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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

MARCH 11, 2016 and JUNE 30, 2016

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCXCIII

PEGGY POLACEK

OFFICIAL REPORTER

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DURING THE PERIOD OF THESE REPORTS

Michael G. Heavican, Chief Justice
John F. Wright, Associate Justice
William M. Connolly, Associate Justice
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice
Stephanie F. Stacy, Associate Justice
Max Kelch, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

Frankie J. Moore, Chief Judge
John F. Irwin, Associate Judge
Everett O. Inbody, Associate Judge
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge

Peggy Polacek . . . . . Reporter
Teresa A. Brown . . . . . Clerk
Corey Steel . . . . . State Court Administrator

JUDICIAL DISTRICTS AND DISTRICT JUDGES

First District

Counties in District: Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer

Judges in District	*City*
Paul W. Korslund	Beatrice
Daniel E. Bryan, Jr.	Auburn
Vicky L. Johnson	Wilber

Second District

Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
William B. Zastera	Papillion
David K. Arterburn	Papillion
Jeffrey J. Funke	Plattsmouth
George A. Thompson	Papillion

Third District

Counties in District: Lancaster

Judges in District	*City*
Steven D. Burns	Lincoln
John A. Colborn	Lincoln
Jodi Nelson	Lincoln
Robert R. Otte	Lincoln
Andrew R. Jacobsen	Lincoln
Lori A. Maret	Lincoln
Susan I. Strong	Lincoln
Darla S. Ideus	Lincoln

Fourth District

Counties in District: Douglas

Judges in District	*City*
Gary B. Randall	Omaha
J. Michael Coffey	Omaha
W. Mark Ashford	Omaha
Peter C. Bataillon	Omaha
Gregory M. Schatz	Omaha
J Russell Derr	Omaha
James T. Gleason	Omaha
Thomas A. Otepka	Omaha
Marlon A. Polk	Omaha
W. Russell Bowie III	Omaha
Leigh Ann Retelsdorf	Omaha
Timothy P. Burns	Omaha
Duane C. Dougherty	Omaha
Kimberly Miller Pankonin	Omaha
Shelly R. Stratman	Omaha
Horacio J. Wheelock	Omaha

Fifth District

Counties in District: Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

Judges in District	*City*
Robert R. Steinke	Columbus
Mary C. Gilbride	Wahoo
James C. Stecker	Seward
Rachel A. Daugherty	Aurora

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth District

Counties in District: Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

Judges in District	*City*
John E. Samson	Blair
Geoffrey C. Hall	Fremont
Paul J. Vaughan	Dakota City

Seventh District

Counties in District: Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

Judges in District	*City*
James G. Kube	Madison
Mark A. Johnson	Madison

Eighth District

Counties in District: Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

Judges in District	*City*
Mark D. Kozisek	Ainsworth
Karin L. Noakes	St. Paul

Ninth District

Counties in District: Buffalo and Hall

Judges in District	*City*
Teresa K. Luther	Grand Island
William T. Wright	Kearney
Mark J. Young	Grand Island
John H. Marsh	Kearney

Tenth District

Counties in District: Adams, Franklin, Harlan, Kearney, Phelps, and Webster

Judges in District	*City*
Stephen R. Illingworth	Hastings
Terri S. Harder	Minden

Eleventh District

Counties in District: Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

Judges in District	*City*
Donald E. Rowlands	North Platte
James E. Doyle IV	Lexington
David Urbom	McCook
Richard A. Birch	North Platte

Twelfth District

Counties in District: Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

Judges in District	*City*
Randall L. Lippstreu	Gering
Leo Dobrovolny	Gering
Derek C. Weimer	Sidney
Travis P. O'Gorman	Alliance

JUDICIAL DISTRICTS AND COUNTY JUDGES

First District

Counties in District: Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer

Judges in District	*City*
Curtis L. Maschman	Falls City
Steven B. Timm	Beatrice
Linda A. Bauer	Fairbury

Second District

Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
Robert C. Wester	Papillion
John F. Steinheider	Nebraska City
Todd J. Hutton	Papillion
Stefanie A. Martinez	Papillion

Third District

Counties in District: Lancaster

Judges in District	*City*
Laurie Yardley	Lincoln
Timothy C. Phillips	Lincoln
Thomas W. Fox	Lincoln
Matthew L. Acton	Lincoln
Holly J. Parsley	Lincoln
Thomas E. Zimmerman	Lincoln
Rodney D. Reuter	Lincoln

Fourth District

Counties in District: Douglas

Judges in District	*City*
Lawrence E. Barrett	Omaha
Marcena M. Hendrix	Omaha
Darryl R. Lowe	Omaha
John E. Huber	Omaha
Jeffrey Marcuzzo	Omaha
Craig Q. McDermott	Omaha
Susan Bazis	Omaha
Marcela A. Keim	Omaha
Sheryl L. Lohaus	Omaha
Thomas K. Harmon	Omaha
Derek R. Vaughn	Omaha
Stephanie R. Hansen	Omaha

Fifth District

Counties in District: Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

Judges in District	*City*
Frank J. Skorupa	Columbus
Patrick R. McDermott	David City
Linda S. Caster Senff	Aurora
C. Jo Petersen	Seward
Stephen R.W. Twiss	Central City

JUDICIAL DISTRICTS AND COUNTY JUDGES

Sixth District

Counties in District: Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

Judges in District	*City*
C. Matthew Samuelson	Blair
Kurt Rager	Dakota City
Douglas L. Luebe	Hartington
Kenneth Vampola	Fremont

Seventh District

Counties in District: Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

Judges in District	*City*
Donna F. Taylor	Madison
Ross A. Stoffer	Pierce
Michael L. Long	Madison

Eighth District

Counties in District: Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

Judges in District	*City*
Alan L. Brodbeck	O'Neill
James J. Orr	Valentine
Tami K. Schendt	Broken Bow

Ninth District

Counties in District: Buffalo and Hall

Judges in District	*City*
Philip M. Martin, Jr.	Grand Island
Gerald R. Jorgensen, Jr.	Kearney
Arthur S. Wetzel	Grand Island
John P. Rademacher	Kearney

Tenth District

Counties in District: Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster

Judges in District	*City*
Michael P. Burns	Hastings
Timothy E. Hoeft	Holdrege
Michael O. Mead	Hastings

Eleventh District

Counties in District: Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

Judges in District	*City*
Kent D. Turnbull	North Platte
Edward D. Steenburg	Ogallala
Anne Paine	McCook
Michael E. Piccolo	North Platte
Jeffrey M. Wightman	Lexington

Twelfth District

Counties in District: Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

Judges in District	*City*
James M. Worden	Gering
Randin Roland	Sidney
Russell W. Harford	Chadron
Kristen D. Mickey	Gering
Paul G. Wess	Alliance

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

Douglas County

Judges	*City*
Douglas F. Johnson	Omaha
Elizabeth Crnkovich	Omaha
Wadie Thomas	Omaha
Christopher Kelly	Omaha
Vernon Daniels	Omaha

Lancaster County

Judges	*City*
Toni G. Thorson	Lincoln
Linda S. Porter	Lincoln
Roger J. Heideman	Lincoln
Reggie L. Ryder	Lincoln

Sarpy County

Judges	*City*
Lawrence D. Gendler	Papillion
Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	*City*
James R. Coe	Omaha
Laureen K. Van Norman	Lincoln
J. Michael Fitzgerald	Lincoln
John R. Hoffert	Lincoln
Thomas E. Stine	Omaha
Daniel R. Fridrich	Omaha
Julie A. Martin	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 292

Andrea Nicole Avila
Michael Joe Baxter
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Whitney Ann Free
Alexander Gerard Galvin
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Sarah Elizabeth Grider
Janae Lynn Hofer
Hilary Nicole Hunt
John A. Hurley
Abigail Grace Johnson
Bradley S. Jones
Steven M. Karcher
Peter Andrew Kemp
Andrew Thomas LaGrone
Whitney Schroeder Lindstedt
Joel Sheng Liu
Kaz Christopher Long
Elsbeth Jane Magilton
Lauren Jean Micek
Andrew James Mock
Yevgen Volodymyrovych Olshevskyy
Ryan David Patrick
Michael Joseph Peters II
Jeromy W. Pharis
Andrew Michael Pope
Lindy Nicole Rauscher
Amber Leigh Rupiper
Stephen Andrew Sael
Robert Thomas Schaefer
Joseph H. Selde
DeAna K. Shaffer
Shivani Sharma
Lisa Marie Shifflet
Naoko Gima Shimizu
James George Sieben
Jason Matthew Smiley
Richard Cleon Stevens II
Adeel Akhtar Syed
Jason Richard Thomas
Joseph Patrick Thompson
Christine Elaine Westberg Dorn
Paul Wilson

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No. S-15-092: **Knehans v. Gorsuch**. Affirmed. Stacy, J. McCormack, J., not participating.

No. S-15-218: **State v. McLemore**. Affirmed. Stacy, J.

No. S-15-249: **Belitz v. Belitz**. Affirmed. Kelch, J. Connolly and Cassel, JJ., not participating.

No. S-15-372: **Cruise v. State**. Affirmed. Per Curiam. Connolly and Stacy, JJ., not participating.

No. S-15-382: **Doe v. Piske**. Petition for further review dismissed as having been improvidently granted. Per Curiam.

No. S-15-570: **Logan v. Logan**. Affirmed. Per Curiam. Connolly, J., not participating.

No. S-15-589: **Maystrick v. Maystrick**. Affirmed. Stacy, J.

No. S-15-590: **Hartley v. Hartley**. Affirmed. Per Curiam.

No. S-15-604: **Denisse v. Denisse**. Affirmed. Heavican, C.J.

No. S-15-779: **Davydzenkava v. Davydzenkau**. Affirmed. Per Curiam. Connolly, J., not participating.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-15-635: **Everts v. Nebraska Dept. of Health & Human Servs**. Appeal dismissed as moot.

No. S-15-804: **Prism Tech. v. Maxim Grp.** Stipulation allowed; appellant's appeal and any appellee cross-appeal dismissed with prejudice.

No. S-15-1188: **Leonor v. Kenney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-15-1238: **State v. Hedrick**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015); *State v. Hunnel*, 290 Neb. 1039, 863 N.W.2d 442 (2015).

No. S-16-092: **State v. Lyle**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-16-409: **State v. Garcia**. Appeal dismissed.

No. S-16-418: **State v. Garcia**. Appeal dismissed. See § 2-107(A)(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-14-789: **Burns v. Burns**, 23 Neb. App. 420 (2015). Petition of appellee for further review sustained on March 9, 2016.

No. A-14-905: **SBC v. Cutler**, 23 Neb. App. 939 (2016). Petition of appellee for further review denied on June 15, 2016.

No. A-14-948: **Kemnitz v. Thalken**. Petition of appellant for further review denied on April 6, 2016.

No. A-14-967: **Ludtke v. Ludtke**. Petition of appellant for further review denied on April 6, 2016.

No. A-14-1044: **State v. Rodriguez-Rojas**. Petition of appellant for further review denied on March 9, 2016.

No. A-14-1065: **Ross, Schroeder v. Artz**, 23 Neb. App. 545 (2016). Petition of appellants for further review denied on April 20, 2016.

No. A-14-1114: **White v. George**. Petition of appellant for further review denied on April 6, 2016.

No. A-14-1166: **State v. McMillion**, 23 Neb. App. 687 (2016). Petition of appellant for further review denied on May 12, 2016.

No. A-15-016: **Payne v. Nebraska Dept. of Corr. Servs.**, 24 Neb. App. 1 (2016). Petition of appellant for further review denied on June 2, 2016.

No. A-15-017: **State v. Brooks**, 23 Neb. App. 560 (2016). Petition of appellant for further review denied on March 23, 2016.

No. A-15-033: **State v. Hernandez**. Petition of appellant for further review denied on March 23, 2016.

No. A-15-043: **Geiger v. Besmer**. Petition of appellant for further review denied on March 25, 2016, as untimely.

No. A-15-054: **State v. Tyson**, 23 Neb. App. 640 (2016). Petition of appellant for further review denied on May 18, 2016.

No. S-15-086: **State v. Mitchell**, 23 Neb. App. 657 (2016). Petition of appellant for further review sustained on April 13, 2016.

No. S-15-104: **In re Estate of Evertson**, 23 Neb. App. 734 (2016). Petition of appellant for further review sustained on June 2, 2016.

No. A-15-146: **Rasmussen v. Nelson**. Petition of appellant for further review denied on May 18, 2016.

No. A-15-178: **Bruzzano v. Bruzzano**. Petition of appellant for further review denied on March 9, 2016.

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No. A-15-195: **Hays v. Hays**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-208: **State v. Harrod**. Petition of appellant for further review denied on March 16, 2016.

No. A-15-222: **Cohrs v. Bruns**. Petition of appellant for further review denied on May 4, 2016.

No. A-15-269: **Vandelay Investments v. Brennan**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-295: **State v. Sullivan**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-304: **State v. Parson**. Petition of appellant for further review denied on March 23, 2016.

No. A-15-306: **State v. Parson**. Petition of appellant for further review denied on March 23, 2016.

No. A-15-333: **State v. Haynes**. Petition of appellant for further review denied on March 4, 2016, as untimely filed.

No. A-15-336: **Derby v. Martinez**, 24 Neb. App. 17 (2016). Petition of appellee for further review denied on June 14, 2016. See § 2-102(F)(1).

No. A-15-347: **State v. Jenkins**. Petition of appellant for further review denied on June 15, 2016.

No. A-15-354: **Concannon v. Fuentes**. Petition of appellant for further review denied on March 9, 2016.

No. A-15-388: **State v. Purdie**. Petition of appellant for further review denied on May 4, 2016.

No. A-15-402: **State v. Watson**. Petition of appellant for further review denied on June 8, 2016.

No. S-15-404: **State v. Olbricht**, 23 Neb. App. 607 (2016). Petition of appellee for further review sustained on May 12, 2016.

No. A-15-413: **State v. Gallegos-Palafox**. Petition of appellant for further review denied on June 8, 2016.

Nos. A-15-417, A-15-694: **In re Interest of Miah T. & DeKandyce H.**, 23 Neb. App. 592 (2016). Petitions of appellant for further review denied on April 6, 2016.

No. A-15-429: **Deinert v. John**. Petition of appellant for further review denied on June 22, 2016.

No. A-15-441: **State v. Cramer**. Petition of appellant for further review denied on March 16, 2016.

No. A-15-448: **State v. Haley**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-461: **In re Interest of Shayla H. et al**. Petition of appellant for further review denied on April 20, 2016.

PETITIONS FOR FURTHER REVIEW

No. A-15-461: **In re Interest of Shayla H. et al**. Petition of appellee David H. for further review denied on April 20, 2016.

No. A-15-462: **State v. Alspaugh**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-470: **In re Interest of Giavanna G.**, 23 Neb. App. 853 (2016). Petition of appellee for further review denied on June 2, 2016.

No. A-15-479: **In re Interest of Shelby H**. Petition of appellant for further review denied on March 11, 2016, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-492: **State v. Gifford**. Petition of appellant for further review denied on June 22, 2016.

No. A-15-495: **State v. Moore**. Petition of appellant for further review denied on March 16, 2016.

No. A-15-496: **Telles v. Excel Corp**. Petition of appellee for further review denied on June 22, 2016.

No. A-15-504: **State v. Papazian**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-505: **State v. Laflin**, 23 Neb. App. 839 (2016). Petition of appellant for further review denied on May 2, 2016.

No. A-15-553: **In re Interest of A.H**. Petition of appellant for further review denied on May 4, 2016.

No. A-15-561: **State v. Marsh**. Petition of appellant for further review denied on March 21, 2016, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-587: **In re Interest of Phaylin D. & Phebie D**. Petition of appellee Keith C. for further review denied on May 12, 2016.

No. A-15-607: **In re Interest of Dante S**. Petition of appellant for further review denied on March 16, 2016.

No. A-15-613: **State v. Assad**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-614: **State v. Burger**. Petition of appellant for further review denied on March 9, 2016.

No. A-15-616: **State v. Wise**. Petition of appellant for further review denied on March 9, 2016.

No. A-15-625: **State v. O'Connor**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-647: **State v. Gutierrez**. Petition of appellant for further review denied on April 13, 2016.

No. S-15-658: **In re Interest of Alec S.**, 23 Neb. App. 792 (2016). Petition of appellant for further review sustained on May 12, 2016.

No. A-15-664: **In re Interest of Santiago T**. Petition of appellant for further review denied on March 9, 2016.

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No. A-15-755: **Steiner v. Steiner**. Petition of appellant for further review denied on June 15, 2016.

No. A-15-759: **In re Interest of Brandon H. et al**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-764: **State v. Moore**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-787: **State v. Terry**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-790: **State v. Newcomer**, 23 Neb. App. 761 (2016). Petition of appellant for further review denied on May 12, 2016.

No. A-15-842: **State v. Brown**. Petition of appellant for further review denied on May 4, 2016.

No. A-15-852: **State v. Brunswick**. Petition of appellant for further review denied on June 8, 2016.

No. A-15-895: **Mengedoht v. Looby**. Petition of appellants for further review denied on April 20, 2016.

No. A-15-902: **Gray v. Gage**. Petition of appellant for further review denied on March 23, 2016.

No. A-15-926: **State v. Brinton**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-929: **State v. Bethel**. Petition of appellant for further review denied on March 11, 2016, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-936: **State v. Moore**. Petition of appellant for further review denied on March 23, 2016.

No. A-15-940: **State v. Mosqueda**. Petition of appellant for further review denied on April 6, 2016.

No. A-15-1004: **State v. Brookins**. Petition of appellant for further review denied on April 13, 2016.

No. A-15-1026: **State v. Mack**. Petition of appellant for further review denied on April 13, 2016.

No. A-15-1035: **State v. Tyler**. Petition of appellant for further review denied on March 4, 2016, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-1045: **State v. Sherrod**. Petition of appellant for further review denied on March 9, 2016.

No. A-15-1055: **Anderson v. Anderson**. Petition of appellant for further review denied on May 18, 2016.

No. A-15-1066: **Lower Loup NRD v. Prokop**. Petition of appellant for further review denied on April 12, 2016, as filed out of time. See § 2-102(F)(1).

PETITIONS FOR FURTHER REVIEW

No. A-15-1081: **In re Interest of Kelsey A**. Petition of appellant for further review denied on June 22, 2016.

No. A-15-1082: **In re Interest of Kailee A**. Petition of appellant for further review denied on June 22, 2016.

No. A-15-1083: **In re Interest of Klayton C**. Petition of appellant for further review denied on June 22, 2016.

No. A-15-1117: **State v. Heiser**. Petition of appellant for further review denied on June 2, 2016.

No. A-15-1173: **State v. Swift**. Petition of appellant for further review denied on March 7, 2016, for failure to file brief in support. See § 2-102(F)(1).

No. A-15-1181: **Fleming v. Fleming**. Petition of appellant for further review denied on March 11, 2016, for failure to pay filing fee.

No. A-15-1195: **State v. Green**. Petition of appellant for further review denied on May 12, 2016.

No. A-15-1199: **State v. Killingsworth**. Petition of appellant for further review denied on June 2, 2016.

No. A-16-041: **Linder v. Crete Carrier Corp**. Petition of appellant for further review denied on March 23, 2016.

No. A-16-087: **State v. McDonald**. Petition of appellant for further review denied on June 15, 2016.

No. A-16-149: **Santos v. Madsen**. Petition of appellant for further review denied on May 31, 2016.

No. A-16-159: **Moser v. Lancaster Cty. Bd. of Equal**. Petition of appellants for further review denied on May 13, 2016.

No. A-16-162: **State v. Castonguay**. Petition of appellant for further review denied on May 4, 2016.

No. A-16-188: **Rivera v. Schreiber Foods**. Petition of appellant for further review denied on April 25, 2016.

No. A-16-205: **State v. Martin**. Petition of appellant for further review denied on June 22, 2016.

No. A-16-294: **State v. Rice**. Petition of appellant for further review denied on June 8, 2016.

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IN RE ESTATE OF ALBERTS
Cite as 293 Neb. 1

Nebraska Supreme Court
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In re Estate of Emil C. Alberts, deceased. Mark Alberts and Mike Alberts, in their individual capacities and as Copersonal Representatives and Cotrustees, appellants, v. Lois M. Alberts, appellee.

875 N.W.2d 427

Filed March 11, 2016. No. S-15-173.

1. **Decedents' Estates: Appeal and Error.** An appeal from the county court's allowance or disallowance of a claim in probate will be heard as an appeal from an action at law. In reviewing a judgment of the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Statutes: Appeal and Error.** The language of a statute is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. ____: ____. When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
5. **Attorney and Client.** The power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved.
6. **Statutes: Appeal and Error.** An appellate court may not add language to the plain terms of a statute to restrict its meaning.

Appeal from the County Court for Custer County: Tami K. Schendt, Judge. Affirmed in part, and in part reversed and remanded with directions.

William J. Lindsay, Jr., of Gross & Welch, P.C., L.L.O., and Steve Windrum, of Malcom, Nelsen & Windrum, L.L.C., for appellants.

Gregory C. Scaglione and John V. Matson, of Koley Jessen, P.C., L.L.O., and Claude E. Berreckman, of Berreckman & Davis, P.C., for appellee.

Heavican, C.J., Wright, Connolly, Cassel, and Stacy, JJ.

Wright, J.

NATURE OF CASE

Following the death of Emil C. Alberts, his surviving spouse, Lois M. Alberts, authorized her attorney to file a petition on her behalf to elect to take one-half of Emil's augmented estate under Neb. Rev. Stat. § 30-2313 (Reissue 2008). Emil's two nephews, Mark Alberts and Mike Alberts, as copersonal representatives of Emil's estate and as beneficiaries of Emil's trust (the appellants), challenge both the validity of Lois' petition and the county court's inclusion of the value of certain trust property into the calculation of Lois' elective share.

BACKGROUND

Emil passed away in June 2013 and was survived by Lois and the appellants. After Emil's death, Lois hired an attorney who filed a petition with the county court for Custer County for Lois to elect one-half of Emil's augmented estate pursuant to § 30-2313.

In response to the petition for the elective share, the appellants objected to the petition's validity and to the calculation of Lois' elective share within it. The appellants alleged that the petition was not valid, because Neb. Rev. Stat. § 30-2315 (Reissue 2008) states that the right to an elective share may only be exercised by the surviving spouse, and Lois did not

sign or file the petition herself. The appellants also alleged that the value of certain property transferred during Emil's lifetime was improperly included in the augmented estate for purposes of calculating Lois' elective share; they argued that Lois consented to the transfer and that thus, the value of the property should have been excluded from the augmented estate under Neb. Rev. Stat. § 30-2314(c)(2) (Reissue 2008).

The property at issue was real estate transferred by deeds to Emil's revocable trust. Seventeen months prior to Emil's death, he and Lois jointly met with an attorney to put together an estate plan. In addition to Emil's living trust and will, the attorney prepared four deeds for them. Two of the deeds conveyed real property to Lois as trustee of Lois' trust. The other two deeds conveyed the real property at issue in this appeal, valued at $2,529,460, to Emil as trustee of Emil's trust. All four deeds were signed by both Emil and Lois on the same day that Emil's trust and will and Lois' trust and will were executed. Lois does not dispute that she signed the deeds and does not allege any fraud in the inducement.

The county court ultimately found that Lois' petition for elective share was validly filed and that the value of the property at issue should be included in the augmented estate for purposes of calculating Lois' elective share.

ASSIGNMENTS OF ERROR

The appellants assign, combined and restated, that the county court erred in finding that the petition for elective share was validly filed and in failing to exclude from the augmented estate the value of the real estate transferred by deeds to Emil's trust under § 30-2314(c)(2).

STANDARD OF REVIEW

[1,2] An appeal from the county court's allowance or disallowance of a claim in probate will be heard as an appeal from an action at law.[1] In reviewing a judgment of the probate court

[1] *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.[2] The probate court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.[3] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[4]

ANALYSIS

[3,4] This case presents two issues involving statutory interpretation. The language of a statute is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[5] When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.[6]

Validity of Petition for Elective Share

The first issue is whether the surviving spouse's claim for her elective share was properly filed. The appellants claim the petition for elective share was not valid, because it was signed and filed by Lois' attorney. The appellants concede that Lois verbally authorized her attorney to file the petition, but they assert that the petition was void, because the attorney signed and filed it, and Lois did not. We disagree.

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[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013).

[6] *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

Section 30-2315 provides in part that "[t]he right of election of the surviving spouse may be exercised only during his or her lifetime by him or her." That right may be exercised "by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share."[7] Neither § 30-2315 nor § 30-2317 requires the surviving spouse to personally sign and file the petition. And we reject the appellants' argument that "[n]o one other than [Lois], her conservator or her agent under an appropriate power of attorney can have the authority to act for [Lois] in exercising her personal right to elect to take the elective share."[8]

The purpose of the statutory elective share is to protect the surviving spouse against disinheritance, and the purpose of § 30-2315 is to ensure that such protection is afforded only to the surviving spouse.[9] In other words, § 30-2315 prevents someone other than the surviving spouse, such as the surviving spouse's heir, from claiming the elective share for himself or herself. But § 30-2315 is clearly not meant to deprive the surviving spouse of his or her own elective share simply because the surviving spouse directed an attorney to sign and file the petition, rather than doing so himself or herself.

[5] Moreover, we have said that the power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved.[10] Here, there is no evidence that Lois' attorney filed the petition without Lois' permission or direction; on the contrary, the appellants agree that Lois authorized her attorney to file the petition on her behalf. Accordingly, we find that Lois properly exercised her right of election by directing her attorney to file the petition on her behalf. We conclude that the petition for elective share was validly filed and that the appellants' first assignment of error is without merit.

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[7] Neb. Rev. Stat. § 30-2317(a) (Reissue 2008).

[8] Brief for appellants at 19.

[9] See, *In re Estate of Fries, supra* note 6; Annot., 83 A.L.R.2d 1077 (1962).

[10] See *Koch v. Koch*, 226 Neb. 305, 411 N.W.2d 319 (1987).

Calculation of Elective Share

The second issue is whether the value of the real estate transferred by deeds to Emil's trust ($2,529,460) should be included in the augmented estate. The county court determined that it should, and the appellants disagree. The appellants argue that the value of the property at issue should be excluded from the augmented estate under § 30-2314(c)(2).

Section 30-2314 sets forth what is to be included in and excluded from the augmented estate. Subsection (a) generally sets forth what is to be included in the calculation, and subsection (c) excludes certain property otherwise includable under subsection (a).

Section 30-2314(a), in relevant part, includes in the augmented estate:

> (1) The value of property transferred by the decedent at any time during marriage . . . to or for the benefit of any person other than a bona fide purchaser or the surviving spouse, but only to the extent to which the decedent did not receive adequate and full consideration in money or money's worth for such transfer, if such transfer is a transfer of any of the following types:
>
> . . . .
>
> (ii) Any transfer to the extent to which the decedent retained at death a power alone or with any other person to revoke such transfer or to consume, invade, or dispose of the principal of the property for his or her own benefit.

The appellants concede that the property would be included in the augmented estate under subsection (a) of § 30-2314, if it were not excluded under subsection (c)(2).

Section 30-2314(c)(2) excludes from the augmented estate:

> Property transferred by the decedent to any person other than the surviving spouse by any . . . deed . . . joined in by the surviving spouse of the decedent or with the consent to transfer manifested before or after death of the decedent by a writing signed by the surviving spouse

> of the decedent before, contemporaneously with, or after the transfer[.]

The county court found that § 30-2314(c)(2) did not apply. In its January 30, 2015, order, it stated:

> Although [Lois] signed warranty deeds conveying the real estate to [the trust], [Emil] retained the power to revoke the trust and enjoy the benefits from the income of this trust during his lifetime, therefore, under §30-2314(a)[(1)](ii) the augmented estate must be increased by the value of the real estate. §30-2314(c)(2) is not applicable and cannot be used to exclude the real estate from the augmented estate, because [Emil] effectively retained possession and enjoyment and right to the income from the property.

We do not agree with the county court's conclusion that the deeds from Lois and Emil were transfers for purposes of subsection (a)(1) of § 30-2314 and were not excluded by subsection (c)(2). The plain language in § 30-2314(c)(2) excludes from the augmented estate certain "[p]roperty transferred by the decedent to *any person* other than the surviving spouse . . . ." (Emphasis supplied.) The rights reserved by Emil as the settlor of the trust do not control the determination of whether the transfer is excluded from the augmented estate. Rather, the question is whether a trust is a "person" for purposes of § 30-2314(c)(2). We find that it is. Although not cited by either party, Neb. Rev. Stat. § 30-2209 (Cum. Supp. 2014) sets forth general definitions of terms applicable to § 30-2314. Section 30-2209 states that the term "[p]erson means . . . an organization . . ." and that the term "[o]rganization includes a . . . trust . . . ."

Substituting the term "person" in § 30-2314(c)(2) with the term "trust," we find that subsection (c)(2) clearly applies and excludes from the augmented estate the value of the property in question. Subsection (c)(2) excludes from the augmented estate "[p]roperty transferred by the decedent to any [trust] by any . . . deed . . . joined in by the surviving spouse of the

decedent or with the consent to transfer manifested before or after death of the decedent by a writing signed by the surviving spouse . . . .” Here, the property was transferred by Emil to his trust by deeds joined in by Lois, *and* with Lois’ consent to the transfer manifested by her signature on the deeds. Lois joined in the transfer by Emil of the property to the trust, and the property was not part of the augmented estate.

Lois does not dispute that she signed the deeds. She does not allege any fraud in the inducement. Yet, Lois contends that her signature on the deeds was not a consent to the transfer. She argues that in order to be excluded under § 30-2314(c)(2), the consent must be to a transfer that diminishes the decedent spouse’s estate. In support of her argument, Lois relies on our discussion of § 30-2314(c)(2) in *In re Estate of Fries*.[11] Her reliance is misplaced.

In *In re Estate of Fries*, a wife executed quitclaim deeds transferring her interest in three parcels of land (Properties) to her husband. The husband later recorded the quitclaim deeds and then transferred the Properties by deed to his children as joint tenants. The wife did not sign the joint tenancy deed. After the husband’s death, the wife filed a petition for elective share and included the Properties in the augmented estate for purposes of calculating her elective share.

Both parties filed motions for summary judgment. The trial court sustained the personal representative’s motion and dismissed the wife’s petition for an elective share as augmented by the Properties described in the quitclaim deeds.

We held that the trial court erred in concluding as a matter of law that the Properties described in the quitclaim deeds should not be included in the augmented estate.

As an alternative basis for summary judgment, the personal representative of the husband’s estate and the husband’s children argued that even if the Properties were includable in the augmented estate under § 30-2314(a), the Properties should be excluded under subsection (c)(2), because the wife signed

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[11] *In re Estate of Fries, supra* note 6.

the deeds transferring the Properties to her husband, thereby relinquishing her rights to inheritance.

We explained that the pertinent transfer for purposes of § 30-2314(c)(2) was the husband's transfer of the Properties to the children. Not only is such fact explicit in the statute ("[p]roperty transferred *by the decedent* to any person . . ." (emphasis supplied)), but we also explained why the decedent's transfer to his children, rather than the transfer *by the wife* to the decedent, comports with the policy of § 30-2314(c)(2):

> Logically, when a spouse agrees to a transfer of property that diminishes the eventual decedent's estate, the surviving spouse should not be allowed to reclaim the value of the transferred property in the augmented estate. But that principle is not implicated if a transfer did not remove the property from the decedent spouse's estate, because the consent of the surviving spouse to the transfer was *not* a consent to any corresponding diminution in the estate.[12]

When the husband presented three documents for the wife's signature, he told her the documents were for tax purposes. Most important was the fact the wife did not sign the deed transferring title of the Properties to the husband's children. The husband's deed of the Properties, and not the wife's execution of the quitclaim deeds, was the decisive transfer.

We concluded there was a genuine issue of material fact regarding whether the wife's execution of the quitclaim deeds to the husband should be interpreted as her written consent to the later transfer of the Properties to the children. We concluded the county court erred in entering summary judgment and dismissing the wife's petition for an elective share of the husband's estate, and we reversed the judgment and remanded the cause for further proceedings.

Based on our statements about diminution of the estate, Lois argues that § 30-2314(c)(2) does not apply to the transfer of the property, because the transfer did not diminish the estate.

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[12] *Id.* at 899, 782 N.W.2d at 606 (emphasis in original).

She argues that Emil retained control over the property and could have terminated the trust at any time prior to his death and that therefore, the deeds to the trust did not diminish her husband's estate. Based on these presuppositions, Lois argues that her signature on the deeds could not have been a consent to relinquish her rights to the property.

But Lois misapplies our rationale in *In re Estate of Fries* regarding the effect of the quitclaim deeds from the wife to the husband. In that case, we explained that § 30-2314(c)(2) applies to transfers made by the decedent and consented to by the surviving spouse in writing. Although the quitclaim deeds were executed by the surviving spouse in writing, subsection (c)(2) did not apply, because the quitclaim deeds by the wife to the husband were not a transfer by the husband. Although the husband's deed to his children was a transfer made by the husband, the value of the Properties transferred was not excluded from the augmented estate under subsection (c)(2), because the wife did not consent to that transfer.

[6] Lois misconstrues *In re Estate of Fries* as adding a requirement to § 30-2314(c)(2) that in order to be excluded from the augmented estate, the transfer must diminish the decedent's estate. But an appellate court may not add language to the plain terms of a statute to restrict its meaning.[13] And our discussion of the diminution of the estate in *In re Estate of Fries* explained why the exclusion in subsection (c)(2) would apply to the transfer made by the husband (had the wife consented) and not to the quitclaim deeds from the wife to her husband. Whether the quitclaim deeds were a consent to the transfer by the husband to his children was a material issue of fact, which cause we remanded to the trial court.

