); 1984 Neb. Laws, L.B. 696, § 1.

Later, the trial court modified its order to the effect that while Mrs. Burchett could not be compelled to answer questions involving confidential communications, she could be compelled to testify as to other matters.

The trial court restricted Mrs. Burchett's testimony because the defendant had been advised by counsel prior to the passage of L.B. 696 that he could talk freely with his wife. There is no showing that the defendant detrimentally relied upon the advice of counsel that his wife would not be allowed to testify as to *acts* she had observed.

The record shows that Mrs. Burchett did not testify as to any confidential communication. Instead, her testimony included information about her children; past neighbors and addresses; the defendant's and her own employment history; financial matters; the events of Mother's Day 1983 when a man in an automobile stopped at their home; matters she discussed with this man; the length of time her husband spent talking to the

man and the fact that they left together for about 20 minutes; the defendant's activities on May 11, 1983; the fact that her children returned home with the defendant with new bicycles that afternoon; the price of the bicycles; the fact that she received a $100 bill from her husband that afternoon; and her husband's acquaintance with Haselhuhn. The State points out that, for the most part, all of these matters could have been proved by other witnesses.

The gist of Burchett's argument is that prior to the amendment of § 27-505(3), he had a reasonable expectation of privacy not only in confidential communications with his wife but also in family activities which took place in confidential surroundings. Burchett maintains that his wife should not have been called to testify against him at all.

The relevant portions of § 27-505, prior to the 1984 amendment, provided:

> (1) Neither husband nor wife can be examined in any case as to any confidential communication made by one to the other while married, nor shall they after the marriage relation ceases be permitted to reveal in testimony any such communication while the marriage subsisted except as otherwise provided by law. This privilege may be waived only with the consent of both spouses. After the death of one, it may be waived by the survivor.
>
> (2) During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses.
>
> (3) These privileges may not be claimed:
>
> (a) In any criminal case where the crime charged is rape, adultery, bigamy, incest, or any crime committed by one against the person or property of the other or of a child of either or in any criminal prosecution against the husband for wife or child abandonment.

§ 27-505 (Reissue 1979).

In response to Burchett's argument the State cites § 27-505(1) (Reissue 1985) and argues that only confidential communications are protected by the statute. The statutory basis of the defendant's motion in limine and objection was

§ 27-505(2) (Reissue 1979), which, as previously noted, precludes *adverse* spousal testimony in criminal cases, with only a few limited exceptions.

The language of § 27-505(2) prior to the 1984 amendment suggests that if the trial court was correct in ruling that the amended statute would amount to an ex post facto law if applied retrospectively, Mrs. Burchett should not have been allowed to testify at all. *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983) (*Palmer II*).

Neither party on appeal briefed the issue as to whether the amended statute is ex post facto, at least in part, as applied in this case.

Today, in *State v. Palmer, ante* p. 282, 399 N.W.2d 706 (1986) (*Palmer III*), we held that § 27-505 as amended was not ex post facto in application to Palmer, who was convicted of felony murder. Under that decision Mrs. Burchett could have been called to testify as to any matter, including confidential communications. We conclude that there was no error in permitting Mrs. Burchett to testify against the defendant and that the rule stated in *Palmer III* is applicable here.

Burchett also contends that the trial court erred in admitting the testimony of Wayne Haselhuhn. The basis of this argument is that Haselhuhn testified under a plea bargain agreement which required that he testify to his last version of the events leading to Juana Rolenc's death in exchange for the State's promise not to present evidence of aggravating circumstances at his sentencing hearing. Burchett contends that it was an abuse of discretion to allow Haselhuhn to testify, because he was required to testify to the satisfaction of the prosecutor in order to receive the benefit of the plea bargain, i.e., life imprisonment as opposed to a sentence of death.

The general rule announced in other jurisdictions is that "an accomplice's testimony is admissible notwithstanding the fact that the testimony is procured by means of a plea bargain. The promise of leniency or otherwise favorable prosecutorial treatment goes only to the credibility of the accomplice's testimony, not to its admissibility." *State v. Garcia*, 102 Idaho 378, 386, 630 P.2d 665, 673 (1981). See, also, *Kelley v. State*, 460 N.E.2d 137 (Ind. 1984); *State v. DeWitt*, 286 N.W.2d 379 (Iowa

1979); *State v. Leonard*, 74 N.C. App. 443, 328 S.E.2d 593 (1985).

Generally, it is only where the prosecution has bargained for false or specific testimony, or a specific result, that an accomplice's testimony is so tainted as to require its preclusion. *United States v. Librach*, 536 F.2d 1228 (8th Cir. 1976); *State v. Garcia, supra; State v. DeWitt, supra.*

The plea agreement in the present case provided, inter alia, that (1) Haselhuhn would plead guilty to first degree murder as soon as feasible after disposition of the cases against Clement Rolenc and Robin Burchett; (2) Haselhuhn would assist the State in the investigation and prosecution of people involved in the murder, including, but not limited to, Burchett and Rolenc, "by speaking truthfully with a representative of plaintiff and testifying truthfully at any Court hearing . . . regarding Wayne Haselhuhn's knowledge of the circumstances surrounding the death of Juana Rolenc"; and (3) the State, in consideration of Haselhuhn's performance under the agreement, would present no evidence of aggravating circumstances and would recommend life imprisonment at his sentencing.

As we stated in *State v. Irish*, 223 Neb. 578, 391 N.W.2d 137 (1986), determinations as to the qualifications of a person to be a witness or the admissibility of evidence are matters left to the sound discretion of the trial court, whose rulings will not be upset absent an abuse of discretion.

Burchett points to the testimony of Haselhuhn's attorney, Kirk Naylor, Jr., as support for his argument that Haselhuhn's plea agreement forced him to testify to certain events, regardless of the truth. Naylor testified that Haselhuhn had in fact given law enforcement officials several different versions of his involvement in the killing when the matter was first investigated. The final version implicating Burchett was understood by Naylor and the prosecutor to be truthful for purposes of the plea agreement. Naylor testified that there was no discussion regarding what would happen if Haselhuhn failed to testify in conformance with this final statement.

The Lancaster County attorney, Michael Heavican, testified that his office would determine if Haselhuhn's testimony at trial was in fact truthful. To make this determination Haselhuhn's

testimony was to be compared to other evidence, and possibly his previous statements. While he would have been surprised by Haselhuhn's testimony if it absolved Burchett of fault in the killing, Heavican testified that he would look at all the facts to determine if such testimony violated the agreement. According to Naylor, the plea agreement was not conditioned upon a jury verdict against Burchett.

While there was question concerning Haselhuhn's credibility, there is no clear showing that the plea agreement required anything but truthful testimony on his part. As such, Haselhuhn's testimony was not so tainted as to require its preclusion.

Burchett contends that the trial court erred in failing to dismiss the information filed against him because it is unconstitutional to charge a capital offense except by presentment or indictment of a grand jury. 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. *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946); *Hawkins v. State*, 60 Neb. 380, 83 N.W. 198 (1900); *Bolln v. State*, 51 Neb. 581, 71 N.W. 444 (1897), *aff'd* 176 U.S. 83, 20 S. Ct. 287, 44 L. Ed. 382 (1900). 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. *Bolln v. State, supra; Hurtado v. California*, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884); *State v. Lehman*, 203 Neb. 341, 278 N.W.2d 610 (1979); *Jackson v. Olson, supra.*

There being no error, the judgment is affirmed.

AFFIRMED.

MARATHON REALTY CORPORATION, A NEBRASKA CORPORATION, APPELLEE, V. ALVIN E. GAVIN, APPELLANT.

398 N.W.2d 689

Filed January 2, 1987. No. 85-405.

1. **Judgments: Appeal and Error.** Where in a law action a jury has been waived, the findings and judgment of the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.
2. **Brokers: Real Estate: Sales.** In order for a broker employed to secure a purchaser of realty to recover a commission, his or her efforts must be the efficient procuring cause of the sale.
3. _____: _____: _____. The efforts of a broker employed to secure a purchaser of realty have been the efficient procuring cause of the sale when the broker has secured a prospective purchaser who is ready, willing, and able to buy the property on terms and conditions upon which the broker is authorized to secure a purchaser, or on terms acceptable to the seller.
4. _____: _____: _____. Efforts which produce a series of unbroken, continuous events culminating in the sale of realty are the efficient procuring cause of the sale, notwithstanding the fact that such efforts may not be the sole cause of the sale.
5. **Brokers: Real Estate: Options to Buy or Sell: Sales.** A broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty.
6. **Options to Buy or Sell: Real Estate: Contracts: Sales.** Once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty.
7. **Contracts: Options to Buy or Sell: Real Estate: Brokers: Sales.** Neb. Rev. Stat. § 36-107 (Reissue 1984) requires that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent; the contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.
8. **Real Estate: Options to Buy or Sell: Brokers: Sales.** One who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an agreed commission on the ground that another also has an interest in the property.
9. _____: _____: _____: _____. A broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed or by said owner's inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third party who has an interest in the land.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

John E. Rice, for appellant.

Joseph L. Leahy, Jr., of Epstein & Leahy, for appellee.

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

CAPORALE, J.

Following a bench trial, plaintiff-appellee, Marathon Realty Corporation, a Nebraska corporation, recovered a $21,000 judgment against defendant-appellant, Alvin E. Gavin, for a commission arising from the sale of certain realty. Gavin assigns as errors the trial court's findings that (1) Marathon was the efficient procuring cause of the sale, (2) the agreement between Marathon and Gavin had not expired prior to the sale, and (3) Gavin, although only a joint owner of the real estate, is responsible to Marathon for the entire commission. We affirm.

On December 8, 1981, Marathon and Gavin executed a written agreement whereby Marathon undertook to sell, within the ensuing 12 months, certain realty in Sarpy County to a prospective buyer whose identity was known to Marathon but not to Gavin. The agreement recited that Gavin was the owner of the realty; in truth and fact, however, he owned it jointly with his estranged wife. The agreement further provided that if the sale were made, Gavin would pay Marathon a commission of 6 percent of the gross sales price. Within the next 2 or 3 weeks, Marathon and Gavin executed a second written agreement, also dated December 8, 1981, which was identical to the first except that the second agreement identified Albertson's Supermarkets of Boise, Idaho, as the prospective buyer. Gavin's wife signed neither of the aforedescribed agreements.

Marathon had had a contact with Albertson's prior to December 8, 1981, at which Marathon learned of Albertson's possible interest in acquiring the realty in question. After the first agreement was signed, Marathon, through a series of telephone calls, correspondence, and in-person conversations, provided Albertson's with information concerning the realty. Much of that information was acquired from Gavin.

On July 9, 1982, Gavin and his wife signed a document, prepared by Albertson's and transmitted to them through Marathon, which granted Albertson's an option to purchase the realty in question. That document provided that the Gavins

would pay Marathon a 6-percent commission. Albertson's, however, rejected that option and, instead, on October 18, 1982, accepted a different option which it had also prepared and transmitted directly to the Gavins. This second option made no provision for the payment of a commission to Marathon but did provide that "[a]ll brokerage commissions" were to be paid by the Gavins. It appears that Marathon had no contact with Albertson's after presenting the first option to the Gavins.

The option accepted by Albertson's expired, as extended, on October 13, 1983. On that date the Gavins executed a general warranty deed conveying the subject realty to Albertson's. On October 14, 1983, the Gavins received $350,000 from Albertson's, and the deed which had been executed the previous day was filed with the register of deeds. Marathon was not permitted to participate in these transactions, although it had sought to do so. Gavin refused to pay Marathon any commission, and this suit followed.

Having reviewed the facts, we proceed to a consideration of Gavin's assignments of error. In doing so it is to be kept in mind that where in a law action a jury has been waived, the findings and will not be set aside unless they are clearly wrong. *Chlopek v. Schmall, ante* p. 78, 396 N.W.2d 103 (1986); *Kreikemeier v. McIntosh,* 223 Neb. 551, 391 N.W.2d 563 (1986); *Lis v. Moser Well Drilling & Serv.,* 221 Neb. 349, 377 N.W.2d 98 (1985).

Gavin's first assignment of error is based on the rule that in order for a broker employed to secure a purchaser of realty to recover a commission, his or her efforts must be the efficient procuring cause of the sale. *Abboud v. Cir Cal Stables,* 190 Neb. 396, 208 N.W.2d 682 (1973). The efforts of such a broker have been the efficient procuring cause of the sale when the broker has secured a prospective purchaser who is ready, willing, and able to buy the property on terms and conditions upon which the broker is authorized to secure a purchaser, or on terms acceptable to the seller. *Oehlrich v. Gateway Realty of Columbus, Inc.*, 209 Neb. 417, 308 N.W.2d 327 (1981); *Huston Co. v. Mooney,* 190 Neb. 242, 207 N.W.2d 525 (1973); *Wisnieski v. Coufal,* 188 Neb. 200, 195 N.W.2d 750 (1972). Cf.

Armstrong v. Hartford Life Ins. Co., 219 Neb. 128, 361 N.W.2d 511 (1985). Efforts which produce a series of unbroken, continuous events culminating in the sale of realty are the efficient procuring cause of the sale, notwithstanding the fact that such efforts may not be the sole cause of the sale. See *United Farm Agency of Ala. v. Green*, 466 So. 2d 118 (Ala. 1985).