Emil and Lois' transfer of property to the revocable trust *did* diminish the decedent's estate for purposes of calculating the elective share, because § 30-2314(c)(2) excludes transfers by the decedent to any person other than the surviving spouse by an instrument joined in by the surviving spouse. The fact

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[13] *Black v. Brooks*, 285 Neb. 440, 827 N.W.2d 256 (2013).

that the trust was revocable during Emil's lifetime is irrelevant for purposes of subsection (c)(2), because the decedent did not revoke the trust while he was alive and cannot revoke it now. Unlike *In re Estate of Fries*, Lois joined in the transfer of the property to a person other than herself.

We find that the language within the deeds of the property, which contained Lois' signatures, is clear evidence that Lois joined in and consented to the transfer. The deeds state that both Emil and Lois convey the property to "EMIL C. ALBERTS, TRUSTEE OF THE EMIL C. ALBERTS LIVING TRUST." Nothing within the deeds suggests that Lois (or Emil in his personal capacity) retained any interest. Accordingly, we conclude that the value of the property at issue should be excluded from Emil's augmented estate.

This result is not only compelled by the clear language of the statute as explained above, but it also comports with the purposes of the elective share and augmented estate statutes. Those statutes work together to protect the surviving spouse from disinheritance, but also to prevent the surviving spouse from taking more than his or her "fair share" of the total wealth of the decedent.[14] Under these principles, Lois cannot include in her elective share the property transferred to Emil's trust by deeds signed by Lois.

CONCLUSION

For the foregoing reasons, we affirm the county court's finding that the petition for elective share was validly filed. We reverse the finding that § 30-2314(c)(2) did not apply and remand the cause with directions to recalculate Lois' elective share consistent with this opinion.

Affirmed in part, and in part reversed and remanded with directions.

Miller-Lerman, J., not participating.

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[14] *In re Estate of Fries, supra* note 6, 279 Neb. at 892, 782 N.W.2d at 601.

Nebraska Supreme Court
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Shamecka Holloway, appellant, v. State of Nebraska et al., appellees.

875 N.W.2d 435

Filed March 11, 2016. No. S-15-280.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Immunity: Appeal and Error.** An appellate court reviews de novo whether a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Tort Claims Act: Liability.** In cases where the facts are undisputed, the application of the discretionary function exemption of the State Tort Claims Act presents a question of law.
5. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
6. **Tort Claims Act: Liability.** A state actor's performance or nonperformance of a discretionary function cannot be the basis of liability under the State Tort Claims Act.
7. **Tort Claims Act.** A court engages in a two-step analysis to determine whether the discretionary function exception of the State Tort Claims Act applies. First, the court must consider whether the action is a matter of choice for the acting employee. If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.
8. **Statutes: Words and Phrases.** Generally, the word "shall" in a statute is mandatory.
9. ____: ____. The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.

10. **Tort Claims Act.** The purpose of the discretionary function exception is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.
11. ____. The discretionary function exception extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions.
12. ____. The discretionary function exception does not extend to the exercise of discretionary acts at an operational level, where there is no room for policy judgment.
13. ____. It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.
14. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.
15. **Actions: Pleadings.** In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
16. ____: ____. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.
17. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
18. **Actions: Motions to Dismiss.** For purposes of a motion to dismiss, a court is not obliged to accept as true a legal conclusion couched as a factual allegation, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.
19. **Employer and Employee: Negligence: Liability.** Under the doctrine of respondeat superior, an employer is held vicariously liable for the negligent acts of an employee committed while the employee was acting within the scope of the employer's business.
20. ____: ____: ____. If an employee is not liable, the employer cannot be liable under the doctrine of respondeat superior.
21. **Mental Health: Health Care Providers: Liability.** A mental health practitioner or psychologist is not liable for failing to warn of a patient's threatened violent behavior unless the patient has communicated to the practitioner a serious threat of physical violence to a reasonably identifiable victim.

22. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
23. ____. There is no duty to control the conduct of a third person as to prevent him or her from causing physical harm to another unless a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.

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

Terrence J. Salerno and Danny C. Leavitt for appellant.

Jonathan J. Papik and Andrew D. Strotman, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee Correct Care Solutions.

Douglas J. Peterson, Attorney General, David A. Lopez, Ryan S. Post, and Andrew T. LaGrone, Senior Certified Law Student, for appellees State of Nebraska, Department of Correctional Services, Robert Houston, Cameron White, and Randy Kohl.

Connolly, Miller-Lerman, Cassel, and Stacy, JJ., and Bishop, Judge.

Cassel, J.

I. INTRODUCTION

After being shot by Nikko Jenkins shortly after his release from prison, Shamecka Holloway sued the State of Nebraska and others. She claimed that the State and one of its contractors were negligent in failing to provide Jenkins with adequate mental health treatment and failing to seek mental health commitment prior to his release. The district court granted the defendants' motions to dismiss without allowing Holloway to proceed with discovery. Because whether to seek commitment is discretionary, the State and its employees were entitled to immunity from suit. And because Holloway failed to plead sufficient facts to show that the contractor was liable, the court did not err in dismissing the complaint. We affirm.

II. BACKGROUND

Jenkins was sentenced to serve 21 years of incarceration with the Nebraska Department of Correctional Services (Department). During Jenkins' incarceration, he engaged in numerous violent activities and other conduct which violated the Department's rules, policies, and procedures. He repeatedly exhibited signs of a serious mental health problem and repeatedly requested treatment for such problem.

On July 30, 2013, after Jenkins had served 10½ years of his sentence, the State released him from incarceration. On August 24, Jenkins shot Holloway as she walked in her front yard in Omaha, Nebraska. As a result, Holloway suffered permanent damage and incurred medical bills.

Holloway sued the State; the Department; Robert Houston, retired director of the Department; Cameron White, behavioral health administrator for the Department; Correct Care Solutions (CCS); Dr. Natalie Baker; and Dr. Randy Kohl (collectively the appellees). She sued Houston, White, Baker, and Kohl in their official and individual capacities.

According to the complaint, the State had a number of responsibilities with respect to inmates. The responsibilities included operating certain correctional facilities in Nebraska, assessing and evaluating inmates in order to determine the need for mental health commitment or other appropriate mental health services, and providing adequate advance notice to members of the public regarding the release of a dangerous individual who threatened serious bodily harm to others.

CCS contracted with the State to provide medical services for inmates incarcerated in the facility in Tecumseh, Nebraska. CCS employees and agents evaluated and treated Jenkins while he was held at the Tecumseh correctional facility. Baker, a physician who worked at the Tecumseh facility under the direction of the Department and CCS, was largely responsible for the mental health care and treatment given to Jenkins. Holloway alleged that Baker personally interviewed and evaluated Jenkins during Jenkins' incarceration, that

Baker failed to take any steps to have Jenkins evaluated at the Lincoln Regional Center, and that Baker allowed Jenkins to be released from prison. According to the complaint, Jenkins told Baker and staff evaluators that he would hurt others upon his release.

Holloway claimed that at all times alleged in her complaint, Houston, White, Baker, and Kohl "were acting within the scope and course of their employment with their various employers." She further alleged that those individuals "evidenced a deliberate indifference to the mental health needs" of Jenkins "when they were aware of facts which created the likelihood that Jenkins, when released, presented a substantial risk of serious bodily harm to the citizens of Nebraska, and specifically to [Holloway]." Holloway claimed that the individual defendants violated the Department's policies or customs related to the treatment, evaluation, and incarceration of inmates exhibiting symptoms of a mental illness.

According to the complaint, Houston directed White to take certain actions. At Houston's direction, White was to reduce the duration of an inpatient treatment program by 4 months and change the clinical recommendations of hundreds of inmates from inpatient to outpatient treatment. As a result, the recommendation for Jenkins was changed from inpatient treatment to outpatient treatment, which accelerated his release from the Department. Holloway also alleged that the State failed to properly calculate and/or apply "good time" for Jenkins in ordering his release on July 30, 2013.

Holloway claimed that she suffered permanent mental and emotional damages as a proximate result of the appellees' acts of omission and commission. She alleged that the State had a duty to her and to the public in Omaha, insofar as the State was aware that Jenkins posed a risk to all citizens of Omaha. She claimed that the State knew or should have known of the foreseeability of harm to her once Jenkins was released. According to Holloway, Baker and CCS owed a duty to the citizens of Nebraska to correctly evaluate and treat all inmates

under their care and that they breached their duty in their treatment and release of Jenkins.

On September 2, 2014, the appellees filed motions to dismiss. One motion was brought on behalf of the State, Houston (official and individual capacities), White (official and individual capacities), Baker (official capacity), and Kohl (official and individual capacities). That motion asserted that the court lacked subject matter jurisdiction over the case and that the complaint failed to state a claim upon which relief could be granted. The other motion to dismiss, brought by CCS, moved to dismiss the complaint with prejudice for failure to state a claim upon which relief could be granted. Holloway later moved to dismiss Baker, alleging that Jenkins' release was not the result of negligence or lack of skill by Baker. The court dismissed the complaint as to Baker.

On September 4 and 5, 2014, the appellees moved for a protective order staying discovery pending resolution of the motions to dismiss. According to the motions, the day after the appellees filed their motions to dismiss, Holloway served 20 interrogatories, 220 requests for admission, and 25 requests for production upon the appellees.

On March 11, 2015, the district court entered an order granting the remaining appellees' motions to dismiss. The court found Holloway's motion to compel discovery to be moot, because it granted the motions to dismiss with prejudice.

The district court first considered the claims against the State and the remaining individual defendants. The court stated that the allegations of the complaint against Houston, White, and Kohl related only to the acts of those individuals within the scope and course of their employment. Thus, it dismissed the claims against them in their individual capacities. The court next considered the applicability of the discretionary function exception to the waiver of sovereign immunity contained in the State Tort Claims Act (Act).[1] The court reasoned

[1] See Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014).

that the State had discretion in applying Jenkins' "good time" credits and in choosing not to civilly commit him, focusing on the "may" language used in the good time and civil commitment statutes.[2] Because the court concluded that the discretionary function exception applied, it dismissed the claims against the State, the Department, Houston, White, and Kohl.

The district court also dismissed the claim against CCS. The court found that Holloway failed to state a negligence claim. The court observed that the only allegations in the complaint pertaining to Jenkins' being improperly released were directed at Baker's negligence in failing to properly treat and evaluate Jenkins and that Holloway admitted Baker properly discharged her duties with respect to Jenkins. The court noted that Holloway did not allege a special relationship existed between CCS and Jenkins and that CCS never exerted control over Jenkins.

Holloway filed a timely appeal, and we granted the remaining appellees' petition to bypass the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

Holloway assigns that the district court erred in (1) granting the remaining appellees' motions to dismiss, (2) failing to allow her case to proceed with discovery, (3) finding that the discretionary function exception was applicable, (4) determining that the individual employees exercised due care in the performance of their duties, and (5) concluding that the dismissal of the direct action against Baker precluded an action based upon respondeat superior against CCS.

IV. STANDARD OF REVIEW

[1-4] A district court's grant of a motion to dismiss is reviewed de novo.[3] An appellate court reviews de novo whether

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[2] See Neb. Rev. Stat. §§ 83-1,107(3) (Cum. Supp. 2012) and 71-921(1) (Reissue 2009).

[3] *Litherland v. Jurgens*, 291 Neb. 775, 869 N.W.2d 92 (2015).

a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party.[4] Statutory interpretation presents a question of law.[5] In cases where the facts are undisputed, the application of the discretionary function exemption of the Act presents a question of law.[6]

[5] Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.[7]

V. ANALYSIS

1. Discretionary Function Exception

Although Holloway's complaint alleged that the State was negligent in two respects, she limits her argument concerning the applicability of the Act's discretionary function exception to a decision to seek a mental health commitment. Holloway's complaint alleged that the State was negligent in failing to properly calculate and apply "good time" for Jenkins and in failing to seek a mental health commitment. But she makes no argument in her brief concerning the "good time" claim. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the party's brief.[8] We therefore do not consider Holloway's "good time" claim.

(a) Overview

[6] The Act contains a discretionary function exception to the waiver of sovereign immunity for certain claims. According to the exception, the Act shall not apply to

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[4] *Anthony K. v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 540, 855 N.W.2d 788 (2014).

[5] *Twin Towers Condo. Assn. v. Bel Fury Invest. Group*, 290 Neb. 329, 860 N.W.2d 147 (2015).

[6] *D.K. Buskirk & Sons v. State*, 252 Neb. 84, 560 N.W.2d 462 (1997).

[7] *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

[8] *Stekr v. Beecham*, 291 Neb. 883, 869 N.W.2d 347 (2015).

> [a]ny claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute, rule, or regulation, whether or not such statute, rule, or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused.[9]

Thus, a state actor's performance or nonperformance of a discretionary function cannot be the basis of liability under the Act.[10]

[7] A court engages in a two-step analysis to determine whether the discretionary function exception of the Act applies.[11] First, the court must consider whether the action is a matter of choice for the acting employee. If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.[12]

(b) Application

The parties rely on different statutes of the Nebraska Mental Health Commitment Act (MHCA)[13] in support of their arguments concerning whether the decision to seek a mental health commitment of another is a matter of choice for the employee. We examine both statutes.

[8] Holloway directs us to a statute that uses mandatory language and argues that the discretionary function

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[9] § 81-8,219(1).

[10] See *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

[11] See *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

[12] *Id.*

[13] See Neb. Rev. Stat. §§ 71-901 to 71-963 (Reissue 2009 & Cum. Supp. 2014).

exception is therefore inapplicable. Section 71-920(1) of the MHCA states:

> A mental health professional who, upon evaluation of a person admitted for emergency protective custody under section 71-919, determines that such person is mentally ill and dangerous shall execute a written certificate as provided in subsection (2) of this section not later than twenty-four hours after the completion of such evaluation. A copy of such certificate shall be immediately forwarded to the county attorney.

Holloway contends that the statute's use of the word "shall" means there was no discretion regarding civil commitment. Generally, the word "shall" in a statute is mandatory.[14]

But § 71-920 is inapplicable, because Jenkins was not "admitted for emergency protective custody." According to the plain language of § 71-920(1), it applies only to a mental health evaluation of a person already "admitted for emergency protective custody." Holloway did not plead that Jenkins was ever in emergency protective custody.

A statute explaining the ways a person believed to be mentally ill and dangerous may be admitted into emergency protective custody does not help Holloway. She argues that under § 71-919(1) of the MHCA, "emergency protective custody" includes a continuation of custody if the person is already in custody, and she pled that Jenkins was in custody. The pertinent part of the statute states that "[a] law enforcement officer . . . may take such person into emergency protective custody, cause him or her to be taken into emergency protective custody, or continue his or her custody if he or she is already in custody."[15] But the following subsection of the statute demonstrates that Jenkins was not taken into emergency protective custody. It provides in part that "[a] person taken

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[14] *Fisher v. Heirs & Devisees of T.D. Lovercheck*, 291 Neb. 9, 864 N.W.2d 212 (2015).

[15] § 71-919(1).

into emergency protective custody under this section shall be admitted to an appropriate and available medical facility . . . ."[16] But we cannot infer from Holloway's complaint that Jenkins was admitted to any medical facility. Although Jenkins was in custody, there is no indication in Holloway's complaint that Jenkins was, while in custody, "admitted for emergency protective custody." Thus, § 71-920 does not apply.

[9] The statute upon which the State relies uses discretionary language. Section 71-921(1) provides:

> Any person who believes that another person is mentally ill and dangerous may communicate such belief to the county attorney. The filing of a certificate by a law enforcement officer under section 71-919 shall be sufficient to communicate such belief. If the county attorney concurs that such person is mentally ill and dangerous and that neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by a mental health board is available or would suffice to prevent the harm described in section 71-908, he or she shall file a petition as provided in this section.

The first sentence of the statute uses the word "may." The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.[17] Under the statute, whether to communicate a belief that another person is believed to be mentally ill and dangerous is a matter of choice. This satisfies the first step toward a determination that the discretionary function exception applies. We now turn to the second step of the analysis.

[10-13] The second step of the analysis requires that when a statute involves an element of judgment, the judgment must be of the kind that the discretionary function exception was

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[16] § 71-919(2)(a).

[17] *Christiansen v. County of Douglas*, 288 Neb. 564, 849 N.W.2d 493 (2014).

designed to shield. The purpose of the discretionary function exception is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.[18] The discretionary function exception extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions.[19] The exception does not extend to the exercise of discretionary acts at an operational level, where there is no room for policy judgment.[20] It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.[21]

The decision whether to report to the county attorney that another person is thought to be mentally ill and dangerous is a policy decision that the Legislature intended to shield from liability. The State's public policy with regard to mentally ill and dangerous persons is that they be encouraged to obtain voluntary treatment.[22] But a report to the county attorney may result in the initiation of mental health board proceedings.[23] And after mental health board proceedings have occurred, a mentally ill and dangerous person could be subject to involuntary custody and treatment.[24] Emergency protective custody is to be used under limited conditions.[25]

To demonstrate the Legislature's differential treatment of policy decisions, we contrast the policy of the MHCA with the policy contained in the Child Protection and Family Safety

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[18] See *Shipley v. Department of Roads, supra* note 11.

[19] See *id.*

[20] See, *id.*; *D.K. Buskirk & Sons v. State, supra* note 6.

[21] *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[22] See § 71-902.

[23] See § 71-921.

[24] See § 71-902.

[25] See *id.*

Act.[26] As mentioned, under the MHCA, reporting to the county attorney that another person is thought to be mentally ill and dangerous is discretionary. But under the Child Protection and Family Safety Act, the Legislature made mandatory the reporting of child abuse or neglect by certain individuals.[27] The Legislature declared that it was the public policy of the State to protect children who may be subject to abuse or neglect and to require the reporting of child abuse or neglect in certain settings.[28] The different treatment of reporting under the two acts is based on policy decisions.

Holloway relies upon *Lemke v. Metropolitan Utilities Dist.*[29] in support of her argument that the discretionary function exception does not protect a failure to warn of a danger that is known to the government but unknown to the public. In *Lemke*, a political subdivision which supplied natural gas knew that certain connectors it had used could leak but did not inform its customers of the problem. A customer of the political subdivision sustained damages when a deteriorated connector resulted in an explosion. We considered whether the claim that the political subdivision failed to warn its customer fell within the discretionary function exception and determined that

> when (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental entity has a nondiscretionary duty to warn of the danger or take

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[26] See Neb. Rev. Stat. §§ 28-710 to 28-727 (Reissue 2008, Cum. Supp. 2014 & Supp. 2015).

[27] See § 28-711(1).

[28] See § 28-710.01.

[29] *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

> other protective measures that may prevent injury as the result of the dangerous condition or hazard. In such a situation, a governmental entity's failure to warn or take other protective measures is not a planning-level decision involving a social, economic, or political policy judgment and, therefore, does not come within the discretionary function exemption of the Political Subdivisions Tort Claims Act.[30]

Importantly, we distinguished *Lemke* in *Jasa v. Douglas County*.[31] *Jasa* involved a negligence action against a county health department after a child was infected with bacterial meningitis at a daycare facility. The child, by and through his parents, claimed that the county health department was negligent in failing to determine that there had been a case of bacterial meningitis at the daycare facility and in failing to inform the child's parents of the presence of the disease. We observed that in *Lemke*, the political subdivision brought the "injury-causing agent" to its customers, but that the county health department did not bring the "injury-causing agent" to the daycare facility.[32] Thus, we stated that "while the subdivision in *Lemke* had dominion, and in that sense control, over the injury-causing agent, the county [health] department did not."[33]

Holloway's situation is more like *Jasa* than *Lemke*, because the State did not have control over Jenkins. Holloway contends that the State "had information about Jenkins's mental illness and dangerousness that it did not disseminate to the public" and that the State "is responsible for bringing the injury-causing agent (Jenkins) to the public when it released him into the Omaha community knowing the risk he posed

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[30] *Id.* at 647, 502 N.W.2d at 89.

[31] *Jasa v. Douglas County, supra* note 10.

[32] *Id.* at 962, 510 N.W.2d at 291.

[33] *Id.*

to the people of the community."[34] However, like in *Jasa*, the State did not have dominion or control over Jenkins after he was released. And because Jenkins had served his sentence, the State's options were limited to mandatorily discharging him or civilly committing him. As we determined above, the decision whether to commit Jenkins was a matter of judgment and, as such, was a discretionary function.

We conclude that the district court correctly determined that the discretionary function exception was applicable. Because an exception to the waiver of sovereign immunity applied, the court properly dismissed Holloway's claims against the State, the Department, Houston, White, and Kohl.

2. Claim Against CCS

The district court concluded that Holloway failed to state a negligence claim against CCS. The court noted that the claims in the complaint were directed toward Baker's negligence in failing to properly treat and evaluate Jenkins, but that Holloway had voluntarily dismissed Baker because Baker adequately discharged her duties. The court reasoned that the complaint failed to state a claim under general negligence principles and failed to plead facts that would allow liability against a mental health provider under Nebraska law.

[14-16] A complaint must meet certain requirements to withstand a motion to dismiss. To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[35] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the

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[34] Brief for appellant at 15.

[35] *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

element or claim.[36] "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[37]

[17,18] The principles concerning review of a motion to dismiss are well known. When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[38] For purposes of a motion to dismiss, a court is not obliged to accept as true a legal conclusion couched as a factual allegation, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.[39]

[19,20] Holloway's negligent treatment claim against CCS fails due to the dismissal of her claims against Baker. Holloway alleged that Baker and CCS owed a duty to the citizens of Nebraska to correctly evaluate and treat all inmates under their care and that they breached their duty in their treatment and release of Jenkins. Her negligent treatment claim was premised upon treatment provided by Baker, who worked for CCS. Under the doctrine of respondeat superior, an employer is held vicariously liable for the negligent acts of an employee committed while the employee was acting within the scope of the employer's business.[40] But Holloway subsequently moved to voluntarily dismiss Baker, because the "actions by others in the Department . . . were not a result of negligence or the lack of skill by . . . Baker." If an employee

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[36] *Id.*

[37] *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

[38] *Litherland v. Jurgens, supra* note 3.

[39] *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 834 N.W.2d 236 (2013).

[40] *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996).

is not liable, the employer cannot be liable under the doctrine of respondeat superior.[41] Because Holloway no longer contended that Baker was negligent, CCS could not be liable for any acts or omissions on Baker's part under a theory of respondeat superior.

Nor has Holloway stated a claim against CCS for negligently releasing Jenkins. Holloway specifically alleged in her complaint that the Department "is the State entity that was responsible for the incarceration, treatment and release of . . . Jenkins." There is no allegation that CCS was responsible for releasing Jenkins, nor can the same be reasonably inferred from the facts pled.

[21] Mental health treatment providers are only liable for failing to warn of a patient's threatened behavior under certain exceptional circumstances. The Mental Health Practice Act[42] and the Psychology Practice Act[43] contain limits on liability. A mental health practitioner or psychologist is not liable for failing to warn of a patient's threatened violent behavior unless the patient has communicated to the practitioner a serious threat of physical violence to a reasonably identifiable victim.[44] Specifically, the pertinent statute in the Mental Health Practice Act states:

> There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is licensed or certified pursuant to the Mental Health Practice Act for failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except when the patient has communicated to the mental health practitioner a serious threat of physical violence

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[41] *Id.*

[42] See Neb. Rev. Stat. §§ 38-2101 to 38-2139 (Reissue 2008 & Cum. Supp. 2014).

[43] See Neb. Rev. Stat. §§ 38-3101 to 38-3132 (Reissue 2008).

[44] See §§ 38-2137(1) and 38-3132(1).

> against himself, herself, or a reasonably identifiable victim or victims.[45]

A statute in the Psychology Practice Act is substantially similar.[46] And we have concluded that a similar limitation on liability applies to psychiatrists.[47]

Liability cannot be established against CCS as a mental health treatment provider because Holloway was not a reasonably identifiable victim. Holloway alleged that Jenkins "presented a substantial risk of serious bodily harm to the citizens of Nebraska, and specifically to [her]." But she also alleged that "the risk of bodily harm to . . . Holloway and to other members of the public in Omaha . . . was great once . . . Jenkins informed . . . agents of the [State] that he intended to cause bodily harm and injury to persons at random." Holloway alleged that CCS owed a duty to her and to the public in Omaha insofar as it was aware that Jenkins posed a risk to all citizens of Omaha. Holloway, a resident of Omaha, alleged that all citizens of Omaha were potential victims. But all citizens of Omaha—a city of the metropolitan class[48] with 300,000 or more inhabitants[49]—cannot constitute "a reasonably identifiable victim or victims." And Holloway did not allege that Jenkins ever communicated a serious threat of physical violence against her. Thus, CCS cannot be liable as a mental health care provider under Nebraska law.

[22,23] Further, CCS could not be liable unless it owed Holloway a legal duty. The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[50] "[T]here is no duty to control

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[45] § 38-2137(1).

[46] See § 38-3132(1).

[47] See *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006).

[48] See *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

[49] See Neb. Rev. Stat. § 14-101 (Reissue 2012).

[50] *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

the conduct of a third person as to prevent him from causing physical harm to another unless 'a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.'"[51] An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship.[52]

The relationship necessary for liability is a custodial relationship. In *Bartunek v. State*,[53] we looked to the Restatement (Second) of Torts, which provided that "'[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.'" We stated that the "takes charge" language referred to a custodial relationship. In the context of the relationship between a probation officer and a probationer, we stated that "[a]bsent the legal responsibility of custodial or round-the-clock visual supervision, there is no logical basis for imposing an ongoing duty on a probation officer to prevent illegal conduct by a probationer."[54]

CCS did not owe Holloway a legal duty, because it did not have a special relationship with Jenkins. Any relationship that CCS had with Jenkins was more attenuated than the relationship between a probation officer and probationer. As alleged by Holloway, CCS provided medical services for inmates by virtue of a contract with the State, and its employees evaluated and treated Jenkins. Holloway did not allege that Jenkins was ever in CCS' custody. Nor did she allege that Jenkins was being supervised by CCS at the time

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[51] *Id.* at 1033, 809 N.W.2d at 492 (quoting Restatement (Second) of Torts § 315(a) (1965)).

[52] *Ginapp v. City of Bellevue, supra* note 50.

[53] *Bartunek v. State*, 266 Neb. 454, 462, 666 N.W.2d 435, 441 (2003) (quoting Restatement (Second) of Torts § 319 (1965)).

[54] *Id.* at 463, 666 N.W.2d at 442.

he injured Holloway. Holloway's complaint does not plead facts showing a special relationship that would allow CCS to be held liable.

Because Holloway failed to plead facts to allow an inference that CCS was liable for the harm to Holloway, the district court did not err in dismissing the complaint as to CCS for failure to state a claim.

3. Discovery

Holloway's claim that she should have been allowed to pursue discovery is without merit. Because the district court did not err in dismissing Holloway's complaint, it did not abuse its discretion in finding Holloway's motion to compel discovery to be moot.

VI. CONCLUSION

We conclude that the decision whether to report to the county attorney that another person is thought to be mentally ill and dangerous falls under the discretionary function exception; thus, an exception to the State's waiver of sovereign immunity applied. We further conclude that Holloway failed to plead facts to state a claim against CCS. Accordingly, the district court did not err in dismissing Holloway's complaint, nor did it abuse its discretion in finding her motion to compel discovery to be moot. We affirm.

Affirmed.

Heavican, C.J., and Wright, J., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Adair Asset Management, L.L.C., appellee, v. Terry's Legacy, LLC, appellant, and First State Bank et al., appellees.

875 N.W.2d 421

Filed March 11, 2016. No. S-15-403.

1. **Statutes: Judgments: Appeal and Error.** The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.
2. **Tax Sale: Time.** Under Neb. Rev. Stat. § 77-1801 et seq. (Reissue 2009), any real property on which taxes have not been paid in full by the first Monday of March can be sold by the county treasurer for the amount of taxes due, plus interest and costs.
3. **Tax Sale.** The successful bidder under the bid-down procedure of Neb. Rev. Stat. § 77-1807 (Reissue 2009) acquires only an interest in the undivided percentage of the real estate.
4. **Tax Sale: Liens.** The purchaser of a tax sale certificate acquires a perpetual lien of the tax on the real property.
5. ____: ____. If the purchaser of a tax sale certificate subsequently pays any taxes levied on the property, he or she shall have the same lien for them and may add them to the amount paid by him or her in the purchase.
6. **Statutes.** Statutes relating to the same subject are in pari materia and should be construed together.
7. **Statutes: Words and Phrases.** It is a recognized rule of statutory construction that where the same words are used repeatedly in the same act, unless the context requires otherwise, the words are to have the same meaning.
8. **Tax Sale: Deeds: Foreclosure: Liens: Notice.** There are two processes through which the holder of a tax certificate can obtain a deed to the property purchased at a tax sale. Under the "tax deed" method of chapter 77, article 18, of the Nebraska Revised Statutes, the holder of a tax certificate can obtain a tax deed from the county treasurer, after

having given proper notice. The other method is the "judicial foreclosure" method under chapter 77, article 19, of the Nebraska Revised Statutes. Through that method, the holder of a tax sale certificate can foreclose upon the tax lien in a court proceeding and compel sale of the property, yielding a sheriff's deed, under Neb. Rev. Stat. § 77-1902 (Reissue 2009).

9. **Statutes: Appeal and Error.** An appellate court will try to avoid, if possible, a statutory construction that would lead to an absurd result.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Cheyenne County: Derek C. Weimer, Judge. Affirmed as modified, and cause remanded with directions.

Sterling T. Huff, of Island & Huff, P.C., L.L.O., for appellant.

Deana K. Walocha for appellee Adair Asset Management, L.L.C.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Cassel, J.

INTRODUCTION

This appeal presents an issue of first, and perhaps last, impression—whether a tax sale certificate issued following a sale of real estate for delinquent property taxes "bid down"[1] to an undivided 1-percent interest in the property limits the lien to be judicially foreclosed[2] to only that fractional share. Because we conclude that it does, we modify the decree of foreclosure accordingly. And to cure a ministerial failure to seal a confidential document, we remand the cause with directions.

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[1] See Neb. Rev. Stat. § 77-1807 (Reissue 2009).

[2] See Neb. Rev. Stat. § 77-1902 (Reissue 2009).

BACKGROUND

In March 2011, Cheyenne County, Nebraska, conducted its annual tax sale. Rather than using a traditional "round robin" format at the sale, and at the request of one of the bidders, the county treasurer used the "bid down" format provided by § 77-1807. That section has since been amended—thereby repealing the bid-down procedure—but the parties agree that the former version controls this appeal.

During the tax sale, Adair Asset Management, L.L.C. (Adair), purchased a tax sale certificate on certain real estate (the property) now owned by Terry's Legacy, LLC. The tax sale certificate was bid down to an undivided 1-percent interest. According to the certificate, Adair paid $2,223.44, representing the 2009 delinquent taxes on the property. After the sale, Adair paid all of the property taxes assessed against the property for the years 2010 through 2012.

In due course, Adair filed an action and obtained a decree judicially foreclosing the lien provided by the tax sale certificate. Although the complaint alleged that there was a potential claim against the property by First State Bank by virtue of a deed of trust and an assignment of rents and leases, the decree made no determination of the amount or extent of any lien under First State Bank's deed of trust. The decree found that "the right, title and interest of each of the Defendants named in the cause of action are wholly junior and inferior to the lien of [Adair]." The court determined that Adair was due $8,722.72 for the tax sale certificate, plus specific amounts representing interest, costs, and attorney fees. The decree provided for the customary relief in the form of an order of sale to be issued to the sheriff after the expiration of 20 days. The parties agree that in effect, the decree ordered a sale of a 100-percent interest in the property.

Terry's Legacy filed a timely appeal, which we moved to our docket.[3]

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

On appeal, Terry's Legacy makes seven assignments of error, one of which is dispositive. It assigns that the district court erred by failing to determine that Terry's Legacy retained a 99-percent interest in the property. In disposing of the appeal, we make directions to cure another assignment—that the court erred in not striking an affidavit that had confidential adoption documents attached to it.

STANDARD OF REVIEW

[1] The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.[4]

ANALYSIS

Decree of Foreclosure

The dispositive issue on appeal is the extent of Adair's interest in the property when it acquired the tax sale certificate after bidding down to a 1-percent interest. Although the bid-down procedure was enacted into the statute over 100 years ago,[5] we have never been presented with this question. Because the tax sale certificate at issue in this appeal was sold on March 7, 2011, the proceedings are governed by the laws in effect on December 31, 2009.[6] And this may well be our last opportunity to address this statutory relic. Due to substantial statutory changes which became operative on January 1, 2015, and eliminated the bid-down procedure,[7] our decision today will affect only those properties sold pursuant to it.

[2] Properties with delinquent property taxes may be sold at a tax sale. Under Neb. Rev. Stat. § 77-1801 et seq. (Reissue 2009), any real property on which taxes have not been paid

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[4] *Grammer v. Lucking*, 292 Neb. 475, 873 N.W.2d 387 (2016).

[5] See 1903 Neb. Laws, ch. 73, § 199, p. 461.

[6] See Neb. Rev. Stat. § 77-1837.01(2) (Cum. Supp. 2014).

[7] See 2013 Neb. Laws, L.B. 341, § 1.

in full by the first Monday of March can be sold by the county treasurer for the amount of taxes due, plus interest and costs.[8]

[3] The "bid down" statute uses specific words to describe what is being sold at the tax sale. It states, in pertinent part:

> The person who offers to pay the amount of taxes due on any *real property* for the smallest portion of *the same* shall be the purchaser, and when such person designates the smallest portion of *the real property* for which he or she will pay the amount of taxes assessed against any such property, *the portion thus designated* shall be considered an undivided portion.[9]

Thus, the successful bidder under the bid-down procedure of § 77-1807 acquires only an interest in the undivided percentage of the real estate. Here, Adair became the purchaser of the tax sale certificate after offering to pay the taxes due on the property for a 1-percent undivided interest in the property.

[4,5] Another statute in the same series uses essentially identical words to describe the interest in property transferred by a tax sale certificate. The purchaser of a tax sale certificate acquires a perpetual lien of the tax on "the real property."[10] If the purchaser subsequently pays any taxes levied on the property, "he or she shall have the same lien for them and may add them to the amount paid by him or her in the purchase."[11] Because Adair later paid other taxes levied on the property, it acquired the same lien for them—a lien secured by a 1-percent undivided interest in the property.

In other words, both statutes use the same words. Section 77-1818 requires that the certificate describe "the real property" purchased. Section 77-1807 also refers to "the real property" purchased, which is "the smallest portion of the real

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[8] *Neun v. Ewing*, 290 Neb. 963, 863 N.W.2d 187 (2015).

[9] § 77-1807 (emphasis supplied).

[10] § 77-1818.

[11] *Id.*

property for which [the purchaser] will pay the amount of taxes assessed against any such property."

[6,7] Two fundamental principles of statutory construction require that these words be understood to mean the same thing. First, statutes relating to the same subject are in pari materia and should be construed together.[12] Second, it is a recognized rule of statutory construction that where the same words are used repeatedly in the same act, unless the context requires otherwise, the words are to have the same meaning.[13] Thus, we conclude that "the real property" as used is § 77-1818 similarly means the smallest portion of the property that the purchaser was willing to take in return for paying the taxes. In this case, the tax sale certificate stated "AS PER NE STATUTE SEC. #77-1807 BID DOWN TO 1% OF UNDIVIDED INTEREST OF PROPERTY" and it contained a legal description of the real estate. The real property purchased was a 1-percent undivided interest in the property.

[8] Adair correctly argues that there are two processes through which the holder of a tax certificate can obtain a deed to the property purchased at a tax sale.[14] Under the "tax deed" method of chapter 77, article 18, of the Nebraska Revised Statutes, the holder of a tax certificate can obtain a tax deed from the county treasurer, after having given proper notice.[15] The other method is the "judicial foreclosure" method under chapter 77, article 19, of the Nebraska Revised Statutes. Through that method, the holder of a tax sale certificate can foreclose upon the tax lien in a court proceeding and compel sale of the property, yielding a sheriff's deed, under § 77-1902.[16] We have said that although the overall objective of both procedures is the recovery of unpaid taxes on

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[12] *Neun v. Ewing, supra* note 8.

[13] See *Knoell v. Huff*, 224 Neb. 90, 395 N.W.2d 749 (1986).

[14] See *Neun v. Ewing, supra* note 8.

[15] See *id.*

[16] See *id.*

real property, these procedures are two separate and distinct methods for the handling of delinquent real estate taxes which are neither comparable nor fungible.[17] Consequently, we have held that the provisions of chapter 77, article 18, are not interchangeable with the provisions of chapter 77, article 19.[18]

But Adair attributes too much significance to the choice of enforcement procedures. Both methods rely upon the existence of a tax sale certificate issued in compliance with § 77-1818. The existence of different procedures available to the holder to convert a tax sale certificate into a deed does not affect the meaning of the tax sale certificate.

[9] It would be absurd to allow a purchaser of a tax sale certificate to change its meaning simply by electing to pursue a judicial foreclosure. An appellate court will try to avoid, if possible, a statutory construction that would lead to an absurd result.[19] Thus, we conclude that Adair can foreclose only upon its undivided 1-percent interest in the property.

And in this proceeding in equity,[20] our conclusion comports with the notion of fairness. It would be unjust to award, in foreclosure proceedings, an interest in the entire property to a purchaser who acquired the tax sale certificate by a bid for less than a 100-percent interest. There may have been several bidders willing to pay the amount of taxes due on the property for a 100-percent interest of the property. But once the interest in the property dropped below 100 percent, those bidders may have ceased bidding. It is unfair to them for Adair to receive a 100-percent interest of the property when Adair became the purchaser only because it offered to pay the taxes due for the smallest interest in the property. Because Adair bid

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[17] *Id.*

[18] *Id.*

[19] *Merie B. on behalf of Brayden O. v. State*, 290 Neb. 919, 863 N.W.2d 171 (2015).

[20] See *Twin Towers Condo. Assn. v. Bel Fury Invest. Group*, 290 Neb. 329, 860 N.W.2d 147 (2015) (real estate foreclosure action is action in equity).

down to a 1-percent interest, it is limited to a 1-percent interest in foreclosure.

Terry's Legacy does not dispute that Adair was entitled to a decree of foreclosure of its tax lien; only the extent of the property subject to the lien is disputed. According to the decree, if redemption was not made, the property would be sold "as upon execution in the entire tract." Thus, the decree had the effect of erroneously treating Adair's interest as a 100-percent undivided interest in the property. But Adair's lien was limited to an undivided 1-percent interest in the real estate, and the decree must be modified accordingly.

We therefore modify the decree to provide that Adair's lien is limited to a 1-percent interest in the property. As to that 1-percent interest, Adair's lien is superior to the right, title, and interest of Terry's Legacy and the other parties joined as defendants below. It necessarily follows that the other 99-percent undivided interest is not subject to the decree of foreclosure or to any order of sale issued pursuant to that decree.

Remaining Assignments of Error

[10] We need not address the remaining errors assigned by Terry's Legacy other than to cure one ministerial failure of the official court reporter. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[21]

Terry's Legacy assigned that the district court erred by failing to strike an exhibit that contained confidential information. Shortly after the summary judgment hearing, Terry's Legacy alerted the district court to this issue via a motion to strike or seal an affidavit. The court granted the motion and ordered that the affidavit be sealed by the court reporter pursuant to Neb. Ct. R. § 6-1521 (rev. 2012). However, the court reporter

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[21] *D.I. v. Gibson*, 291 Neb. 554, 867 N.W.2d 284 (2015).

apparently failed to seal the affidavit and it was included in the public bill of exceptions.

To cure this failure to perform a ministerial function, we remand the cause with directions. The official court reporter is directed to seal the affidavit in the bill of exceptions, as previously ordered by the district court. And we direct the clerk of the district court, upon return of the bill of exceptions from our clerk, to verify that the affidavit has been sealed before returning the bill of exceptions to the district court's files.

In order to ensure that the confidential information is not disseminated in the interim, we direct our clerk to make the bill of exceptions unavailable to the public until it is returned to the district court.

CONCLUSION

Because Adair purchased the tax sale certificate by bidding down to a 1-percent undivided interest of property, its lien to be foreclosed under § 77-1902 is limited to 1 percent of the property. We modify the decree of foreclosure to apply only to Adair's undivided 1-percent interest in the property. As so modified, the decree is affirmed. And we remand the cause with directions, as set forth above, to cure the failure to seal the affidavit containing confidential information.

Affirmed as modified, and cause remanded with directions.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Andrew Casterline, appellant.

878 N.W.2d 38

Filed March 18, 2016. No. S-15-045.

1. **Criminal Law: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
2. ____: ____: ____. The relevant question when an appellate court reviews a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
4. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.
5. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
6. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
7. **Robbery: Words and Phrases.** A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever.

8. **Aiding and Abetting.** A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
9. **Aiding and Abetting: Proof.** Aiding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor. No particular acts are necessary, however, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.
10. ____: ____. Evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.
11. **Homicide: Robbery: Intent: Time.** There is no statutory requirement that the intent to rob be formed at any particular time as long as the homicide occurs as the result of acts committed while in the perpetration of the robbery.
12. **Evidence: Proof.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
13. **Rules of Evidence: Proof.** Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2008), does not impose a high hurdle for authentication or identification.
14. ____: ____. A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity. If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of Neb. Evid. R. 901(1), Neb. Rev. Stat. § 27-901(1) (Reissue 2008).
15. **Trial: Evidence.** Authentication rulings are necessarily fact specific, so a trial court has discretion to determine whether evidence has been properly authenticated.
16. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
17. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial.
18. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
19. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law,

are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.

Appeal from the District Court for Webster County: Stephen R. Illingworth, Judge. Affirmed.

Charles D. Brewster, of Anderson, Klein, Swan & Brewster, for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ., and Riedmann, Judge.

Wright, J.

I. NATURE OF CASE

Andrew Casterline appeals from his convictions following a jury trial for first degree murder, use of a deadly weapon to commit a felony, and burglary. He claims the evidence was insufficient to support his convictions for the first two offenses. He also assigns that the district court erred in admitting certain evidence and in including certain language in its instructions to the jury. For the reasons set forth below, we affirm.

II. BACKGROUND

Casterline moved to Guide Rock, Nebraska, with his mother, Shelley Casterline (Shelley), who wanted to start a new life after she was released from prison. Shelley had maintained an "on again, off again" relationship with Ronald Jamilowski, the father of her twin daughters. Casterline lived with Shelley and Jamilowski for a few months, but then moved into the house next door, which was another property Jamilowski owned. Jamilowski's mother, Virginia Barone, who was the victim, lived nearby.

The relationship between Casterline, Shelley, Jamilowski, and Barone was quite volatile. Although they saw each

other daily, none of them got along very well. Shelley and Jamilowski had tried to rekindle their relationship, but they argued and got into physical altercations frequently, due mostly to Jamilowski's drinking. Shelley and Barone often fought about money and about Shelley's relationship with Jamilowski, of which Barone apparently did not approve. Casterline got into arguments with Shelley, and he was known to have "hated" Jamilowski.

1. Events Surrounding Killing

During the early evening on October 3, 2013, Casterline went to Hastings, Nebraska, to run errands with his friend, Trevor Marihugh, who lived across the street from Casterline, Shelley, and Jamilowski. They took Marihugh's vehicle, because Casterline's was not working. Both Casterline and Marihugh were abusing prescription medications, and Marihugh ended up getting arrested for driving under the influence. Around 3 a.m. the next day, Casterline called Shelley and said that he needed a ride home from Hastings because Marihugh was in jail. Shelley woke up Jamilowski and Barone, because Barone was the only one with a car, and the three of them drove to Hastings to pick up Casterline. On the way back to Guide Rock, Jamilowski and Casterline were fistfighting in the back seat, while Shelley and Barone were arguing in the front seat. Barone even pulled over at one point and tried to throw Shelley out of the vehicle. They continued to Guide Rock, and they all went to their respective homes.

Just after 9 a.m., Casterline was seen using Barone's automatic teller machine (ATM) card at a bank in Superior, Nebraska. A bank employee testified that she went out to service the ATM and observed a young man standing at the ATM and an older white or light-colored vehicle parked close by. She identified Casterline as the man at the ATM. She observed a middle-aged woman sitting in the passenger seat, who was later determined to be Shelley, and there were various things in the back seat, including a guitar case. The bank employee testified that it was very obvious that Casterline did

not want her to see what he was doing. After about 5 minutes, the woman in the passenger seat got out and spoke to Casterline, at which point they both got back into the vehicle and drove away.

The transaction history for Barone's account confirmed that several transactions occurred on Barone's account on the morning of October 4, 2013. A "debit balance inquiry" occurred at 9:18 a.m., followed by a withdrawal of $500 at 9:19 a.m. There were several more attempted withdrawals over the next couple of minutes, but those attempts were denied due to the $500 daily ATM withdrawal limit. The bank employee explained that in order to withdraw cash from an ATM using a debit card, one must have the personal identification number (PIN) for that card, which is selected by the card owner and is not retained by the bank. In the event a customer loses his or her PIN, the card must be canceled and a new card must be ordered, because it is not possible for the bank to retrieve a PIN; that information is destroyed as soon as the card is created.

Throughout that day, Casterline and Shelley stopped at various places to get more money—including the Wal-Mart stores in Hastings; Grand Island, Nebraska; and York, Nebraska—where they used Barone's debit card to make numerous small purchases and got large sums of cash back with each purchase. Between their purchases and withdrawals, Casterline and Shelley stole more than $2,000 from Barone, which nearly emptied her bank account. At approximately 1:30 p.m., they stopped at a pawn shop in Grand Island and sold several things, including a television, a video game system with 13 games, and an amplifier for a guitar, for which they received a total of $309.

While traveling in Barone's vehicle on Interstate 80 near Plattsmouth, Nebraska, Casterline and Shelley were stopped about 7:40 p.m. for a traffic violation. The officer who made the stop testified that Casterline appeared to be under the influence of prescription drugs. He observed that Casterline's nails were dirty and he had several nicks and cuts on his hands. Casterline told the officer that the vehicle belonged to his

grandmother and that she was letting him borrow it to go to his grandfather's funeral in Pennsylvania. Casterline was arrested for driving under the influence and taken to the Plattsmouth jail. Shelley was released, but Barone's vehicle was impounded because Shelley did not have a valid driver's license.

At approximately 9:30 p.m., Marihugh returned home to Guide Rock and discovered that his house had been burglarized. Several things were missing, including his television, his video game system with several games, two laptop computers, two guitars, and an amplifier. He reported the burglary to law enforcement, who discovered that some of the items stolen from his house had been sold to a pawn shop in Grand Island by Casterline and Shelley. Marihugh testified that he did not give Casterline or Shelley permission to go into his house and take any items.

The next morning, law enforcement received a telephone call from one of Barone's neighbors requesting a welfare check at Barone's house. A sheriff's deputy entered the home with the neighbor and found that several pieces of furniture had been knocked over. The officer followed a trail of blood to a back room and found Barone dead under a pile of boards. Barone had sustained multiple stab wounds and several cuts on her fingers, which appeared to be defensive wounds from trying to block a sharp object. She had some small drops of blood on her face, which suggested that she may have been breathing for some time after she was stabbed and had breathed out blood.

Investigators observed a bloodstain on a rug in the living room, a shoe in the living room with blood on it, blood smears which appeared to be drag marks leading from the living room to the room where Barone's body was found, and drops of blood on the porch area outside the front door. The telephone appeared to have been ripped out of the wall, and a number of things were lying in the driveway where Barone normally parked her vehicle. Investigators found no financial devices in Barone's purse, and her vehicle, a white 1995 Pontiac, was missing.

During the investigation, Jamilowski arrived at Barone's house and was detained for questioning. After speaking with Jamilowski, law enforcement officers identified Casterline and Shelley as suspects in Barone's death. They learned that Casterline had been arrested the night before in Cass County while driving Barone's vehicle, but had since been released, and that he and Shelley were believed to be heading east through Iowa in a stolen Jeep. Police were able to track Shelley's cell phone to a location near Newton, Iowa. Authorities in Iowa were notified and performed a traffic stop on the stolen Jeep, and identified the occupants as Casterline and Shelley.

Upon searching Casterline, officers located $322 cash, several Wal-Mart and ATM receipts, and Barone's debit card. Shelley had over $2,000 in her purse. A search of the Jeep revealed a bag with Marihugh's name on it, two laptop computers, and a knife with a 4-inch blade inside the glovebox. The owner of the Jeep testified that none of those items were in the Jeep when it was stolen from a parking lot in Plattsmouth the day before.

Casterline and Shelley were arrested and taken to a detention center in Iowa. At the time of booking, officers observed various injuries. Shelley had a bruise on her right arm and some small scrapes on her right wrist and index finger. Casterline had a bruise above his eye, cuts on the thumb and fingers of his right hand, an abrasion on his left forearm, and dried blood on his right palm. Officers collected DNA samples and fingernail scrapings from Casterline and Shelley and collected the clothing that they were wearing. Casterline was reluctant to give the officers his clothing.

2. Investigation

Casterline and Shelley were interviewed by investigators the following day. Shelley initially denied having anything to do with Barone's death, but later admitted to killing Barone. She claimed Casterline had nothing to do with it. Shelley told investigators that when they got back from Hastings, she and Casterline went to Barone's house and the three of them

argued. Barone was blaming Shelley for Jamilowski's problems, at which point Casterline told Barone to shut up or he would knock her out.

Shelley stated that she grabbed a knife and began stabbing Barone, then dragged Barone into another room and covered her body with boards. She said that Casterline was there when she killed Barone but that he had nothing to do with the killing. However, she acknowledged that she was taking blame for the murder in order to "save [Casterline's] life."

When Casterline was interviewed, he claimed that he and Shelley had nothing to do with Barone's death and that he had no idea Barone was dead. He later admitted that he was at Barone's house when Barone and Shelley got into an argument, but claimed that he went home during the argument and did not know how Barone died. Later during the interview, however, Shelley began screaming from another room that she killed Barone, at which point Casterline stated that Shelley did it but maintained that he had nothing to do with Barone's death.

Investigators performed DNA testing on the knife found in the Jeep and the clothing that Casterline and Shelley were wearing when they were apprehended. They compared those results to known DNA samples from Casterline, Shelley, Barone, Jamilowski, and Marihugh. They located DNA on the blade of the knife and on three pieces of clothing: Casterline's jeans, Casterline's shoe, and Barone's sweatpants. The DNA on the knife was a mixture of two individuals, with Casterline being the major contributor and everyone except Shelley being excluded as the minor contributor. The DNA on Casterline's jeans tested positive for blood and was a mixture of two contributors, with Barone being the major contributor and everyone except Casterline being excluded as the minor contributor. The DNA on Casterline's shoe also tested positive for blood and matched the DNA profile of Barone only. The DNA on Barone's sweatpants was inconclusive as to the major contributor, but everyone except Casterline, Shelley, and Barone being excluded as a minor contributor.

The forensic pathologist who conducted the autopsy concluded that Barone's death was a homicide. The autopsy revealed that Barone sustained 22 stab wounds, which varied from ½ to 8½ inches in depth. The angle of the stab wounds also varied. Seven of the wounds were inflicted at a downward trajectory, and 13 were inflicted at an upward trajectory. The pathologist testified that more than one knife may have been used to stab Barone, although she could not confirm whether that was actually the case. She explained that it is possible for a knife to inflict wounds deeper than its blade length, due to the way the body reacts when it is punctured. She concluded that the cause of Barone's death was stab wounds to the chest, upper arm, and abdomen, which caused her to bleed out and die from loss of blood.

3. Shelley's Testimony

Shelley testified for the defense. She testified that she alone killed Barone and that Casterline had nothing to do with it. She explained that shortly after they arrived home from Hastings, she walked to Barone's house with the intention of retrieving her cell phone, which she had left in Barone's car. She and Barone got into an intense argument that was about to turn physical, when Casterline entered the house looking for Shelley. Shelley told Casterline to get out of the house, which he did. Shelley then grabbed a knife and stabbed Barone multiple times. Shelley said Casterline came back into the house and saw Barone lying on the floor. She decided to drag Barone's body into another room and convinced Casterline to help her. Shelley then told Casterline to pack his things because they were leaving town. She admitted that before leaving, they went to Marihugh's house and took several items of his personal property, and then left town in Barone's car. She admitted they used Barone's debit card to obtain money at an ATM and by doing "cash back" transactions at three Wal-Mart stores in central Nebraska.

At trial, several details of Shelley's testimony were inconsistent with what she told investigators when she was interviewed

in Iowa following her arrest. For example, she testified at trial that Casterline was not at Barone's house when she stabbed Barone, whereas in her prior interview, she said that he was present during the killing. She testified that Casterline helped her move Barone's body after the stabbing, but in her prior interview she said that she alone moved the body. Finally, she testified at trial that she took Barone's ATM card and called the bank to get the PIN, whereas in her prior interview, she said that she knew nothing about the use of Barone's ATM card and that investigators would have to talk to Casterline about that. Shelley acknowledged several of the inconsistencies on cross-examination, but stated that her trial testimony was the truth and that she must have been misremembering things during her prior interview due to having been under the influence of prescription drugs at that time.

On cross-examination, Shelley acknowledged that she wrote a letter to one of her daughters stating that two knives may have been involved in the murder, but claimed at trial that that was not true and that she was just misremembering what happened. Shelley acknowledged that she told her daughter that Barone struck Casterline, but claimed at trial that that was not true either and that she lied to her daughter. Shelley acknowledged that prior to trial, she wrote a letter to her daughter, who in turn wrote to Casterline, about there being blood on him because Shelley made him move the body, but Shelley denied that she was attempting to coordinate their testimony.

4. Verdicts and Sentencing

The jury found Casterline guilty on all three charges. Casterline was sentenced to consecutive terms of life imprisonment for first degree murder, 49 to 50 years' imprisonment for use of a deadly weapon to commit a felony, and 19 to 20 years' imprisonment for burglary. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

Casterline assigns, combined and restated, that the district court erred in (1) finding sufficient evidence to sustain

his convictions for first degree murder and use of a deadly weapon to commit a felony; (2) admitting into evidence without proper foundation a letter that was purportedly written by Casterline while in jail following his arrest; (3) admitting into evidence, over Casterline's relevance objection, the knife that was found in the Jeep in which Casterline and Shelley were traveling when they were apprehended; and (4) improperly instructing the jury on the elements of first degree murder, second degree murder, and manslaughter by adding language that Casterline was guilty if he acted "either alone or by aiding another," and by refusing Casterline's proposed elements instructions.

IV. STANDARD OF REVIEW

[1,2] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[1] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[2]

[3,4] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[3] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.[4]

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[1] *State v. Escamilla*, 291 Neb. 181, 864 N.W.2d 376 (2015).

[2] *Id.*

[3] *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015).

[4] *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

[5,6] Whether the jury instructions given by a trial court are correct is a question of law.[5] When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.[6]

V. ANALYSIS

1. Sufficiency of Evidence

Casterline claims there was insufficient evidence to sustain his convictions for first degree murder and use of a deadly weapon to commit a felony. He does not dispute that the evidence was sufficient to find him guilty of burglary.

In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[7] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[8]

(a) Essential Elements

[7] Casterline was charged with first degree murder under the alternative theories of premeditated murder and felony murder. In order to find him guilty of first degree murder, the State had to prove that Casterline killed Barone, either alone or by aiding another, and that he did so either (1) purposely and with deliberate and premeditated malice or (2) while in the perpetration of a robbery.[9] A person commits robbery if, with

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[5] *State v. Armagost*, 291 Neb. 117, 864 N.W.2d 417 (2015).

[6] *Id.*

[7] *State v. Escamilla, supra* note 1.

[8] *Id.*

[9] See Neb. Rev. Stat. § 28-303 (Reissue 2008).

the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever.[10]

Casterline was also charged with use of a deadly weapon to commit a felony, which, in this case, was the murder of Barone. To find him guilty of this offense, the State had to prove that Casterline, either alone or by aiding another, knowingly and intentionally used a deadly weapon to murder Barone.

[8-10] The jury was instructed in this case that it could convict Casterline of these crimes either as the principal offender or as an aider and abettor. A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.[11] Aiding and abetting requires some participation in a criminal act which must be evidenced by word, act, or deed, and mere encouragement or assistance is sufficient to make one an aider or abettor.[12] No particular acts are necessary, however, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime.[13] Yet, evidence of mere presence, acquiescence, or silence is not enough to sustain the State's burden of proving guilt under an aiding and abetting theory.[14]

(b) Evidence Against Casterline

We review the State's evidence against Casterline to determine whether any rational trier of fact could have found the essential elements of first degree murder and use of a deadly weapon to commit a felony beyond a reasonable doubt. We conclude that the record contains sufficient evidence to sustain Casterline's convictions on both counts.

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[10] Neb. Rev. Stat. § 28-324(1) (Reissue 2008).

[11] Neb. Rev. Stat. § 28-206 (Reissue 2008).

[12] *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

[13] *Id.*

[14] *Id.*

At trial, the evidence showed that Casterline stole Barone's vehicle and used her debit card to steal nearly $2,000 from her bank account, which occurred the day before Barone was found dead. Although Shelley claimed responsibility for the stabbing, there was blood on Casterline's shoe and pant leg which matched Barone's DNA. There was no blood or DNA found on Shelley's clothing. Additionally, Shelley told police that Casterline was present during the killing and there was evidence that more than one knife may have been used due to the varying depths and trajectories of the stab wounds. Shelley's letter to her daughter indicated that more than one knife may have been used. Police found a knife with a 4-inch blade in the vehicle in which Casterline and Shelley were traveling when they were apprehended. The blade of the knife contained Casterline's DNA.

A rational trier of fact could conclude that Shelley and/or Casterline used force, violence, and/or fear to obtain Barone's car keys, debit card, and PIN at some point before, during, or shortly after the stabbing, while Barone was still alive. Contrary to Shelley's testimony that she obtained Barone's PIN by calling the bank, there was testimony from a bank employee that it was impossible for the bank to retrieve a customer's PIN, because the bank destroys that information after the card is created. Thus, the evidence supports a finding that Casterline aided and abetted or used force to obtain Barone's PIN from Barone before she died. This evidence is sufficient to support a finding that Casterline, either alone or by aiding Shelley, killed Barone during the commission of a robbery.

[11] Casterline argues that there was no evidence that he intended to rob Barone until after the murder had been completed by Shelley. Even if this fact was true, it would not absolve him of liability for felony murder. There is no statutory requirement that the intent to rob be formed at any particular time as long as the homicide occurs as the result of acts

committed while in the perpetration of the robbery.[15] Barone's death occurred while in the perpetration of a robbery, because the act that killed her, the stabbing, was closely connected in time and place with the robbery, so the act and the robbery may be considered one continuous occurrence.

Regarding Casterline's conviction for use of a deadly weapon to commit a felony, the evidence was undisputed that Barone was stabbed to death. The 22 stab wounds varied from ½ to 8½ inches in depth and were inflicted at two different trajectories, suggesting that more than one knife may have been used. When Casterline and Shelley were apprehended, officers located a knife in the vehicle in which they were traveling, and Casterline's DNA was located on the blade of the knife. Casterline argues that the evidence failed to prove that he was in possession of a weapon while a felony was being committed. We find that a rational trier of fact could conclude that he was. Even if the jury concluded that Casterline did not actually wield a knife during the stabbing, it could have found him guilty of aiding and abetting Shelley's use of a knife to commit the murder.[16]

We conclude that there was sufficient evidence to sustain the jury's guilty verdicts.

2. Admissibility of Letter

Casterline argues that the district court erred in admitting a letter purportedly written by him to Jamilowski while he was in jail in Iowa following his arrest. Casterline objected to the admission of the letter and claims it should have been excluded because the State failed to lay sufficient foundation under Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2008).

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[15] See *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974).

[16] See, *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012); *State v. Leonor, supra* note 12.

(a) Additional Relevant Facts

The letter in question was received into evidence during the testimony of the chief jailer at the detention center in Iowa where Casterline and Shelley were held after their arrest. The jailer testified regarding the jail's policy to monitor all mail unless it is privileged, such as attorney-client communications. A jailer scans the mail for inappropriate materials and then documents all incoming and outgoing mail in the jail's computerized database. The letter in question was documented as outgoing mail in the database. A printout from the database entitled "Jasper County Sheriff Inmate Activity Log Report" was received into evidence. It contains Casterline's full name, inmate number, and jail cell number, and reflects that he mailed this letter to Jamilowski on October 10, 2013. The return address on the letter contains Casterline's name and address at the jail. The letter, in its entirety, states:

> Hey Ronnie this is aj writing you. For what reason I don't know I never did like you because of the way you treated my mother. you are an alcoholic but's its okay to be. you spent 12 years in prison. Well me and mom are locked up because she needed money and a car to get away from you that is how much she hated you but anyways Im getting some of the Blame for her mistakes. I have just heard what happened to your mom and Im so sorry I couldn't Imagine losen mine. But the cops are trying to blame me for that, but you know who really did it. I am writing you with simpity because I care about you and want you to write me back I still consider you a father. And when I get out of jail I would like to move back to guide rock. Tell Trevor my mom is the one who took his stuff you know how she is and tell trevor I dont wanna lose his friendship and tell him he can write me too he is like my brother. Candy and Sam wont talk to me on the phone can you send me there addresses and give them mine please? Well Ronnie Im going to leave it up to you to forgive me but please forgive and write back. lol put down that bottle.

> And dont forget to tell trevor and everybody how sorry I am for my moms mistakes. you know Im not that person. Soo take care of yourself and pay your bills.
>
> PS. Send me a picture of my sisters and mom.

(b) Analysis

[12-14] The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.[17] Rule 901 does not impose a high hurdle for authentication or identification.[18] A proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all possibilities inconsistent with authenticity.[19] If the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirement of rule 901(1).[20]

[15] A proponent may authenticate a document under rule 901(2)(a) by the testimony of someone with personal knowledge that it is what it is claimed to be, such as a person familiar with its contents.[21] But that is not the exclusive means. Under rule 901(2)(d), a proponent may authenticate a document by circumstantial evidence, or its "'[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.'"[22] Authentication rulings are necessarily fact specific, so a trial court has discretion to determine whether evidence has been properly authenticated.[23]

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[17] § 27-901(1).

[18] *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014).

[19] *Id.*

[20] *Id.*

[21] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[22] *Id.* at 473, 755 N.W.2d at 82.

[23] See *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

We find that the foundational evidence set forth above was sufficient to support a finding under rule 901 that the letter was what it purported to be, a letter from Casterline to Jamilowski. In addition to the testimony of the chief jailer, the substance of the letter provides further authentication, because it contained personal information and facts of which others would not likely have knowledge. We find that the letter was sufficiently authenticated, and the district court did not abuse its discretion in overruling Casterline's foundation objection.

3. Admissibility of Knife

Casterline argues that the district court erred by admitting into evidence, over his relevance objection, the knife that was found in the Jeep in which he and Shelley were traveling when they were apprehended in Iowa. He further argues that even if relevant, the knife should have been excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), because its probative value was outweighed by the danger of unfair prejudice.

[16,17] The State argues that Casterline has waived this issue because he failed to timely object to the knife at trial. The record supports the State's assertion that Casterline did not object to the knife on relevance grounds until after two witnesses had testified about the knife's being found in the glovebox and two pictures of the knife had been offered and received into evidence without objection. It is well settled that failure to make a timely objection waives the right to assert prejudicial error on appeal.[24] The record further reflects that Casterline did not raise an objection to the knife on grounds of rule 403 at any point during the trial. On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial.[25]

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[24] See *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015).

[25] *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

Even if these objections had not been waived, we conclude the knife was clearly relevant and admissible under rule 403, given that it was found in the vehicle Casterline was driving, it contained Casterline's DNA, and the victim in this case was stabbed to death. The district court did not err in admitting the knife into evidence.

4. Jury Instructions

Casterline makes two arguments with respect to the jury instructions. First, he argues that the district court improperly instructed the jury on the elements of first degree murder, second degree murder, and manslaughter by adding language that he was guilty of those crimes if he acted "either alone or by aiding another." He argues that that language is not contained in the pattern jury instructions and improperly emphasized the prosecution's theory of aiding and abetting.

Second, Casterline argues that the district court erred by refusing his proposed elements instruction, which was taken directly from the Nebraska pattern jury instructions and was identical to the court's instructions except that it omitted the language "either alone or by aiding another." Casterline argues this language clearly confused the jury, as evidenced by the fact that the jury submitted a written question to the trial court during deliberations, which stated: "Could we get a copy of the State Law that states how you are guilty by association?"

[18,19] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[26] All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[27]

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[26] *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012).

[27] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[28]

The district court instructed on the alternate theories of either premeditated murder or felony murder. The jury was instructed as follows:

> [T]he charge may be based on either premeditated murder or felony murder, and it matters not if some jurors arrive at a verdict of guilty of First Degree Murder based on proof of premeditated murder and some jurors arrive at the same verdict based on proof of felony murder so long as each juror is convinced that the State has proved beyond a reasonable doubt that the defendant committed either premeditated murder or felony murder.

The jury was then instructed on the elements of premeditated murder and felony murder as follows:

> The elements which the State must prove by evidence beyond a reasonable doubt in order to convict . . . Casterline of First Degree Murder, are:
>
> I.) PREMEDITATED MURDER
>
> . . . That . . . Casterline, either alone or by aiding another, killed . . . Barone . . . on or about October 4, 2013 . . . in Webster County, Nebraska . . . purposely . . . with deliberate and premeditated malice.
>
> II.) FELONY MURDER
>
> . . . That . . . Casterline, either alone or by aiding another, killed . . . Barone . . . on or about October 4, 2013 . . . in Webster County, Nebraska . . . during the perpetration of or an attempt to perpetrate the crime of burglary and/or the crime of robbery; and . . . [t]hat such burglary, attempted burglary, robbery or attempted

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[28] *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013).

> robbery respectively, consisted of each and every one of the following elements.

The instruction also set forth the elements of burglary, attempted burglary, robbery, and attempted robbery.

The State argues that the additional language, "either alone or by aiding another," was correct because one who aids and abets a crime may be held liable as the principal. We agree. A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.[29] We have previously upheld an elements instruction containing nearly identical language.[30] We find that the additional language complained of was warranted by the evidence, was a correct statement of the law, and, when read in conjunction with the other instructions, adequately presented the law of felony murder and an aider and abettor's criminal liability as principal.

We also reject Casterline's argument that the district court erred in refusing to give his proposed instruction, which was identical to the district court's instruction except that it omitted the language "either alone or by aiding another." Because we found no error in the inclusion of this language in the district court's instruction, Casterline was not prejudiced by the district court's refusal to give his proposed instruction omitting this language.

VI. CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court.

Affirmed.

McCormack, J., not participating.

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[29] § 28-206.

[30] See *State v. Brunzo*, 248 Neb. 176, 532 N.W.2d 296 (1995).



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

In re Interest of Isabel P. et al., children under 18 years of age. State of Nebraska, appellant, and Bradley C. Easland, guardian ad litem, appellee and cross-appellant, v. Charles J., appellee and cross-appellee.

875 N.W.2d 848

Filed March 18, 2016. No. S-15-487.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
5. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.
6. **Juvenile Courts: Parental Rights: Due Process.** So long as a parent was afforded due process of law, a defect during the adjudication phase does not preclude consideration of termination of parental rights pursuant to Neb. Rev. Stat. § 43-292(1) through (5) (Cum. Supp. 2014).
7. **Parental Rights: Proof.** In order to terminate parental rights, a court must find by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2014) exists and that the termination is in the child's best interests.