The evidence establishes that Marathon brought the fact of Albertson's interest in the realty to Gavin's attention and performed a number of services which assisted Albertson's in making its decision to buy. Under that circumstance it cannot be said the trial court's finding that Marathon's efforts were the efficient procuring cause of the sale is clearly wrong. Thus, the first assignment of error is without merit.

Gavin's second assignment, that his agreement with Marathon had expired prior to the sale, rests on the facts that Albertson's signed a mere option to purchase realty and that the sale was not completed until a day after that option had expired.

It is true that where the seller does not prevent the exercise of the option, a broker is not entitled to a commission for producing a prospective buyer willing to execute only an option to purchase realty. *DaLee Realty, Inc. v. Kuhl*, 209 Neb. 6, 305 N.W.2d 891 (1981). This is so because an option in and of itself does not create a binding obligation to either sell or purchase the realty. See *Struempler v. Peterson*, 190 Neb. 133, 206 N.W.2d 629 (1973). However, once an option to purchase is exercised, it becomes a contract for the purchase and sale of the realty. *Struempler v. Peterson, supra*. Thus, when Albertson's exercised the second option, a contract came into existence obligating Albertson's to buy and the Gavins to sell the realty. That option was exercised on October 13, 1983; consequently, Marathon's efforts produced a purchaser who was ready, willing, and able to buy the realty on terms acceptable to Gavin within the period his agreement with Marathon was in existence.

Moreover, the deed conveying title to the realty from the Gavins to Albertson's was executed within the period the option

existed. That the purchase price was paid the day after the option expired does not alter the fact that it was the contract created by the option which was fulfilled. Thus, the trial court's finding that the agreement between Marathon and Gavin had not expired prior to the sale is correct, and Gavin's second assignment of error fails.

In connection with his third and last assignment, Gavin urges that in no event should he be held liable for more than one-half of the commission, as he was but a joint owner of the realty.

Nebraska law provides that every contract between the owner and any broker or agent employed to sell land is void unless the contract is in writing and subscribed by both the owner and the broker or agent. The contract must also describe the land to be sold and set forth the compensation to be allowed by the owner in case of sale by the broker or agent. Neb. Rev. Stat. § 36-107 (Reissue 1984). The agreement between Marathon and Gavin complied with these requirements. It is to be noted at the outset that this suit does not concern itself with Gavin's rights, if any, against his wife, only with Marathon's rights against Gavin as a signatory to an agreement which recited that he was the owner of the realty.

The law of this jurisdiction has long been that one who is a joint owner of realty but represents himself or herself to be the sole owner thereof may not avoid full payment of an agreed commission on the ground that another also has an interest in the property. *Koliha v. Jonas*, 98 Neb. 790, 154 N.W. 556 (1915); *Bell v. Stedman*, 88 Neb. 625, 130 N.W. 257 (1911); *Valerius v. Luhring*, 87 Neb. 425, 127 N.W. 112 (1910). See, also, *Sohler v. Christensen*, 151 Neb. 843, 39 N.W.2d 837 (1949). When the broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person who hired the broker has received the service for which he or she has contracted, and the broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed, *Wisnieski v. Coufal*, 188 Neb. 200, 195 N.W.2d 750 (1972), or by said owner's inability to convey good title to real estate because of the failure to obtain a joinder in the conveyance by a third party who has an interest in the land,

Peters v. Dreger, 146 Neb. 670, 21 N.W.2d 436 (1946). There is no legal merit to Gavin's third assignment. The agreement which Gavin signed recited that the broker would recover a commission if the prospective buyer purchased the property. Gavin received the service for which he contracted and must now pay the agreed consideration for that service.

Since the record does not sustain any of Gavin's assignments of error, the judgment of the trial court is affirmed.

AFFIRMED.

DEUTSCHE CREDIT CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. HI-BO FARMS, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

398 N.W.2d 693

Filed January 2, 1987. No. 85-512.

1. **Uniform Commercial Code: Security Interests: Notice: Words and Phrases.** A guarantor, being one "who owes payment or other performance of the obligation secured," is a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and is thus entitled to notice of sale of collateral under the provisions of Neb. U.C.C. § 9-504(3) (Reissue 1980).
2. **Uniform Commercial Code: Security Interests: Notice.** An ambiguity in a notice sent pursuant to the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980) is to be resolved against the drafter of the notice.
3. **Summary Judgment.** Summary judgment is to be granted to the moving party where there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and the moving party is entitled to judgment as a matter of law.
4. _____. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
5. _____. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

W. Eric Wood of Dwyer, Pohren, Wood & Heavey, for appellant.

Kent L. Frobish of Erickson & Sederstrom, P.C., for appellees.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Plaintiff-appellant, Deutsche Credit Corporation, a Delaware corporation, brought a suit for a deficiency judgment against defendants-appellees, Hi-Bo Farms, Inc., a Nebraska corporation, Allen Bors, Janice Bors, Dale E. Hinz, and Carol Hinz. The noncorporate defendants, who guarantied Hi-Bo Farms' debt, each moved for a summary judgment against plaintiff. The trial court sustained the motion, thereby dismissing plaintiff's suit as to each of the guarantors. Plaintiff's four assignments of error converge to present a single issue: whether the trial court correctly determined that plaintiff failed to give each of the guarantors notice, as a consequence of which plaintiff is barred from recovering a deficiency judgment from any one of them. We affirm.

On June 28, 1981, Hi-Bo Farms purchased farm machinery on a retail installment contract from Friend Implement Company for a total deferred purchase price of $130,599.82, which contract included a security interest in favor of Friend Implement. Friend Implement then assigned the security interest to Fiat Credit Corporation. Fiat later filed a restated certificate of incorporation in the State of Delaware to change its name to D.B. Credit Corporation. A second Delaware restated certificate of incorporation changed the name to the present Deutsche Credit Corporation.

Concurrent with the signing of the contract between Hi-Bo Farms and Friend Implement, each of the noncorporate defendants entered into a guaranty with Fiat. One guaranty was signed by Allen Bors, who was a vice president of Hi-Bo Farms, and Janice Bors, who was the treasurer. A second guaranty was signed by Dale Hinz, who was president of Hi-Bo Farms, and

Carol Hinz, who was the secretary. The guaranties made the individuals personally liable for the debts of Hi-Bo Farms.

Hi-Bo Farms defaulted, and plaintiff accelerated the balance due under the terms and conditions of the retail installment contract and security agreement. Hi-Bo Farms then surrendered the equipment to plaintiff. Thereafter, plaintiff mailed a separate notice of private sale to Hi-Bo Farms as well as to each of the guarantors. Each notice reads as follows:

> RE: HI-BO FARMS INC.
>
> You are hereby notified by and on behalf of the undersigned secured party that by virtue of the default under the terms and provisions of a security agreement executed by the captioned Debtor dated 06-28-81, the undersigned secured party, holder of the aforesaid agreement and the indebtedness represented therby [sic] will, on or after 08-18-84 make one or more private sales or other dispositions of our right, title and interest in and to the goods described in said agreement, which goods may be described as follows:
>
> ONE WHITE 9700 COMBINE S/N 97-20218 W/CORNHEAD S/N A90065, AND KWICK CUT HEAD S/N 912118
>
> The net proceeds of sale (less expenses incurred) shall be, in accordance with said agreement, applied to the reduction of total obligation due and owing by Debtor to the undersigned secured party.
>
> Dated this 7TH day of AUGUST, 1984.
>
> Deutsche Credit Corporation

The equipment was sold at private sale on October 3, 1984, for $28,800. This action for deficiency involves the principal balance of $35,154.24 remaining due under the installment sales contract and security agreement after application of the net proceeds of the sale.

Neb. U.C.C. § 9-504(1) (Reissue 1980) provides that after default a secured party may sell the collateral. Section 9-504(3) provides for the disposition of the collateral by public or private sale and, with certain exceptions not relevant to the present

inquiry, requires that reasonable notice of the sale be sent by the secured party to the debtor. A guarantor, being one "who owes payment or other performance of the obligation secured," has been held to be a "debtor" as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980), and thus entitled to notice. *Allis-Chalmers Corp. v. Haumont*, 220 Neb. 509, 371 N.W.2d 97 (1985).

The guarantors contend the trial court correctly determined they were not given notice. In so arguing they place heavy reliance upon this court's recent opinion in *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983).

In *Hughes*, Vernor L. Hughes and his wife, Diana L. Hughes, were corporate officers of Central Auto & Truck Supply, Inc. The bank's loan to Central Auto was evidenced by a promissory note and by a security agreement tying the loan to the security of the assets of Central Auto. The loan, promissory note, and security agreement were executed by Central Auto through Mr. Hughes, its president. On the same date the loan was made, Mr. and Mrs. Hughes both executed and delivered a personal guaranty for the corporate debt. Default subsequently occurred, and Central Auto filed a bankruptcy proceeding. The trustee in bankruptcy abandoned the secured assets of Central Auto, and the bank obtained possession of them. The bank then sent a letter to the Hughes residence, reading as follows:

> Mr. Venor [sic] Hughes, President
> Central Auto & Truck Supply
> 1558 East 5th
> Fremont, NE. 68025
>
> RE: Loan #869930
> Collateral: Financing Statement 5-9-74
>
> Dear Mr. Hughes:
>
> This is to notify you that, in connection with the repossession of the above collateral involved in the abovee [sic] account, you may redeem said collateral and terminate the contract relating thereto by payment of $51,417.90 plus interest and expenses any time prior to the sale of said collateral on the date designated below. It is possible for this sum to increase should further expenses

of any nature be incurred by our bank.

In the event you are not able to fully redeem the collateral or make suitable arrangements for redemption, the collateral will be sold at private sale on or after April 10, 1981 at the present place of storage which is 245 East 5th St., and First National Bank & Trust Company of Fremont.

Local, State and Federal laws permitting, you will be held liable for any deficiency declared owing after disposal of this collateral.

Hughes at 44-45, 332 N.W.2d at 676.

In resolving the case we said:

> The [above] notice in this case makes no reference to the guaranty; indeed, it makes reference only to the "Financing Statement 5-9-74," in fact a security agreement dated May 24, 1974, a document which was signed individually by neither Mr. Hughes nor Mrs. Hughes. In that regard the notice fails to apprise either Mr. or Mrs. Hughes that a personal deficiency judgment might be sought against any one of them in his or her capacity as guarantor of the corporation's debt. Secondly, as between Mr. Hughes and Central Auto, the matter as to whom the notice was sent is ambiguous. The interest of Mr. Hughes in this context conflicts with that of the corporation. It cannot be said that the notice, as addressed, unmistakably advises Mr. Hughes personally that he is the "you" who may be held "liable for any deficiency declared owing after disposal of this collateral." To assume that Mr. Hughes would know that a deficiency could not be obtained against the bankrupt Central Auto is to assume something not supported by the record before us. Although the statement that ambiguous language is to be construed against the drafter of the language is generally applied in the case of insurance policies, *Niemeyer v. Estate of Tichota*, 191 Neb. 484, 215 N.W.2d 885 (1974), the reasoning behind that rule is equally applicable to notices of the nature involved here.

Hughes at 46-47, 332 N.W.2d at 677. We thus determined that the Hugheses had not received notice and that the trial court

was therefore correct in dismissing the bank's petition at the close of the bank's evidence.

The guarantors contend that the notices in the present case are indistinguishable from the notice in *Hughes*. Plaintiff argues that, on the contrary, its notices are different from the notice in *Hughes* in several important respects. First of all, while in *Hughes* there was but a single notice, in the present case each of the guarantors was sent a separate notice. While the notice in *Hughes* was addressed to the president of the corporate debtor, each of the notices to the guarantors in this case was addressed to a guarantor individually, and no reference was made to the guarantor's capacity as an officer of the corporate debtor. While the notice in *Hughes* directed specific attention to "Collateral: Financing Statement 5-9-74," which the guarantor had not signed, the notices in this case directed attention to the entire "HI-BO FARMS INC." transaction. Plaintiff concludes that these distinctions are such that the guarantors had no reasonable basis to conclude that the notices were sent to them in their capacity as corporate officers rather than to them in their own individual capacities.

The guarantors, on the other hand, point to the facts that, as did the notice in *Hughes*, the notices in this case refer only to Hi-Bo Farms as the debtor. Moreover, as the notice in *Hughes* failed to make any reference to the guaranties executed by the Hugheses, so in this case did the notices limit themselves to the "default under the terms and provisions of a security agreement executed by the captioned Debtor . . . ." Thus, the guarantors argue that the notices are, at best, ambiguous and, as such, constitute no notice at all insofar as they individually are concerned.

We conclude that the notices are ambiguous as a matter of law with respect to the guarantors. They refer to but a single debtor, Hi-Bo Farms, and refer only to the security agreement executed by that debtor solely. That ambiguity is to be resolved against plaintiff as the drafter of the notices. *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983).

That being so, the only question remaining is whether a summary judgment in favor of the guarantors and against plaintiff should have been entered.

Summary judgment is to be granted to the moving party where there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom and the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Carlson v. Waddle*, 223 Neb. 671, 392 N.W.2d 777 (1986); *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986); *Cornhusker Agrl. Assn. v. Equitable Gen. Ins. Co.*, 223 Neb. 618, 392 N.W.2d 366 (1986); Neb. Rev. Stat. § 25-1332 (Reissue 1985).