8. **Parental Rights: Abandonment: Words and Phrases.** For purposes of Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2014), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.
9. **Parental Rights: Abandonment: Proof.** To prove abandonment in determining whether parental rights should be terminated, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.
10. **Parental Rights: Abandonment: Time: Intent.** A court reviewing a termination of parental rights case on the ground of abandonment need not consider the 6-month period in a vacuum. Instead, the court may consider evidence of a parent's conduct, either before or after the statutory period, in determining whether the purpose and intent of that parent was to abandon his or her children.
11. **Parental Rights: Abandonment.** Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.
12. **Parent and Child.** Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child.
13. **Parental Rights: Presumptions: Proof.** A child's best interests are presumed to be served by having a relationship with his or her parent. This presumption is overcome only when the State has proved that the parent is unfit.
14. **Constitutional Law: Parental Rights: Words and Phrases.** In the context of the constitutionally protected relationship between a parent and a child, parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.
15. **Parental Rights.** The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.

Appeal from the County Court for Madison County: Ross A. Stoffer, Judge. Reversed and remanded with directions.

Gail E. Collins, Deputy Madison County Attorney, for appellant.

Kathleen Koenig Rockey, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellee Charles J.

Bradley C. Easland, of Morland, Easland & Lohrberg, P.C., guardian ad litem.

Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Wright, J.

I. NATURE OF CASE

The State appeals an order of the county court for Madison County, Nebraska, sitting as a juvenile court, declining to terminate Charles J.'s parental rights to his son, K.J., pursuant to Neb. Rev. Stat. § 43-292 (Cum. Supp. 2014). The juvenile court declined to terminate parental rights, because it had not provided counsel for Charles in the proceedings leading up to the adjudication of K.J. pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008). The State appeals, and the guardian ad litem (GAL) cross-appeals.

II. BACKGROUND

In 2012, K.J. and his three siblings were living with their mother, Kristie P., in her mother's apartment in Norfolk, Nebraska. Kristie had recently been cited for child abuse and was struggling with addiction. Her mother called the Department of Health and Human Services (DHHS) out of concern for her grandchildren. Several other calls were made to DHHS as well. On October 18, DHHS removed the children from the apartment. K.J. and one of his brothers were placed in a foster home together and remained there at the time of the hearing on the State's petition to terminate Charles' parental rights.

1. Adjudication

On October 19, 2012, the State filed a petition pursuant to § 43-247(3)(a), which grants courts jurisdiction over any person under the age of 18

> who lacks proper parental care by reason of the fault or habits of his or her parent . . . ; whose parent . . . neglects or refuses to provide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of such juvenile; . . . or who is in a situation . . . dangerous to life or limb or injurious to the health or morals of such juvenile.

A child adjudicated to be within the meaning of § 43-247(3)(a), and thus under the court's jurisdiction, is said to be "adjudicated."[1]

The State requested that the court adjudicate the four children, including K.J., and enter orders of disposition in the best interests of the children. The petition alleged, among other things, that the mother of the children, Kristie, was physically and/or verbally abusive to the juveniles, had failed to give K.J. or his school officials his prescribed psychiatric medicines, and was transient and left her children with others without telling them how long she would be gone or where she could be reached.

The first hearing for the adjudication petition took place on November 1, 2012. Although there were no allegations against him, Charles appeared at the hearing. The State indicated that it was under the impression that Charles was not very involved in K.J.'s life and suggested that a supplemental petition might be filed to include allegations against Charles.

At the hearing, the court advised both Charles and Kristie of the nature of the proceedings, the possible consequences, and the parties' rights, as required by Neb. Rev. Stat. § 43-279.01 (Reissue 2008). Those rights include the right of a parent to have counsel appointed if the parent is unable to afford to hire a lawyer. Kristie requested and was appointed an attorney. The

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[1] See, *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999); *In re Interest of Keisha G.*, 21 Neb. App. 472, 840 N.W.2d 562 (2013).

court declined to appoint an attorney for Charles because there were no allegations against him. It stated:

> Once allegations are filed against you, or in other words, once the State starts saying some things that you did that also caused the children to be put in that position that I talked about before where they were endangered or abandoned or abused or anything of that nature, then, at that point, you would become entitled to have an attorney here and I would address that with you at that time.

The State requested that the care, custody, and control of the children remain with DHHS. Charles objected to the request, explaining that he would like to have custody of K.J. At that time, Kristie supported placement of K.J. with Charles. But the State did not, and it presented evidence against Charles. Because of the evidence adduced about Charles' criminal history, his history of drug abuse, and his failure to provide DHHS with information that would allow them to do a background check on Charles' roommates, the court ordered care, custody, and control to remain with DHHS.

Kristie eventually admitted most of the allegations within the adjudication petition and relinquished her parental rights to the children, including K.J.

2. Petition to Terminate Charles' Parental Rights

Over 22 months after the adjudication, on August 27, 2014, the State petitioned to terminate Charles' parental rights. Section 43-292 allows for termination of parental rights if the termination is in the best interests of the child and at least one of the enumerated grounds within the statute exists. The State alleged that grounds (1) through (3), (6), and (7) existed. Section 43-292 provides, in relevant part:

> The court may terminate all parental rights between the parents . . . and such juvenile when the court finds such action to be in the best interests of the juvenile and it

appears by the evidence that one or more of the following conditions exist:

(1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition;

(2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection; [and]

(3) The parents, being financially able, have willfully neglected to provide the juvenile with the necessary subsistence, education, or other care necessary for his or her health, morals, or welfare or have neglected to pay for such subsistence, education, or other care when legal custody of the juvenile is lodged with others and such payment ordered by the court.

Charles was appointed counsel on October 15, 2014. On October 28, at the first hearing on the petition to terminate, the court again informed Charles of the nature of the proceedings, the possible consequences, and his rights, as required by § 43-279.01.

3. Charles' Objection to Case Plan

On November 5, 2014, Charles filed an objection to the case plan, which contained the goal of adoption for K.J. Charles opposed that goal and also requested that the case plan set forth a more specific schedule of visitation.

A hearing on Charles' objection to the case plan was held on January 29, 2015. The DHHS worker who created the case plan testified that visitations were always the parents' responsibility to schedule. Initially, Charles was able to schedule a visit with K.J. for up to 15 hours per week, but was subsequently limited to therapeutic visits, because he had missed a number of scheduled visits and the visits were negatively affecting K.J. The foster mother testified as to K.J.'s behavior before and

after visits with Charles and stated that K.J. told her he did not want visits with Charles.

The juvenile court overruled Charles' objection to the case plan and found it was in K.J.'s best interests that no visitation take place at that time. The court's order stated, "Clear and convincing evidence [was] presented that during a period of over 6 months beginning February 20, 2014, no contact took place between [Charles] and [K.J.]"

4. Hearing on Motion to Terminate Charles' Parental Rights

The hearing on the motion to terminate Charles' parental rights was held on February 24 and 27 and March 27, 2015. At the termination hearing, evidence was presented concerning (a) Charles' relationship with K.J. from birth to removal; (b) DHHS' consideration of placing K.J. with Charles after removal; (c) K.J.'s experience in foster care; and (d) Charles' relationship with K.J. while K.J. was in foster care, including the frequency and length of Charles' visits.

(a) Charles' Relationship With K.J. From Birth to Removal

When K.J. was conceived, Charles and Kristie were not married and both testified that they were not in a romantic relationship at the time K.J. was born. Charles testified that during the first month of K.J.'s life, he was living with Kristie and helped her with K.J. and her other children.

In 2005, when K.J. was 1-month old, Kristie and Charles were involved in a domestic violence disturbance. An investigator from the Norfolk Police Department, who had responded to the call, testified that an eyewitness said Charles hit Kristie in the face and body while she was holding K.J. Charles was convicted of third degree assault and sentenced to 20 days in jail. Kristie testified she did not have much contact with Charles after that time.

After Charles served the sentence for that assault, he was transferred to South Dakota to serve a 4-year sentence for

possession with intent to distribute cocaine. Charles also served time for tampering with a witness. He was granted parole in 2006.

Kristie testified that while Charles was in jail, he did not send any cards, letters, or gifts to K.J. Even when Charles was not serving time, Kristie said that Charles did not send cards or letters to K.J. and that he never came to K.J.'s birthdays. However, Kristie testified that Charles did give K.J. a few gifts.

When Kristie was in jail, Kristie's mother had temporary guardianship of K.J. She allowed Charles, who was on parole at the time, to see K.J. as much as he wanted, until she received a call from DHHS inquiring about where K.J. was living. According to Kristie's mother, Charles had gone to DHHS to get benefits for K.J. by saying K.J. lived with him. Charles' parole was revoked in 2007 after he was convicted of driving under the influence. He was released later that year.

Kristie testified that when Charles was not in jail and before K.J. was removed, Charles would visit about four times a year. In 2009, when K.J. was 4 years old, Kristie and her children lived in Burlington, Iowa. She agreed to meet Charles in Des Moines, Iowa, so that he could take K.J. back to Norfolk for a few days. After Kristie had driven 4 hours back to Burlington, she received a call from the Norfolk Police Department notifying her that they had found her 4-year-old son wandering the street alone in the middle of the night. Kristie immediately called her mother, who lived in Norfolk, and asked her to go to the police station and get K.J.

In 2012, when K.J. was 7 years old, Kristie sent K.J. to stay with Charles in Lincoln, Nebraska. Charles' "neighbor," Willie M., who lived in the basement of the house Charles rented, called Kristie and told her that Charles had left K.J. with him. Willie is a convicted felon and admitted that he was charged with strangulation and child abuse, which later was reduced to a third degree assault. He also testified that he has been

convicted of assault and delivery of an exceptionally hazardous drug, a Class II felony.

Another time in 2012, Charles left K.J. in Lincoln for 6 to 7 days while Charles went to Texas to visit a girlfriend. Kristie said Willie contacted her again, and she and her mother drove to Lincoln to get K.J.

The testimony conflicted as to the length of time Charles was in Texas and the extent of supervision K.J. received while Charles was gone. Kristie's mother testified that K.J. was very upset when she and Kristie arrived and told her that he was scared because he had awakened in the middle of the night and that Charles was gone and the door to the basement where Willie lived was locked. K.J.'s DHHS worker testified that Charles told her that he had a neighbor "checking in" on K.J.

Willie testified he was responsible for K.J. while Charles was in Texas. Willie testified that K.J. stayed with him every night and was with him all waking hours. He said this was possible because he does not work on the weekends. When confronted with evidence that Charles was gone for more than a weekend, Willie said, "Well, I'm not — I don't — I don't recall that, you know. But . . . you know, you got other people there, too, you know what I mean."

Charles also testified about the Texas incident. After being confronted with prior testimony from the first adjudication hearing, Charles admitted he was in Texas for 6 or 7 days. He said he made arrangements for K.J. before he left. He told Kristie, Willie, and another neighbor that he was going to see his girlfriend and his cousin and would be gone for 2 or 3 days. Charles said he made sure that there was food, that K.J. had clothes, and that the neighbors would help watch K.J. His return was delayed because he was flying with a "buddy pass," which he explained only allowed him to fly standby. He said that during the 2 or 3 extra days he was gone, the other neighbor watched K.J. while Willie was at work. The other neighbor was not at the hearing and did not testify.

In contrast to Kristie's testimony that Charles visited K.J. only about four times per year, Charles testified that he saw K.J. at least two times per week between 2007, when he was released from prison, until 2010, when he went back to prison for conspiracy to commit a Class II felony. Charles testified that he spent holidays with K.J., but he could not specify which holidays or which years. He then testified that he remembered spending Thanksgiving of 2013 with K.J. His counsel promptly reminded him that was not possible, because K.J. was removed from his home in October 2012. Charles then said it must have been the year before (2012). When his counsel suggested it was 2011, Charles agreed.

There was never a custody agreement or custody order regarding K.J., but Charles was ordered to pay $50 per month for K.J. At the time of the termination hearing, Charles was $2,320 in arrears with regard to K.J. Charles has four other children for whom he is obligated to pay child support, and he was behind on all those obligations at the time of the termination hearing.

(b) Placement of K.J.
With Charles

A child protection safety worker from DHHS testified that she was involved with the investigation and removal of K.J. and his siblings from their home. After K.J. was removed, she interviewed K.J. regarding his relationship with Charles. She said it did not appear that Charles was very involved with K.J.

The worker contacted Charles as a potential placement for K.J., but several things caused her concern. Charles had a history of drug and alcohol use and had been convicted of several drug-related crimes. Charles was convicted of attempted possession of cocaine, driving while under the influence, and possession of marijuana. The worker was also concerned because K.J. told the worker that Charles had a lot of beer cans in his apartment.

Charles' propensity for violence was another concern. Kristie had told the worker that Charles had assaulted her just after K.J. was born. And at the termination hearing, Charles admitted that he had served 30 days for an assault of a different woman.

The worker was also concerned about placing K.J. with Charles because of the Texas incident. She noted that K.J. expressed a fear of being left alone that was not isolated to the Texas incident. She testified that regardless of these concerns, she could not place K.J. with Charles, because DHHS requires that background checks be performed on everyone living in the house and Charles had failed to provide her with information that would allow her to do background checks on his roommates.

(c) K.J.'s Experience in Foster Care

Instead of being placed with Charles after removal in 2012, K.J. was placed in a foster home with one of his brothers. His foster parents, Jenny A. and Kevin A., are licensed with the State of Nebraska. At the termination hearing, Jenny testified that K.J. had been living with them for 2 years and had bonded with them. K.J. tells her he loves her, calls her "mom," and calls Kevin "dad." She and Kevin were willing to continue to provide a safe, stable, and secure environment for them.

Jenny also testified that K.J. had made progress on behavioral issues while in the foster home. When the boys first arrived in 2012, they fought a lot, used "filthy" language, would not listen, and had terrible "meltdowns" and tantrums several times a day. K.J. would put himself in a fetal position on the floor and not talk to her or Kevin. But at the time of the termination hearing, K.J. was a "very good little boy"; Jenny testified that K.J. was smart, loving, well behaved, and healthy. She did not deny that K.J. still had some behavioral problems, but testified that, for the most part, he was a very

well mannered boy. K.J. has gone to therapy regularly, but that the frequency has declined significantly.

(d) Charles' Relationship With K.J. While in Foster Care

Jenny also testified about K.J.'s interactions with Charles during the time K.J. was in her care. Charles gave K.J. a few gifts: pants and tennis shoes (which did not fit), Legos, a candy bar, and a used Xbox. K.J. also received a birthday card and a letter. Charles' visits seemed to have a negative effect on K.J. After visiting with Charles, K.J. became more insecure and argumentative and he would act up, not wanting her or Kevin to go anywhere without him. Jenny said that when Charles failed to attend several visits, K.J. became angry, and that Jenny and Kevin would have to "talk him up" for the next visit, telling him that Charles loved him and wanted to see him.

While K.J. was in foster care, Charles was initially given a lot of flexibility regarding visitation. The visits were first supervised by family support workers with a local counseling center. But because of the infrequency and inconsistency in Charles' visits, starting January 8, 2014, Charles was eventually allowed only therapeutic visits. Those visits took place in an office setting with K.J.'s therapist present.

Family support workers and K.J.'s therapist testified at the termination hearing. One family support worker testified that there were appropriate displays of affection during the visits. Another worker testified that K.J. appeared to be happy and smiling during a visit. But K.J.'s therapist testified that Charles' visits had a negative impact on K.J. She testified that K.J. did not want to go to visits with Charles and that the visits seemed to cause K.J. anxiety. She said that the inconsistency in Charles' visits affected K.J.'s self-esteem and sense of self-worth.

Their testimony established that during the 22-month period from K.J.'s placement into foster care in October 2012 until

the termination motion was filed on August 27, 2014, Charles visited K.J. eight times for a total of 14 hours. In addition to the eight visits Charles actually attended, six other visits were scheduled, but Charles either canceled those visits or failed to show.

February 19, 2014, was Charles' last visit with K.J. before the termination petition was filed 6 months later. According to Charles, he was not more involved in visits with K.J. because he believed Kristie was going to successfully reunify with the children.

5. Juvenile Court's Order

Following the termination hearing, the court found that it should have appointed an attorney for Charles at the adjudication hearing, and for that reason, it denied the State's petition to terminate the parental rights of Charles. The court vacated its January 29, 2015, order terminating Charles' visitation rights and reinstated its prior order, which stated that any visitation between Charles and K.J. must take place in a therapeutic setting. The court instructed Charles that the burden was on him to set up visitation.

III. ASSIGNMENTS OF ERROR

The State assigns, restated, that the juvenile court erred in declining to terminate Charles' parental rights without considering grounds (1) through (3) as listed under § 43-292. The GAL assigns the same error and also assigns that the juvenile court erred in not terminating Charles' parental rights to K.J.

IV. STANDARD OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[2]

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[2] *State v. Mendoza-Bautista*, 291 Neb. 876, 869 N.W.2d 339 (2015); *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013); *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[2] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.[3]

V. ANALYSIS

1. Jurisdiction

[3] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[4]

[4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.[5] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.[6]

This case involves the second type of final order—an order affecting a substantial right made during a special proceeding. The terms "special proceeding" and "substantial right" are not defined by statute, but have been interpreted by case law. Our case law establishes that a proceeding

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[3] *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

[4] *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007).

[5] See, Neb. Rev. Stat. § 43-2,106.01 (Cum. Supp. 2014); *In re Interest of Jassenia H.*, 291 Neb. 107, 864 N.W.2d 242 (2015).

[6] *Kilgore v. Nebraska Dept. of Health & Human Servs.*, 277 Neb. 456, 763 N.W.2d 77 (2009).

before a juvenile court is a special proceeding for appellate purposes.[7]

[5] Therefore, the focus of our jurisdictional inquiry is on whether the juvenile court's order affected a substantial right. We find that it does. We have explained that a substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.[8]

The State has an interest in protecting the welfare of its resident children.[9] Whether the order affects the substantial rights of the parties necessarily depends on the substance of the order. The juvenile court's order stated that "the Court does not feel it is in a position to terminate the parental rights of [Charles] at this time." Because the juvenile court made no reference to taking the case under advisement, we interpret this statement to be a denial of the State's motion to terminate Charles' parental rights. The order affected the State's right to protect the welfare interests of its resident child, K.J., which was a substantial right, and we therefore have jurisdiction.

2. Juvenile Court's Failure to Consider § 43-292(1) Through (3)

We next consider whether the juvenile court erred when it denied the State's motion to terminate parental rights without considering whether termination of parental rights was in the child's best interests or justified under grounds (1) through

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[7] *In re Interest of Jassenia H., supra* note 5; *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011); *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011); *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003); *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002); *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000).

[8] *Id.*

[9] *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

(3) of § 43-292. The court did so because Charles was not provided with counsel in the proceedings leading up to K.J.'s adjudication. The State claims this was error, and we agree.

[6] We have previously held that so long as a parent was afforded due process of law, a defect during the adjudication phase does not preclude consideration of termination of parental rights pursuant to § 43-292(1) through (5).[10] Thus, so long as Charles was provided due process of law, the juvenile court's failure to provide Charles with counsel during the adjudication phase does not preclude consideration of termination of parental rights pursuant to § 43-292(1) through (3).

Charles was afforded due process in the termination proceedings. At the first hearing on the State's petition to terminate, Charles was advised of the nature of the proceeding, the potential consequences, and his rights, as required by § 43-279.01. All evidence necessary to decide the termination issue was adduced at the termination hearing while Charles was represented by counsel.

Charles argues that the denial of counsel misled him to "believe that he did not need to be involved in the case" and that had "he been appointed counsel from the very beginning, he could have had the help of an attorney to navigate this matter."[11] But one of the bases for termination of Charles' parental rights was that Charles abandoned K.J. for at least 6 months immediately preceding the filing of the termination petition. With respect to that allegation, we cannot say that Charles' failure to visit K.J. was the court's fault. Due process in a termination proceeding does not require that the parent be advised that he or she should be involved in the child's life.

Charles was afforded due process, and we conclude that the juvenile court erred in denying the State's motion to terminate

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[10] See *In re Interest of Joshua M. et al., supra* note 1.

[11] Brief for appellee Charles at 29-30.

parental rights without considering whether termination of parental rights was in the child's best interests or justified under grounds (1) through (3) of § 43-292.

3. Termination of Charles' Parental Rights

Because the juvenile court should have considered whether Charles' parental rights should be terminated pursuant to § 43-292(1) through (3), we make that determination upon our de novo review.

[7] In order to terminate parental rights, a court must find by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that the termination is in the child's best interests.[12] The State has alleged that termination of Charles' parental rights is in K.J.'s best interests and that five of the grounds listed within § 43-292 (grounds (1) through (3), (6), and (7)) exist. However, the State and the GAL request that we consider grounds (1) through (3). Those grounds are as follows:

> (1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition;
>
> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection; [and]
>
> (3) The parents, being financially able, have willfully neglected to provide the juvenile with the necessary subsistence, education, or other care necessary for his or her health, morals, or welfare or have neglected to pay for such subsistence, education, or other care when legal custody of the juvenile is lodged with others and such payment ordered by the court.

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[12] See *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

(a) § 43-292(1)

[8,9] For purposes of § 43-292(1), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.[13] To prove abandonment in determining whether parental rights should be terminated, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.[14]

[10] A parent's abandonment of his or her child for 6 months or more immediately prior to the filing of a petition to terminate parental rights is a ground for termination of such rights under § 43-292(1). In this case, the petition to terminate Charles' parental rights was filed on August 27, 2014. Thus, the relevant 6-month period is from February 27 to August 27, 2014.[15] We have said that a court reviewing a termination of parental rights case on the ground of abandonment need not consider the 6-month period in a vacuum.[16] Instead, the court may consider evidence of a parent's conduct, either before or after the statutory period, in determining whether the purpose and intent of that parent was to abandon his or her children.[17]

Clear and convincing evidence supports that Charles abandoned K.J. for at least 6 months prior to the filing of the

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[13] *In re Interest of Gabriella H.*, 289 Neb. 323, 855 N.W.2d 368 (2014); *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014).

[14] *In re Interest of Gabriella H., supra* note 13; *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013).

[15] See *In re Interest of Gabriella H., supra* note 13.

[16] See *id.*

[17] See *id.*

termination petition. Not only does Charles admit that he did not visit K.J. during the 6-month period before the petition to terminate his parental rights was filed, but prior to that, Charles had minimal contact with K.J. During the 22-month period from when K.J. went into foster care in October 2012 until the petition was filed in August 2014, Charles visited K.J. only eight times for a total of 14 hours. We also consider that Charles either failed to show or canceled almost as many visits as he attended during that time.

Further, there were significant gaps in time between Charles' visits during that 22-month time period. In addition to the 6-month gap preceding the filing of the termination petition, the evidence shows that there were two 3-month gaps and one 5-month gap in which Charles did not visit K.J. We note that 3 months is a long time for a parent to go without seeing his or her child; it is perhaps perceived by a child as an even longer period of time for the child to go without seeing his or her parent.

We find no just cause or excuse for Charles' failure to maintain a relationship with K.J. Charles claims he "was taking a step back," because he believed that Kristie was going to successfully reunify with K.J.[18] But K.J.'s reunification with Kristie would not have precluded Charles from caring for K.J. or being present in K.J.'s life.

[11,12] Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.[19] Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child.[20] We conclude that Charles' sporadic, insubstantial

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[18] Brief for appellee Charles at 33.

[19] *Kenneth C. v. Lacie H., supra* note 14; *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010); *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999).

[20] *Id.*

efforts to maintain a relationship with K.J., combined with Charles' failure to visit K.J. in the 6 months prior to the filing of the termination petition, constitute clear and convincing evidence that Charles abandoned K.J. within the meaning of § 43-292(1).

Because § 43-292 requires that the State prove only one of the enumerated statutory grounds for termination of parental rights, we need not review the other alleged bases for termination of those rights.[21]

We next consider whether there is sufficient evidence to establish by clear and convincing evidence that it is in K.J.'s best interests that Charles' parental rights be terminated.

(b) Best Interests of K.J.

[13-15] A child's best interests are presumed to be served by having a relationship with his or her parent.[22] This presumption is overcome only when the State has proved that the parent is unfit. In the context of the constitutionally protected relationship between a parent and a child, parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.[23] The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.[24]

In considering Charles' fitness as a parent and whether termination of Charles' parental rights are in K.J.'s best interests,

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[21] See *In re Interest of Joshua M. et al., supra* note 1.

[22] See, *In re Interest of Jahon S.*, 291 Neb. 97, 864 N.W.2d 228 (2015); *Kenneth C. v. Lacie H., supra* note 14; *In re Interest of Kendra M. et al., supra* note 12; *In re Interest of Ryder J.*, 283 Neb. 318, 809 N.W.2d 255 (2012).

[23] *In re Interest of Jahon S., supra* note 22.

[24] *Id.*

we cannot ignore Charles' criminal history. The record shows that Charles has been convicted of a number of drug charges and other felony charges during K.J.'s lifetime, including a violent crime against Kristie while she was holding K.J., who was then an infant. Among other crimes, Charles was convicted of possession with intent to distribute cocaine, possession of marijuana, and attempted tampering with a witness in 2005. In 2010, Charles was charged with delivery of a controlled substance, which was reduced to attempted possession.

As a result of Charles' criminal conduct, he has been incarcerated several times throughout K.J.'s life, making it impossible for him to be consistently present in K.J.'s life or provide him with proper care and support. The record shows that Charles was in jail or prison, at least, from February 2005 to January 2006; for 30 days in 2007; for 30 days in 2008; and from December 2010 until June 2011.

Moreover, Charles does not appear able to act in K.J.'s best interests. Although K.J. has struggled with anxiety, attention deficit hyperactivity disorder, and other behavioral problems, Charles testified that he did not agree with K.J.'s being treated with medication or with K.J.'s seeing a psychiatrist or counselor.

Additionally, Charles has a history of leaving K.J. unsupervised. When K.J. was 4 years old and was supposed to be in Charles' care, the police found K.J. wandering the street in the middle of the night. The week before K.J. was removed from his home and placed into foster care, Charles left 7-year-old K.J. in his apartment for 7 days. Charles claims that he arranged for his two neighbors, one who was a convicted felon charged with child abuse and another who did not testify, to watch K.J. We find Charles' evidence about the extent of his supervision unconvincing. Moreover, even if K.J. *were* fully supervised, we question Charles' choice of supervisors and are concerned that Charles expresses no regret for that choice. Although these incidents have not resulted in physical harm to K.J., it is clear that it had a negative effect on K.J.'s

sense of well-being; i.e., he has developed a fear of being left alone.

To the extent that Charles was present in K.J.'s life, the testimony of K.J.'s therapist and foster mother indicate that Charles' interactions affected K.J. negatively and that K.J. does not want a relationship with Charles.

Considering all the evidence, we conclude there is clear and convincing evidence that termination of Charles' parental rights is in K.J.'s best interests.

VI. CONCLUSION

Upon our de novo review, we conclude that the State proved by clear and convincing evidence that Charles abandoned K.J. and that the termination of his parental rights was in K.J.'s best interests. We therefore reverse the decision of the juvenile court, and we remand the cause with directions to vacate its order filed May 21, 2015, and enter an order terminating Charles' parental rights to K.J.

Reversed and remanded with directions.

Heavican, C.J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Interest of Jackson E., a child under 18 years of age. State of Nebraska, appellee, v. Chelsy G. and Jeff E., appellees, and Erin R. and Paul R., intervenors-appellants.

875 N.W.2d 863

Filed March 18, 2016. No. S-15-534.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Parent and Child: Standing: Appeal and Error.** Foster parents, as such, do not have standing to appeal from an order changing a child's placement.
4. **Standing: Words and Phrases.** Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.
5. **Standing: Proof.** Persons claiming standing must show that their claim is premised on their own legal rights and not the rights of another.
6. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court.
7. **Juvenile Courts: Appeal and Error.** The right of an appeal in a juvenile case in Nebraska is purely statutory.

Appeal from the County Court for Holt County: Alan L. Brodbeck, Judge. Appeal dismissed.

Frederick T. Bartell, of Fitzgerald, Vetter & Temple, for intervenors-appellants.

Thomas P. Herzog, Special Holt County Attorney, of Herzog Law Office, for appellee State of Nebraska.

Forrest F. Peetz, of Peetz Law, P.C., L.L.O., guardian ad litem.

Heavican, C.J., Wright, Connolly, Cassel, and Stacy, JJ.

Cassel, J.

INTRODUCTION

Jackson E.'s former foster parents, one of whom is also his maternal grandmother, attempt to appeal from a juvenile court order overruling their motion for new trial or to alter or amend the court's order declining to return Jackson's placement to them. Because we conclude that they do not have standing to appeal, we dismiss the appeal for lack of jurisdiction.

BACKGROUND

Adjudication, Placement, and Change of Placement

In September 2012, the State filed a juvenile petition alleging that Jackson was an abused or neglected child[1] and requesting temporary custody of Jackson. The county court for Holt County, Nebraska, sitting as a juvenile court, found that Jackson had suffered head injuries in his home and granted the Department of Health and Human Services (Department) temporary custody of Jackson. Jackson's mother and father both entered pleas of no contest to the allegations. They did not give up their parental rights, and the Department has not sought to terminate their rights.

The Department placed Jackson in foster care with his maternal grandmother, Erin R., and her husband, Paul R. Over the next 2½ years, Jackson remained placed with Erin and

[1] See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008).

Paul as a foster child. The Department's permanency objective for Jackson was reunification with both parents.

In March 2015, the Department removed Jackson from his placement with Erin and Paul and placed him with other foster parents. Thereafter, Erin and Paul filed a motion for placement requesting that the court order the Department to place Jackson back with them. They also filed a motion to intervene.

Hearing

The court held a hearing to review both the Department's permanency objective for Jackson and Erin and Paul's motion for placement and motion to intervene. It granted Erin and Paul's motion to intervene, to which no party objected. After hearing testimony related to Jackson's permanency objective, the court changed the permanency objective from reunification to adoption.

The court then took up Erin and Paul's motion for placement. After 3 days of testimony, it found that the State had met its burden to prove by a preponderance of the evidence that its placement of Jackson with the new foster parents was in his best interests. Accordingly, the court denied Erin and Paul's motion.

Erin and Paul later filed a motion for new trial or to alter or amend the order denying their motion for placement. The parties dispute whether the terminating motion was timely filed. After the county court overruled the terminating motion, Erin and Paul brought this appeal.

ASSIGNMENTS OF ERROR

Erin and Paul assign that the county court erred in (1) finding that the State had met its burden of proof that its placement plan was in the best interests of Jackson, (2) failing to give adequate preference to relative placement, and (3) failing to sustain their motion for placement.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of

law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[2]

ANALYSIS

[2] In a juvenile case, as in any other appeal, before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] Thus, before reaching the merits, we must determine whether we have jurisdiction of this appeal.

Two jurisdictional issues are presented. The first is whether Erin and Paul have standing to appeal. The second is whether Erin and Paul timely filed their notice of appeal. Because we conclude that Erin and Paul do not have standing, we do not reach the second issue. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[4]

[3] The State argues that Erin and Paul lack standing to appeal. It notes that we recently held *In re Interest of Enyce J. & Eternity M.*[5] that foster parents, as such, do not have standing to appeal from an order changing a child's placement. Erin and Paul respond that their case is distinguishable from *In re Interest of Enyce J. & Eternity M.*, because Erin is Jackson's grandmother and because they were granted leave to intervene.

[4-6] Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.[6] Persons claiming standing must show that their claim is premised on their own legal

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[2] *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

[3] *Id.*

[4] See *D.I. v. Gibson*, 291 Neb. 554, 867 N.W.2d 284 (2015).

[5] *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

[6] *Id.*

rights and not the rights of another.[7] Standing is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court.[8]

As foster parents, Erin and Paul do not have standing to appeal the change in Jackson's placement. As we said in *In re Interest of Enyce J. & Eternity M.*, their status as foster parents gives them a role in the proceeding, but it does not confer on them a right, title, or interest in the subject matter of the controversy that gives them standing to appeal.

Neither their status as intervenors nor Erin's status as Jackson's grandmother changes this result. Although grandparents have a right to intervene in dependency proceedings involving their minor grandchildren prior to final disposition,[9] this right "does not confer any special entitlements or priorities upon them with respect to temporary custody, placement, or any other issue before the juvenile court."[10] Rather, "[e]xercising their right of intervention simply enables those grandparents wanting to keep abreast of dependency proceedings to receive notice and have an opportunity to be heard with respect to actions taken by a juvenile court which could significantly affect their relationship with their grandchildren."[11] Erin and Paul's intervention allowed them to keep abreast of the proceedings and be heard by the county court, but it did not confer standing to appeal.

[7] The right of appeal in a juvenile case in this state is purely statutory,[12] and neither foster parents nor grandparents, as such, have a statutory right to appeal from a juvenile court

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[7] *Id.*

[8] *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009).

[9] See *In re Interest of Kayle C. & Kylee C.*, 253 Neb. 685, 574 N.W.2d 473 (1998).

[10] *Id.* at 693, 574 N.W.2d 478.

[11] *Id.*

[12] See, Neb. Rev. Stat. § 43-2,106.01 (Cum. Supp. 2014); *Huskey v. Huskey*, 289 Neb. 439, 855 N.W.2d 377 (2014).

order. The statute that confers a right to appeal provides, in relevant part, that an appeal from a final order or judgment entered by a juvenile court may be taken by the "juvenile's parent, custodian, or guardian."[13] It goes on to define custodian or guardian, providing that "[f]or purposes of this subdivision, custodian or guardian shall include, but not be limited to, the Department . . . , an association, or an individual to whose care the juvenile has been awarded pursuant to the Nebraska Juvenile Code."[14]

Erin and Paul are not and were not Jackson's custodians or guardians for the purposes of the statute. We have interpreted the term "custodian" in the context of standing to appeal under the Nebraska Juvenile Code on two occasions. On the first occasion, in *In re Interest of S.R.*,[15] the statute then in effect lacked the current provision defining "custodian or guardian." We held that "custodian" meant "legal custodian, that is, the person or entity given custody of a child by appropriate court order."[16] We said that "[m]ere 'placement with' a person, or 'possession of' a child, does not constitute the persons given such placement or possession as custodians."[17] And we therefore concluded that a child's foster parents did not have standing to appeal, because they did not constitute custodians for purposes of the statute.