Since the notices are ambiguous as a matter of law and since as a matter of law the ambiguity must be resolved against plaintiff and in favor of the guarantors, the situation is, as the guarantors argue, as if no notice whatsoever had been sent to them. Under that circumstance there exists no genuine issue as to any material fact or as to the inferences to be drawn therefrom, and the guarantors are entitled to judgment as a matter of law. Consequently, the trial court was correct in sustaining the guarantors' motion for summary judgment, resulting in a dismissal of plaintiff's action as to the guarantors.

AFFIRMED.

KRIVOSHA, C.J., not participating.

BOSLAUGH, J., dissenting.

Except in certain circumstances, Neb. U.C.C. § 9-504(3) (Reissue 1980) requires that a secured party give "reasonable notification" of the time after which any private sale is to be made. In comment 5 of the 1972 comments to § 9-504, it is stated: " 'Reasonable notification' is not defined in this Article; at a minimum it must be sent in such time that persons entitled to receive it will have sufficient time to take appropriate

steps to protect their interests by taking part in the sale or other disposition if they so desire."

Consistent with this commentary, we have recognized that the purpose underlying the § 9-504(3) notice requirements is to ensure that a debtor entitled to notice at least has an opportunity to protect his interests, whether by redemption, finding prospective purchasers for the collateral, or otherwise. *City Bank & Trust Co. v. Van Andel*, 220 Neb. 152, 368 N.W.2d 789 (1985); *Havelock Bank v. McArthur*, 220 Neb. 364, 370 N.W.2d 116 (1985). In other words, the purpose of the statutory notice is to inform the debtor that the collateral is about to be sold to satisfy all or a part of the debt.

Clearly, a guarantor is entitled to notice as a debtor under § 9-504(3). *Allis-Chalmers Corp. v. Haumont*, 220 Neb. 509, 371 N.W.2d 97 (1985). But saying that a guarantor is entitled to notice as a debtor provides no justification for requiring that the guarantor be notified with more specific information than the primary obligor.

In previous cases not involving notice to guarantors, we have indicated that the only notice required by § 9-504(3) as to a private sale is written notice of the time after which the collateral will be sold. *Citizens State Bank v. Sparks*, 202 Neb. 661, 276 N.W.2d 661 (1979); *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977).

The U.C.C. is recognized by several courts to embody a general scheme which makes distinctions along functional, rather than formal, lines. See, *MBank Dallas, N.A. v. Sunbelt Mfg., Inc.*, 710 S.W.2d 633 (Tex. App. 1986); *Chase Manhattan Bank, N.A. v. Natarelli*, 93 Misc. 2d 78, 401 N.Y.S.2d 404 (1977). If the notices in this case served their purpose, they should have been held to satisfy the requirements of § 9-504(3). There seems to be no question but that the notices here met the express statutory requirements and gave the guarantors sufficient time to protect their interests. Thus, it would seem that the notices were sufficient.

In *Reeves v. Habersham Bank*, 254 Ga. 615, 331 S.E.2d 589 (1985), the court rejected the argument of three guarantors who claimed that they had not received reasonable notice as required by the Georgia equivalent to § 9-504(3). The guarantors based

their argument on the fact that the notice had been sent to them because of their status as secondary lienholders on the collateral, and not because of their status as debtors. In rejecting this argument the court reasoned that the notice was adequate because it afforded the guarantors an opportunity to take steps to protect their interests. Similar logic should apply in the present case.

The general purpose of the U.C.C., including article 9, "is to simplify, clarify and modernize the law governing commercial transactions . . . ." *Natarelli, supra* at 87, 401 N.Y.S.2d at 410. Our decisions run contrary to that purpose by creating numerous traps and pitfalls for the unwary creditor. The majority opinion seems to indicate that the notice must include legal advice to the debtor as to why he may be liable for a deficiency. What ought to be a simple procedure has become a highly technical matter in which skilled legal advice is necessary to avoid disaster.

The present case is distinguishable on its facts from *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983). In the *Hughes* case the single letter of notice sent was addressed to one of the guarantors in his corporate capacity in the debtor corporation. An ambiguity arose from the fact that the addressee's interest as a coguarantor was in direct conflict with that of the debtor corporation as primary obligor. In the present case the individual guarantors each received a letter of notification which made no reference to their corporate capacities. Thus, the ambiguity in the *Hughes* case was not a factor here.

The fact that the notices in this case failed to refer to the guaranty agreements should not affect the result. A person who voluntarily signs a guaranty for the debt of another should be expected to know that if any part of the debt is not paid he will be liable for all or part of the deficiency. I would not have affirmed the judgment.

DONALD HOLDEN AND KAREN HOLDEN, APPELLANTS, V. DIANA URBAN, APPELLEE.

398 N.W.2d 699

Filed January 2, 1987. No. 85-875.

1. **Pleadings.** Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.
2. **Pleadings: Appeal and Error.** The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried.
3. **Appeal and Error.** In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.
4. **Courts: Judgments: Appeal and Error.** 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.
5. **Judgments: Appeal and Error.** 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.
6. **Negligence: Proof: Evidence.** One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of negligence. Negligence is not presumed and must be proved by evidence, direct or circumstantial.
7. **Negligence.** For actionable negligence, there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such undischarged duty.
8. _____. Foreseeability is a factor in establishing a defendant's duty.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Roger R. Holthaus, for appellants.

David J. Kolenda, for appellee.

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

SHANAHAN, J.

Donald and Karen Holden appeal the judgment of the district court for Sarpy County, reversing and vacating their judgment for $1,140.13 obtained in a county court bench trial on their claim for property damage caused by negligence of

Diana Urban. We affirm.

Holdens and Urbans lived across the street from each other on 70th Street in LaVista, Nebraska. Urbans' residence was on the west side of 70th and had a driveway with a 30° grade, sloping toward the street. Directly opposite Urbans' driveway was the level driveway for the Holden residence, on the east side of 70th.

Diana Urban parked her El Camino in the Urban driveway and left the car keys on the dashboard of the unlocked vehicle, but could not recall whether she applied the automobile's emergency brake. Immediately adjacent to the garage attached to the Holden house was a parked 1958 Buick Roadmaster series 75 V-8 four-door sedan. To the rear and west of the Buick was a trailer, converted from the box of a Ford pickup.

On hearing a "loud crash" and believing a tree had fallen on her house, Karen Holden rushed from inside the house and saw the stationary El Camino partly in the street and partly in Holdens' driveway. Inside Diana's vehicle was 4-year-old Kari Urban, huddled in the front seat and crying. Karen Holden further observed that the trailer had been propelled into the trunk of the Buick, which, in turn, had collided with the corner of Holdens' garage. Diana Urban was running across the street to Holdens' and, on discovering Kari in the car, apologized for the vehicular misadventure. This incident was the first that Karen Holden had spoken to Diana Urban.

In their second amended petition Holdens alleged Diana Urban's specific negligence, namely, Diana Urban had "improperly" parked her automobile or was guilty of "negligent supervision of her four year old daughter," and requested damages for their trailer, Buick, and garage. On judgment for Holdens ($1,140.13), Diana Urban appealed to the district court, which found that the "judgment of County Court [is] erroneous as a matter of law, should be vacated and set aside." Holdens contend that the district court judgment is erroneous as a matter of law.

Holdens argue: "If this is not a true case of res ipsa loquitur, it comes very close to it." Brief for Appellants at 4. However, Holdens' petition also speaks for itself. The case was tried on Holdens' allegations of Diana Urban's specific acts of

negligence. " 'Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.' " *League v. Vanice*, 221 Neb. 34, 43, 374 N.W.2d 849, 855 (1985). See, also, *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). The Supreme Court disposes of an appeal on the basis of the theory presented by the pleadings on which the case was tried. *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985). In the absence of plain error, where an issue is raised for the first time in the Supreme Court, such issue will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition. *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985). Consequently, we dispose of Holdens' appeal on the basis of the specific acts of negligence alleged by Holdens.

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." Neb. Rev. Stat. § 24-541.06 (Reissue 1985). 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. Cf. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

One alleging negligence has the burden to prove such negligence. Establishing that an accident has occurred does not prove a case of negligence. See, *Himes v. Carter*, 219 Neb. 734, 365 N.W.2d 840 (1985); *Porter v. Black*, 205 Neb. 699, 289 N.W.2d 760 (1980). Negligence is not presumed and must be proved by evidence, direct or circumstantial. *Himes v. Carter, supra; Porter v. Black, supra.*

For actionable negligence there must be a defendant's legal duty to protect the plaintiff from injury, a failure to discharge that duty, and damage resulting from such undischarged duty. See, *Daniels v. Andersen*, 195 Neb. 95, 237 N.W.2d 397 (1975); *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978).

> "[D]uty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff;

> and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .
>
> A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.

Prosser and Keeton on the Law of Torts, *Limited Duty* § 53 at 356 (5th ed. 1984).

Foreseeability is a factor in establishing a defendant's duty, or, as expressed by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916): "[F]oresight of the consequences involves the creation of a duty . . . ." See, also, *Lock v. Packard Flying Service, Inc.*, 185 Neb. 71, 73, 173 N.W.2d 516, 518 (1970): " 'Foresight, not retrospect, is the standard of diligence. . . .' " (Citing and quoting from *Kolar v. Divis*, 179 Neb. 756, 140 N.W.2d 658 (1966).)

Applying the aforementioned principles to Holdens' case, there is no evidence that the Urban vehicle was insecurely parked. Diana Urban's inability to recollect her application of the El Camino's emergency brake does not carry the day on Holdens' specification that Diana's car had been "improperly" parked. Holdens failed to prove negligence on the part of Diana Urban in parking her automobile. Concerning Holdens' allegation of negligence regarding "supervision" of 4-year-old Kari, Holdens, again, have failed to prove their specification of Diana Urban's negligence. How did Kari come to be in Diana's parked car? Although Diana Urban left her automobile unlocked and unattended, there is no evidence establishing Kari's presence in the automobile when Diana Urban left her car unattended. If Kari was outside the car when Diana Urban left the vehicle, Holdens' evidence fails to establish that, under the circumstances, Diana Urban should have foreseen Kari's presence in proximity to the unattended vehicle and Kari's opportunity and ability to enter the accessible automobile. Kari's presence in the car after the collision is insufficient proof to establish any negligence of Diana Urban in relation to Kari and the unattended vehicle.

As a matter of law, Holdens have failed to prove Diana Urban's negligence in accordance with their specifications. Consequently, the county court's finding that Diana Urban was negligent is clearly erroneous. The district court's judgment is correct and, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RONALD STEELE, APPELLANT.
399 N.W.2d 267

Filed January 2, 1987. No. 86-238.

1. **Criminal Law: Statutes.** Penal statutes are to be strictly construed, and it is not for us to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
2. **Statutes.** A provision of a statute which does not relate to the essence of the thing to be done but governs the time or manner of performance is generally considered to be directory as opposed to mandatory.
3. **Mental Health: Final Orders: Appeal and Error.** This court will not interfere on appeal with a final order made by the district court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

William G. Line of Kerrigan, Line & Martin, for appellant.

Robert M. Spire, Attorney General, Dale D. Brodkey, and William L. Howland, for appellee.

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

WHITE, J.

This is an appeal from the district court for Dodge County. Appellant, Ronald Steele, was charged by information with possession of a short shotgun in violation of Neb. Rev. Stat. § 28-1203 (Reissue 1985), and with being a felon in possession

of a firearm in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1985). Appellant was found to be not responsible by reason of insanity. The facts relevant to this appeal are as follows.

Steele entered a plea of not responsible by reason of insanity, was so adjudged, and was committed to the Lincoln Regional Center pursuant to Neb. Rev. Stat. § 29-3701 (Reissue 1985) for a 90-day evaluation period. Although the appellant was committed on November 8, 1985, he was not actually admitted to the center until November 15. The report required by statute was prepared on February 6, 1986, and sent to the court on February 10. The hearing required by Neb. Rev. Stat. § 29-3702 (Reissue 1985) was provided the appellant on February 18, 1986, at which Steele was found by clear and convincing evidence to be dangerous to himself and others and was committed to the Lincoln Regional Center. His annual review provided for under Neb. Rev. Stat. § 29-3703(1) (Reissue 1985) is set for February 2, 1987.

The appellant assigns error to the failure of the district court to meet the statutory time limits under §§ 29-3701 and 29-3702. Specifically, the appellant assigns error to the lower court's failure to provide him an evidentiary hearing prior to the expiration of the 90-day evaluation period. The appellant also assigns error to the failure of the hospital and the court to provide and review the report of the examining psychiatrists at the Lincoln Regional Center 10 days prior to the expiration of the 90-day evaluation period. Steele's second assignment of error centers around the finding of the district court that he is dangerous to himself and others. The appellant contends that there is insufficient evidence to support such a finding. Steele contends that as a result of the above-claimed errors, the court has lost jurisdiction of the appellant and he must be released from the Lincoln Regional Center. We affirm the district court.