On the second occasion, in *In re Interest of Artharena D.*,[18] we noted that the relevant statutory language was amended to include the provision defining "custodian or guardian," and we concluded that the amendment expanded our definition

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[13] § 43-2,106.01(c).

[14] *Id.*

[15] *In re Interest of S.R.*, 217 Neb. 528, 352 N.W.2d 141 (1984), *disapproved on other grounds, In re Interest of Kayle C. & Kylee C., supra* note 9.

[16] *In re Interest of S.R., supra* note 15, 217 Neb. at 535, 352 N.W.2d at 145.

[17] *Id.*

[18] *In re Interest of Artharena D.*, 253 Neb. 613, 617, 571 N.W.2d 608, 611 (1997).

of "custodian." We stated that through the amendment, "the Legislature expressed an intention to expand the definition of 'custodian' beyond the restrictive meaning we gave it in *In re Interest of S.R.* and to extend the right of appeal to individuals having the care of a juvenile by means other than an award under the Juvenile Code."[19] We therefore concluded that a person empowered by parental authority to act as the custodian for a child has a right to appeal under the statute.

The statutory amendment and our recognition of the expanded definition of "custodian" in *In re Interest of Artharena D.* do not change the outcome in this case. The amendment and our subsequent interpretation make clear that the Legislature intended the amendment to ensure that those with alternative custody arrangements, bestowed outside the courts, have standing to appeal. The amendment does not affect the validity of our holding in *In re Interest of S.R.* that foster parents are not custodians for the purposes of the statute. Foster care is generally a short-term placement: It is a temporary measure for maintaining the child until the court can make a permanent disposition.[20] Erin and Paul were only Jackson's foster parents and were never awarded custody of Jackson. Therefore, they are not custodians or guardians for the purposes of the appeals statute, and they have no right to take an appeal in these circumstances.

CONCLUSION

Without a right to appeal, Erin and Paul have no standing, and this court has no jurisdiction over their purported appeal. Accordingly, we dismiss the appeal.

Appeal dismissed.

Miller-Lerman, J., participating on briefs.

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[19] *Id.* at 618, 571 N.W.2d at 612.

[20] *In re Interest of Enyce J. & Eternity M., supra* note 5.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

Cindy Marshall, appellant, v. EyeCare Specialties, P.C. of Lincoln, appellee.

876 N.W.2d 372

Filed March 25, 2016. No. S-14-696.

1. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Trial: Evidence: Waiver.** If the party against whom evidence is offered fails to object to its introduction, that party waives whatever objection he or she might have had.
4. **Fair Employment Practices: Employer and Employee: Proof.** To show that an employer regarded an employee as disabled under Neb. Rev. Stat. § 48-1102(9)(c) (Reissue 2010), the employee must demonstrate either that (1) despite having no impairment at all, the employer mistakenly believed that the employee had an impairment that substantially limited one or more major life activities, or (2) the employee had a nonlimiting impairment that the employer mistakenly believed substantially limited one or more major life activities.
5. **Fair Employment Practices: Discrimination: Proof.** An employee asserting a claim of disability discrimination under the Nebraska Fair Employment Practice Act has two ways to show a genuine issue of material fact for summary judgment purposes: (1) producing direct evidence of discrimination or (2) raising an inference of discrimination under the tripartite burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

6. **Fair Employment Practices: Discrimination: Evidence: Words and Phrases.** In the context of a disability discrimination claim under the Nebraska Fair Employment Practice Act, direct evidence consists of statements by a person with control over the employment decision sufficient to prove discrimination without inference or presumption.
7. **Fair Employment Practices: Discrimination: Proof.** To raise an inference of discrimination under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), tripartite burden-shifting framework, (1) the plaintiff has the burden of proving a prima facie case of discrimination; (2) if the plaintiff proves a prima facie case, the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action; and (3) if the employer articulates a nondiscriminatory reason for its action, the employee maintains the burden to persuade the fact finder that the stated reason was pretextual.
8. **Fair Employment Practices: Words and Phrases.** Under Neb. Rev. Stat. § 48-1102(9) (Reissue 2010), "major life activities" are those activities that are of central importance to daily life.
9. **Fair Employment Practices: Proof.** Under Neb. Rev. Stat. § 48-1102(9) (Reissue 2010), to be substantially limited in the major life activity of working, the plaintiff must show that he or she was significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.
10. **Fair Employment Practices: Words and Phrases.** Drug addiction is an impairment under Neb. Rev. Stat. § 48-1102(9) (Reissue 2010), but it is not a disability unless it substantially limits a major life activity or is perceived by the employer to substantially limit a major life activity.
11. **Fair Employment Practices: Discrimination: Proof.** To establish a prima facie case of disability discrimination under the Nebraska Fair Employment Practice Act, plaintiffs must show that (1) they were disabled, (2) they could perform the essential functions of the position with or without reasonable accommodation, and (3) their employer subjected them to an adverse employment action because of their disability.
12. **Fair Employment Practices: Words and Phrases.** Concentrating, thinking, and communicating are major life activities under Neb. Rev. Stat. § 48-1102(9) (Reissue 2010).

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. On motion for rehearing, reargument granted. See 291 Neb. 264, 865 N.W.2d 343 (2015), for

original opinion. Original opinion withdrawn. Reversed and remanded for further proceedings.

Abby Osborn and Joy Shiffermiller, of Shiffermiller Law Office, P.C., L.L.O., for appellant.

Shawn D. Renner, Susan K. Sapp, and Tara A. Stingley, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

Heavican, C.J., Connolly, Miller-Lerman, and Cassel, JJ., and Irwin, Inbody, and Pirtle, Judges.

Connolly, J.

I. SUMMARY

This case is before us on a motion for rehearing filed by EyeCare Specialties, P.C. of Lincoln (EyeCare Specialties). EyeCare Specialties employed Cindy Marshall as an optical technician from 2007 until it terminated her employment in 2012. Marshall sued EyeCare Specialties, alleging that it discriminated against her because it regarded her as disabled. The district court sustained EyeCare Specialties' motion for summary judgment, and Marshall appealed.

We filed an opinion deciding the appeal on July 2, 2015,[1] but we later sustained EyeCare Specialties' motion for rehearing. We now withdraw our former opinion. Marshall created a dispute of material fact concerning whether EyeCare Specialties discriminated against her because of her skin condition and tremors, which EyeCare Specialties perceived to substantially limit her ability to work. She did not create a fact question concerning whether EyeCare Specialties discriminated against her because of a perceived disability related to her past prescription drug abuse. We therefore reverse, and remand for further proceedings.

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[1] *Marshall v. EyeCare Specialties*, 291 Neb. 264, 865 N.W.2d 343 (2015).

II. BACKGROUND

In January 2007, EyeCare Specialties hired Marshall as an optical technician. Marshall previously worked as a registered nurse but "lost [her] nursing license" because of prescription drug abuse. Marshall said that she successfully completed treatment and did not abuse prescription drugs while she worked for EyeCare Specialties. She told her coworkers about her past drug abuse because they asked why she no longer worked as a nurse.

1. Employment Actions in 2007

In Marshall's first performance evaluation in March 2007, her scores were excellent or above average in every category except one. But she quickly became the subject of complaints from coworkers. In May 2007, a coworker said that Marshall had "a hard time staying focused on the flow" and got "very shakey [sic] more towards afternoon." Marshall told the coworker she was taking over-the-counter diet pills, which the coworker speculated might be causing Marshall's shakiness. In June, another coworker saw Marshall furtively "taking medications" at work. Yet another coworker said that "random drug testing NEEDS to be implemented." Marshall received a corrective action in June, signed by her "Team Leader" and the "Administration," stating that she needed to improve her "[i]nterpersonal issues with coworkers" and "[q]uality of work . . . ."

Marshall told EyeCare Specialties' administrators that she took "diet pills," in addition to medication to control her blood pressure and headaches. She later admitted that the diet pills might have worsened her "tremors." The administrators suggested that Marshall allay her coworkers' suspicion by setting her pill bottles on the table where others could see them.

2. Employment Actions From 2008 Through 2011

The record suggests that Marshall's next 4 years at EyeCare Specialties were relatively quiet. Her May 2008 performance

evaluation scored her as excellent or above average in all nine categories, including quality and productivity. The evaluation noted, though, that Marshall "[s]ometimes gets nervous with multitasking" and needed to "work on steady flow and not getting flustered."

In Marshall's March 2009 performance evaluation, her scores were excellent or above average in eight categories and satisfactory in one. The evaluation urged Marshall to not "spend too much time with challenging cases." In Marshall's June 2010 evaluation, which used a different rubric than the prior evaluations, the mean of her performance ratings was "Meets Requirements." The evaluation stated that Marshall "has had a few issues with tardy arrivals" but was improving.

Marshall received a slightly better rating in her March 2011 evaluation. The optometrists' comments were generally positive, although they noted that Marshall occasionally took too much time with a "tough patient" or a "difficult refraction." In April, the clinic coordinator expressed concerns about Marshall's inefficiency, tension with coworkers, and "attitude problem." An optometrist replied that Marshall was "very nervous and not good at multitasking."

3. Employment Actions in 2012

In 2012, Marshall's employment situation turned for the worse. On January 9, a coworker approached Laura Houdesheldt, EyeCare Specialties' human resources director, and said that Marshall was "very slow and getting slower." The coworker said that Marshall was "nervous," "confused," "'itching,'" and "shaking," and was taking what looked like diet pills.

Houdesheldt had a discussion with Marshall on January 9, 2012, culminating in a documented "verbal" warning. The corrective action plan stated that Marshall was "not doing her fair share."

Later, on January 24, 2012, Marshall and Houdesheldt had another talk about Marshall's performance. During their conversation, Houdesheldt observed "red, raw-looking scratches

on [Marshall's] right arm" and "some open sores that appeared to be wet." Houdesheldt said that Marshall's hands were "shaking quite a bit."

After her conversation with Marshall, Houdesheldt spoke to several of Marshall's coworkers. One coworker said she was "worried that [Marshall] was taking diet pills at work" and that Marshall's paranoia and confusion were increasing. The coworker reported that Marshall had told previous coworkers she had a "history of substance abuse." Houdesheldt later testified that she did not "perceive [Marshall] as having a drug or alcohol problem."

On January 26, 2012, Houdesheldt spoke with an optometrist who was concerned about Marshall's "inconsistent pace." The optometrist was also worried that Marshall jeopardized the patients' safety because she shook while administering tests and had "open wounds."

Houdesheldt met again with Marshall. Marshall said that the apparent sores were "beneath her skin," but Houdesheldt "observed some of the sores to be wet." Houdesheldt explained that EyeCare Specialties viewed Marshall's shaking and sores as workplace hazards:

> Marshall's use of specialized tools in close proximity to patients' eyes while suffering from hand tremors could pose [a risk of] injury to patients and cause discomfort and alarm to patients during testing procedures. Similarly, . . . Marshall's open weeping wounds on her arms could have exposed patients to . . . Marshall's bodily fluids or possible bacteria, or could have exposed . . . Marshall to infectious material from patients' eyes.

Houdesheldt offered to procure a "large bandage" but Marshall declined. Houdesheldt also discussed Marshall's "marked decrease in the quantity of her work." But, according to Marshall, Houdesheldt said that Marshall's failure to do her "fair share" was "'not our real concern.'"

Marshall began to cover her arms after the January 26, 2012, meeting with Houdesheldt, although she denied having "open,

weeping, wet wounds." Marshall said she had "very thin skin that bruises easy." Bandages would tear her skin, so she used "leggings" made from children's clothing to cover her arms. Marshall said that Houdesheldt referred to the leggings as a "clever idea."

In February 2012, Marshall and Houdesheldt had another discussion that climaxed in a written warning. Houdesheldt again pressed Marshall to "cover[] her open wounds" with bandages. The corrective action plan stated that Marshall had "progressively become slower paced in her work" and that her "shaking and her uncovered sores are a concern as she performs tests that bring her in close proximity to patient's [sic] eyes." Marshall left work after her conversation with Houdesheldt. She thought she had permission to leave early, but Houdesheldt disagreed.

On March 13, 2012, an optometrist told Houdesheldt that "Marshall's work pace was very inconsistent and slow, that . . . Marshall was confused from time to time and had trouble verbalizing her thoughts, and that . . . Marshall's failure to address and improve her performance issues was problematic." Houdesheldt had another talk with Marshall.

At her March 13, 2012, meeting with Houdesheldt, Marshall produced a note from her physician dated January 27, 2012, which said that Marshall had a "non-intention tremor & it does not affect work performance." The doctor's note further said that Marshall's "rash is not contagious." The note did not alleviate Houdesheldt's concerns because she did not think Marshall's skin condition was a "rash."

The March 13, 2012, corrective action plan stated that Marshall was "very inconsistent, with periods of average performance followed by periods where her performance decreases significantly." Furthermore, Marshall "continue[d] to refuse to cover her sores with bandages, using the bottom cuffs of some children's legging as sleeve extenders instead." She also "continue[d] to be jittery and easily flustered." The plan stated that "termination is likely" unless Marshall's pace

of work improved and she used an "acceptable barrier" for her "open sores." According to Houdesheldt, Marshall refused to sign the corrective action plan and left before the end of her shift.

After Marshall left, Houdesheldt and the clinic coordinator decided to terminate her employment. On March 14, 2012, Houdesheldt informed Marshall that EyeCare Specialties would no longer employ her.

To rebut the charge that she worked slowly, Marshall collected records for 13 days between February 2 and March 14, 2012, showing the number of patient examinations she and other technicians had performed. According to Marshall's records, she performed as many or more examinations than the other technicians on every day but one. The records do not show if these 13 days between February 2 and March 14 were the only days that she worked during that period.

4. Procedural Background

Marshall filed a complaint against EyeCare Specialties requesting damages under the Nebraska Fair Employment Practice Act (FEPA).[2] She claimed that EyeCare Specialties discriminated against her because of a "perceived disability." Specifically, she alleged that EyeCare Specialties regarded her as disabled because (1) "it became known that she had entered into substance abuse treatment prior to her employment," (2) she had "at-rest hand tremors," and (3) she had "a skin condition . . . that caused red marks on her skin."

The court sustained EyeCare Specialties' motion for summary judgment. In the fact section of the judgment, the court noted that the Nebraska Equal Opportunity Commission and the Lincoln Commission on Human Rights both denied the claims of discrimination that Marshall filed against EyeCare Specialties. In its analysis, the court concluded that Marshall had not presented any direct evidence that EyeCare Specialties

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[2] See Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 2010 & Cum. Supp. 2014).

discriminated against her because of a perceived disability. After deciding that Marshall had not presented direct evidence of discrimination, the court declined her invitation to analyze her claim under a mixed motive framework. It concluded that she had not created a material issue of fact under the *McDonnell Douglas Corp. v. Green*[3] three-part burden-shifting test.

III. ASSIGNMENTS OF ERROR

Marshall assigns, consolidated, that the court erred by (1) citing the determination made by the Nebraska Equal Opportunity Commission and (2) determining that there was no genuine issue of material fact concerning whether EyeCare Specialties discriminated against her because it regarded her as disabled.

IV. STANDARD OF REVIEW

[1,2] We affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and give that party the benefit of all reasonable inferences deducible from the evidence.[5]

V. ANALYSIS

1. Nebraska Equal Opportunity Commission's Determination

Marshall assigns that the court "impermissibly relied on the findings of the [Nebraska Equal Opportunity Commission]

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[3] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[4] *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015).

[5] *Id.*

in granting summary judgment." EyeCare Specialties argues that Marshall did not object to the admission of the commission's determination.

One sentence in the summary judgment order mentions the commission's determination: "On or about November 15, 2012, the Nebraska Equal Opportunity Commission closed its file on [Marshall's] Charge of Discrimination and found no reasonable cause to believe discrimination as alleged by [Marshall] had occurred." We note that in EyeCare Specialties' answer, it affirmatively alleged that Marshall had failed to exhaust administrative remedies. This purported defense might explain the court's brief mention of the administrative proceedings.

[3] Furthermore, Marshall did not object to the admission of the commission's determination. At the summary judgment hearing, the court asked Marshall if she had an objection and she said: "Judge, we don't object for purposes of this hearing. I did include in my brief my objection to the reference to the findings of the [Nebraska Equal Opportunity Commission], but we don't object to the Court considering it for the purposes of this hearing." If the party against whom evidence is offered fails to object to its introduction, that party waives whatever objection he or she might have had.[6] Marshall did not object to the court's considering the commission's determination for purposes of EyeCare Specialties' motion for summary judgment, so she cannot complain if the court actually considered the determination in its summary judgment order.

2. Disability Discrimination

The FEPA[7] prohibits employers from discriminating against individuals because of certain protected characteristics,

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[6] See, *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002); *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000). See, also, *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

[7] §§ 48-1101 to 48-1125.

including disability.[8] Section 48-1107.01 provides: "It shall be an unlawful employment practice for a covered entity to discriminate against a qualified individual with a disability because of the disability of such individual . . . ." Under § 48-1102(10)(a), a "[q]ualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." "Disability," under § 48-1102(9), is "(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (b) a record of such an impairment, or (c) being regarded as having such an impairment."

The Legislature enacted the FEPA in 1965,[9] but it added the above-quoted language in §§ 48-1102 and 48-1107.01 in 1993.[10] The Legislature specifically intended that its 1993 amendments would provide the same protections from employment discrimination that title I of the Americans with Disabilities Act of 1990 (ADA of 1990) provided.[11] So it is appropriate to consider how federal courts have interpreted the counterparts to the 1993 amendments in the ADA of 1990.[12]

But in considering federal precedent, we must be mindful of subsequent amendments made by the Legislature and Congress. The Legislature has amended the disability provisions in the FEPA since 1993,[13] although the changes are not

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[8] See § 48-1104.

[9] See 1965 Neb. Laws, ch. 276, pp. 782-98.

[10] 1993 Neb. Laws, L.B. 360.

[11] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 329; *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015).

[12] *Arens v. NEBCO, Inc., supra* note 11. See *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999). See, also, *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002).

[13] See, 2015 Neb. Laws, L.B. 627; 2004 Neb. Laws, L.B. 1083.

relevant here. And Congress substantially amended the ADA of 1990 in the ADA Amendments Act of 2008 (ADAAA of 2008).[14] For example, the ADAAA of 2008—unlike the ADA of 1990—provides that an employer can regard an individual as disabled even if the employer does not perceive the individual to be substantially limited in any major life activity.[15] But the Legislature has not adopted these federal amendments. So changes made by the ADAAA of 2008 are not indicative of the Legislature's intent in the FEPA, and we continue to look to federal decisions interpreting the language of the ADA of 1990.

[4] Below, Marshall alleged that EyeCare Specialties perceived her as disabled because she had sought treatment for drug abuse, because she had tremors, and because she had a skin condition. She claims that these impairments are disabilities under § 48-1102(9)(c), which states that an individual is disabled if she is "regarded as having such an impairment." The phrase "such an impairment" in § 48-1102(9)(c) refers to "a physical or mental impairment that substantially limits one or more of the major life activities of such individual" under § 48-1102(9)(a). So to show that EyeCare Specialties regarded her as disabled, Marshall had to demonstrate either (1) that despite having no impairment at all, EyeCare Specialties mistakenly believed that she had an impairment that substantially limited one or more major life activities, or (2) that she had a nonlimiting impairment that EyeCare Specialties mistakenly believed substantially limited one or more major life activities.[16]

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[14] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

[15] See 42 U.S.C. § 12102(3)(A) (2012).

[16] *Eshelman v. Agere Systems, Inc.*, 554 F.3d 426 (3d Cir. 2009). See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999) (superseded by ADAAA of 2008); *Ollie v. Titan Tire Corp.*, 336 F.3d 680 (8th Cir. 2003).

The focus of the "regarded as" prong in § 48-1102(9)(c) is on the employer's beliefs and acts.[17] But it is not enough for Marshall to show that EyeCare Specialties treated her adversely because it believed she had physical or mental impairments.[18] Rather, she must show that EyeCare Specialties treated her adversely because it perceived her as having impairments that substantially limited one or more major life activities.[19]

[5-7] Turning to the mechanics of creating a fact question concerning disability, Marshall had two ways to survive EyeCare Specialties' motion for summary judgment. First, she could produce "direct evidence" of discrimination.[20] In this context, we have said that direct evidence "'consists of statements by a person with control over the employment decision "sufficient to prove discrimination without inference or presumption."'"[21] The statements must reflect a discriminatory or retaliatory attitude correlating to the discrimination complained of by the employee.[22] Direct evidence is not the converse of circumstantial evidence.[23] Instead it is evidence which shows "'a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually

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[17] See 1 Jonathan R. Mook, Americans with Disabilities Act: Employee Rights & Employer Obligations § 3.04[1][a] (2015).

[18] See *Weber v. Strippit, Inc.*, 186 F. 3d 907 (8th Cir. 1999).

[19] *Id.* See *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162 (1st Cir. 2002).

[20] See, *Griffith v. City of Des Moines*, 387 F.3d 733 (8th Cir. 2004); 2 Jonathan R. Mook, Americans with Disabilities Act: Employee Rights & Employer Obligations § 8.03[2][c][i] (2015).

[21] *Father Flanagan's Boys' Home v. Agnew, supra* note 12, 256 Neb. at 404, 590 N.W.2d at 695, quoting *Moore v. Alabama State University*, 980 F. Supp. 426 (M.D. Ala. 1997).

[22] *Id.*

[23] *Griffith v. City of Des Moines, supra* note 20.

motivated' the adverse employment action."[24] Alternatively, if Marshall lacks direct evidence, she must create a genuine issue of material fact by raising an inference of discrimination under the *McDonnell Douglas Corp.* tripartite burden-shifting framework.[25] Under that framework, (1) the plaintiff has the burden of proving a prima facie case of discrimination; (2) if the plaintiff proves a prima facie case, the burden shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action; and (3) if the employer articulates a nondiscriminatory reason for its action, the employee maintains the burden to persuade the fact finder that the stated reason was pretextual.[26]

(a) Skin Condition and Tremors

Marshall argues that her skin condition was "a nonlimiting impairment" which EyeCare Specialties mistakenly believed substantially limited her major life activity of working.[27] She argues that she produced direct evidence that EyeCare Specialties was concerned about "contagion" between herself and patients because of her skin condition.[28] At oral argument, Marshall asserted that EyeCare Specialties also regarded her tremors as substantially limiting her major life activity of working.

[8] The FEPA does not define "physical or mental impairment," "substantially limits," or "major life activities."[29] Nor

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[24] *Id.* at 736, quoting *Thomas v. First Nat. Bank of Wynne*, 111 F.3d 64 (8th Cir. 1997). See 2 Mook, *supra* note 20, § 8.03[2][c][ii].

[25] *Griffith v. City of Des Moines, supra* note 20. See, *Arens v. NEBCO, Inc., supra* note 11; *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011); 1 Barbara T. Lindemann & Paul Grossman, Employment Discrimination Law, ch. 13, § VII.A.3.b (4th ed. 2007 & Supp. 2008).

[26] See *Arens v. NEBCO, Inc., supra* note 11.

[27] Supplemental brief for appellant at 1.

[28] *Id.* at 2.

[29] See *Arens v. NEBCO, Inc., supra* note 11.

did the ADA of 1990.[30] But Marshall's skin condition and tremors are within the broad understanding of "'physical impairment'" or "'mental impairment.'"[31] Federal courts interpreted "'substantially limited'" to mean "'unable to perform'" or "'significantly restricted as to the condition, manner or duration.'"[32] The word "major" in "major life activities" means "important."[33] So "major life activities" are "those activities that are of central importance to daily life."[34] The ADA of 1990 did not delegate authority to any agency to define "disability,"[35] but the Equal Employment Opportunity Commission nevertheless promulgated regulations relied upon by courts.[36] The commission's regulations defined "major life activities" to include "'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'"[37]

[9] But if the major life activity under consideration was "working," courts required the plaintiff to show more than a perception that she was unfit for a particular job. In *Sutton v. United Air Lines, Inc.*,[38] the U.S. Supreme Court explained:

> To be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps

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[30] See *Sutton v. United Airlines, Inc., supra* note 16.

[31] See 1 Lindemann & Grossman, *supra* note 25, ch. 13, § IV.A at 822-23.

[32] *Wenzel v. Missouri-American Water Co.*, 404 F.3d 1038, 1041 (8th Cir. 2005). See *Sutton v. United Airlines, Inc., supra* note 16.

[33] *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002) (superseded by ADAAA of 2008).

[34] *Id.* See, also, 1 Lindemann & Grossman, *supra* note 25, ch. 13, § IV.B.

[35] *Sutton v. United Air Lines, Inc., supra* note 16.

[36] See, e.g., *Wenzel v. Missouri-American Water Co., supra* note 32.

[37] *Sutton v. United Air Lines, Inc., supra* note 16, 527 U.S. at 480, quoting 29 C.F.R. § 1630.2(i) (1998).

[38] *Sutton v. United Air Lines, Inc., supra* note 16.

> not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.[39]

The plaintiff must show that she was "'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'"[40]

Here, Marshall presented direct evidence that EyeCare Specialties fired her because of her skin condition. She stated that Houdesheldt—an agent of EyeCare Specialties with decisionmaking power—told her in January 2012 that EyeCare Specialties' "'real concern is that you have sores on your arm.'" In February and March, Houdesheldt chastised Marshall for failing to cover her arms. The February 21 corrective action plan stated that Marshall's "sores are a concern as she performs tests that bring her in close proximity to patient's [sic] eyes." The March 13 corrective action plan, issued the same day that Houdesheldt and the clinic coordinator decided to terminate Marshall's employment, stated that Marshall had failed to create an "acceptable barrier" between patients and her "open sores."

Similarly, Marshall presented direct evidence that her tremors were a factor in EyeCare Specialties' decision to fire her. On January 26, 2012, Houdesheldt told Marshall that her "use of specialized tools in close proximity to patients' eyes while suffering from hand tremors could pose [a risk of] injury to patients and cause discomfort and alarm to patients during testing procedures." The February 21 corrective action plan, issued about 3 weeks before EyeCare Specialties terminated Marshall's employment, stated that Marshall's shaking was "a concern as she performs tests that bring her in close proximity to patient's [sic] eyes."

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[39] *Id.*, 527 U.S. at 492.

[40] *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435, 440 (8th Cir. 2007).

And Marshall created a material issue of fact as to whether EyeCare Specialties perceived her skin condition and tremors as substantially limiting her major life activity of working. We note that despite concerns about circularity,[41] courts interpreting the ADA of 1990 have generally accepted that working is a major life activity, and the parties do not dispute this conclusion.[42] Marshall presented direct evidence that EyeCare Specialties perceived her as unable to perform jobs which required her to have her arms near a patient's eyes or which required her to operate equipment near a patients' eyes. Given Marshall's employment background and training in medical services, there is at least a factual dispute whether such severe perceived restrictions on her ability to interact with patients would substantially limit her access to a class of jobs or broad range of jobs in various classes.[43]

(b) Past Drug Abuse

In her complaint, Marshall alleged that EyeCare Specialties "perceived [her] as disabled as it became known that she had entered into substance abuse treatment prior to her employment." She argues on appeal that she was disabled because EyeCare Specialties "perceived [her] as chemically dependent."[44] She contends that EyeCare Specialties perceived this impairment as substantially limiting her major life activities of concentrating, thinking, communicating, and working.

Under the FEPA, the term "disability" does not include "psychoactive substance use disorders resulting from current illegal use of drugs."[45] Similarly, § 48-1102(10)(b) provides:

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[41] See *Sutton v. United Air Lines, Inc., supra* note 16.

[42] See 1 Lindemann & Grossman, *supra* note 25, ch. 13, § IV.B.

[43] See *Moorer v. Baptist Memorial Health Care*, 398 F.3d 469 (6th Cir. 2005).

[44] Brief for appellant at 21.

[45] § 48-1102(9).

"Qualified individual with a disability shall not include any employee or applicant who is currently engaged in the illegal use of drugs when the covered entity acts on the basis of such use[.]" But an individual who is otherwise a qualified individual with a disability does not lose that status because of past drug abuse or a misperception of current illegal drug use. Section 48-1102(10)(c) states:

> Nothing in this subdivision shall be construed to exclude as a qualified individual with a disability an individual who:
>
> (i) Has successfully completed a supervised drug rehabilitation program or otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;
>
> (ii) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (iii) Is erroneously regarded as engaging in such use but is not engaging in such use.

Section 48-1102(10)(b) and (c) closely track language in the ADA of 1990.[46]

Federal courts have at times been less than consistent in their treatment of drug addiction and perceived drug addiction. A few cases seem to hold that addiction is a disability without determining whether, on the facts of the case, the plaintiff's addiction substantially limited one or more major life activities or was perceived to have such an effect by the employer.[47] But

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[46] Compare § 48-1102(10)(b) and (c), with 42 U.S.C. § 12114(a) and (b) (2006).

[47] See, *Pugh v. City of Attica, Indiana*, 259 F.3d 619 (7th Cir. 2001); *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182 (9th Cir. 2001); *Duda v. Franklin Park Pub. School Dist. 84*, 133 F.3d 1054 (7th Cir. 1998); *Buckley v. Consolidated Edison Co. of New York*, 127 F.3d 270 (2d Cir. 1997), *vacated* 155 F.3d 150 (2d Cir. 1998); *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), citing *Crewe v. U.S. Office of Personnel Management*, 834 F.2d 140 (8th Cir. 1987); *Bryant v. Madigan*, 84 F.3d 246 (7th Cir. 1996).

the greater weight of authority is that the plaintiff must show that his or her particular addiction, or perceived addiction, in fact substantially limited, or was perceived to substantially limit, a major life activity.[48]

[10] We agree with the majority view and hold that while drug addiction is an impairment,[49] it is not a disability under the FEPA unless it substantially limits a major life activity or is perceived by the employer to substantially limit a major life activity. The majority rule is consistent with the principle that whether a person has a disability is an individualized inquiry.[50] Courts have been reluctant to recognize particular impairments as "per se" disabilities without testing whether the impairment actually limits one of the plaintiff's major life activities.[51]

(i) No Direct Evidence of Disability Discrimination for Past Drug Abuse

Turning to the summary judgment record, we conclude that Marshall did not present direct evidence that EyeCare

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[48] See, *Dovenmuehler v. St. Cloud Hosp., supra* note 40; *Moorer v. Baptist Memorial Health Care, supra* note 43; *Sullivan v. Neiman Marcus Group, Inc.*, 358 F.3d 110 (1st Cir. 2004); *Bailey v. Georgia-Pacific Corp., supra* note 19; *Zenor v. El Paso Healthcare System, Ltd.*, 176 F.3d 847 (5th Cir. 1999); *Nielsen v. Moroni Feed Co.*, 162 F.3d 604 (10th Cir. 1998); *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681 (8th Cir. 1998); *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997). See, also, Renee Parsons & Thomas J. Speiss III, *Does the Americans with Disabilities Act Really Protect Alcoholism?* 20 Lab. Law. 17 (2004).

[49] See *Bailey v. Georgia-Pacific Corp., supra* note 19.

[50] See, *Sutton v. United Air Lines, Inc., supra* note 16; 1 Lindemann & Grossman, *supra* note 25, ch. 13, § V.

[51] See, *Griffin v. United Parcel Service, Inc.*, 661 F.3d 216 (5th Cir. 2011); *E.E.O.C. v. Lee's Log Cabin, Inc.*, 546 F.3d 438 (7th Cir. 2008); *Weber v. Strippit, Inc., supra* note 18; *Deas v. River West, L.P.*, 152 F.3d 471 (5th Cir. 1998). See, also, *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.3d 1275 (11th Cir. 2001).

Specialties discriminated against her because it perceived her to be a drug addict. Marshall cites statements from coworkers reporting that Marshall was "taking some type of pill" and urging EyeCare Specialties to start random drug testing. Marshall concedes, however, that these are not "statements by the decision makers directly."[52] Nor does she argue that the decisionmakers adopted the statements as their own simply by recording them. References to Marshall's being "jittery" or "flustered" do not establish a specific link between any "'[d]iscrimination in the air'" and the termination of Marshall's employment.[53] Statements by decisionmakers unrelated to the decisional process itself are not direct evidence.[54] The only arguable item of direct evidence is an administrator's suggestion in June 2007 that Marshall set her pill bottles where others could see them. But that evidence is stale because more than 4 years passed between the statement and the termination of Marshall's employment.[55]

(ii) No Question of Fact Under
McDonnell Douglas Corp.
for Past Drug Abuse

[11] Because she lacks direct evidence, Marshall's drug addiction claim must withstand EyeCare Specialties' summary judgment motion under the *McDonnell Douglas Corp.* framework. The first step is for Marshall to establish a prima facie case. Section 48-1107.01 prohibits an employer from taking an adverse employment action against a qualified individual with a disability because of the individual's disability. Section 48-1102(10)(a) states that a qualified individual with a disability is a person with a disability who, with or without reasonable

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[52] Brief for appellant at 24.

[53] See 2 Mook, *supra* note 20, § 8.03[2][c][ii] at 8-64.

[54] *Father Flanagan's Boys' Home v. Agnew, supra* note 12.