Section 29-3701(1) provides as follows:

> Following receipt of a verdict of acquittal on grounds of insanity, the court shall forthwith conduct a hearing to determine whether there is probable cause to believe the person is dangerous to himself, herself, or others by reason of mental illness or defect, or will be so dangerous in the foreseeable future, as demonstrated by an overt act

> or threat. If the court finds probable cause, the court shall determine whether and under what conditions of confinement the acquitted person should be committed to a regional center or other appropriate facility for a period not to exceed ninety days for an evaluation of the person's mental condition and for the preparation of a treatment plan pursuant to subsection (4) of this section. When the court commits the person for evaluation, the court shall specify all conditions of the person's confinement during the evaluation including, but not limited to, all circumstances under which the person may leave a locked facility at the place of confinement. The order of commitment specifying the conditions of confinement shall include a finding by the court that any freedom of movement accorded the person outside a locked facility is consistent with the safety of the public.

The appellant argues that the evaluation of his mental health was not provided to the court within 10 days prior to the expiration of the 90-day evaluation period and that his evidentiary hearing was not provided before the expiration of the evaluation period. The appellant bases his argument upon the contentions that the language of the statutes which govern this case is mandatory and that the failure of the court to follow the statutorily set guidelines should result in the appellant's release. We disagree.

First, we find no announced penalty in the statute or the case law interpreting the statute for the State's failure to meet the statutory time limits. The appellant gives no support for his contention that the remedy is dismissal and loss of jurisdiction. Looking to analogous statutes, we note that Neb. Rev. Stat. §§ 29-1205 et seq. (Reissue 1985), the Nebraska speedy trial statutes, provide for the sanction of dismissal if the defendant is not brought to trial within the 6 months provided by statute. We note that no such sanction is provided by the statutes governing acquittals on the ground of insanity.

Penal statutes are to be strictly construed, and it is not for us to supply missing words or sentences to make clear that which is indefinite, or, as in this case, to supply that which is not there. *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986). See,

also, *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985), where this court held that the failure of a sheriff to immediately serve parents with notice that their child had been taken into custody, Neb. Rev. Stat. § 43-250 (Reissue 1984), and the failure of the Department of Social Services to file a petition within 48 hours after taking custody of the child, Neb. Rev. Stat. § 43-275 (Reissue 1984), did not deprive the court of jurisdiction absent direct statutory language to that effect.

The appellant bases his contentions on the language of §§ 29-3701 and 29-3702, which he maintains is mandatory, and asserts that a failure to follow the time limits set out in the statutes requires discharge. Section 29-3702 provides: "Prior to the expiration of the evaluation period provided for in section 29-3701, the court shall conduct an evidentiary hearing regarding the condition of the person . . . ." Section 29-3701(5) provides in relevant part: "Such evaluation and treatment plan shall include the facts upon which conclusions stated therein are based and shall be received by the court at least ten days prior to the expiration of the evaluation period."

The appellant relies upon the case of *State v. Stratton,* 220 Neb. 854, 374 N.W.2d 31 (1985). In *Stratton* this court construed a statute which required the sentence imposed on one convicted of violating Neb. Rev. Stat. § 28-1205 (Reissue 1985), using a firearm to commit a felony, to be served consecutively to any other sentence imposed for another felony conviction as mandatory. There, we stated that the word "shall" in that statute constituted a mandate, as opposed to a directive, to consecutive sentencing.

The statute in *Stratton* differs significantly from the statutes involved in this case. The portions of §§ 29-3701 and 29-3702 which were not complied with were merely the portions of those statutes which govern the time by which the report must be submitted to the court and the time by which evidence must be provided on the subject being evaluated. In *Hartman v. Glenwood Tel. Membership Corp.*, 197 Neb. 359, 249 N.W.2d 468 (1977), this court distinguished between provisions of statutes which govern the essence of the thing to be done and those provisions of a statute which govern or direct the time or the method of the thing to be done. As stated in *Hartman* at

371-72, 249 N.W.2d at 475,

> "Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory. . . . Provisions governing the time for doing an act, or directing the doing of certain things within certain times without any negative words restraining the doing thereof afterward, are deemed to be directory."

The statute involved in *Hartman* required that the Public Service Commission have a decision within 30 days of a hearing. The decision at issue in *Hartman* was not on file at the expiration of the 30-day period. There, we held that the 30-day limit was not a mandate, but a directive. The language of the statute provides that except for a showing of good cause, "a decision of the commission *shall* be made and filed within thirty days after completion of the hearing or after submission of affidavits in nonhearing proceedings." (Emphasis supplied.) See Neb. Rev. Stat. § 75-128 (Reissue 1986).

In the case of *Taylor v. Department of Transp.*, 260 N.W.2d 521 (Iowa 1977), the appellant requested a hearing after the revocation of his driver's license. Iowa Code Ann. § 321B.26 (West 1985) provides that such hearing shall be held within 20 days of the request. The appellant was not given a hearing within the statutory time limits and contended that the trial court and the Department of Transportation had lost jurisdiction as a result. The Iowa court stated at 523:

> Nevertheless, the time provision in § 321B.8 [now 321.B26] is clearly designed to provide order and promptness in the administrative process, the characteristic purpose of a directory statute. The main legislative goal of removing dangerous drivers from the highways can still be attained when hearings are late. In the absence of a showing of prejudice by the licensee, a failure to hold the revocation hearing within 20 days of receipt should not preclude a later hearing. We hold that the hearing time provision of § 321B.8 is directory and not

mandatory.

The Iowa court went on to say that statutes which fix the form, mode, or time of performance by public functionaries are generally considered to be directory, as opposed to mandatory.

Clearly, there are factual differences between these cases. However, the failure of the lower court in this case to meet the time limit set out in § 29-3701 or § 29-3702 was not a violation of a mandatory provision, as was the case in *Stratton*, but a violation of provisions of the statutes which governed the time in which the report was to be delivered to the court and the time by which an evidentiary hearing was to be provided. Appellant was given an evidentiary hearing, and a report was delivered to the court. We find no prejudice to the appellant, and this assignment of error does not support the appellant's contention that he should be released from the Lincoln Regional Center. This assignment of error is without merit.

Appellant's second assignment of error contends that there was insufficient evidence to justify his commitment to the Lincoln Regional Center. In his brief Steele alleges he committed no overt act sufficient to meet the clear and convincing evidence standard for commitment. We disagree. Here, as we have often stated, the rule in regard to the "clear and convincing standard" in a civil mental health commitment proceeding has been established. "This court will not interfere on appeal with a final order made by the District Court in a mental health commitment proceeding unless the court can say as a matter of law that the order is not supported by clear and convincing proof." *State v. Mayfield*, 212 Neb. 724, 727, 325 N.W.2d 162, 164 (1982); *State v. Simants*, 213 Neb. 638, 330 N.W.2d 910 (1983).

While in possession of a short shotgun, Steele was found walking around his son's school. He stated he had come to say goodbye to his son before killing himself. The reports of the several psychiatrists that have examined the appellant have concluded that Steele is insane, suffering from alcoholism, is paranoid, and has delusions and hallucinations. The opinion of Dr. Woytassek of the Lincoln Regional Center is that Steele was dangerous to himself and others. Clearly, it cannot be said that, as a matter of law, the trial judge was incorrect in his finding

that the appellant was dangerous to himself and others. This assignment of error is also without merit. We affirm the findings and order of the trial court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALAN W. FRIES, JR., APPELLANT.

398 N.W.2d 702

Filed January 2, 1987. No. 86-339.

1. **Postconviction: Appeal and Error.** To obtain postconviction relief the defendant has the burden of proof to establish the grounds 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.** To establish ineffectiveness of counsel as a ground for postconviction relief, the defendant must prove that his counsel failed to perform at least as well as an attorney in the area with ordinary training and skill in the criminal law.
3. **Attorney and Client: Effectiveness of Counsel.** It is the duty of defense counsel to represent their clients in a manner consistent with the prevailing professional standard within their community. Implicit in that duty is a duty to conscientiously protect the interests of the client—a duty which is an integral part of every attorney-client relationship.
4. **Postconviction: Effectiveness of Counsel: Proof.** To obtain postconviction relief on the ground of ineffectiveness of counsel, the defendant must show that counsel's action or inaction prejudiced the defense of the case and that there is a reasonable probability that, but for counsel's errors, the result of the case would have been different.
5. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness is a matter of trial strategy. Even if that choice proves ineffective, it will not, without more, sustain a finding of ineffectiveness of counsel.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Mark W. Bubak, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

BOSLAUGH, J.

The defendant was convicted in 1982 of 27 counts of violating Nebraska laws regulating the registration and sale of securities. He was sentenced to imprisonment to three consecutive terms of 16 months to 5 years on the first three counts and to terms of 16 months to 5 years on the remaining counts, to be served concurrently with the sentence on count III. The judgment was affirmed in *State v. Fries,* 214 Neb. 874, 337 N.W.2d 398 (1983).

On May 21, 1985, the defendant petitioned for postconviction relief. After an evidentiary hearing on December 18, 1985, the district court denied the requested relief. From that order the defendant has appealed.

The defendant has assigned as error the trial court's finding that he was not denied effective assistance of counsel at trial. The defendant contends his counsel were ineffective because they failed to employ an expert in securities law to properly advise the defendant and to rebut the State's expert witness. The defendant argues that a competent criminal defense attorney would have employed such an expert and that had such an expert been employed, the outcome of the trial could have been different.

To obtain postconviction relief the defendant has the burden of proof to establish the grounds for such relief, and the findings of the district court will not be disturbed on appeal unless clearly erroneous. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984); *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982).

The standard by which this court determines whether a defendant in a criminal trial has been afforded effective assistance of counsel has been stated in various forms. In *State v. Leadinghorse*, 192 Neb. 485, 489, 222 N.W.2d 573, 577 (1974), we stated, "Our present test would be that trial counsel perform at least as well as a lawyer with ordinary training and

skill in the criminal law in his area, and that he conscientiously protect the interests of his client." This was consistently utilized until *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982). In *Otey* we stated that, to determine the effectiveness of counsel, we would employ a two-part test: first, whether the lawyer performed at least as well as an attorney in the area with ordinary training and skill in the criminal law; and, second, whether the attorney conscientiously protected the interests of his client. In addition, the defendant had to show that the attorney's action or inaction caused the defendant to suffer prejudice in the defense of his case.

The *Otey* test required the defendant to prove both parts of the test to establish ineffective assistance of counsel. It has been employed by this court in numerous cases. See, e.g., *State v. Birge*, 223 Neb. 761, 393 N.W.2d 713 (1986); *State v. Brown*, 220 Neb. 305, 369 N.W.2d 639 (1985); *State v. Pearson*, 220 Neb. 183, 368 N.W.2d 804 (1985); *State v. Manchester*, 220 Neb. 41, 367 N.W.2d 733 (1985); *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984); *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983).

The *Otey* two-part test was given a slightly different, yet unexplained, articulation in *State v. Crouch*, 215 Neb. 205, 337 N.W.2d 766 (1983). In *Crouch* it was stated that to establish a right to postconviction relief the defendant had to prove that counsel had failed to perform at least as well as an attorney in the area with ordinary training and skill in the criminal law, *or* had failed to conscientiously protect the defendant's interest. Some subsequent postconviction relief cases followed this articulation of the test. See, e.g., *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986); *State v. Andrews*, 223 Neb. 830, 394 N.W.2d 638 (1986); *State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 738 (1986); *State v. Hochstein, supra.*

A third statement of the test recently emerged in *State v. Grotzky*, 222 Neb. 39, 382 N.W.2d 20 (1986). There, the standard was stated to be whether counsel performed at least as well as an attorney in the area with ordinary training and skill in the criminal law. The second part of the test, that of conscientiously protecting the interests of the defendant, was not mentioned. Several recent cases have utilized this

articulation of the standard. See, e.g., *State v. Meis*, 223 Neb. 935, 395 N.W.2d 509 (1986); *State v. Rust*, 223 Neb. 150, 388 N.W.2d 483 (1986); *State v. Apodaca*, 223 Neb. 258, 388 N.W.2d 837 (1986).

While these three articulations apparently differ, the differences are more semantic than substantive. Essentially, the applicable standard is whether the attorney performed at least as well as an attorney in the area with ordinary training and skill in the criminal law. This standard imposes upon attorneys the duty to represent criminal clients in a manner consistent with the prevailing professional standard within their community. Implicit in that duty is a duty to conscientiously protect the interests of the client—a duty which is an integral part of every attorney-client relationship. See Canon VI, EC 6-4, Code of Professional Responsibility. The most recent cases interpreting this standard have recognized the test really has but one part, and accurately reflect the standard by which effectiveness of counsel in a criminal case is to be determined. This requirement is consistent with the test imposed by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and by the U.S. Court of Appeals for the Eighth Circuit in *Morrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978).

In addition to showing the attorney failed to perform as required, the defendant must show, on the record, that counsel's action or inaction prejudiced the defense of the case. *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982). The defendant must establish there is a reasonable probability that, but for counsel's errors, the result of the case would have been different. *State v. Pearson, supra*. See, also, *Strickland v. Washington, supra*. 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. Poe*, 214 Neb. 540, 334 N.W.2d 642 (1983). See, also, *State v. Andrews, supra*.

The defendant contends that counsel's failure to call an expert witness constituted ineffective counsel. There is no showing on the record of how such inaction prejudiced the

defense or that had such an expert been called, a different result probably would have followed.

The record is silent as to the type of testimony such an expert could have provided. Instead, the record discloses that the decision not to call an expert witness was carefully made and based on trial strategy. One of defendant's counsel testified that it was his belief that an expert witness could have been more detrimental than beneficial to the defendant's case. Both counsel testified that they considered and decided against obtaining an expert. The fact that the strategy proved unsuccessful does not sustain a finding of ineffectiveness of counsel. *State v. Poe, supra.*

The trial court's finding is supported by the record and was not clearly erroneous. The order denying postconviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ABE CLARK LYTLE, APPELLANT.

398 N.W.2d 705

Filed January 2, 1987. No. 86-491.

1. **Postconviction.** An evidentiary hearing on a motion for postconviction relief is not required when the motion, files, and records of the case show that the defendant is not entitled to relief.
2. _____. An applicant proceeding under the Postconviction Act (Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985)) must allege facts amounting to a violation or infringement of constitutional rights, and the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing.
3. **Postconviction: Effectiveness of Counsel: Proof.** When a 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.

4. **Postconviction.** Postconviction motions cannot be used to obtain a further review of issues already litigated.
5. **Effectiveness of Counsel.** In claiming ineffective assistance of counsel because counsel failed to obtain a plea concession, the defendant must allege facts which, if true, would establish that such a plea negotiation was reasonably possible.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Abe Clark Lytle, pro se.

Robert M. Spire, Attorney General, and James H. Spears, for appellee.

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

PER CURIAM.

Defendant appeals orders of the district court for Douglas County denying his request for postconviction relief and an evidentiary hearing thereon, and denying his motion for rehearing and to allow the filing of an amended petition. We affirm.

Following a jury trial in the district court, defendant was convicted of first degree murder arising out of a purse snatching and assault under the felony murder rule. He was sentenced to imprisonment for life. He appealed his conviction, which was affirmed in *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975).

Defendant on his own behalf filed a motion for postconviction relief alleging ineffective assistance of counsel. The district court refused to grant an evidentiary hearing and denied the motion. The defendant then moved for a rehearing and requested leave to file an amended petition. The court denied the motion. Defendant appeals.

The defendant contends that the district court abused its discretion when it (1) refused to grant an evidentiary hearing, (2) denied his motion for postconviction relief, and (3) denied his motion for a rehearing and leave to file an amended petition.

Referring to the first of the defendant's claims, it is well established that an evidentiary hearing on a motion for

postconviction relief is not required when the motion, files, and records of the case show that the defendant is not entitled to relief. *State v. Bradford*, 223 Neb. 908, 395 N.W.2d 495 (1986). Although the defendant's petition is somewhat unclear, it appears he is claiming he was denied effective assistance of counsel for two reasons: first, defense counsel failed to make "faithful attempts at plea-negotiations"; and, second, counsel did not raise the issue of the defendant's illegal arrest until the direct appeal of the case to this court, thereby precluding review of that issue.

In denying an evidentiary hearing on the first of those claims of ineffective assistance of counsel, the district court ruled the defendant had not alleged sufficient specific facts to make a preliminary determination that a hearing was justified on that question. We agree.

An applicant proceeding under the Postconviction Act (Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985)) must allege facts amounting to a violation or infringement of constitutional rights, and the pleading of mere conclusions of fact or of law is not sufficient to require the court to grant an evidentiary hearing. *State v. Bradford, supra.* 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. *State v. Fries, ante* p. 482, 398 N.W.2d 702 (1987); *State v. Meis*, 223 Neb. 935, 395 N.W.2d 509 (1986).

The essence of the defendant's allegation regarding defense counsel's failure to negotiate a plea is that, given the evidence against the defendant, the only way counsel could have conscientiously protected the defendant's interest would have been for counsel to have informed the defendant of the nature of the felony murder rule and the trial risks attendant thereto, and then to have negotiated a plea bargain with the prosecution. Such allegations are mere conclusions, not factual

allegations constituting an infringement of the defendant's right to effective assistance of counsel. As such, an evidentiary hearing on that issue was properly denied.

In denying an evidentiary hearing on the second of defendant's claims of ineffective assistance of counsel, the district court ruled that the issue of the legality of the defendant's arrest had already been reviewed on direct appeal and therefore could not be brought up again in the motion for postconviction relief. Again, we agree with the ruling of the district court.

Postconviction motions cannot be used to obtain a further review of issues already litigated. *State v. Evans, ante* p. 64, 395 N.W.2d 563 (1986). Although on direct appeal we determined that the issue of probable cause for the defendant's arrest was not raised in the district court and therefore not properly before us, we did go on to determine that probable cause for the arrest existed. *State v. Lytle*, 194 Neb. 353, 231 N.W.2d 681 (1975). Inasmuch as that issue was actually reviewed by this court, it cannot be the subject of an ineffective assistance of counsel claim in a subsequent motion for postconviction relief.

Because we agree that the district court properly denied an evidentiary hearing on the defendant's motion for postconviction relief in that the motion did not show the defendant was entitled to relief, it logically follows that we also approve of the district court's denial of the motion itself. Thus, the defendant's second contention of abuse of discretion on the part of the district court is without merit.

That brings us to the defendant's final contention—that the district court abused its discretion in denying the defendant's motion for a rehearing and for leave to file an amended complaint. The defendant submitted an affidavit supporting his motion in which he stated his amended complaint would show that (1) counsel's action led him to believe a plea negotiation was his sole option, (2) counsel led defendant's family to believe counsel was seeking plea negotiations, (3) counsel's actions before and during trial led defendant to believe that the State was pursuing a second degree murder charge, and (4) counsel's action and discussions with the

defendant's parents led them to believe that the defendant would be convicted of second degree murder. Considering this affidavit, the district court denied the defendant's motion for a rehearing and leave to file an amended petition.

Although defendant made his allegations of ineffective assistance of counsel more fact specific, he still failed to present any facts as to whether a plea negotiation was even possible given the facts in the case. Without this necessary showing of how the defendant was prejudiced by this omission of defense counsel, the defendant still had not presented the district court with a cognizable claim of ineffective assistance of counsel. As such, the district court properly denied the defendant's motion for a rehearing and leave to file an amended petition.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JASPER EDDIE FALKNER, APPELLANT.

398 N.W.2d 708

Filed January 2, 1987. No. 86-501.

1. **Postconviction: Appeal and Error.** The Postconviction Act cannot be used as a substitute for appeal or as a further review of issues already litigated.
2. _____: _____. A motion for postconviction relief may not raise questions which were or could have been raised on direct appeal.
3. **Constitutional Law: Trial: Juries.** Lack of jury members of the same race as the defendant, standing alone, does not support a claim of improper racial composition of the jury.
4. _____: _____: _____. All that the Constitution forbids is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels. The burden is on the defendant to allege and prove such systematic exclusion.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Jasper Eddie Falkner, pro se.

Robert M. Spire, Attorney General, and Fredrick F. Neid, for appellee.

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

PER CURIAM.

Defendant appeals from the judgment of the district court denying his motion for postconviction relief and an evidentiary hearing thereon.

In his pro se brief defendant assigns two errors: (1) "The all white jury veniremen wherefrom relator's jury was chosen which did not have any blacks on it from which all blacks had been deliberately, systematically and unconstitutionally excluded"; and (2) "The total ineffectiveness of relator's counsel for his refusal and failure to challenge the array . . . ." Additionally, by virtue of an "amended brief," defendant appears to further assign as error the claim of ineffectiveness of trial counsel in the cross-examination of the State's witnesses. We affirm.

Ineffectiveness of counsel was considered by this court in defendant's direct appeal, in which he appeared pro se and was also represented by counsel. *State v. Falkner*, 218 Neb. 896, 360 N.W.2d 482 (1984). This court has consistently held that the Postconviction Act cannot be used as a substitute for appeal or as a further review of issues already litigated. *State v. Lytle, ante* p. 486, 398 N.W.2d 705 (1987); *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985).

In raising the question of ineffectiveness of counsel on direct appeal, as he did, defendant could have litigated the questions of alleged failure of counsel to challenge the racial composition of the trial jury and the claimed ineffective cross-examination of the State's witnesses. A motion for postconviction relief may not raise questions which were or could have been raised on direct appeal. *State v. Galvan*, 222 Neb. 104, 382 N.W.2d 337 (1986). The second and third assignments of error are without merit.

In his application for postconviction relief defendant alleges only that there are black people living in Sarpy County but that none were called to serve on his jury. Lack of jury members of

the same race as the defendant, standing alone, does not support a claim of improper racial composition of the jury. *Bell v. State*, 159 Neb. 474, 67 N.W.2d 762 (1954) (no constitutional or statutory requirements that a jury shall be composed of both whites and blacks in certain proportions).

> All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members of his race are on the jury, but must prove that his race has been systematically excluded.

Apodaca v. Oregon, 406 U.S. 404, 413, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972).

It goes without saying that not only must the defendant prove improper racial exclusion by surveys or statistical data, or other analysis reflecting systematic exclusion, but must, in the first instance, allege such facts. That he has not done.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHNNY DON CLANCY, APPELLANT.

398 N.W.2d 710

Filed January 2, 1987. No. 86-531.

1. **Theft: Value of Goods: Proof.** Where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place of the alleged crime.
2. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury—all of which is within a jury's province for disposition. 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.
3. **Rules of 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. Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)).

4. **Rules of Evidence: Other Acts.** 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. Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)).
5. _____: _____. Neb. Evid. R. 404(2) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged. Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
6. _____: _____. The "purposes" set forth in Neb. Evid. R. 404(2) (Neb. Rev. Stat. § 27-404(2) (Reissue 1985)) are not exhaustive or mutually exclusive but are illustrative only, and are not pigeonholes for admission of evidence pertaining to "other acts."
7. **Evidence: Trial: Appeal and Error.** The admission or exclusion of evidence is a matter within the sound discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion.
8. **Rules of Evidence: Other Acts: Witnesses.** Under Neb. Evid. R. 404(2), a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed. Neb. Rev. Stat. § 27-404(2) (Reissue 1985).
9. **Motions for Mistrial: Appeal and Error.** Determination whether to grant a mistrial is a matter within the sound discretion of a trial court, whose ruling regarding a mistrial will be upheld unless such ruling constitutes an abuse of discretion.
10. **Directed Verdict.** In a criminal case a 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) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
11. **Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.

Appeal from the District Court for Adams County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

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

SHANAHAN, J.

Johnny Don Clancy appeals his conviction in a jury trial and sentence to imprisonment for a term of 20 months to 5 years for violating the Nebraska Criminal Code, Neb. Rev. Stat. § 28-517 (Reissue 1985), which provides: "A person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed with intention to restore it to the owner."

In accordance with the language found in § 28-517, the information charged that Clancy received, retained, or disposed of stolen property belonging to Todd Burgess and having a value more than $300, a crime which is a Class IV felony. See Neb. Rev. Stat. § 28-518(2) (Reissue 1985). Burgess' property was a 65-horsepower Mercury outboard motor.

Clancy claims the following errors occurred at his trial: (1) Insufficient evidence on the value of the outboard motor in question; (2) Improper admission of evidence (testimony of Jane DeVaney concerning Clancy's telephone call to her); (3) Failure to grant a mistrial; and (4) Failure to grant a directed verdict at the close of all evidence. Clancy also contends that the sentence imposed is excessive.

To prove the value of Burgess' outboard motor, the State called Leonard Heil as a witness. Heil owned Heil Marine Center, a business involving sales, purchases, and appraisals of new and used outboard motors, including Mercury outboards. After he had inspected Burgess' motor before trial, Heil testified that he would buy that outboard for $250 in the hope that the motor might be sold in the course of Heil's business, giving Heil a profit on resale. Heil then testified that the Burgess outboard, "as is," had a "fair market value" of, or was worth, $400 "on the open market." Clancy argues, "The evidence clearly established that the price which would be paid for the motor by a willing, knowledgable buyer was only

$250.00 and not over $300.00 as charged in the information." Brief for Appellant at 6.

State v. Hayes, 187 Neb. 325, 190 N.W.2d 621 (1971), involved prosecution for receiving or buying stolen goods which had a value greater than $100 (grand larceny), in violation of Neb. Rev. Stat. § 28-513 (Reissue 1964). In *Hayes* this court stated at 326, 190 N.W.2d at 622:

> The value of the goods in question is an essential element of the crime and like all other elements thereof the evidence must be sufficient to support a finding of the necessary value beyond a reasonable doubt.
>
> This and other courts have long held that where value of goods is an element of the crime charged and there is a market for the goods, the value to be proved is the market value at the time and place. [Citations omitted.]

See, also, *State v. Redding*, 213 Neb. 887, 331 N.W.2d 811 (1983); *State v. Weik*, 206 Neb. 217, 292 N.W.2d 289 (1980).

Although Heil initially indicated that, in conjunction with his business activity, he would pay $250 for the Burgess outboard, he also testified about the Burgess outboard in terms of "fair market value" and its value "on the open market," thereby distinguishing "market value" from the price he might pay as a motor merchant anticipating a profitable resale of the motor.

> In determining whether evidence is sufficient to sustain a conviction in a jury trial, [the Supreme Court] does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is within a jury's province for disposition. 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. Schott, 222 Neb. 456, 462, 384 N.W.2d 620, 624-25 (1986).

Heil's testimony supplied the jury with relevant evidence from which a jury could reasonably find that the value of Burgess' outboard motor was "three hundred dollars or more." See § 28-518(2).