[55] See *Brown v. City of Jacksonville*, 711 F.3d 883 (8th Cir. 2013).

accommodation, can perform the essential functions of the job. So to establish a prima facie case of disability discrimination under the FEPA, Marshall must show that (1) she was disabled, (2) she could perform the essential functions of the position with or without reasonable accommodation, and (3) EyeCare Specialties subjected her to an adverse employment action because of her disability.[56]

The first element in Marshall's prima facie case is that she had a disability as that term is understood in the FEPA. Drug addiction is an impairment,[57] and there is some evidence that viewed in the light most favorable to Marshall, would show that EyeCare Specialties perceived Marshall as a drug addict. Marshall told her coworkers that she lost her nursing license because she abused prescription drugs, and her coworkers informed administrators and supervisors of Marshall's history of chemical dependence. In January 2012, one of Marshall's coworkers told Houdesheldt that Marshall had said she "had a history of substance abuse."

But, again, Marshall must still present evidence that EyeCare Specialties perceived her drug addiction as substantially limiting a major life activity for the impairment to be a disability under the FEPA. As to the major life activity of working, the record lacks evidence that EyeCare Specialties regarded Marshall's addiction as precluding her from a substantial class or broad range of jobs. There is no evidence of how such a perceived limitation would affect Marshall's employment prospects given her particular skills and background.

In addition to working, Marshall argues that EyeCare Specialties perceived her as substantially limited in the

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[56] See, *Kozisek v. County of Seward, Nebraska*, 539 F.3d 930 (8th Cir. 2008); *RGR Co. v. Lincoln Commission on Human Rights*, 292 Neb. 745, 873 N.W.2d 881 (2016); *Doe v. Board of Regents*, 287 Neb. 990, 846 N.W.2d 126 (2014); *IBP, inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353 (1997).

[57] See *Bailey v. Georgia-Pacific Corp., supra* note 19.

major life activities of concentrating, thinking, and communicating. These activities—now included in the federal definition of "major life activities" because of the ADAAA of 2008[58]—did not appear in the Equal Employment Opportunity Commission's regulations interpreting the ADA of 1990, although the commission's compliance manual stated that thinking, concentrating, and interacting with others were major life activities.[59] Most courts interpreting the ADA of 1990 held that thinking[60] and communicating[61] were major life activities. Courts were divided over whether concentrating was a major life activity.[62]

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[58] See 42 U.S.C. § 42-12102(2)(A) (2012).

[59] See *E.E.O.C. v. Chevron Phillips Chemical Co., LP*, 570 F.3d 606 (5th Cir. 2009).

[60] *Id.*; *Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003); *Taylor v. Phoenixville School Dist.*, 184 F.3d 296 (3d Cir. 1999); *Miller v. Hersman*, 759 F. Supp. 2d 1 (D.D.C. 2010); *E.E.O.C. v. Voss Elec. Co. d/b/a Voss Lighting*, 257 F. Supp. 2d 1354 (W.D. Okla. 2003); *E.E.O.C. v. Dollar General Corp.*, 252 F. Supp. 2d 277 (M.D.N.C. 2003). But see *Starks-Umoja v. Federal Express Corp.*, 341 F. Supp. 2d 979 (W.D. Tenn. 2003).

[61] See, *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221 (S.D. Ga. 2003); *E.E.O.C. v. Voss Elec. Co. d/b/a Voss Lighting, supra* note 60; *E.E.O.C. v. Dollar General Corp., supra* note 60; *Downing v. United Parcel Service, Inc.*, 215 F. Supp. 2d 1303 (M.D. Fla. 2002). See, also, *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12 (1st Cir. 1997).

[62] See, *Miller v. Hersman, supra* note 60. Compare *Battle v. United Parcel Service, Inc.*, 438 F.3d 856 (8th Cir. 2006), *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565 (3d Cir. 2002), *Sussle v. Sirina Protection Systems Corp.*, 269 F. Supp. 2d 285 (S.D.N.Y. 2003), *Walsted v. Woodbury County, IA*, 113 F. Supp. 2d 1318 (N.D. Iowa 2000), *DeMar v. Car-Freshner Corp.*, 49 F. Supp. 2d 84 (N.D.N.Y. 1999), and *Bitney v. Honolulu Police Dept.*, 96 Haw. 243, 30 P.3d 257 (2001), with *Pack v. Kmart Corp.*, 166 F.3d 1300 (10th Cir. 1999), *Starks-Umoja v. Federal Express Corp., supra* note 60, *Lemire v. Silva*, 104 F. Supp. 2d 80 (D. Mass. 2000), *Phillips v. Wal-Mart Stores, Inc.*, 78 F. Supp. 2d 1274 (S.D. Ala. 1999), and *Hook v. Georgia-Gulf Corp.*, 788 So. 2d 47 (La. App. 2001).

[12] We conclude that concentrating, thinking, and communicating are major life activities under the FEPA. As noted, major life activities are activities of central importance to daily life.[63] A substantial limitation on one's ability to concentrate, think, or communicate is a great debility, preventing one from understanding the symbols, reasoning, and customs necessary to interact with the world and the people in it. Some courts have reasoned that concentrating itself is not a major life activity because it is as an aspect of other activities, like working or learning.[64] But there is no reason to demote concentration because it is necessary for other life activities. If anything, the fact that an individual must concentrate to perform a multitude of functions shows its importance.

But the evidence, even viewed in the light most favorable to Marshall, does not support a reasonable inference that EyeCare Specialties perceived Marshall as having a drug addiction that substantially limited her ability to concentrate, think, or communicate. That is, Marshall did not meet the first element of her prima facie case under *McDonnell Douglas Corp.* requiring her to show she has a "disability" as that term is defined by the FEPA. Marshall urges us to assume that references to her being confused, flustered, or unable to multitask were veiled references to her history of substance abuse. We decline her invitation because there is more than one reason why a person may be confused, flustered, or bad at multitasking and the record does not suggest an inference that the perceptions were based on Marshall's past abuse of prescription drugs. We will not simply assume that because Marshall told her coworkers about her prior abuse of prescription drugs, any abnormalities in her behavior were perceived by her employer as the effects of addiction.

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[63] See *Toyota Motor Mfg., Ky., Inc. v. Williams, supra* note 33.

[64] See, *E.E.O.C. v. Chevron Phillips Chemical Co., LP, supra* note 59; *Pack v. Kmart Corp., supra* note 62.

VI. CONCLUSION

We withdraw our opinion filed on July 2, 2015. Marshall presented direct evidence that EyeCare Specialties terminated her employment because of her skin condition and tremors, both of which EyeCare Specialties perceived to substantially limit Marshall's major life activity of working. But she failed to present evidence, direct or indirect, that EyeCare Specialties perceived her as having a drug addiction that substantially limited one or more major life activities. We therefore affirm the summary judgment as to Marshall's drug addiction claim. We reverse, and remand for further proceedings for Marshall's claims related to her skin condition and tremors.

Reversed and remanded for
further proceedings.

Wright and Stacy, JJ., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

George Poullos and Jody Poullos, appellees, v. Pine Crest Homes, LLC, a Nebraska limited liability company, appellant.

876 N.W.2d 356

Filed March 25, 2016. No. S-15-236.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.
4. **Adverse Possession: Notice.** The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in adverse possession of another.
5. **Adverse Possession.** If an occupier's physical actions on the land constitute visible and conspicuous evidence of possession and use of the land, that will generally be sufficient to establish that possession was notorious.
6. ____. Although the enclosure of land renders the possession of land open and notorious, it is not the only way by which possession may be rendered open and notorious. Nonenclosing improvements to land, such as erecting buildings or planting groves or trees, which show an intention to appropriate the land to some useful purpose, are sufficient.
7. **Adverse Possession: Notice.** An adverse possession must be sufficiently notorious to give notice to the record owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest.

8. **Adverse Possession.** Platted land is no less subject to adverse possession than unplatted land. To hold otherwise would defeat the historical and general application of the doctrine of adverse possession.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Reversed and remanded with directions.

Jeffrey A. Nix, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellant.

James T. Boler, P.C., L.L.O., for appellees.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Stacy, J.

FACTS

In November 2001, George Poullos and Jody Poullos purchased a home and residential property on lot 368 in an Omaha, Nebraska, subdivision. When they purchased the home, it was fully completed; sod had been laid on the lot, an underground sprinkler system had been installed, and a sidewalk had been constructed. The Poulloses believed their property extended to the edge of the sod line—a line that was just outside the sprinkler system and perpendicular to the end of the sidewalk. From 2001 on, George continuously mowed, fertilized, and watered the sod. He also maintained the sprinkler system. In the winter, George cleared the sidewalk of snow.

At the time the Poulloses purchased and moved into their home, the property directly adjacent to the north, lot 367, was vacant. The vacant lot was generally covered with dirt and weeds. A photograph taken in about November 2001 shows a demarcation between the sod line and the vacant lot. Global positioning system photographs and other evidence admitted at trial generally demonstrated that the sod line demarcation continued over the ensuing 10 to 12 years, but became less even over time as the sod spread.

Lot 367 remained vacant until 2013, when Pine Crest Homes, LLC, began constructing a home. A survey revealed that a wedged-shaped section of land consisting of portions of the sod and sprinkler system maintained by the Poulloses was actually part of lot 367, not lot 368. The area in dispute is about 667 square feet of land.

In April 2013, the Poulloses filed a complaint for injunctive relief and to quiet title. They attempted to stop the construction of the home on lot 367 and asked that title to the wedge-shaped section of land in dispute be quieted in them based on the theory of adverse possession. The district court denied injunctive relief but, after conducting a bench trial, found the Poulloses had established all of the elements of adverse possession and quieted title to the disputed land in their favor. Pine Crest Homes timely filed this appeal, and we moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1] For the reasons discussed below, we reverse, and remand with directions to enter judgment for Pine Crest Homes.

ASSIGNMENTS OF ERROR

Pine Crest Homes assigns, restated, that (1) the district court erred in finding the Poulloses had established all the elements of adverse possession and (2) the legal description of the disputed property offered by the Poulloses was insufficient to support quieting title in their favor.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity.[2] On appeal from an equity action, an appellate court decides factual questions

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[1] Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

[2] *Obermiller v. Baasch*, 284 Neb. 542, 823 N.W.2d 162 (2012); *Newman v. Liebig*, 282 Neb. 609, 810 N.W.2d 408 (2011).

de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[3]

ANALYSIS

[3] The Poulloses sought to quiet title under the theory of adverse possession. A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.[4] Here, the district court found the Poulloses' possession was actual, continuous, exclusive, and under a claim of ownership for a period of at least 10 years. Upon de novo review, we conclude the district court correctly found the Poulloses' possession of the contested area was actual, continuous, exclusive, and under a claim of ownership for a period of at least 10 years.

Here, the central issue on appeal is whether the Poulloses' possession was also "notorious." The district court found it was, relying heavily on the visible sod line between the properties and the Poulloses' physical acts of maintaining the sod and clearing the sidewalk. We disagree.

[4-6] The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in adverse possession of another.[5] If an occupier's physical actions on

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[3] *Stacy M. v. Jason M.*, 290 Neb. 141, 858 N.W.2d 852 (2015); *SID No. 196 of Douglas Cty. v. City of Valley*, 290 Neb. 1, 858 N.W.2d 553 (2015).

[4] *Inserra v. Violi*, 267 Neb. 991, 679 N.W.2d 230 (2004); *Nye v. Fire Group Partnership*, 265 Neb. 438, 657 N.W.2d 220 (2003).

[5] *Nye v. Fire Group Partnership, supra* note 4; *Gustin v. Scheele*, 250 Neb. 269, 549 N.W.2d 135 (1996).

the land constitute visible and conspicuous evidence of possession and use of the land, that will generally be sufficient to establish that possession was notorious.[6] Although the enclosure of land renders the possession of land open and notorious, it is not the only way by which possession may be rendered open and notorious.[7] Rather, nonenclosing improvements to land, such as erecting buildings or planting groves or trees, which show an intention to appropriate the land to some useful purpose, are sufficient.[8]

The Poulloses rely heavily on our decision in *Wanha v. Long*.[9] There, Donald and Lee Wanha moved into a home on lot 105 in an Omaha subdivision in 1965. When the Wanhas purchased their home, lot 105 had no lawn and no sidewalk. The adjacent lot, 104, however, was sodded and had a sidewalk along the lot frontage. The Wanhas installed a connecting sidewalk and planted grass seed up to and abutting the sodded area of lot 104. In 1973 or 1974, the owners of lot 104 built a fence along the seeded grass/sod line; this fence remained in place for at least the next 20 years.

In 1996, the owners of lot 104 obtained a survey and discovered the actual platted lot line of lot 104 extended into the area the Wanhas had seeded and had been maintaining. The Wanhas eventually sought title to the disputed area via adverse possession. The trial court found that from 1965 to 1996, the boundary line was the sod/fence line, and ruled in favor of the Wanhas. We affirmed. In doing so, we noted that the evidence showed the Wanhas were the only persons to use the disputed property during the relevant time period. We also found that their use was not clandestine, noting that

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[6] *Nye v. Fire Group Partnership, supra* note 4.

[7] *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

[8] *Id.*

[9] *Id.*

the owner of lot 104 was aware of the use. Although we did not expressly rely on the existence of the fence, from 1973 to 1996, the existence of that openly visible improvement further supported an award of adverse possession in favor of the Wanhas.

In other cases where we have found adverse possession of property to be sufficiently notorious, the use of the land similarly included something more than general acts of maintenance. For example, in *Purdum v. Sherman*,[10] we found the possession was notorious when the adverse holder's cattle grazed the disputed land. And in *Nye v. Fire Group Partnership*,[11] we reversed a finding that the possession was not notorious as a matter of law, where the adverse holders "planted grass, mowed and maintained the property, erected a snow fence in the winter, and left the 5- to 6-foot-high fence-posts permanently in place."

[7] Our prior cases illustrate that an adverse possession must be sufficiently notorious to give notice to the record owner that his title or ownership is in danger so that he may, within the period of limitation, take action to protect his interest.[12] In the present case, our de novo review indicates this threshold was not met, because neither the Pollouses' use of the land nor the improvements to the land were sufficiently notorious to pass title by adverse possession. Before the Poulloses purchased lot 368, the prior owner installed an underground sprinkler system which extended partially onto the neighboring lot and laid sod which extended partially onto the neighboring lot. While the installation of sod and underground sprinklers were both improvements to the land, they were not conspicuous. Abutting lawns are ubiquitous in

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[10] *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957).

[11] *Nye v. Fire Group Partnership, supra* note 4, 265 Neb. at 443, 657 N.W.2d at 224-25.

[12] *Purdum v. Sherman, supra* note 10.

residential neighborhoods, and here neither the underground sprinkler system nor the sprinkler heads were visible. Though we assume water spray was visible when the sprinkler system was operating, there is nothing in the record indicating the time of day or the frequency with which the sprinklers were operated during the 10-year period, so no reasonable conclusions can be drawn about the visibility of the sprinkler's overspray during the relevant timeframe. The Poulloses made no other visible improvements to the disputed land that might indicate a claim of ownership, such as planting trees or installing a shed, fence, or playset on the land.

Nor was the Poulloses' act of regularly mowing and watering a strip of lot 367 while performing their own lawn maintenance on lot 368 the sort of notorious act that supports adverse possession. As this court has said, "'It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.'"[13] Acts of routine yard maintenance, without more, are not sufficiently notorious to warn the titleholder that another is claiming or using the land for his own purpose. Something more than a neighbor watering and mowing over the property line is needed to alert a reasonable owner that his title is in danger and he must take steps to protect his interest.

Upon de novo review, we find the Poulloses have failed to prove, by a preponderance of the evidence, that their possession of the disputed property was sufficiently notorious to support a claim of adverse possession. Because we reach this conclusion, we need not address the second assignment of error.

[8] We note Pine Crest Homes also argues that the doctrine of adverse possession should not apply in platted subdivisions as a matter of public policy. We specifically rejected such an

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[13] *Pettis v. Lozier*, 217 Neb. 191, 196, 349 N.W.2d 372, 375-76 (1984).

argument in *Wanha v. Long*,[14] reasoning that "'platted land is no less subject to adverse possession than unplatted land. To hold otherwise would defeat the historical and general application of the doctrine'" of adverse possession. We adhere to that holding.

CONCLUSION

For the foregoing reasons, we reverse the district court's order quieting title in favor of the Poulloses and remand the cause with directions to enter judgment in favor of Pine Crest Homes.

Reversed and remanded with directions.

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[14] *Wanha v. Long, supra* note 7, 255 Neb. at 863, 587 N.W.2d at 542.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Joan C. Phillips, appellant, v. Liberty Mutual Insurance Company, defendant and third-party plaintiff, appellee, and Douglas County, a political subdivision of the State of Nebraska, and Timothy Dunning, sheriff of Douglas County, Nebraska, third-party defendants, appellees.

876 N.W.2d 361

Filed March 25, 2016. No. S-15-324.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists.
4. **Summary Judgment: Proof.** A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
5. ____: ____. Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
6. **Political Subdivisions Tort Claims Act: Negligence: Proof.** A negligence action brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012), has the same

elements as a negligence action against an individual. In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.

7. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
8. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
9. **Negligence.** The existence of a duty generally serves as a legal conclusion that an actor must exercise that degree of care as would be exercised by a reasonable person under the circumstances.
10. ____. Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.
11. ____. Whether a duty exists is a policy decision.
12. **Police Officers and Sheriffs: Arrests.** Under the provisions of Neb. Rev. Stat. § 28-1412 (Reissue 2008), the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.
13. ____: ____. Under the provisions of Neb. Rev. Stat. § 28-1412 (Reissue 2008), a police officer in making an arrest must use only reasonable force, which is that amount of force which an ordinary, prudent, and intelligent person with the knowledge and in the situation of the arresting police officer would have deemed necessary under the circumstances.
14. **Police Officers and Sheriffs.** The reasonableness inquiry as to excessive force is whether the officer's actions were objectively reasonable.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Raymond K. Wilson, Jr., Ronald E. Frank, and Mary M. Schott, of Sodoro, Daly, Shomaker & Selde, P.C., L.L.O., for appellant.

Sandra Connolly, Deputy Douglas County Attorney, for appellees Douglas County and Timothy Dunning.

Heavican, C.J., Wright, Miller-Lerman, Cassel, and Stacy, JJ.

Miller-Lerman, J.

NATURE OF CASE

On April 1, 2010, Joan C. Phillips, the appellant, was injured when she was a bystander while two deputies of the Douglas County Sheriff's Department were in the process of taking a minor student into custody. On June 13, 2011, Phillips filed her complaint in the district court for Douglas County against Douglas County (the County) and Timothy Dunning, the elected sheriff of the County, the appellees. Phillips alleged that she was injured as a result of the deputies' negligence and sought damages. On March 25, 2013, the district court filed an order in which it granted the motion for summary judgment in favor of the County and Dunning. Following resolution of several procedural challenges, the district court again granted summary judgment in favor of the County and Dunning on April 2, 2015. Phillips appeals. Although our reasoning differs from that of the district court, we affirm.

STATEMENT OF FACTS

The underlying facts in this case are generally not in dispute. Phillips is a resident of Omaha, Nebraska, in the County. The County is a political subdivision of Nebraska. Dunning, at all relevant times, was the elected sheriff of the County.

Phillips was employed at an alternative education center in Omaha. On April 1, 2010, deputies from the Douglas County Sheriff's Department arrived at the education center for the purposes of taking one of the minor students into custody. They had a warrant. As explained in our analysis, the parties and the district court treated the matter as effectuating an arrest, as do we.

Before arriving, the deputies had spoken to Phillips, who requested that they utilize the back door of the building so as not to disrupt the classroom. When the deputies arrived, Phillips led the student to the back door of the building. When Phillips and the student stepped out of the building, the student saw the deputies and ran back inside the building. The deputies ran after the student. While the deputies were in the process

of chasing after the student, the deputies knocked Phillips into a wall and to the ground. A deputy grabbed the student as the student held onto the doorknob to a classroom. The deputies removed the student's hands from the doorknob, placed her on the ground, and placed handcuffs on her.

On June 13, 2011, Phillips filed her complaint against the County and Dunning, alleging that the deputies were negligent when they knocked her into a wall and to the ground while in the process of taking the student into custody. Phillips alleged that as a result of this incident, she sustained personal injuries which resulted in physical and mental pain and suffering and that she had incurred medical expenses and lost wages. Phillips alleged in her complaint that she had made a claim pursuant to the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012), and that the claim had been withdrawn pursuant to the PSTCA.

Apart from this lawsuit, Phillips had received workers' compensation benefits as a result of this incident. In her complaint, Phillips listed Liberty Mutual Insurance Company (Liberty Mutual) as a defendant. Liberty Mutual was Phillips' employer's workers' compensation insurer. Liberty Mutual was later realigned as a third-party plaintiff, and it is not appearing in this appeal.

The County and Dunning filed an answer on July 14, 2011, in which they generally denied the allegations contained in Phillips' complaint and denied liability. The County and Dunning also raised various affirmative defenses, including: The deputies "acted reasonably and with due care," Phillips' claim was barred by § 13-910 of the PSTCA, and Phillips failed to state a claim.

On January 12, 2012, the County and Dunning filed a motion for judgment on the pleadings, which the district court overruled on February 10.

On April 23, 2012, the County and Dunning filed a motion for leave to amend their answer, which the district court granted

on May 7. The County and Dunning amended their answer to add the affirmative defense of contributory negligence.

On November 26, 2012, the County and Dunning filed a motion for summary judgment and sought a dismissal of Phillips' complaint. The County and Dunning alleged that there are no genuine issues of material fact in this case and that they are entitled to judgment as a matter of law. On March 25, 2013, the district court filed its order in which it granted summary judgment in favor of the County and Dunning based upon its determination that Phillips' claim was derived from a battery on the student and was therefore barred by § 13-910(7) of the PSTCA, which bars suits based on intentional torts.

On April 25, 2013, Phillips appealed from the March 25 order. This appeal was docketed in the Court of Appeals as case No. A-13-366. On July 17, the Court of Appeals dismissed Phillips' appeal, because the March 25 order did not explicitly dispose of the claim against Liberty Mutual, citing Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) and *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005). See *Phillips v. Douglas County*, 21 Neb. App. xx (No. A-13-366, July 17, 2013).

On March 12, 2014, Phillips filed a motion to realign the parties in which she generally asked to align Liberty Mutual as a third-party plaintiff, which would allow the court to address only the County and Dunning as defendants. The district court granted the motion in an order filed April 3. The court ordered that "the parties should be and hereby are realigned, making Liberty Mutual . . . a third party Plaintiff with respect to the above captioned matter."

On May 5, 2014, Phillips again appealed from the summary judgment order. This appeal was docketed in the Court of Appeals as case No. A-14-387. On July 7, the Court of Appeals dismissed Phillips' appeal, because the order appealed from was not a final, appealable order, citing Neb. Rev. Stat. § 25-1902 (Reissue 2008). See *Phillips v. Douglas County*, 22 Neb. App. xxxvi (No. A-14-387, July 7, 2014).

On April 2, 2015, the district court filed an order titled "Order Nunc Pro Tunc on Defendant[s'] Motion for Summary Judgment With Parties Aligned." The district court ordered that "Defendants [the County] and . . . Dunning's Motion for Summary Judgment is granted as to all claims by all parties." This is the order appealed from in the current case, docketed before us as case No. S-15-324.

ASSIGNMENT OF ERROR

Phillips claims, restated, that the district court erred when it granted the County and Dunning's motion for summary judgment.

STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Zornes v. Zornes*, 292 Neb. 271, 872 N.W.2d 571 (2015). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

In this case, Phillips filed a complaint against the County and Dunning in which she alleged that the deputies "negligently knocked [her] into a wall and to the ground," proximately causing injuries and damages. The parties variously refer to the occasion of this alleged negligence as having occurred while the deputies were at the education center to cause the apprehension or imminent apprehension of the student, effectuate custody of the student, or execute a lawful warrant for the arrest of the student. Consistent with the manner in which the case was conducted before the district court,

we treat the matter as one involving effectuating an arrest of the student.

Following the filing of their amended answer and preliminary motions, the County and Dunning filed a motion for summary judgment. In connection with the summary judgment motion, the parties and the district court discussed whether the student was subjected to a battery and whether the intent thereof was transferred to Phillips, thus precluding recovery under § 13-910(7), which bars recovery for intentional torts. In this regard, based on their reading of *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011), they placed considerable, arguably undue, emphasis on the "intent" of the deputies. The district court reasoned that Phillips' claim was barred by § 13-910 of the PSTCA and sustained the motion.

Phillips claims that the district court erred when it granted the County and Dunning's motion for summary judgment. As explained more fully below, with due regard for the pleadings and evidence, we view this matter as a negligence action filed by Phillips against the County and Dunning for which there is no issue of material fact that they did not breach their duty and are entitled to summary judgment as a matter of law. Although our reasoning differs from that of the district court, as explained below, we affirm the district court's grant of summary judgment in favor of the County and Dunning. See *Doe v. Board of Regents*, 283 Neb. 303, 809 N.W.2d 263 (2012) (stating that appellate court may affirm lower court's ruling which reaches correct result, albeit based on different reasoning).

[3] On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists. *Gonzalez v. Union Pacific RR. Co.*, 292 Neb. 281, 872 N.W.2d 579 (2015). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of

all reasonable inferences deducible from the evidence. *Id*. Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id*.

[4,5] A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015). Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. *Id*.

[6] Subject to certain exceptions, "in all suits brought under the [PSTCA] the political subdivision shall be liable in the same manner and to the same extent as a private individual." § 13-908. Accord *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012). Thus, we have recognized that a negligence action brought under the PSTCA has the same elements as a negligence action against an individual. See *Connelly v. City of Omaha, supra*. In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Peterson v. Kings Gate Partners*, 290 Neb. 658, 861 N.W.2d 444 (2015).

[7,8] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id*. When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court. *Kimminau v. City of Hastings*, 291 Neb. 133, 864 N.W.2d 399 (2015). In the past, we used the risk-utility test to determine the existence of a tort duty. See *Peterson v. Kings Gate Partners, supra*. However, in *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907

(2010), we abandoned the risk-utility test and adopted the duty analysis set forth in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010). Under this approach, an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011). This approach examines the defendant's conduct, not in terms of whether the defendant had a "duty" to take particular actions, but, rather, in terms of whether the defendant's conduct breached the duty to exercise the care that would be exercised by a reasonable person under the circumstances. *Id*.

In *A.W.*, we stated:

> [F]oreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.

280 Neb. at 216, 784 N.W.2d at 917.

[9-11] After *A.W.*, the existence of a duty generally serves as a legal conclusion that an actor must exercise that degree of care as would be exercised by a reasonable person under the circumstances. See *id.* See, also, *Peterson v. Kings Gate Partners, supra*. Moreover, "[d]uty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases." *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. at 212-13, 784 N.W.2d at 914-15. Whether a duty exists is a policy decision. *Peterson v. Kings Gate Partners, supra*. In this case, we conclude as a matter of law that the deputies who were effectuating the arrest of the student had a duty and were required to exercise that degree

of care toward innocent persons, such as Phillips, as would be exercised by a reasonable deputy effectuating an arrest under the circumstances.

Our analysis is informed by statutes and the common law in this area. Neb. Rev. Stat. § 28-1412(1) (Reissue 2008) states:

> Subject to the provisions of this section and of section 28-1414, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

Neb. Rev. Stat. § 28-1414 (Reissue 2008), referred to in § 28-1412(1), states in part:

> (3) When the actor is justified under sections 28-1408 to 28-1413 in using force upon or toward the person of another but he recklessly or negligently injures or creates a risk of injury to innocent persons, the justification afforded by those sections is unavailable in a prosecution for such recklessness or negligence towards innocent persons.

[12-14] We have stated that under the provisions of § 28-1412, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest. *State v. Thompson*, 244 Neb. 189, 505 N.W.2d 673 (1993). Under the provisions of § 28-1412, a police officer in making an arrest must use only reasonable force, which is that amount of force which an ordinary, prudent, and intelligent person with the knowledge and in the situation of the arresting police officer would have deemed necessary under the circumstances. *State v. Thompson, supra*; *Wagner v. City of Omaha*, 236 Neb. 843, 464 N.W.2d 175 (1991). See, also, *Waldron v. Roark*, 292 Neb. 889, 874 N.W.2d 850 (2016). The reasonableness inquiry as to excessive force is whether the officer's actions were objectively reasonable. See *Tyler v. Kyler*, 15 Neb. App. 939, 739 N.W.2d 463 (2007) (affirming summary judgment where bystander to stop

for traffic violation became subject of arrest and determining officer's use of force was reasonable as matter of law based on objective standard). See, also, *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

In regard to innocent third persons who are injured while an officer is effectuating an arrest, we have stated that the duty of law enforcement officers to apprehend violators of the law must be balanced with a duty of care to the general public as well. *Lee v. City of Omaha*, 209 Neb. 345, 307 N.W.2d 800 (1981). A similar duty has been recognized by other jurisdictions. See, e.g., *Giant Food v. Scherry*, 51 Md. App. 586, 590, 444 A.2d 483, 486 (1982) (stating that "a person has, in effect, a double responsibility—one to the prospective arrestee not to use unnecessary force against him, and one to the public at large to use even reasonable force in a reasonable manner"). In *Giant Food*, the Court of Special Appeals of Maryland described the circumstances in which an officer who is effectuating an arrest may be held liable for injuring an innocent third person. The court stated:

> These kinds of situations, in which an innocent bystander is injured or killed in the course of an attempt to apprehend a criminal or defend an attack on one's person or property, arise in a variety of contexts—some more life-threatening to the actor than others, some involving felons and felonies, others involving misdemeanants and misdemeanors. The context is important in determining the reasonableness of the action taken, but the basic standard seems to be the same. Where the evidence shows that the actor, whether a police officer or a private citizen, acted without due regard to the danger caused to innocent third parties, he (and his employer) have been held liable. . . .
>
> Conversely, where the evidence establishes that the defendant acted reasonably, liability has been denied.

Giant Food v. Scherry, 51 Md. App. at 591-92, 444 A.2d at 487 (collecting cases).

The treatment we afford the innocent bystander to an arrest has found support in the construction of a statute comparable to § 28-1412, as well as in the common law as reflected in the Restatement (Second) of Torts (1965). With respect to the statute, in *Hyatt v. Anoka Police Dept.*, 691 N.W.2d 824, 827 (Minn. 2005), the Minnesota Supreme Court construed the Minnesota reasonable force statute, Minn. Stat. Ann. § 609.06, subd. 1 (West 2003), which provided:

> "Except as otherwise provided in subdivision 2, reasonable force may be used upon or toward the person of another without the other's consent when the following circumstances exist or the actor reasonably believes them to exist:
>
> "(1) when used by a public officer or one assisting a public officer under the public officer's direction:
>
> "(a) in effecting a lawful arrest[.]"

The Minnesota Supreme Court stated as follows:

> [T]he authorization in section 609.06 is stated broadly to include force that is directed "*toward* the person of another." . . .
>
> The statute does not specifically address the legal consequence where reasonable force is directed toward the arrestee but causes harm to an innocent bystander. But reference to the common law provides some guidance on that issue. Generally, tort law recognizes that the use of force . . . is "privileged" if it is reasonable and it is used for the purpose of effecting a lawful arrest. *See, e.g.*, Restatement (Second) of Torts § 118 (1965) ("The use of force against another for the purpose of effecting his arrest and the arrest thereby effected are privileged if [several applicable] conditions . . . exist"). And, in that context, the privilege extends to harm to an innocent bystander caused by force directed toward the arrestee, unless under the circumstances it was "unreasonable for [the actor] to take the chance of causing grave harm

> to bystanders." Restatement (Second) of Torts § 137 cmt. c (1965).

Hyatt v. Anoka Police Dept., 691 N.W.2d at 828-29 (emphasis in original).

The statutory interpretation and comments of the Minnesota Supreme Court in *Hyatt* find application to the present case, where it is undisputed that the contact the deputies had with Phillips occurred prior to their contact "upon" the student. That is, the behavior of the deputies was directed "toward" the student but not yet "upon" the student at the time they made contact with Phillips. See § 28-1412. The force used in connection with the arrest of the student, if reasonable, is privileged, and in this context, the privilege extends to the harm to the innocent bystander, Phillips, caused by force directed "toward" the student, unless it was unreasonable for the officers to take the chance of causing harm to Phillips.

Our statutes and case law are in accord with the Restatement (Second), *supra*. As recognized by the Minnesota Supreme Court in *Hyatt*, the Restatement (Second), *supra*, § 118, generally provides that an officer is privileged to use reasonable force in effectuating a lawful arrest. The Restatement extends this privilege to harm caused to innocent bystanders, unless the officer's actions were unreasonable under the circumstances. See Restatement (Second), *supra*, § 137.

The Restatement provides commentary to illustrate when an officer's conduct while effectuating an arrest creates an unreasonable risk of harm to an innocent third person:

> [I]f an actor is privileged to shoot at an escaping felon, he is not liable to a third person harmed by a stray bullet, if when he shot there was little or no probability that any person other than the felon would be hit. But when he shoots into a crowded thoroughfare, and unintentionally hits a passerby, his act is unprivileged if, in view of the surrounding conditions, including the nature of the crime for which he seeks to arrest, recapture, or maintain

> custody, the harm which may ensue if he does not act, and his skill or lack of skill in the use of the weapon, it is unreasonable for him to take the chance of causing grave harm to bystanders.

Restatement (Second) of Torts § 137, comment *c.* at 246 (1965).

In the present case, the question before us is whether there is a genuine issue of material fact regarding whether the deputies were acting reasonably at the point in time when the deputies "knocked [Phillips] into a wall and to the ground" while they were effectuating the arrest of the student. Viewing the evidence in the light most favorable to Phillips, we determine that there is no material issue of fact regarding whether the deputies acted reasonably. The evidence shows that the deputies arrived at the school pursuant to a warrant to take the student into custody. When the deputies arrived, Phillips escorted the student out the back door of the building, but when the student saw the deputies, she turned and ran back into the building. The deputies chased after the student in order to effectuate the arrest. As the deputies ran past Phillips, they knocked her into a wall and to the ground. Nothing in the record suggests that the deputies were acting recklessly or unreasonably at the point in time when they made contact with Phillips. Compare *Giant Food v. Scherry*, 51 Md. App. 586, 444 A.2d 483 (1982) (in case involving apprehension of robber, stating it was question for fact finder whether security guard acted unreasonably by firing second shot at vehicle after first shot failed to stop robber's fleeing vehicle, which second shot shattered woman's window in apartment complex, causing woman mental and emotional distress).

There is no evidence in the record before us that the deputies were utilizing weapons in effectuating the arrest of the student or that they were chasing the student in a way that could be described as reckless. Based upon the framework set forth above, the deputies were allowed to use a reasonable amount of force in effectuating the arrest of the student, and

nothing in the record indicates that at the point in time when they bumped into Phillips, the deputies realized or objectively should have realized that their actions created an unreasonable risk of harm to any innocent third persons, such as Phillips.

Although whether the deputies acted unreasonably and breached their duty is a question of fact, even viewing the facts in the light most favorable to Phillips, no reasonable fact finder could find that the deputies breached their duty to exercise reasonable care with respect to Phillips. The County and Dunning demonstrated that they were entitled to judgment as a matter of law, and thus, the burden shifted to Phillips to present evidence showing the existence of a material issue of fact regarding breach which would prevent entry of judgment against her. See *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015). We have reviewed the record and find no evidence which raises a question of material fact regarding the reasonableness of the deputies' actions or prevents entry of judgment in favor of the County and Dunning.

CONCLUSION

Even viewing the evidence in the light most favorable to Phillips, we determine that the County and Dunning were entitled to summary judgment. Although our reasoning differs from that of the district court, we affirm the order of the district court which granted summary judgment in favor of the County and Dunning.

Affirmed.

Connolly, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Thomas Lamb, appellant, v. Fraternal Order of Police Lodge No. 36 and Michael Robinson, Washington County Sheriff, an individual, appellees.

876 N.W.2d 388

Filed March 25, 2016. No. S-15-361.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
4. **Labor and Labor Relations: Contracts.** Generally, individual employees seeking to assert contract grievances attempt to use the grievance procedure agreed to by a union and an employer as a mode of redress.
5. **Commission of Industrial Relations: Jurisdiction: Breach of Contract.** The Commission of Industrial Relations has no jurisdiction over breach of contract claims.
6. **Constitutional Law: Immunity: Waiver.** Under the 11th Amendment, a nonconsenting state is generally immune from suit unless the state has waived its immunity.

7. **Political Subdivisions: Counties: Legislature.** A county is a political subdivision of the state and has subordinate powers of sovereignty conferred by the Legislature.
8. **Constitutional Law: Legislature: Actions.** Neb. Const. art. V, § 22, provides that the State may sue and be sued and that the Legislature shall provide by law in what manner and in what courts suits shall be brought.
9. **Tort Claims Act: Legislature: Immunity: Waiver.** The Legislature has waived the State's immunity through the State Tort Claims Act.
10. **Political Subdivisions Tort Claims Act: Legislature: Immunity: Waiver.** The Legislature has waived immunity belonging to political subdivisions, like counties, through the Political Subdivisions Tort Claims Act.
11. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver. A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
12. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** An appellate court strictly construes the Political Subdivisions Tort Claims Act in favor of the political subdivision and against the waiver of sovereign immunity.
13. **Political Subdivisions Tort Claims Act: Tort Claims Act.** Generally, provisions of the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act.

Appeal from the District Court for Washington County: John E. Samson, Judge. Affirmed.

Thomas M. White, C. Thomas White, and Amy S. Jorgensen, of White & Jorgensen, for appellant.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee Fraternal Order of Police Lodge No. 36.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., for appellee Michael Robinson.

Heavican, C.J., Wright, Connolly, Cassel, and Stacy, JJ.

Heavican, C.J.

I. INTRODUCTION

Thomas Lamb filed suit against the Fraternal Order of Police Lodge No. 36 (Lodge No. 36) and Michael Robinson, Washington County Sheriff, alleging breach of contract and intentional interference with a business relationship. The district court dismissed Lamb's suit. Lamb appeals. We affirm.

II. FACTUAL BACKGROUND

Lamb was employed as a captain in the Washington County, Nebraska, sheriff's office. Lamb was a member of Lodge No. 36, a labor union representing employees of the Washington County sheriff's office. Lodge No. 36 and Washington County entered into a labor agreement on June 28, 2005. Robinson is the sheriff of Washington County.

On April 4, 2013, Robinson informed Lamb that he was under investigation. The reason for this investigation is not in our record. Robinson appointed two sergeants within his office to conduct the investigation into Lamb. Lamb maintained that as officers holding a lesser rank, the appointed officers were not permitted by the labor contract to investigate him; despite this, Lamb was questioned in connection with the investigation. Lamb also requested, from Lodge No. 36, representation during the questioning, but alleged that he did not receive it.

On April 13, 2013, apparently at the instigation of the investigating officers, Robinson took over the investigation into Lamb. On April 19, Lamb's employment was terminated.

On September 2, 2014, Lamb filed suit against Lodge No. 36 and Robinson. He subsequently filed an amended complaint. That complaint sets forth two causes of action.

The first, against Lodge No. 36, alleges breach of contract. Lamb alleges that Lodge No. 36's refusal to provide representation after he requested it was a breach of the labor contract and of Lodge No. 36's duty of fair representation. Lamb further alleges that there was no grievance procedure set forth in

the labor contract for grievance against Lodge No. 36 and that therefore, he had no obligation to file one.

The second cause of action is against Robinson for tortious interference with a business relationship. Lamb alleges that Robinson obstructed Lodge No. 36's ability to fulfill its duty of fair representation. Lamb further alleges that Robinson is a member of Lodge No. 36, despite the fact that he is the supervisor and thus prohibited by Neb. Rev. Stat. § 48-816 (Cum. Supp. 2014) from being a member of the same bargaining unit as nonsupervisors.

Lamb sought general and special damages and past and present lost income.

Both Lodge No. 36 and Robinson filed motions to dismiss. Lodge No. 36 argued that the Commission of Industrial Relations (CIR), not the district court, had jurisdiction to decide this dispute, and that Lamb waived his cause of action by failing to file a grievance. Robinson argued that the action against him was barred by sovereign immunity.

The district court granted both motions to dismiss. Lamb appeals.

III. ASSIGNMENTS OF ERROR

Lamb assigns, restated and consolidated, that the district court erred in dismissing his causes of action against Lodge No. 36 and against Robinson.

IV. STANDARD OF REVIEW

[1-3] A district court's grant of a motion to dismiss is reviewed de novo.[1] When reviewing an order dismissing a complaint, an appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[2] To prevail against a motion to dismiss for

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[1] *SID No. 1 v. Adamy*, 289 Neb. 913, 858 N.W.2d 168 (2015).

[2] *Id.*

failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[3] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[4]

V. ANALYSIS

1. Action Against Lodge No. 36

Lamb argues that the district court erred in finding that he needed to file a grievance and that his action should have been filed with the CIR and not with the district court.

(a) Failure to File Grievance

The district court concluded that Lamb's amended complaint should be dismissed because he failed to file a grievance in accordance with the labor contract. On this fact, we disagree.

[4] It is true that generally, individual employees seeking to assert contract grievances attempt to use the grievance procedure agreed to by a union and an employer as a mode of redress.[5] And it is true that Lamb did not file such a grievance in this case.

Lamb's failure to file a grievance does not necessitate dismissal of his complaint. Lamb, while no doubt upset over the termination of his employment, did not sue Lodge No. 36 over that termination. Rather, Lamb asserted that Lodge No. 36 breached the labor contract, and further alleged that Robinson tortiously interfered with Lamb's relationship with Lodge No. 36.

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[3] *Id.*

[4] *Id.*

[5] *Republic Steel v. Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965).

When the grievance process set forth in the labor contract is examined, it is clear that it would have been futile for Lamb to file a grievance under that procedure. The procedure deals with a grievance against the county. It does not provide a mechanism for Lamb to complain about Lodge No. 36. There would have been no point in Lamb's filing a grievance with Washington County when his grievance was really with Lodge No. 36.

The district court erred in dismissing Lamb's amended complaint for failure to file a grievance.

(b) District Court Jurisdiction

Lamb also assigns that the district court erred when it concluded that it lacked subject matter jurisdiction and that this action should have been filed before the CIR. Lamb argues that the district court has jurisdiction, because breach of contract claims must be decided by that court and cannot be decided by the CIR.

[5] We agree with Lamb that the CIR has no jurisdiction over breach of contract claims.[6] But Lamb does not allege only a claim for a breach of contract. He also alleges that Lodge No. 36 breached its duty of fair representation.

A duty of fair representation claim is implicitly authorized by Neb. Rev. Stat. § 48-824 (Cum. Supp. 2014).[7] That section identifies a variety of "prohibited practices" actionable against not only a public employer, but also a public employee, a public employee organization, or a collective bargaining agent; the CIR has the power to find that any of these parties committed such a prohibited practice. But the jurisdiction for such an action does not lie with the district court; rather,

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[6] See *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979) (superseded by statute as stated in *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.*, 278 Neb. 572, 772 N.W.2d 564 (2009)).

[7] See *Davis v. Fraternal Order of Police*, 15 Neb. App. 470, 731 N.W.2d 901 (2007).

because it involves the determination of a prohibited practice under Nebraska's Industrial Relations Act, jurisdiction lies with the CIR.[8]

Lamb attempts to characterize his claim against Lodge No. 36 as a breach of contract claim. Lamb's amended complaint alleges that "[Lodge No.] 36 leaders were aware of the interrogation and . . . Lamb's request for representation but failed and refused to provide such representation. This failure and refusal by [Lodge No.] 36 was a material breach of [the labor contract] and the duty of fair representation." But, in our view, Lamb is simply restating his breach of the duty of fair representation claim as one for breach of contract. We can only surmise that Lamb attempts this in order to invoke the jurisdiction of the district court and avoid the CIR. But in this case, the proper place for Lamb to bring his complaint against Lodge No. 36 is the CIR.

And while the CIR's power is limited, we are not persuaded that it lacks the ability to provide relief for a breach of the duty of fair representation. While the CIR lacks the authority to grant declaratory or injunctive relief, it is not powerless. Neb. Rev. Stat. § 48-819.01 (Reissue 2010) provides:

> [T]he [CIR] shall have the power and authority to make such findings and to enter such temporary or permanent orders as the [CIR] may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in section 48-802, and to resolve the dispute.

Moreover, even if Lamb had successfully pled a breach of contract claim, we must conclude that Lamb cannot sue for such claim, because he is not a party to the labor contract. Although Lamb generally alleged that he and Lodge No. 36 were in a "business relationship," he did not allege or

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[8] § 48-824. Cf. *South Sioux City Ed. Assn. v. Dakota Cty. Sch. Dist.*, *supra* note 6.

otherwise argue that he was a third-party beneficiary to the labor contract.

Because the CIR, and not the district court, is the appropriate body in which to file a breach of fair representation claim against a union, we conclude that the district court did not err in dismissing the action against Lodge No. 36.

2. Action Against Robinson

The sole issue on appeal with respect to Robinson is whether he is immune from suit under the doctrine of sovereign immunity.

[6-8] Under the 11th Amendment, a nonconsenting state is generally immune from suit unless the state has waived its immunity.[9] A county is a political subdivision of the state and has subordinate powers of sovereignty conferred by the Legislature.[10] But Neb. Const. art. V, § 22, provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." Thus, the State may waive its sovereignty in whatever way it sees fit.

[9-13] The Legislature has waived the State's immunity through the State Tort Claims Act.[11] It has similarly waived immunity belonging to political subdivisions, like counties, through the Political Subdivisions Tort Claims Act.[12] It is well settled that statutes that purport to waive the protection of sovereign immunity of the state or its subdivisions are strictly construed in favor of the sovereign and against the waiver.[13] A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other

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[9] *SID No. 1 v. Adamy, supra* note 1.

[10] *Id.*

[11] Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2014).

[12] Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012).

[13] *Stick v. City of Omaha,* 289 Neb. 752, 857 N.W.2d 561 (2015).

reasonable construction.[14] We have specifically stated that we strictly construe the Political Subdivisions Tort Claims Act in favor of the political subdivision and against the waiver of sovereign immunity.[15] And we have held that generally, provisions of the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act.[16]

The issue presented here is whether Robinson, as the sheriff, was acting in his official capacity as an agent of Washington County, entitling him to the county's immunity, or if he was acting in his individual capacity and therefore was not entitled to immunity. The parties generally agree that the resolution of the question depends upon whether Robinson's actions were taken within the scope of his employment. Per the caption to his amended complaint, Lamb purported to sue Robinson in Robinson's individual capacity. But Robinson argued, and the district court agreed, that he was acting as sheriff at all times relevant to the allegations made in that amended complaint.

We agree that Robinson was entitled to immunity. We first note that Robinson investigated Lamb and eventually terminated Lamb's employment while acting as sheriff of Washington County.

And we find Lamb's allegations regarding §§ 48-816(3)(a) and 48-824 of little import here. Section 48-816(3) prohibits a supervisor from being in a bargaining unit with nonsupervisors. But Lamb does not allege that Robinson was in the same bargaining unit as nonsupervisors. Lamb alleges only that Robinson was a member of Lodge No. 36. But Lodge No. 36 is a labor organization, not a bargaining unit, and § 48-816 refers to the makeup of bargaining units.

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[14] *Id.*

[15] *Id.*

[16] *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003). See *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

Of course, Lamb is correct that it is a prohibited practice under § 48-824 to dominate or interfere with a labor organization, as he alleged Robinson has done. But assuming, as we must, that Lamb's allegations regarding Robinson's interference are true, we find that Lamb's allegations actually support the conclusion that Robinson's actions were within the scope of his employment. As noted above, a prohibited practice can be committed by a public employer, a public employee, a public employee organization, or a collective bargaining agent. In order to commit a prohibited practice in this case, Robinson necessarily must be acting as a public employer. We further note that as a public employer, any prohibited practice committed by Robinson is actionable before the CIR.

As such, even if Robinson interfered with the workings of Lodge No. 36, those actions, too, were made by Robinson when he was acting in his capacity as Washington County Sheriff and were within the scope of his employment.

The decision of the district court finding that Robinson was entitled to immunity was not error. Lamb's final assignment of error is without merit.

VI. CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Miller-Lerman, J., participating on briefs.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Patricia Sulu, appellant, v. Kim Magana, appellee.

879 N.W.2d 674

Filed April 1, 2016. No. S-15-128.

1. **Judgments: Jurisdiction.** A jurisdictional question that does not involve a factual dispute is a question of law.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Attorney Fees: Costs.** Attorney fees, where recoverable, are generally treated as an element of court costs.
5. **Judgments: Costs.** An award of costs in a judgment is considered a part of the judgment.
6. **Pretrial Procedure: Depositions: Attorney Fees.** The rules governing discovery from a nonparty without a deposition authorize a sanction, including reasonable attorney fees, if undue burden or expense is imposed on the nonparty subject to a subpoena.
7. **Summary Judgment.** A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.
8. ____. When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted.
9. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and

gives that party the benefit of all reasonable inferences deducible from the evidence.

10. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
11. **Torts: Employer and Employee.** Factors to consider in determining whether interference with a business relationship is "improper" include: (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties.
12. **Torts: Liability.** A person does not incur liability for interfering with a business relationship by giving truthful information to another.
13. **Summary Judgment: Proof.** A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
14. ____: ____. Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
15. **Summary Judgment: Evidence.** Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.
16. **Summary Judgment: Witnesses: Testimony.** In summary judgment proceedings, a witness' testimony may be used if it is based on personal knowledge, sets forth facts that would be admissible in evidence, and is made by a person competent to testify on the matter in issue.
17. **Rules of Evidence: Hearsay: Proof.** 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.
18. **Rules of Evidence: Hearsay.** The general rule is that hearsay evidence is inadmissible unless it fits within a recognized exception to the rule against hearsay.

Appeal from the District Court for Scotts Bluff County: Leo Dobrovolny, Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Snyder, Chaloupka, Longoria & Kishiyama, P.C., L.L.O., for appellant.

John M. Guthery and Joshua J. Schauer, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Cassel, J.

INTRODUCTION

On the advice of a parent, who was also a school board member, a student authored a letter critical of a public school teacher's curriculum. Instead of changing her curriculum, the teacher quit her job. The teacher then sued the parent/board member on the theory of tortious interference with a business relationship or expectancy. The teacher appeals from a summary judgment dismissing her claim. Because the parent/board member provided truthful information and honest advice, her actions were not unjustified. We affirm the entry of summary judgment.

BACKGROUND

Key Individuals

At all relevant times, Kim Magana was a parent of a student in the Scottsbluff Public School District (School District) and a member of the School District's school board (Board). She ran for a position on the Board out of a desire to make the school's curriculum more rigorous and became a member in 2000. Magana served on the Board's curriculum and technology committee.

Patricia Sulu was an upper-level Spanish teacher and chair of the world languages department at Scottsbluff Senior High School. She had developed curriculums for her classes and

the world languages department without criticism from the School District over her 25 years of employment, and she had received a number of awards.

Daniel Luke Keener began teaching at the high school in 2005. He taught Spanish "1" and "2" during the 2011-12 school year. He kept documentation focusing on comments made by students concerning Sulu and another Spanish teacher.

S.J. attended Scottsbluff Senior High School from August 2008 through December 2011 and took a number of Spanish classes, including two semesters of Spanish 2 from Keener and one semester of Spanish "4" from Sulu. S.J. thought Sulu's classes focused too much on culture and not enough on language. S.J. testified that she had "a couple of confrontations" with Sulu about being taught too much culture. When asked for more details about the confrontations, S.J. explained that students in Sulu's classroom told Sulu they felt they were not being taught Spanish and that S.J. "[j]ust joined in the conversation that we were taught more culture than . . . the language." In 2010, S.J. addressed her concerns about Sulu's classes with the principal at that time, but the principal did not provide any help.

Meeting and Letter

In August 2011, Magana approached Keener and said that she was frustrated with the lack of rigor in upper-level Spanish classes. According to Keener, several students had similarly voiced opinions that the curriculum was not as rigorous as it should be. He arranged for Magana to meet with S.J., who was one of those students.

In August or September 2011, S.J. met briefly with Magana and Keener after school in Keener's classroom to express concerns about the Spanish curriculum. At that time, S.J. did not know Magana was a member of the Board. From Magana's standpoint, the meeting was for her to seek information as a member of the Board and its curriculum committee. Magana

suggested that writing a letter to the Board and the superintendent was an option for S.J.

In September 2011, S.J. drafted a letter to the Board to address her worries about the Spanish classes taught by Sulu. The letter spoke of concern about the foreign language programs—specifically the upper-level Spanish classes—not being at their "highest potential" and about culture being the main focus of study. The letter suggested that a "'surprise' observation day (including a standardized test)" would be beneficial. According to S.J., no one helped her with the content of the letter. S.J. asked Keener to proofread the letter, but she did not accept any of Keener's suggested changes. S.J. did not have anyone else review the letter. S.J. circulated the letter to classmates, asking them to sign it if they agreed, and 20 students signed it. S.J. mailed the letter to the superintendent of the School District and the Board. In response to a question later posed on social media as to whether the letter was Keener's or Magana's idea, S.J. answered, "both."

Sulu testified in a deposition that because Magana told S.J. to write the letter, Sulu assumed Magana told S.J. what to write in the letter. Sulu also testified that during mediation with Keener, he said Magana "had a hand in it" and helped write the letter. When asked, "[D]id he say she had a hand in it or he said she . . . helped write the letter?" Sulu answered, "Said . . . Magana and [S.J.] were together and then the letter was written."

Aftermath of Letter

According to Sulu, her job changed as a result of the letter. Sulu testified that the superintendent told her to teach no culture, even though three of Nebraska's five teaching standards have to do with culture. She explained that due to the letter, the superintendent told her to change the curriculum in the middle of the year. Sulu believed that her employment could be terminated if she taught culture. She began taking her

students to a computer laboratory because she thought they were going to have to take a standardized test.

Sulu tendered her resignation to the Board in March 2012. She testified that she felt she had been pressured to quit. Sulu did not think that she had done anything wrong, but testified that "when [the superintendent] said, do you want to turn in your resignation right now, that was a signal to me." She testified that before the letter, she had the support of the administrators for 25 years.

Lawsuit

Sulu sued Magana. She alleged that Magana's actions were "committed not in her capacity as a [B]oard member nor on behalf of the [Board], but in her individual capacity as a private citizen." Sulu claimed that Magana actively participated with Keener in drafting the letter. She alleged that Magana's "initiation" of the letter was intentional, unjustified, and outside Magana's capacity as a Board member. Sulu further alleged that she had a valid business expectancy in her career as a Spanish teacher and that Magana's initiation of the letter interfered with Sulu's business relationship with the School District and caused harm to Sulu.

Summary Judgment

Magana moved for summary judgment, and the district court granted the motion. The court found that Sulu presented no evidence to permit a reasonable inference that Magana's conduct was unjustified. The court explained:

> There is no evidence [Magana] authored the letter in any fashion. There is no evidence the assertions of the letter are untruthful, even though some students may have regretted signing it. Though she expected the letter would be sent, there is no evidence Magana knew the contents of the letter before it was sent, or told the student what to put in the letter.

Sulu appealed, and we granted her petition to bypass the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

Sulu assigns that the district court erred in finding that Magana's actions were "not unjustified" within the meaning of the elements of tortious interference with a business expectancy and, thus, erred in sustaining Magana's motion for summary judgment.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is a question of law.[1]

[2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2]

ANALYSIS

Jurisdiction

[3] We must first address a jurisdictional question. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3]

The parties disagree whether the June 27, 2014, order granting summary judgment was final and appealable, thereby starting the running of the time for appeal. Sulu seeks to challenge the June 27 order via a notice of appeal filed on

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[1] *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

[2] *Grammer v. Lucking*, 292 Neb. 475, 873 N.W.2d 387 (2016).

[3] *Castellar Partners v. AMP Limited*, 291 Neb. 163, 864 N.W.2d 391 (2015).

February 9, 2015. Magana argues that the appeal time began running when the summary judgment order was entered. Obviously, if this is correct, the appeal was out of time and we lack jurisdiction of the issue. Sulu responds that the order was not initially final but later became so.

The answer depends upon whether the absence of a ruling on a nonparty's motion for costs and fees—filed prior to entry of summary judgment—prevented the order granting summary judgment from being a final and appealable order. In order to set forth the pertinent procedural history, we provide the following timeline:

- December 22, 2013: School District files motion for costs and attorney fees under Neb. Ct. Disc. R. § 6-334(A) and Neb. Rev. Stat. § 84-712 (Reissue 2014). The motion does not include any notice of hearing.
- June 27, 2014: District court grants summary judgment in favor of Magana and states that "[m]otions for costs which are pending or which may be filed will be set for hearing on proper motion."
- July 7, 2014: Magana files motion to tax costs against Sulu and sets it for hearing on July 23.
- July 14, 2014: School District refiles motion for costs and fees.
- July 18, 2014: Sulu files notice of appeal.
- October 17, 2014: Pursuant to parties' stipulation, Court of Appeals dismisses appeal.
- January 23, 2015: District court grants Magana's motion for costs (although our transcript does not include this order, both parties' briefs recite that the motion was disposed of on that date).
- February 4, 2015: District court enters order granting School District's motion for costs.
- February 9, 2015: Sulu files notice of appeal, stating that she is appealing orders of June 27, 2014, and February 3, 2015.

[4,5] Our case law supports the conclusion that the School District's motion for costs prevented the summary judgment

order from becoming final until the motion was disposed of. Attorney fees, where recoverable, are generally treated as an element of court costs.[4] And an award of costs in a judgment is considered a part of the judgment.[5] Thus, in the context of a motion for attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 2008), we have stated that when such a motion is made prior to the judgment of the court in which the attorney's services were rendered, the judgment will not become final and appealable until the court has ruled upon that motion.[6]

[6] The School District's motion for fees and expenses was authorized by a discovery rule. The rules governing discovery from a nonparty without a deposition authorize a sanction, including reasonable attorney fees, if undue burden or expense is imposed on the nonparty subject to a subpoena.[7] The rule also contemplates that the requesting party may be responsible for the advance payment of the reasonable cost of copying documents.[8] Thus, under Nebraska's discovery rules, the School District was permitted to seek an award of attorney fees and expenses.

The absence of any disposition of the nonparty's pending motion for costs and fees initially prevented the district court's judgment from being final. The School District moved for costs and attorney fees prior to the judgment. But the district court did not rule on the motion in the June 27, 2014, order; rather, the court stated that "[m]otions for costs which are pending or which may be filed will be set for hearing on proper motion." The court was likely signaling the parties that the School District's motion had not been noticed for

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[4] *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

[5] *Id.*

[6] See *id.*

[7] See § 6-334(A)(c)(1).

[8] See § 6-334(A)(c)(2)(A).

hearing. Nonetheless, the absence of any ruling on the motion left a portion of the judgment unresolved; consequently, the June 27 order was not final when it was first entered.

The summary judgment order became final on February 4, 2015, when the district court entered its order disposing of the School District's motion for costs and fees. Because Sulu timely appealed from the February 4 order, we have jurisdiction to consider the assignment of error directed to the June 27, 2014, order.

Tortious Interference With Business Expectancy

[7-9] The principles regarding summary judgment are well established. A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[9] When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted.[10] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[11]

[10] We have previously set forth what must be shown to prevail on a claim for tortious interference with a business relationship or expectancy. To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the

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[9] *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015).

[10] *Zornes v. Zornes*, 292 Neb. 271, 872 N.W.2d 571 (2015).

[11] *Id.*

interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.[12] This appeal centers on one aspect of the third element of the claim—whether the act was "unjustified."

[11] To assist in determining whether interference is "unjustified," Nebraska has adopted the seven-factor balancing test of the Restatement (Second) of Torts.[13] Under the Restatement's general test, factors to consider in determining whether interference with a business relationship is "improper" include: (1) the nature of the actor's conduct, (2) the actor's motive, (3) the interests of the other with which the actor's conduct interferes, (4) the interests sought to be advanced by the actor, (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relations between the parties.[14] Thus, we would ordinarily use these factors in order to determine whether interference is "improper" and, thus, "unjustified" under our law.[15]

But a different section of the Restatement sets forth a "special application of the general test."[16] Section 772 provides:

> One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person
>
> (a) truthful information, or

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[12] *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

[13] See, *Recio v. Evers*, 278 Neb. 405, 771 N.W.2d 121 (2009); Restatement (Second) of Torts § 767 (1979).

[14] See *Recio v. Evers, supra* note 13.

[15] See *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461 (2000).

[16] See Restatement, *supra* note 13, § 772, comment *a.* at 50.

(b) honest advice within the scope of a request for the advice.[17]

[12] The truthfulness of the information provided correlates to whether the interference is unjustified. If the information provided is truthful, the interference is not unjustified.[18] Recently, in an appeal from entry of summary judgment against a plaintiff on her claim for tortious interference with a business relationship, we expressly held that "a person does not incur liability for interfering with a business relationship by giving truthful information to another."[19] Even though the third person to whom Magana gave the information and advice was S.J., and not Sulu's employer, we think the principle from § 772 still applies, particularly because Sulu alleged that Magana interfered by initiating the letter. Thus, if Magana gave truthful information and honest advice to S.J. in initiating the letter and was not aware that S.J. would include any false statements in it, its content would not be attributable to Magana.

[13] Magana produced evidence sufficient to show that she was entitled to judgment if the evidence were uncontroverted at trial. A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.[20] Viewing the evidence in the light most favorable to Sulu, Magana initiated the letter by advising S.J. that S.J. could write a letter to the superintendent and the Board to express concerns about the Spanish curriculum. There was nothing false about this information. Nor was there any evidence providing an inference that Magana knew that S.J. would make any false statements

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[17] *Id.*, § 772 at 50.

[18] See *Recio v. Evers, supra* note 13.

[19] *Id.* at 421, 771 N.W.2d at 133.

[20] *Roskop Dairy v. GEA Farm Tech., supra* note 9.

in the letter. Thus, Magana made a prima facie showing of entitlement to summary judgment by adducing evidence to show that her interference was not unjustified.

[14,15] The burden then shifted to Sulu. Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.[21] Conclusions based on guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for the purposes of summary judgment; the evidence must be sufficient to support an inference in the nonmovant's favor without the fact finder engaging in guesswork.[22]

Sulu failed to meet her burden to produce admissible contradictory evidence creating a material issue of fact to rebut Magana's prima facie case. Sulu attempts to connect Magana to the letter's authorship on three grounds.

[16] First, Sulu testified that she assumed Magana told S.J. what to write. Sulu's "assumption" does not establish that she had personal knowledge of the fact. Indeed, it confesses the absence of personal knowledge. In summary judgment proceedings, a witness' testimony may be used if it is based on personal knowledge, sets forth facts that would be admissible in evidence, and is made by a person competent to testify on the matter in issue.[23] Because Sulu lacked personal knowledge, her assumption cannot provide the necessary connection between Magana and the letter's allegedly false statements.

Sulu's second ground relies upon S.J.'s social media answer, but it did not speak to the authorship of the letter. The question

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[21] *Id.*

[22] *Id.*

[23] See, Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 2008); *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996).

posed on social media was whether the letter was Keener's or Magana's idea. S.J. answered, "both." Reliance upon this question and answer for the identity of the letter's author amounts to mere guess, speculation, or conjecture, which is not sufficient to raise an issue of material fact.

[17,18] Sulu's final attempt rests upon her deposition testimony that Keener said Magana had a hand in helping S.J. write the letter. When pressed as to whether Keener told her that Magana "had a hand in it" or that Magana "helped write the letter," Sulu clarified that Keener told her that "Magana and [S.J.] were together and then the letter was written." But what Keener told Sulu would be hearsay.[24] 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.[25] And the general rule is that hearsay evidence is inadmissible unless it fits within a recognized exception to the rule against hearsay.[26] Thus, what Keener told Sulu cannot provide the link between Magana and the letter's false statements.

Magana adduced evidence that she had no input on the content of the letter and no involvement in its drafting, and Sulu failed to produce admissible evidence to the contrary. Because Magana did not write the letter or supply its content, whether the allegations contained therein were false is immaterial in this suit against her.

As we have already noted, Magana merely told S.J. that S.J. could write a letter to the superintendent and the Board to express concerns about the Spanish curriculum. This was clearly truthful information and honest advice. And because Magana provided only truthful information and honest advice, any interference on her part was not unjustified. We conclude

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[24] See Neb. Evid. R. 801, Neb. Rev. Stat. § 27-801 (Reissue 2008).

[25] *Plowman v. Pratt*, 268 Neb. 466, 684 N.W.2d 28 (2004).

[26] *Werner v. County of Platte*, 284 Neb. 899, 824 N.W.2d 38 (2012).

that the district court did not err in determining that there was no evidence which would permit a reasonable inference that Magana's conduct was unjustified. Thus, the court did not err in granting Magana's motion for summary judgment.

CONCLUSION

The order granting summary judgment was not a final, appealable order due to a pending motion for costs and fees that the district court noted but did not immediately resolve. After that motion was ruled upon, Sulu timely filed her notice of appeal. We conclude that viewing the evidence in the light most favorable to Sulu, there was no evidence which would permit a reasonable inference that Magana's conduct was unjustified. Because the evidence showed that Magana provided S.J. with truthful information and honest advice and the evidence failed to raise any permissible inference to the contrary, any interference on Magana's part was not unjustified. We therefore affirm the entry of summary judgment.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska, appellee, v. Robert W. Grant, appellant.

876 N.W.2d 639

Filed April 1, 2016. No. S-15-192.

1. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, whether based on a claimed violation of the Fourth Amendment or on its alleged involuntariness, an appellate court applies a two-part standard of review. Regarding historical facts, the appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which the appellate court reviews independently of the court's determination.
2. **Confessions: Constitutional Law.** Under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), courts must institute fair procedures to determine whether a confession is voluntary, because involuntary or coerced confessions cannot be introduced into evidence.
3. **Confessions: Police Officers and Sheriffs: Due Process.** While the totality of the circumstances weighs on the question whether a statement was voluntary, coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.
4. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements derived during custodial interrogations unless the prosecution demonstrates that its agents used procedural safeguards that are effective to secure the privilege against self-incrimination.
5. **Miranda Rights.** The relevant inquiry in determining "custody" for purposes of *Miranda* rights is whether, given the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interaction and leave.
6. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** "Interrogation" under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), refers not only to express questioning, but also

to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.