Next, Clancy complains that his telephone call to Jane

DeVaney was erroneously admitted as evidence. According to her testimony, for 3 years Jane DeVaney had been acquainted with Clancy, who dated DeVaney's daughter. About 11 p.m. on an unspecified date early in December 1985, Clancy brought a Mercury outboard motor to DeVaneys' home and asked to leave the motor in the DeVaney garage. Sometime later, Jane DeVaney became suspicious about the motor and "thought it might have been stolen." On February 4, 1986, she telephoned the Adams County Sheriff's Department concerning the outboard motor. In response to Mrs. DeVaney's call, Deputy Larry Peterson came to the DeVaney home on February 4 to investigate, and later transported the outboard to the basement of the Adams County Courthouse, where Burgess identified the motor as his missing and stolen property. At the sheriff's office on the evening of February 5, Deputy Peterson interrogated Clancy concerning the Mercury motor. After his arrest Clancy posted bond, was released from custody, and, in a telephone call to Jane DeVaney, said "he was going to come over and kill Gary and I, or else have our house blown up." Gary is Jane DeVaney's husband. On the basis of relevancy Clancy objected to Jane DeVaney's testimony about the telephone call, and when that objection was overruled, Clancy requested a mistrial, which the court denied. In his testimony Clancy never denied the telephone call to Jane DeVaney or the contents of that call as testified by her. In pertinent part Neb. Rev. Stat. § 28-919 (Reissue 1985) states:

> (1) A person commits an offense if, believing that an official proceeding or investigation of a criminal matter is pending or about to be instituted, he attempts to induce or otherwise cause a witness, informant, or juror to:
>
> . . . .
>
> (b) Withhold any testimony, information, document, or thing; . . .
>
> . . . .
>
> (2) Tampering with witnesses, informants, and jurors is a Class IV felony.

Clancy contends: "Since Appellee did not establish that [the telephone call to Jane DeVaney] shows guilty knowledge or any of the other permitted purposes the evidence only went to prove

the bad character of the Appellant and as such under the provisions of Neb. Rev. Stat. §27-404(2) is not admissible." Brief for Appellant at 8.

"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." Neb. Evid. R. 401 (Neb. Rev. Stat. § 27-401 (Reissue 1985)). See, also, *State v. Robertson*, 219 Neb. 782, 366 N.W.2d 429 (1985).

Neb. Evid. R. 404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Neb. Rev. Stat. § 27-404(2) (Reissue 1985).

> Rule 404(2) of the Nebraska Evidence Rules is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged.

State v. Stewart, 219 Neb. 347, 351, 363 N.W.2d 368, 371 (1985). See, also, *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

The "purposes" set forth in Neb. Evid. R. 404(2) are not exhaustive or mutually exclusive but are illustrative only, and are not pigeonholes for admission of evidence pertaining to "other acts." See, *State v. Craig, supra; State v. Stewart, supra.*

> However, Rule 404(2) is subject to the overriding protection of Rule 403 of the Nebraska Evidence Rules [Neb. Rev. Stat. § 27-403 (Reissue 1985)] (exclusion, if probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, misleading the jury, causing undue delay, wasting time, or needlessly presenting cumulative evidence).

State v. Craig, supra at 77, 361 N.W.2d at 213 (1985).

The admission or exclusion of evidence is a matter within the sound discretion of the trial court, whose ruling on an evidential question will be upheld unless such ruling constitutes an abuse of discretion. *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

In Clancy's case the burden was on the State to prove, beyond a reasonable doubt, that Clancy, knowing or believing that the Mercury outboard motor had been stolen, received or retained the outboard motor without his intention to restore the motor to its owner. See § 28-517.

The mental element involved in the offense charged against Clancy, "knowing" or "believing" that the outboard had been stolen, is crucial for commission of the crime charged. In the context found, Clancy's telephone call to Jane DeVaney was an attempt to influence or discourage any further informational activity by DeVaney relative to the pending charge against Clancy or his eventual trial for the crime charged. Would evidence of the telephone call to Jane DeVaney entitle a reasonable juror to believe that it was more probable that Clancy was conscious or knew that the outboard motor had been stolen? See Neb. Evid. R. 401 (relevant evidence; defined). See, also, McCormick on Evidence § 185 (E. Cleary 3d ed. 1984). If the answer to that question is in the affirmative, the telephone call has probative value and is admissible as relevant evidence.

Probative value 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. See *State v. Bostwick, supra*.

Before enactment of the Nebraska Evidence Rules in 1975, this court ruled that a defendant's act occurring after commission of a crime was a relevant circumstance from which an inference of the defendant's guilt may be drawn. For instance, in *Kennedy v. State*, 71 Neb. 765, 99 N.W. 645 (1904), evidence of an attempted escape from jail by a defendant, awaiting trial, was admissible on the " 'question of the guilt or innocence of the accused.' " 71 Neb. at 770, 99 N.W. at 646. In

Crowell v. State, 79 Neb. 784, 113 N.W. 262 (1907), this court held that the defendant's attempt to induce a witness to leave the state and refrain from testifying at the defendant's trial was admissible in " 'determining the guilt or innocence of the defendant.' " 79 Neb. at 785, 113 N.W. at 262. *State v. Nelson*, 182 Neb. 31, 152 N.W.2d 10 (1967), involved a situation where, pending trial, the defendant "drove [the witness] out into the country where defendant said: '* * * he was going to whip' " the witness and then assaulted the witness. 182 Neb. at 37, 152 N.W.2d at 14. In *Nelson* this court stated: "Evidence of threats made to, or of an assault made upon, a witness by a defendant is admissible." 182 Neb. at 39, 152 N.W.2d at 15.

Therefore, in view of the Nebraska Evidence Rules, this case presents a question of first impression: Is a defendant's attempted intimidation or intimidation of a State's informant or witness admissible under Neb. Evid. R. 404(2)?

Referring to conduct as evidence of guilt, Wigmore has expressed: "No one doubts that the state of mind which we call 'guilty consciousness' is perhaps the strongest evidence . . . that the person is indeed the guilty doer; nothing but an hallucination or a most extraordinary mistake will otherwise explain its presence." 2 J. Wigmore, Evidence in Trials at Common Law § 273(1) at 115 (J. Chadbourn rev. 1979). "There are two processes or inferences involved—from conduct to consciousness of guilt, and then from consciousness of guilt to the guilty deed." 1A J. Wigmore, *supra* § 173 at 1840.

The Supreme Court of Illinois, in *The People v. Gambony*, 402 Ill. 74, 80, 83 N.E.2d 321, 325 (1948), stated:

> Any attempt by a party to a suit, either civil or criminal, to conceal or, by threats or otherwise, to suppress evidence or obstruct an investigation of an issue, is relevant upon the trial of such issue. In a criminal prosecution any attempted intimidation of a witness is properly attributable to a consciousness of guilt, and testimony relating thereto is relevant and admissible in evidence.

A defendant's attempted intimidation or intimidation of a State's witness is evidence of the defendant's "conscious guilt" that a crime has been committed and serves as a basis for an inference that the defendant is guilty of the crime charged. See

People v. Smith, 3 Ill. App. 3d 958, 279 N.E.2d 512 (1972). See, also, *State v. Shaw*, 199 Mont. 248, 253, 648 P.2d 287, 290 (1982) (under Rule 404(b), Mont. R. Evid., the defendant's attempted intimidation of a witness was relevant to the crime charged, "indicating consciousness of guilt"). As further illustration that "there is no new thing under the sun," more than two millennia ago it was observed: "There is no witness so dreadful, no accuser so terrible as the conscience that dwells in the heart of every man." (Polybius.) Consequently, we now hold that, under Neb. Evid. R. 404(2), a defendant's attempted intimidation or intimidation of a State's informant or witness is relevant evidence concerning the defendant's conscious guilt that a crime has been committed, and is a circumstance from which an inference may be drawn that the defendant is guilty of the crime charged.

We conclude that Clancy's threatening telephone call to Jane DeVaney was important evidence to the State's case. The probative value of the telephone call, as proof of Clancy's conscious guilt for the crime charged, outweighed prejudice to Clancy and did not confuse the issues being tried or mislead the jury. See Neb. Evid. R. 403 (Neb. Rev. Stat. § 27-403 (Reissue 1985)) (exclusion of relevant evidence). Therefore, Jane DeVaney's testimony about the telephone call was admissible evidence.

Next, Clancy claims that a mistrial should have been granted in view of Jane DeVaney's testimony concerning the telephone call from Clancy.

> A mistrial results in nullification of a pending jury trial. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process. Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury, to the extent that any damaging effect cannot be removed by proper admonition or instruction to the jury. [Citations omitted.]
>
> Courts have considerable discretion in passing on the

motions for mistrial, to the end that justice be more nearly effectuated.

State v. Archbold, 217 Neb. 345, 351, 350 N.W.2d 500, 504 (1984). Determination whether to grant a mistrial is a matter within the sound discretion of a trial court, whose ruling regarding a mistrial will be upheld unless such ruling constitutes an abuse of discretion. See *State v. Archbold, supra*. See, also, *State v. Borchardt, ante* p. 47, 395 N.W.2d 551 (1986). Because the evidence of the telephone call to DeVaney was admissible, as we have previously determined, there was no basis for the mistrial sought by Clancy, and the district court correctly denied Clancy's request for a mistrial.

Clancy's penultimate assignment of error is the denial of a directed verdict at the close of all the evidence. In a criminal case a 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) evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. See, *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985); *State v. Rubek*, 220 Neb. 537, 371 N.W.2d 115 (1985).

Clancy readily admitted that he brought the outboard motor to the DeVaney garage, where the motor remained in storage until removed by Deputy Larry Peterson. Thus, a critical point in this case is Clancy's explanation for his possession of the outboard motor. According to Clancy, after awaiting termination of a 2-hour conversation between Raymond Rothfuss and an unidentified "older fellow" at the Rothfuss residence in late November 1985, Clancy struck an agreement with Rothfuss for purchase of the outboard at a price of $500, with a deferred payment. Clancy never made a payment for the outboard. To counter Clancy's explanation that the motor had been purchased from Rothfuss, the State called Todd Burgess, who, after identifying the motor in question as the one severed with a hacksaw from his boat, established that his outboard motor was stolen. Melvin Schafer, a long-time fishing companion of Rothfuss, testified that he was acquainted with all Rothfuss' boating and fishing equipment; weekly checked everything at Rothfuss', including "coolers full of night

crawlers," during the last stages of Rothfuss' illness with cancer; and had seen Rothfuss' Ebko boat with two outboard motors, a 115-horsepower Evinrude and a 15-horsepower Scott motor, but no Mercury motor at the Rothfuss place. Carol Ann Spear, Rothfuss' daughter, testified that she frequently, at least weekly, visited her father, whose only occasion to be outside his home was when he went "to the hospital for cobalt treatments." Rothfuss died December 11, 1985. When Deputy Peterson began to question Clancy about the Mercury outboard motor, Clancy remarked: "Gee, I hope it isn't stolen." On cross-examination, in reference to his conversation with Deputy Peterson, Clancy was asked whether he was concerned that the motor was stolen, and Clancy answered: "Sure I was." Last, but not least, there was Clancy's threatening telephone call to Jane DeVaney, as previously mentioned.

"Circumstantial evidence is sufficient if the evidence and reasonable inferences that may be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt." *State v. Ellis*, 223 Neb. 779, 782, 393 N.W.2d 719, 722 (1986). " 'One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.' " *State v. Schott*, 222 Neb. 456, 462, 384 N.W.2d 620, 625 (1986). We conclude that, regarding every element of the offense charged, there was evidence with probative value to submit to the jury the question whether Clancy was guilty of the crime charged. The district court correctly denied Clancy's motion for a directed verdict.

Finally, Clancy claims the sentence imposed is excessive. Clancy is convicted of a Class IV felony, punishable by imprisonment for 5 years, a $10,000 fine, or both such imprisonment and fine, with no minimum penalty prescribed. See Neb. Rev. Stat. § 28-105 (Reissue 1985).

> We have regularly and repeatedly held that a sentence imposed within the statutory limits will not be modified on appeal, absent an abuse of discretion on the part of the trial court. [Citations omitted.] Furthermore, we have repeatedly held that the granting of probation as opposed

> to imposing of a sentence is a matter which is left to the sound discretion of the trial court, and absent a showing of abuse, this court will not on appeal disturb the trial court's denial of probation.

State v. Bovill, 223 Neb. 764, 767, 393 N.W.2d 715, 717 (1986).

The presentence investigation and report discloses a long list of Clancy's prior criminal offenses, which includes the following convictions and sentences: 1979—three counts of misdemeanor theft (60 days in county jail) and a felony burglary (2 years' probation and 90 days in county jail); 1981—theft (90 days in county jail); 1984—assault (120 days in county jail), false reporting (60 days in county jail), and third degree assault (30 days in county jail); 1985—third degree assault (1 year in Nebraska Penal and Correctional Complex; released August 28, 1985). Based upon the nature of the charge in the present case and Clancy's history of criminal acts, including impermissible liberties with people and the property of others, we find that the district court did not abuse its discretion in the sentence imposed on Clancy.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES L. DILLON, APPELLANT.
398 N.W.2d 718

Filed January 2, 1987. No. 86-545.

1. **Plea Bargains.** The State may withdraw from a plea arrangement at any time prior to, but not after, actual entry of the defendant's guilty plea or before the defendant's other action constituting detrimental reliance on the plea arrangement.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.
3. _____: _____. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Affirmed.

Richard Scott, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

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

SHANAHAN, J.

After an examination of the verified motion of Charles L. Dillon, as well as an examination of the files and records in Dillon's case, the district court declined to grant an evidential hearing on the motion and denied postconviction relief to Dillon. See Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985) (postconviction proceedings). We affirm.

Dillon claims he has been denied due process of law, guaranteed by Neb. Const. art. I, § 3, and U.S. Const. amend. XIV, concerning his nolo contendere plea entered to the charge of first degree sexual assault. Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1985). As the result of his nolo contendere plea, Dillon was convicted and sentenced to not less than 16 nor more than 49 years in the Nebraska Penal and Correctional Complex.

The factual background for Dillon's conviction is found in our opinion disposing of Dillon's direct appeal, *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986).

Initially, Dillon was charged with four felonies which occurred on November 1, 1984, namely, attempted first degree murder, first degree arson, burglary, and first degree sexual assault (forcible). Dillon was arraigned in the district court on February 11, 1985, and entered a not guilty plea to all four felonies charged. Sometime between arraignment and "two or three days" before Dillon's next court appearance on March 7, there were plea negotiations involving Dillon personally, his attorney, and the county attorney, during which, according to Dillon, "[W]e worked out our agreement, you know, a verbal agreement," whereby Dillon would plead to "breaking and

entering and theft," but "They brought this affidavit in, bingo [the county attorney] says . . . we will take the sex offense charge and that is because we've got this [affidavit]." The affidavit mentioned by Dillon was the "affidavit from a Kansas woman who stated that, in August 1983, she was forcibly sexually assaulted by Dillon." 222 Neb. at 133, 382 N.W.2d at 355.

On March 7 Dillon, with his lawyer, appeared before the district judge, who was informed that there had been plea negotiations and remarked: "I assume there has been some agreement between the State and the defendant." The county attorney stated the plea arrangement for disposition of the charges against Dillon, namely: In exchange for Dillon's plea of nolo contendere to the charge of forcible sexual assault, the State agreed to dismiss the other pending felony charges (attempted murder, arson, and burglary). The county attorney did not state or indicate any position or views regarding a possible sentence on Dillon's conviction. After acknowledging the plea arrangement which the county attorney had described to the court, Dillon entered his nolo contendere plea to first degree sexual assault. In accordance with *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), the court then determined that Dillon's nolo contendere plea was intelligently, voluntarily, and understandingly made; concluded that Dillon had validly waived the rights specified in *Irish*; found a factual basis for Dillon's plea; and accepted Dillon's plea of nolo contendere to first degree sexual assault.

Dillon's due process claim is founded on the initial plea bargain to dispose of Dillon's case on the basis of "breaking and entering and theft" charges and the county attorney's later withdrawal of that agreement before Dillon's plea.

In the main, Dillon relies on *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), which involved a guilty plea entered on a prosecutor's promise to refrain from recommending a sentence to be imposed on Santobello. At the hearing for sentencing, the prosecutor recommended that Santobello receive the maximum sentence. The sentencing court, disclaiming any influence by the prosecutor's recommendation, imposed the maximum penalty under New

York law. The U.S. Supreme Court, considering "fairness in securing agreement between an accused and a prosecutor," 404 U.S. at 261, and "the interests of justice," 404 U.S. at 262, stated:

> [The plea arrangement] phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

404 U.S. at 262.

Although Dillon may envision some principle of contract law entitling him to specific enforcement of a plea arrangement, we find the words of the U.S. Supreme Court appropriate: "[W]e do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law." *Brewer v. Williams*, 430 U.S. 387, 401 n.8, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

In *State ex rel. Fortner v. Urbom*, 211 Neb. 309, 318 N.W.2d 286 (1982), this court adopted the following principle: The State may withdraw from a plea arrangement at any time prior to, but not after, actual entry of the defendant's guilty plea or before the defendant's other action constituting detrimental reliance on the plea arrangement. See *Shields v. State*, 374 A.2d 816 (Del. 1977).

Dillon has failed to demonstrate a lack of fundamental fairness, that is, a denial of due process, regarding the plea arrangement and his nolo contendere plea. First, Dillon has not shown in what manner the State has failed to fulfill its part of the plea arrangement reached with Dillon. Second, the record conclusively establishes, and Dillon does not deny, that the initial plea arrangement was withdrawn before Dillon entered his nolo contendere plea. Third, Dillon does not show that he, relying on the initial plea arrangement, took any action or refrained from acting in reference to his eventual nolo contendere plea. Dillon's statements about plea negotiations

clearly establish that the change in the State's position occurred before Dillon had taken any action at all. Dillon's eventual action, including his nolo contendere plea, was taken after notice that any prospective nolo contendere plea, as ultimately entered on March 7, related to the charge of first degree sexual assault. Moreover, Dillon's nolo contendere plea was the result of the second and distinctly new plea arrangement extended by the State and was not a product of the first plea arrangement withdrawn by the State. As determined by the district court, Dillon intelligently, voluntarily, and understandingly entered his nolo contendere plea to the charge of first degree sexual assault. Accordingly, Dillon was not coerced in his acceptance of the State's altered and revised plea arrangement. We conclude that Dillon has not been denied due process of law concerning his nolo contendere plea entered pursuant to the plea arrangement in this case.

A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal. *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985). In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous. *State v. Williams, ante* p. 114, 396 N.W.2d 114 (1986). The decision and judgment of the district court are correct.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUNEAL DALE PRATT, APPELLANT.
398 N.W.2d 721

Filed January 2, 1987. No. 86-608.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Juneal Dale Pratt, pro se.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

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

PER CURIAM.

This is an appeal from the district court for Douglas County, Nebraska, wherein Juneal Dale Pratt sought postconviction relief pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). While the assignments of error are couched in terms which purport to raise constitutional issues, in fact Pratt's sole and only complaint is that the sentences imposed were excessive. The district court denied Pratt's request for relief without an evidentiary hearing. We agree with the decision of the district court.

These cases, including the sentences, were appealed and affirmed by this court in *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977), and *State v. Pratt*, 197 Neb. 390, 249 N.W.2d 500 (1977). They are not, therefore, proper subjects for postconviction relief. See *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985). A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. See, *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984), *cert. denied* 469 U.S. 873, 105 S. Ct. 226, 83 L. Ed. 2d 156; *State v. Weiland*, 188 Neb. 626, 198 N.W.2d 327 (1972). The decision of the district court denying postconviction relief is affirmed.

AFFIRMED.

ROLAND E. REYNOLDS ET AL., APPELLANTS, V. HAROLD S. MYERS ET AL., APPELLEES.

398 N.W.2d 722

Filed January 16, 1987. No. 85-385.

Appeal and Error. Where the appellants' brief does not contain specific assignments of error as required by Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), the judgment will be affirmed in the absence of any plain error this court may note.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Mary Cannon Veed and Michele M. Wheeler, for appellants.

Gerald P. Laughlin of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, and Frank A. Taylor of Kutak, Rock & Campbell, for appellees.

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

PER CURIAM.

The appellants' brief in this case, which was filed on September 30, 1985, contained no specific assignments of error as required by Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). In this circumstance the judgment will be affirmed in the absence of any plain error this court may note. *In re Interest of P.W., ante* p. 197, 397 N.W.2d 36 (1986).

We note no plain error. The judgment is, therefore, affirmed.

AFFIRMED.

CAPORALE, J., not participating.

HENRY BUSEKIST, APPELLANT AND CROSS-APPELLEE, V. ANN I. BUSEKIST, APPELLEE AND CROSS-APPELLANT.

398 N.W.2d 722

Filed January 16, 1987. No. 85-487.

1. **Antenuptial Agreements: Intent: Divorce.** An unambiguous antenuptial agreement which neither expressly nor by reasonable implication indicates an intention of the parties that it be valid upon divorce shall not be valid and binding upon the dissolution of marriage.
2. **Property Division: Alimony: Appeal and Error.** It is the rule in Nebraska that the division of property and the awarding of alimony in marriage dissolution cases are matters entrusted to the sound discretion of the trial judge. On appeal these matters will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.

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

James T. Gleason of Swarr, May, Smith & Andersen, P.C., for appellant.

Bernard T. Schafersman of Yost, Schafersman, Yost, Lamme & Hillis, P.C., for appellee.

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

GRANT, J.

Henry Busekist appeals the decree of the district court for Douglas County dissolving his marriage with Ann I. Busekist. In his appeal Henry alleges the district court erred in finding the antenuptial agreement between the parties was a binding agreement which survived the dissolution of the marriage. Henry further alleges the court erred in finding reasonable the amount of alimony awarded and in granting Ann a $10,000 mortgage on the home of Henry as a reasonable division of property. Ann cross-appeals, alleging the district court erred in not awarding her one-half the jointly owned house and in not awarding alimony payments for at least 48 months. Ann further assigns as error the district court's failure to secure the payments provided for in the antenuptial agreement and its refusal to award attorney fees and court costs. For the reasons hereinafter stated the judgment of the district court is reversed

in part and affirmed in part.

The facts preceding this matter are relatively simple. Henry Busekist and Ann Marshall were married on August 17, 1981. Henry, at the time of trial, was 80 years old and Ann was 55. Henry was retired and was a widower at the time of the marriage. Henry has heart problems, is hard of hearing, and must use a cane to walk. Ann is in good physical condition except for a painful arthritis condition requiring medication. No children were born of this union, and neither party is responsible for the welfare and support of any minor children. Henry has one adult daughter from a prior marriage.

At the time of the marriage the parties were possessed of substantially different assets. Henry's assets consisted of 400 acres of farmland, a home, savings, certificates of deposit, a car, coin collection, and antiques and other household furnishings. Ann's assets included her car, some household goods, and rights in a teachers' retirement plan.

Due to the substantial difference in assets, the parties executed an antenuptial agreement. The agreement was to define and limit the claims and demands which each of the parties might have against the estate of the other. The agreement provided that Henry would transfer the title of his principal residence to Henry and Ann as joint tenants with rights of survivorship. Furthermore, the agreement provided that in the event Henry shall predecease Ann, his estate would pay $600 per month to Ann during her lifetime. This payment was to come from the income of a trust created at the time the agreement was entered into, having as its corpus the 400 acres of farmland.

The marriage lasted for approximately 3 years before Henry filed a petition for dissolution. During this brief period of marital union, the couple experienced a shortage of income. Henry complained about excessive spending, but the financial problems continued. The marriage was dissolved by a decree of the district court for Douglas County. The decree held the antenuptial agreement to be valid and binding. Furthermore, the court granted the respondent, Ann, a mortgage to the value of $27,500 on the family residence as a result of the joint tenancy deed. This was later amended to a $10,000 mortgage.

Finally, the decree ordered alimony payments of $500 per month for 24 months to be paid to the respondent.

Petitioner's first assignment of error concerns the district court's finding that the antenuptial agreement was valid and binding. The general rule in Nebraska regarding the validity of antenuptial agreements in the event of divorce, as stated in *Sims v. Sims*, 186 Neb. 780, 186 N.W.2d 491 (1971), is that an antenuptial agreement containing no provision to the contrary is not affected by a divorce of the parties. We hold that the rule as stated in *Sims* is too broad in that it may operate to hold valid, in the event of divorce, an antenuptial agreement that is clearly to become effective only in the event of the death of a spouse simply because there is not an express provision to the contrary in the agreement. The agreement entered into between the parties in this case, when read as a whole, is clearly to be effective only as long as the marital relationship exists. The agreement neither expressly nor by reasonable implication indicates the parties wished the agreement to be effective in the event of divorce. The situation presented in *Sims* differs significantly on one important fact. In *Sims*, while there was no express provision in the agreement that the agreement should remain effective after a divorce, there was evidence adduced at trial that such was the intention of the parties. In the *Sims* case the parties had removed from the agreement, as signed, a provision that expressly voided the antenuptial agreement in the event of divorce. Such conduct was relevant evidence leading to the conclusion that the parties intended their agreement to continue in effect even after divorce.

In the present case there was testimony to the effect that the topic of divorce was never discussed as the antenuptial agreement was prepared. Such a document contemplating only the death of a spouse cannot be reasonably expected to include a provision for continued support after the marriage is dissolved by a divorce. Furthermore, in the absence of such a provision, such an agreement cannot be held to be valid and binding in the event of a divorce. Therefore, we hold that as to petitioner's first assignment of error, the district court did commit error in finding the antenuptial agreement a valid and binding agreement in light of the divorce. We hold that an

unambiguous antenuptial agreement which neither expressly nor by reasonable implication indicates an intention of the parties that it be valid upon divorce shall not be valid and binding upon the dissolution of marriage. To the extent it holds otherwise, *Sims* is overruled.

This is not to say that an antenuptial agreement may not specifically contain certain agreements between the parties to become effective in the event of a divorce between those parties. If the parties desire, they may so contract. Such a contract, however, is subject to our holding in *Mulford v. Mulford*, 211 Neb. 747, 749, 320 N.W.2d 470, 471 (1982), which states:

> It is generally held that antenuptial agreements providing in the event of divorce or separation the spouse should forfeit his or her rights in the property of the other are contrary to public policy and void as tending to promote divorce. This court so indicated in the early cases of *Tiernan v. Tiernan,* 112 Neb. 707, 201 N.W. 145 (1924), and *White v. White,* 112 Neb. 850, 201 N.W. 662 (1924).

In any event, in a divorce action the effect of an appropriate antenuptial agreement has been set out in *White v. White,* 112 Neb. 850, 853, 201 N.W. 662, 664 (1924), where we stated:

> The statute has made no exceptions in the case of an antenuptial contract, and the power is vested in the trial court to make fair and fitting award not limited by the provisions of such contract. The contract may be in evidence, among other evidence, as to the amount to be awarded, but no more.

Petitioner's last two assignments of error shall be considered together with respondent's first two assignments of error in her cross-appeal. These are concerned with the property division and the award of alimony. It is the rule in Nebraska that the division of property and the awarding of alimony in marriage dissolution cases are matters entrusted to the sound discretion of the trial judge. On appeal these matters will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986); *Anderson v. Anderson*, 222 Neb. 212, 382 N.W.2d 620 (1986). The ultimate test in determining correctness in the amount of alimony awarded as well as the

appropriateness of the division of property is reasonableness as determined by the facts of each case. *Taylor v. Taylor, supra; Burhoop v. Burhoop*, 221 Neb. 657, 380 N.W.2d 254 (1986). An appropriate division of property must turn on reasonableness and the circumstances of each case in light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984). *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986). These factors include duration of the marriage, history of the contributions to the marriage by each party, interruption of personal careers or educational opportunities, and the ability to engage in gainful employment. § 42-365. After a careful review of the record, we find no abuse of discretion on behalf of the trial court. The division of property, including the awarding to respondent, Ann Busekist, a lien in the form of a first mortgage in the amount of $10,000 on the family residence, as well as the award of alimony for 24 months was reasonable in light of the circumstances of this particular case.

Respondent's third assignment of error need not be considered. This assignment of error is concerned with the court's failure to secure the payments in the antenuptial agreement. This court's finding that the agreement is no longer a valid and binding document in light of the dissolution of marriage is dispositive of this issue.

Finally, respondent in her cross-appeal alleges the trial court erred in not awarding to her attorney fees and court costs. The awarding of attorney fees is a matter within the trial court's initial discretion. While it is reviewed de novo on the record, it will not be disturbed on appeal in the absence of abuse of discretion. *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986); *Kocarnik v. Kocarnik*, 209 Neb. 454, 308 N.W.2d 352 (1981). In the present instance the decree of the district court ordered each party to pay his or her own attorney fee and court costs. We cannot say upon a de novo review of the record that the district court abused its discretion in not awarding respondent attorney fees. The judgment of the district court is reversed in part and affirmed in part.

AFFIRMED IN PART, AND IN PART REVERSED.

KRIVOSHA, C.J., concurs in the result.

HELEN JOAN WEHLING, APPELLANT, V. DANIEL E. WEHLING, APPELLEE.

398 N.W.2d 726

Filed January 16, 1987. No. 85-546.

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

John W. Ballew, Jr., of Raymond, Olsen, Ediger & Ballew, P.C., for appellant.

Mark S. Trustin of Stehlik, Smith, Trustin & Schweer, and, on brief, Herbert M. Sampson III of Sampson & Forney, for appellee.

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

PER CURIAM.

Helen Joan Wehling appeals a judgment of the district court dissolving her marriage to Daniel E. Wehling in which the property was divided, but no alimony was awarded. The failure to order alimony and the award of property made are assigned as errors.

We have reviewed the record de novo, as we are required, to determine whether the district court abused its discretion. See *Vitosh v. Vitosh, ante* p. 196, 397 N.W.2d 35 (1986). Our review leads us to the conclusion that the district court did not abuse its discretion, and therefore its judgment should be affirmed.

The judgment is affirmed.

AFFIRMED.

RUSSELL D. OLSON AND GILBERTA OLSON, APPELLANTS, V. COUNTY OF DAKOTA ET AL., APPELLEES.

398 N.W.2d 727

Filed January 16, 1987. No. 85-621.

1. **Taxation: Valuation: Appeal and Error.** A property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. An appeal may then be taken to the district court from the order of the county board of equalization fixing the assessed value of the property.
2. **Taxation: Valuation: Collateral Attack.** A collateral attack on valuation of property for tax purposes is permissible only if the assessment is partially or entirely void.
3. **Mandamus.** A writ of mandamus is not an available remedy when there is a plain and adequate remedy at law.

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

Norris G. Leamer of Leamer Law Office, for appellants.

Kurt A. Hohenstein, Dakota County Attorney, for appellees.

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

BOSLAUGH, J.

The plaintiffs appeal from the order of the district court sustaining the defendants' demurrers and dismissing the action.

The plaintiffs commenced this action in 1985 to obtain a writ of mandamus, compelling the county and the county assessor to correct the valuation for tax purposes for the years 1978, 1979, and 1980 of a tract of real estate owned by the plaintiffs. The defendants filed demurrers, alleging that the plaintiffs failed to state a cause of action, that the court lacked subject matter jurisdiction, and that there was improper joinder of parties defendant. The plaintiffs filed an amended petition, and the defendants' demurrers were again sustained. The plaintiffs elected to stand on their petition, and the action was dismissed. This appeal followed.

Plaintiffs assign as error the trial court's order sustaining the defendants' demurrers. The plaintiffs contend their amended

petition stated a cause of action pursuant to the following language in Neb. Rev. Stat. § 77-519 (Reissue 1986): "The county assessor of any county . . . with the approval of the county board of any county, may correct the tax list before the tax is paid in case of erroneous assessments." They argue that this statute provides property owners with a statutory right to compel the county assessor to correct erroneous tax valuations.

Plaintiffs argue the tax valuations of their property for the years in question are prima facie erroneous because the valuations are substantially higher than the valuations in 1977 and 1981. Accordingly, plaintiffs requested the trial court to order the assessor to correct the tax lists for 1978, 1979, and 1980 to show the value of their property as $44,275, the value stated in 1981.

The plaintiffs are complaining that the valuations placed on their property for the years in question were excessive. We have consistently held that a property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. An appeal may then be taken to the district court from the order of the county board of equalization fixing the assessed value of the property. Neb. Rev. Stat. §§ 77-1502 (Reissue 1986) and 77-1510 (Reissue 1981); *Riha Farms, Inc. v. Dvorak*, 212 Neb. 391, 322 N.W.2d 801 (1982); *Scudder v. County of Buffalo*, 170 Neb. 293, 102 N.W.2d 447 (1960); *Power v. Jones*, 126 Neb. 529, 253 N.W. 867 (1934). This remedy is full, adequate, and exclusive. *Riha Farms, Inc., supra*. Such a claim cannot be made, in the first instance, "by direct application to any other body or by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination." *Id.* at 393, 322 N.W.2d at 803. A collateral attack is permissible only if the assessment is partially or entirely void.

A writ of mandamus is not an available remedy when there is a plain and adequate remedy at law. Neb. Rev. Stat. § 25-2157 (Reissue 1985); *Little v. Board of County Commissioners*, 179 Neb. 655, 140 N.W.2d 1 (1966).

Plaintiffs had an adequate statutory remedy to correct the alleged overvaluation of their property for the years in

question. *Riha Farms, Inc., supra.* The amended petition indicates this procedure was not followed. Further, plaintiffs did not allege the tax assessments were entirely or partially void. Accordingly, plaintiffs have not alleged facts showing a right to mandamus to compel the assessor to correct the tax lists.

Plaintiffs' reliance on § 77-519 as providing a basis for relief in mandamus is misplaced. The purpose of the statute is to permit the county assessor to correct clerical errors in the tax list, not to correct alleged errors in valuation of property.

The trial court properly sustained the defendants' demurrers. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OLLIE J. DAVIS, APPELLANT.

398 N.W.2d 729

Filed January 16, 1987. No. 86-269.

1. **Prior Convictions: Right to Counsel: Waiver.** To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment.
2. **Pleas: Prior Convictions: Appeal and Error.** Whether a defendant's guilty plea, which results in a conviction later used as the basis for application of an enhanced penalty, has been made understandingly, intelligently, and voluntarily is not an issue in the Supreme Court's review concerning the validity of an enhanced punishment imposed on a defendant.
3. **Prior Convictions: Proof.** Existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the accused's testimony and duly authenticated records maintained by the courts or penal and custodial authorities.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Mary G. Likes, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

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

SHANAHAN, J.

A jury convicted Ollie J. Davis on the charge of second degree forgery, see Neb. Rev. Stat. § 28-603(1) (Reissue 1985), an offense which occurred on April 25, 1985, and the district court sentenced Davis as a habitual criminal, see Neb. Rev. Stat. § 29-2221 (Reissue 1985). Davis appeals the sentence. We affirm.

For the enhanced penalty (habitual criminal), the State offered exhibits reflecting Davis' guilty pleas resulting in convictions and sentences for two previous felonies—one in a federal court, the other in a state district court of Nebraska. Neither of Davis' prior convictions has been set aside, and Davis has not been pardoned on either conviction and sentence.

Davis contends that the State's evidence for the enhanced penalty is insufficient, that is, the evidence does not show that Davis was "represented by or waived his right to counsel, nor did [the State's documentary proof] set forth whether the pleas were freely and voluntarily and intelligently made." Brief for Appellant at 5. To support his contention Davis relies on *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), where the U.S. Supreme Court, construing the 6th and 14th amendments to the U.S. Constitution, held that an uncounseled felony conviction could not be used to enhance punishment under a recidivist statute.

As noted, Davis' appeal involves a question concerning the sufficiency of evidence to sustain imposition of enhanced punishment under § 29-2221, a penalty prescribed by Nebraska's "habitual criminal" statute.

To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction. Other objections to the validity of such prior conviction constitute collateral attacks on that prior conviction and must be raised either by direct appeal from the prior conviction or in separate

proceedings commenced expressly for the purpose of setting aside such prior conviction as an invalid judgment. *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986). See, also, *State v. Fraser*, 222 Neb. 862, 387 N.W.2d 695 (1986); *State v. Soe*, 219 Neb. 797, 366 N.W.2d 439 (1985); *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984).

Whether Davis' guilty pleas to previous felony charges were understandingly, intelligently, and voluntarily made is irrelevant to the present proceedings because such question about either prior plea and resultant conviction is a subject for direct appeal or separate proceedings expressly for the purpose of setting aside those prior convictions, and is a collateral attack on such prior convictions and, therefore, an improper inquiry in the enhancement proceeding under review. Whether a defendant's guilty plea, which results in a conviction later used as the basis for application of an enhanced penalty, has been made understandingly, intelligently, and voluntarily is not an issue in the Supreme Court's review concerning the validity of an enhanced punishment imposed on a defendant. See *State v. Hamblin, supra*. Consequently, we limit our examination to the remainder of Davis' contention, namely, whether the State's evidence was sufficient to prove Davis' two prior counseled convictions for felonies.

Regarding Davis' conviction in federal court, the prosecution introduced into evidence appropriate copies of records for proceedings in the U.S. district courts. The copy of the "Judgment and Commitment," entered on June 18, 1973, in the U.S. District Court for the Southern District of Iowa, recited that "[Davis] appeared in person and by Richard A. Strickler, counsel. IT IS ADJUDGED that the defendant upon his plea of guilty . . . has been convicted of" interstate transportation of a forged check drawn on an Omaha bank in violation of 18 U.S.C. § 2314 (1982). The court sentenced Davis to imprisonment for 3 years but, suspending execution of that sentence, placed Davis on probation for 3 years. Administration of Davis' probation was transferred to federal jurisdiction in Nebraska. On January 2, 1975, Davis appeared with his lawyer before the U.S. District Court for the District of Nebraska, where Davis admitted violation of the 1973

probation ordered by the federal court in Iowa. The federal court in Nebraska vacated the previous order of probation entered in Iowa and then reinstated the 3-year prison sentence imposed in Iowa in 1973.

As proof of Davis' other felony conviction and sentence, the State introduced an appropriate copy of the "Judgment and Sentence" of the district court for Douglas County, Nebraska, entered on June 4, 1975, which document recited: "Ollie J. Davis is present in court with counsel, W. Campbell . . . [and] is arraigned for sentence upon his plea of guilty to the charge of Unlawful Delivery of Controlled Substance, as heretofore entered herein . . . and . . . the said defendant still adheres to his said plea of guilty and says he desires to stand thereon."

At the enhancement hearing after his conviction on the Nebraska forgery charge, Davis acknowledged that his "attorney over there in Iowa worked out a plea bargain with the U.S. attorney over there" and that Davis then entered his guilty plea to the federal charge in Iowa. Concerning his prior conviction in the district court for Douglas County, namely, his guilty plea to the charge of delivering a controlled substance, Davis acknowledged that he was represented by the "Public Defender's Office" when, in 1975, he "pled guilty to delivery of a controlled substance" and was sentenced.

> It is well established that the existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.

State v. Luna, 211 Neb. 630, 634, 319 N.W.2d 737, 740 (1982).

In view of the entire record before us, including Davis' acknowledgments about his prior convictions, there is no doubt that Davis had a lawyer when he entered his guilty plea to each felony charge on which he was previously convicted. The State presented sufficient evidence establishing Davis' counseled felony convictions used as bases for valid imposition of the enhanced punishment prescribed by § 29-2221. There is no error in the sentence imposed.

AFFIRMED.