7. **Arrests: Police Officers and Sheriffs.** Questioning designed to obtain biographical information necessary for routine booking is not interrogation when police have no reason to know that questioning is reasonably likely to elicit an incriminating response.
8. **Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in decisions to admit evidence based on relevancy or admissibility, and those decisions will not be overturned by an appellate court in the absence of an abuse of discretion.
9. **Criminal Law: Juries: Evidence.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
10. **Trial: Convictions: Evidence.** Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.
11. **Rules of Evidence: Hearsay: Proof.** 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.
12. **Hearsay.** If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.
13. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews de novo whether the trial court applied the correct legal standards for admitting an expert's testimony.
14. ____: ____: ____. An appellate court reviews for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony.
15. **Rules of Evidence: Expert Witnesses.** Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert.
16. **Trial: Expert Witnesses.** A general foundational objection is insufficient to preserve an issue under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).
17. **Evidence: Words and Phrases.** Evidence is relevant if it tends in any degree to alter the probability of a material fact.
18. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

19. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
20. **Rules of Evidence: Witnesses.** Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 2008), prohibits a witness from testifying unless evidence is introduced to support a finding that the witness has personal knowledge of the matter.
21. **Rules of Evidence: Appeal and Error.** An objection that evidence is irrelevant does not preserve for review any objection under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).
22. **Trial: Evidence: Appeal and Error.** Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. An appellate court reviews a trial court's ruling on authentication for abuse of discretion.
23. **Criminal Law: Trial: Evidence.** Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.
24. **Motions for Mistrial: Appeal and Error.** Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
25. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
26. **Motions for Mistrial: Proof.** A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial. Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
27. **Mental Competency: Appeal and Error.** The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.
28. **Courts: Mental Competency.** The means to be employed to determine competency or the substantial probability of competency within the foreseeable future are discretionary with the district court, and the court may cause such medical, psychiatric, or psychological examination of the accused to be made as he or she deems necessary in order to make such a determination under Neb. Rev. Stat. § 29-1823(1) (Reissue 2008).

29. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.
30. **Trial: Judges.** In Nebraska, a trial judge has broad discretion over the conduct of a trial.
31. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
32. **Jury Instructions.** When instructing the jury, it is proper for the court to describe the offense in the language of the statute.
33. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing for sufficiency of the evidence to sustain a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Appeal from the District Court for Douglas County: Gregory M. Schatz, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and John J. Jedlicka for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Heavican, C.J.

I. NATURE OF CASE

Robert W. Grant appeals from his convictions of murder in the first degree and use of a deadly weapon to commit a felony in connection with the death of his girlfriend, Trudy McKee. Grant raises 14 assignments of error, ranging from overruled evidentiary objections to errors in the conduct of trial and the insufficiency of evidence. We affirm.

II. BACKGROUND

1. McKee and Carter Move to Omaha in July 2013

Grant and McKee had been in an "on again, off again" relationship for a number of years preceding McKee's death on September 17, 2013. McKee and her 16-year-old daughter, Alexis Carter, moved from Wichita, Kansas, to Omaha, Nebraska, on July 26, 2013. Carter testified that Grant did not help McKee and Carter pack or move. Nor did Carter see any signs of Grant at the new apartment during the first week in Omaha. Carter testified that she believed Grant and McKee's relationship was over at that time.

2. Grant's Move to Omaha in August 2013 and His Arguments With McKee

At some point roughly 2 weeks after McKee and Carter moved to Omaha, Carter came home from school to find Grant at the apartment. Carter testified that Grant had two duffelbags with him, including a black and yellow duffelbag. From that time until September 17, 2013, when McKee died, Grant stayed at the apartment some nights and at homeless shelters the rest of the time.

Carter testified that after Grant arrived in Omaha, McKee became uneasy and was less outgoing than she had been during the first week after moving from Wichita. According to Carter, during the week leading up to McKee's death, Grant and McKee argued more than they had when they lived in Wichita. One of the arguments was about a T-shirt Grant wore that read "'almost single.'" Carter said this argument took place around the first week of September. According to Carter, this and two other arguments during that time period were loud, ranging from 7 to 12 on a 10-point scale.

3. McKee's Death and Grant's Whereabouts on September 17, 2013

On Tuesday, September 17, 2013, Carter woke up around 6:30 or 6:40 a.m. Carter testified that she followed her normal

morning routine and did not notice anything out of the ordinary in the apartment's joined bathrooms. She checked in McKee's bedroom before leaving and saw Grant and McKee sleeping soundly in bed. Carter then left for school at about 7:30 a.m.

In an apparent attempt to establish the time of McKee's death, the State offered the testimony of a witness who lived in the apartment directly above McKee and Carter's. She testified that between 9 and 9:30 a.m., she heard a man and a woman arguing. She could not tell from where the sound originated. After the witness noticed a brief pause in the argument, she then heard screaming that she described as "scary" and "chilling," which lasted 3 or 4 minutes. The State also called Jessica Von Seggern, another neighbor in the building. Von Seggern was awake and home all morning and afternoon except for a brief time from roughly 9:15 to 9:40 a.m. Von Seggern testified that she did not hear anything in the building that morning.

In addition, McKee's sister had attempted to call McKee's cell phone sometime between 9 and 10 a.m. McKee did not answer, which her sister testified was abnormal. McKee's cell phone was later recovered from a toilet in the apartment, and Thomas Queen, the lead detective, found that McKee had four missed calls between 8:45 a.m. and noon. During trial, Grant referenced a call detail sheet from McKee's cell phone provider showing that a call was placed from McKee's cell phone to her voice mail inbox at 10:33 a.m. The State responded to this evidence by eliciting testimony that anybody holding McKee's cell phone could have made outgoing calls.

A friend of Grant's who lived in Omaha testified that Grant called him around 10 to 10:30 a.m. The friend heard people in the background and asked Grant where he was; Grant replied that he was at a bus station. The friend testified that Grant had an unusual "quivery" and "hyper" tone in his voice. During the conversation, Grant and the friend made plans for Grant to visit his home later that morning, but Grant never arrived.

Carter got home from school around 3:30 p.m. She testified that she did not see anything unusual in the apartment building hallway and that the door to the apartment itself was locked from the outside. Elaine Adler, the apartment manager, noted that the doorknob could be locked from the inside on the way out of the apartment. But the deadbolt had to be locked with a key from the outside. Carter never specified which lock—the knob or the deadbolt—was locked when she came home. Only the leasing office, Carter, and McKee had keys to the apartment.

According to Carter's testimony, when she got home, she first entered her own bedroom and saw Grant's "'almost single'" T-shirt, which had been the subject of one of Grant and McKee's recent arguments, draped over Carter's television.

Carter then entered McKee's bedroom and found her mother's body on the floor, "[c]ut up." She started screaming and ran out into the building's hallway. Hearing the screaming, Von Seggern intercepted Carter. While Von Seggern called the 911 emergency dispatch service, Carter ran back into her own apartment and attempted to lift McKee's body. She then exited the apartment again and, in the following minutes, left McKee's blood on several surfaces in the building's hallway.

Von Seggern and Carter waited for law enforcement outside the building and placed a call to Adler. Adler arrived shortly with two maintenance men and a leasing agent. Adler testified that when they arrived, Carter was "[e]xtremely upset. Crying. Screaming. Frantic [and] overwhelmed" and that Carter was saying, "'[t]hat fucker, that fucker, he killed her, I know he killed her. My mom's dead.'"

Adler and the maintenance men then entered McKee and Carter's apartment hoping to save McKee's life; but it was too late. Adler testified that they did not touch anything in the apartment other than the door and a few light switches.

After that point, law enforcement arrived at the scene. Further details of the police investigation at the scene are related below.

4. Grant's Arrest

Matthew Partridge, an employee of a security company, was providing security at a bus station in Omaha on the evening of September 17, 2013. Partridge was monitoring the boarding of a bus to Chicago, Illinois, when he became aware of a man, later identified as Grant, bypassing the ticket-checking line to board the bus. Partridge confronted Grant and determined that he did not have a ticket. Partridge detained Grant in handcuffs and brought him to a security office.

While Grant was detained in the office, Partridge contacted police. Partridge asked Grant for his name, address, and other identifying information. Grant gave a false name, "Brian Edwards." Grant told Partridge that he had come from Wichita to be with a girlfriend, but that they had broken up. Grant said he was trying to get to Chicago to meet another woman he had met online. Partridge testified that Grant did not appear to have any luggage with him.

After about 15 minutes, two police officers arrived. Officer Kevin Checksfield was one of the officers who responded to the bus station. Checksfield asked Grant for physical identification; claiming to have none, Grant told Checksfield his name was "Brian Edwards" and that his date of birth was January 25, 1987. Checksfield then engaged in a line of questioning designed to determine whether, under the Omaha Police Department's policy, Grant should either be issued a citation or be taken to a correctional center for booking. Determining that Grant had no ties to the community, Checksfield decided that Grant should be placed under arrest and transported to the correctional center. Throughout the time Grant was detained in the security office, he repeatedly asked to be let off with a warning or citation.

At the correctional center, Checksfield attempted to locate information for a "Brian Edwards" in a law enforcement database. Finding none, Checksfield confronted Grant. Grant gave three more false dates of birth. After Checksfield decided to fingerprint Grant in an effort to identify him, Grant told Checksfield his real name and date of birth.

Shortly after Checksfield and his partner booked Grant, Det. Sherry King, who was on the team investigating McKee's death, received notification of Grant's arrest. King arranged for Grant to be transported from the correctional center to police central headquarters. In a pretrial hearing, King testified that she interviewed Grant at headquarters about McKee's death. Before Grant had been read his *Miranda* rights, King asked about Grant's whereabouts throughout the day. But at trial, King never testified to Grant's statements of his whereabouts on September 17, 2013.

King finally read Grant his rights at police central headquarters after she had obtained biographical information and information about his whereabouts that day. At that point, Grant invoked his right to an attorney and did not thereafter waive his *Miranda* rights.

5. Police Investigation of McKee's Death

After police secured the scene and paramedics confirmed that McKee was dead, police began their investigation in earnest.

The apartment door showed no signs of forced entry. Nor were there signs of a struggle anywhere outside of the master bedroom.

Police interviewed a number of potential witnesses, and eventually spoke to all of the tenants in McKee's building. One tenant told an officer that he had had a third-party maintenance crew in his apartment the morning of September 17, 2013. But detectives in the homicide unit apparently never received that information and did not speak with the third-party maintenance crew. Detectives did, however, speak with Carter, Adler, Grant's brother, Grant's sister, McKee's ex-husband, and McKee's former coworkers.

Det. Ryan Hinsley testified about Carter's demeanor when he interviewed her at the police station on September 17, 2013. Hinsley stated that Carter was crying, upset, and making spontaneous utterances. When the State asked whether Carter's

demeanor changed over the course of the interview, Hinsley testified, "she began calming down. Throughout the interview she would break out into tears again."

At trial, the State introduced a substantial number of photographs of the master bedroom. Blood spatter covered nearby furniture and walls, with some drops extending 6 to 8 feet from the body. Crime laboratory technician James Brady testified that the blood spatter suggested that McKee had been stabbed with "a great deal of force." The State also introduced a number of autopsy photographs. The autopsy eventually revealed that McKee had suffered more than 50 cutting wounds, mostly in the upper body.

In the apartment police found, as relevant on appeal, the following pieces of evidence: the "'almost single'" T-shirt; McKee's cell phone, which was found in a toilet; a black and yellow "Dale Junior 88" duffelbag; McKee's purse, covered in blood and containing her wallet with coins but no cash, a checkbook, bank cards, and medication; a bloody shoeprint on the bathroom floor; indications that somebody had washed off blood in the shower; and black hairs found in each of McKee's hands.

Inside the Dale Junior 88 duffelbag, police discovered, in relevant part, several packages of alcohol swabs, a maroon tank top with a blue tank top inside of it, black pants, and black and white, size-10 Adidas shoes. The clothing, the shoes, and several other items in the bag had significant amounts of blood on them.

Brady processed the shoeprint found on the bathroom floor with a type of chemical that produces a more visible stain. Brady testified that the tread of the shoeprint matched the tread of the Adidas shoes found in the Dale Junior 88 duffelbag.

Eventually, the maroon tank top and Adidas shoes were sent to the University of Nebraska Medical Center (UNMC) for DNA testing. Additionally, the Nike shoes that Grant had been wearing during his arrest, envelopes that were used to collect

the black hairs found in McKee's hands, and DNA swabs taken from McKee's fingernails were sent to UNMC.

Before these evidentiary items were sent for testing, there was some discussion in the homicide unit that the sergeant in charge of the unit wanted to look at the hairs collected from McKee's hands. It is unclear whether the sergeant did actually remove the hairs from evidence. At the time of trial, there was an ongoing internal police investigation into the sergeant's actions.

Later, when a forensic DNA analyst from the UNMC laboratory, Melissa Helligso, opened the envelope supposed to contain hairs collected from McKee's left hand, Helligso could not find anything in the envelope. The hairs were never found. Thus, the hairs collected from McKee's left hand were never tested.

Helligso testified extensively about the process of DNA testing and the results of her testing in this case. As she explained, DNA testing can produce three results: exclusion of the known sample as a source, inability to exclude the known sample as a source, or inconclusive. Known source samples were taken from Grant and McKee in this case.

Testing on the black hairs from McKee's right hand, the blood on the Adidas shoes, the blood on the maroon tank top, and the drop of blood on the Nike shoes did not exclude McKee as the source. Samples from the inside of the Adidas shoes, the inside of the Nike shoes, and the inside of the maroon tank top showed multiple DNA contributors. For the Nike shoes, Helligso was able to isolate a major contributor, and testing revealed Grant could not be excluded as that major contributor. Testing of the maroon tank top could not exclude Grant and McKee as contributors.

Testing of the inside of the Adidas shoes could exclude neither Grant nor McKee. The probability of individuals unrelated to Grant or McKee matching either contributor of DNA on the Adidas shoes was 1 in 1,810,000 for Caucasians, 1 in 983,000 for African-Americans, and 1 in 2,010,000 for American Hispanics.

The alcohol swabs found in the duffelbag were not tested for fingerprints. When asked to explain why, Queen testified that police had been told the duffelbag belonged to Grant and that therefore, they would expect to find Grant's fingerprints.

6. Conduct of Trial

An 8-day trial was held in the district court for Douglas County in October 2014. Prior to trial, Grant's counsel requested that the district court order a psychological evaluation of Grant. There had been some indication during discovery that Grant might suffer from paranoid schizophrenia. The court granted the request, and the results of the evaluation showed that Grant was competent to stand trial.

Grant's defense theory centered largely on the missing hairs from McKee's left hand as well as the fact that more items of evidence were not tested for DNA or for fingerprints. Grant also pointed out that Carter had given somewhat conflicting information about Grant's possessions. In one interview, Carter told police that Grant's only pair of black and white shoes were Nike brand and that she was not familiar with a pair of Adidas shoes. Additionally, Carter originally described Grant's black and yellow duffelbag as a Nike brand, rather than Dale Junior 88.

On the sixth day of trial, just after breaking for lunch and outside the presence of the jury, Grant apparently hit one of the court deputies. After lunch, the court questioned the jury to ascertain whether any members had witnessed any part of the incident. The district court questioned five jurors individually who had said they saw something during lunch. Each of the five jurors had seen officers running in response to radio calls. Four of the jurors did not know whether the incident involved Grant. One juror had assumed the incident had to do with Grant's case. Another juror noted that because she was now being questioned about what she had seen, she "had questions" about what had occurred. Of the five jurors, the district court asked four (including the two who had speculated that

the incident involved Grant) whether they could still be fair and impartial; they answered that they could.

Grant moved for a mistrial, claiming that because two of the jurors had speculated that Grant was involved in the incident, they could no longer remain impartial. The district court denied the motion.

On the seventh day of trial, Grant had another outburst. This time Grant struck his defense attorney in the presence of the jury. The jury was removed from the courtroom and then dismissed until the following day and given the usual admonitions.

Counsel for Grant moved again for a mistrial and submitted an affidavit to the district court expressing concerns about Grant's mental health and competency to stand trial. Defense counsel asked for a short recess and psychological evaluation in light of the incidents on the sixth and seventh days of trial and the information provided in counsel's affidavit.

In support of the motion for mistrial, Grant attempted to present testimony of Todd Cooper, a reporter who was in the courtroom at the time of Grant's outburst on the seventh day of trial. But when Cooper expressed reluctance to testify because of his job as a reporter, the court suggested that Grant use another witness to get the information. Grant then attempted to present testimony by Kelly Steenbock, an employee of the Douglas County Public Defender who had interviewed Cooper about what he witnessed. During Steenbock's testimony, Cooper, apparently from the courtroom gallery, made a hearsay objection, claiming he had the right to do so under the First Amendment. The State then objected to Steenbock's testimony on hearsay grounds and suggested that Grant may be able to prove the day's events through Hinsley, who was on the stand during the outburst. Instead, Grant made an offer of proof through Steenbock about what Cooper had related to her.

The district court overruled the motion for mistrial and denied counsel's request for a recess. The district court

reasoned that the pretrial psychological evaluation showed Grant was competent to stand trial and that counsel's affidavit did not present sufficient evidence to change that finding.

At the close of trial, the district court gave the jury instructions, in relevant part, defining the elements of murder in the first degree, murder in the second degree, and intentional manslaughter.

The jury found Grant guilty of first degree murder and guilty of use of a deadly weapon to commit a felony. The district court sentenced Grant to life imprisonment for first degree murder, and a period of 50 to 50 years' imprisonment for use of a deadly weapon, to be served consecutively, with credit for 504 days of time served. Grant appeals.

III. ASSIGNMENTS OF ERROR

Grant assigns, restated and renumbered, that the district court erred in:

(1) admitting Grant's statements at the bus station, at the correctional center, and at the Omaha Police Department central headquarters, in violation of *Miranda v. Arizona*[1] and *Jackson v. Denno*[2];

(2) permitting Queen to testify that the duffelbag belonged to Grant;

(3) admitting Adler's testimony of Carter's out-of-court statement that "'he killed her'";

(4) allowing Brady to testify that a shoeprint matched the tread of the Adidas shoes;

(5) admitting exhibit 206 and allowing Hinsley and a crime laboratory technician to testify about Grant's demeanor;

(6) allowing Carter to testify that Grant and McKee were not a couple in July 2013 until after the first week McKee and Carter lived in Omaha;

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

(7) allowing Hinsley to testify about Carter's demeanor while she was being questioned;

(8) admitting 11 autopsy photographs over Grant's objections;

(9) admitting the maroon tank top and black pants into evidence;

(10) denying Grant's first and second motions for mistrial;

(11) denying Grant's motion for a recess and psychological evaluation of Grant;

(12) permitting Cooper to refuse to testify and giving Cooper standing to object; and

(13) including the words "without malice" in the jury instruction for intentional manslaughter.

Grant also assigns that

(14) there was insufficient evidence to support his convictions.

IV. ANALYSIS

1. *Miranda v. Arizona* and *Jackson v. Denno*

In Grant's first assignment of error, he asserts that the State violated *Miranda v. Arizona* and *Jackson v. Denno* by introducing statements Grant made to Partridge and to Checksfield.

(a) Standard of Review

[1] In reviewing a trial court's ruling on a motion to suppress, whether based on a claimed violation of the Fourth Amendment or on its alleged involuntariness, an appellate court applies a two-part standard of review. Regarding historical facts, the appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which the appellate court reviews independently of the court's determination.[3]

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[3] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

(b) Analysis

[2,3] Grant first assigns that the State violated *Jackson*, in which the U.S. Supreme Court held that courts must institute fair procedures to determine whether a confession is voluntary, because involuntary or coerced confessions cannot be introduced into evidence.[4] While the totality of the circumstances weighs on the question whether a statement was voluntary, "coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment."[5] We find that the district court complied with *Jackson* by holding an appropriate pretrial hearing to assess whether Grant's statements were voluntary.

The nature of Grant's *Jackson* argument is not clear from his brief. But, to the extent Grant may have preserved his argument, it lacks merit. The district court held a pretrial hearing on Grant's motion to suppress and determined that the relevant statements were voluntary and did not violate *Miranda*. The district court determined that statements made by Grant to Partridge and Checksfield in the bus station were admissible.

Further, there is nothing in the facts of this case to suggest that Grant had been coerced into making the statements introduced at trial. He was never threatened or offered any bargains in return for his choice to make statements to Partridge or Checksfield.

Because the district court held a full hearing on the admissibility of Grant's statements, we find no merit to Grant's arguments with respect to *Jackson.*

[4] Next, Grant argues that the introduction of his statements violated *Miranda*. *Miranda* prohibits the use of statements derived during custodial interrogations unless the prosecution demonstrates that its agents used procedural safeguards that

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[4] See *Jackson, supra* note 2.

[5] *State v. Garner*, 260 Neb. 41, 49, 614 N.W.2d 319, 327 (2000).

are effective to secure the privilege against self-incrimination.[6] At trial, Grant made continuing objections to any mentions of his statements at the bus station, at the correctional center, and at police central headquarters.

[5-7] The relevant inquiry in determining "custody" for purposes of *Miranda* rights is whether, given the objective circumstances, a reasonable person would have felt he or she was not at liberty to terminate the interaction and leave.[7] Next, "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.[8] Questioning designed to obtain biographical information necessary for routine booking is not interrogation when police have no reason to know that questioning is reasonably likely to elicit an incriminating response.[9]

For purposes of this analysis, we assume without deciding that Partridge, the security employee, was a state actor and that *Miranda* is applicable to his actions.

We determine that Grant was in custody when he made the statements. Partridge had restrained Grant in handcuffs almost immediately upon discovering Grant, and Grant was not free to leave after that point. Grant, in fact, made requests to be let go with a warning or citation, but was not permitted to do so.

However, Partridge and Checksfield did not interrogate Grant for purposes of *Miranda*. Partridge asked Grant only for his name, where he was from, his address, and similar information. When Checksfield arrived, he merely asked questions in line with Omaha Police Department policy, which were aimed at determining whether to issue Grant a citation or to arrest

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[6] *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

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

[8] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[9] See *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010).

him. At this point in time, neither Partridge nor Checksfield were aware that Grant was a suspect or person of interest in a homicide. Therefore, they had no indication whatsoever that asking Grant about his living arrangements or where he was from might elicit an incriminating response.

The district court did exclude some statements Grant had made at police central headquarters. King had asked Grant about his whereabouts on September 17, 2013, before reading Grant any *Miranda* warnings. The district court found that Grant's statements in response to King's questions were inadmissible. At trial, King testified that Grant had told King his name and that he lived at a homeless shelter. But the State did not offer any of the excluded incriminating statements Grant made about his whereabouts on September 17.

The limited statements offered through King's testimony at trial were made in response to purely biographical questions. Though King was questioning Grant in relation to McKee's death, the statements offered at trial were limited to Grant's name and where he lived. When questioning Grant, King did not have reason to believe this biographical information would be incriminating. In contrast, further pre-*Miranda* statements Grant made to King about his whereabouts on September 17, 2013, were properly excluded, because King knew that Grant's statements would likely incriminate him.

Under our well-established case law, biographical inquiries that law enforcement have no reason to believe will prompt an incriminating response are not interrogations for purposes of *Miranda*.[10] The statements admitted at trial were a result of purely biographical inquiries. Thus, we find that Grant's *Miranda* rights were not violated by the introduction of his statements.

For these reasons, Grant's first assignment of error is without merit.

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[10] See *id.*

2. Admission of Alleged Hearsay Testimony

In Grant's second and third assignments of error, he argues that the district court erred by admitting two pieces of testimony over Grant's hearsay objections. First, Grant argues that Queen should not have been permitted to testify that he received information that the Dale Junior 88 duffelbag belonged to Grant. Second, Grant claims the court erred by admitting Adler's testimony about Carter's statements after Carter had discovered McKee's body.

(a) Standard of Review

[8] The exercise of judicial discretion is implicit in decisions to admit evidence based on relevancy or admissibility, and those decisions will not be overturned by an appellate court in the absence of an abuse of discretion.[11]

[9,10] The improper admission of evidence is a trial error and subject to harmless error review.[12] In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[13] Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.[14]

(b) Hearsay

[11,12] 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.[15] Hearsay is

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[11] *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009).

[12] *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014).

[13] *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013).

[14] *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[15] *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

not admissible except as provided by the rules of evidence.[16] Conversely, if an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.[17]

(c) Queen's Testimony

At trial, Grant cross-examined Queen about whether a number of items at the scene were tested for fingerprints or DNA evidence. In an attempt to raise reasonable doubt, Grant focused his defense primarily on the evidence that had not been tested. On redirect, the State asked Queen why police did not test many items Grant had discussed on cross-examination, including alcohol swabs found inside of the Dale Junior 88 duffelbag. Queen testified that he had received information that the bag belonged to Grant, so police thought there was no need to fingerprint the contents of the bag.

Grant asserts that Queen's testimony was hearsay. However, assuming without deciding that the testimony was hearsay, we hold that its admission was harmless error. Even if the State offered the out-of-court statement to prove the truth of the matter asserted, that Grant owned the duffelbag, the testimony was cumulative. Carter testified that the bag was Grant's, and DNA evidence linked Grant to items of clothing that were in the bag. Therefore, even without Queen's testimony, the State had established that the bag belonged to Grant.

Therefore, the testimony was admissible and Grant's second assignment of error is without merit.

(d) Adler's Testimony

Adler testified that when she arrived at the apartment building, Carter was visibly extremely upset and crying, and that she was saying, "[t]hat fucker, that fucker, he killed her, I know he killed her. My mom's dead." According to Von Seggern's

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[16] *State v. Castor*, 262 Neb. 423, 632 N.W.2d 298 (2001).

[17] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

testimony, Carter made these statements very shortly after finding McKee's body.

Adler's testimony was hearsay. Carter made the statement outside of court, and the State offered it in evidence apparently in order to prove the truth of the matter asserted—that Grant killed McKee. But the State argues that the statement was admissible under the excited utterance hearsay exception.

Assuming without deciding that the testimony was inadmissible, we hold that any error was harmless.

Even without looking to the admitted hearsay statement, there was a great deal of other evidence to support the conviction. DNA evidence and Carter's testimony proved that the Dale Junior 88 duffelbag and the Adidas shoes, maroon tank top, and black pants belonged to Grant. DNA evidence also linked McKee to the blood on Grant's clothing. There was no forced entry to the apartment, and the door was apparently locked from the outside after the homicide took place. The morning of McKee's death, Carter had seen Grant with McKee sleeping in bed. Furthermore, Grant and McKee had been arguing with some frequency. Finally, Grant was discovered attempting to board a bus departing Omaha and lied about his identity. When he was eventually arrested, a drop of McKee's blood was found on his shoe. This evidence overwhelmingly proves Grant's guilt.

Furthermore, the jury was well aware that Carter had not actually witnessed the murder. A reasonable trier of fact would only consider Carter's out-of-court statement in light of this knowledge. Grant's third assignment of error is without merit.

3. Brady's Testimony Regarding Shoeprint

In Grant's fourth assignment of error, he argues that the district court erred by allowing Brady to testify that the tread of the bloody shoeprint in McKee's bathroom appeared to match the tread of the Adidas shoes. Grant asserts that Brady's testimony was not proper expert witness testimony, because

Brady, a crime laboratory technician, was not qualified to compare shoeprints.

(a) Standard of Review

[13,14] We review de novo whether the trial court applied the correct legal standards for admitting an expert's testimony.[18] We review for abuse of discretion how the trial court applied the appropriate standards in deciding whether to admit or exclude an expert's testimony.[19]

(b) Analysis

[15] First, we note that Brady's comparison of the shoeprint was not expert testimony. Under evidence rule 702,[20] a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness qualifies as an expert.[21] Brady's testimony did not require any specialized knowledge, any lay person would be capable of comparing pictures of the Adidas shoe tread and the shoeprint side by side. Therefore, Brady's testimony is not governed by rule 702.

[16] In any case, Grant has waived this argument. The objection Grant now raises on appeal was not obvious from the context at trial. We specifically stated in *State v. Ellis*[22] that a general foundational objection is insufficient to preserve an issue under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[23] and *Schafersman v. Agland Coop*.[24]

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[18] *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015).

[19] *Id.*

[20] Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008).

[21] *Orchard Hill Neighborhood v. Orchard Hill Mercantile*, 274 Neb. 154, 738 N.W.2d 820 (2007).

[22] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

[23] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) (setting standards for admissibility of expert testimony in federal court).

[24] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001) (adopting *Daubert, supra* note 23, in Nebraska courts).

Grant objected to Brady's testimony only on the basis of "foundation." The district court likely thought that Grant was making a personal knowledge objection, as opposed to an improper expert opinion objection. We conclude that Grant has waived any argument regarding Brady's testimony. His fourth assignment of error is therefore without merit.

4. Grant's Demeanor at Police Central Headquarters

In Grant's fifth assignment of error, he asserts that three particular pieces of evidence about his demeanor at police central headquarters were inadmissible.

(a) Standard of Review

The exercise of judicial discretion is implicit in decisions to admit evidence based on relevancy or admissibility, and those decisions will not be overturned by an appellate court in the absence of an abuse of discretion.[25]

(b) Exhibit 206

First, Grant argues that exhibit 206, a photograph of him, was irrelevant and unfairly prejudicial under evidence rule 403.[26]

[17,18] Evidence is relevant if it tends in any degree to alter the probability of a material fact.[27] Under rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[28]

Exhibit 206 showed Grant in the clothing he was wearing when arrested. It depicts him grinning and with his hands cuffed. Pieces of molded gold plating that fit over his front teeth are visible.

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[25] *Sack, supra* note 11.

[26] Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

[27] *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

[28] *Bauldwin, supra* note 8.

The photograph was relevant to show the clothing Grant was wearing, particularly the Nike shoes that had a drop of McKee's blood on them. Additionally, Grant's demeanor during his arrest may have been relevant. But Grant argues that this probative value is outweighed by the fact that his gold teeth were visible in the picture. He claims, without reference to any sources, that white jurors become prejudiced when they see that a black man has gold teeth.

Even assuming Grant's assertion regarding prejudice is correct, any prejudicial effect Grant's gold teeth may have had on the jury cannot outweigh the very high probative value of proving that Grant was wearing an item of clothing on which McKee's blood was found. Grant's argument regarding exhibit 206 is without merit.

(c) Testimony That Grant Was "[G]oofy"

Grant next claims that the court erred by admitting Hinsley's testimony that Grant was "goofy, not really caring as to what he was there for." Grant argues on appeal that the testimony violated rule 403.

However, Grant has waived a rule 403 objection by failing to specifically raise rule 403, as we required in *State v. Schrein*[29]: "[T]he trial court is required to weigh the danger of unfair prejudice against the probative value of the evidence only when requested to do so at trial." Grant objected only on relevance grounds and did not raise rule 403 at trial. Therefore, we need not consider Grant's rule 403 contention. Grant's argument on this point is without merit.

(d) Testimony That Grant Was "Cooperative"

[19] Third, Grant claims the district court erred by admitting a crime laboratory technician's testimony that Grant was

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[29] *State v. Schrein*, 244 Neb. 136, 147, 504 N.W.2d 827, 834 (1993).

"[c]ooperative." However, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[30] Though Grant assigns the admission of the testimony as error, he never argues why it was error. As such, we will not address this argument further.

Grant's fifth assignment of error lacks merit.

5. Admission of Other Testimony

In Grant's sixth and seventh assignments of error, he argues that the district court erred by admitting two additional pieces of testimony. First, Grant objects to Carter's testimony that Grant and McKee had no relationship during McKee and Carter's move from Wichita to Omaha and during the first week McKee and Carter lived in Omaha. Second, Grant argues that Hinsley should not have been permitted to testify about Carter's demeanor on the day McKee was killed.

(a) Standard of Review

The exercise of judicial discretion is implicit in decisions to admit evidence based on relevancy or admissibility, and those decisions will not be overturned by an appellate court in the absence of an abuse of discretion.[31]

(b) Carter's Testimony About Grant and McKee's Relationship

[20] Grant asserts the admission of Carter's testimony regarding Grant and McKee's relationship violated evidence rule 602.[32] Rule 602 prohibits a witness from testifying "unless evidence is introduced to support a finding that [s]he has personal knowledge of the matter."

Grant essentially argues that Carter should not have been able to testify about the nature of McKee's relationship with

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[30] *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015).

[31] *Sack, supra* note 11.

[32] Neb. Evid. R. 602, Neb. Rev. Stat. § 27-602 (Reissue 2008).

Grant because Carter was not present for every single encounter between Grant and McKee. But Carter did not testify about any matters or events that she did not personally witness. The State never asked Carter whether Grant and McKee were actually together. Instead, Carter testified about her personal observations of Grant's absence and her conversations with McKee. (Grant does not raise any hearsay argument regarding this testimony.) Carter testified only that she had the ***impression*** that Grant and McKee were not together.

Grant also assigns that the district court erred by admitting Carter's testimony that Grant and McKee's arguments got worse in the weeks leading up to the murder. However, although Grant assigned this error, he did not argue it in his brief and the basis of this assignment is not readily apparent from the record. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[33] We will not consider this argument further.

For the reasons stated, we hold that Grant's sixth assignment of error is without merit.

(c) Hinsley's Testimony About Carter's Demeanor

At trial, Grant objected to Hinsley's testimony only on the basis of relevancy. Grant now argues that the testimony was not relevant under evidence rule 401[34] and that it was unfairly prejudicial under rule 403.

We turn first to relevancy under rule 401. Evidence is relevant if it tends in any degree to alter the probability of a material fact.[35] In this case, whether Grant killed McKee was a material fact. The State was required to prove Grant's guilt beyond a reasonable doubt. That burden gives the State a

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[33] *Cook, supra* note 30.

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

[35] *Ford, supra* note 27.

strong incentive to discredit theories that another person committed the crime, even if the defense did not explicitly raise such a theory. Hinsley's testimony about Carter's demeanor was relevant under rule 401, because it tended to prove that Carter did not kill McKee.

[21] We next turn to Grant's rule 403 argument. Unless an objection to offered evidence is sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom on appeal.[36] In *Schrein*, we held that a defendant's objection that evidence is irrelevant does not preserve for review any objection under rule 403.[37] Therefore, Grant's relevancy objection did not preserve the rule 403 objection he now raises on appeal.

Grant's seventh assignment of error is without merit.

6. Autopsy Photographs

In Grant's eighth assignment of error, he asserts that 11 autopsy photographs, exhibits 230 to 236, 239 to 241, and 245 were cumulative and unfairly prejudicial under rule 403. The photographs show McKee's body from various angles. Each photograph depicts several wounds, and no photograph shows exactly the same wounds as any other. The State agreed to withhold exhibits 237 and 238, because the district court suggested that they may have been cumulative. But the district court determined that none of the other photographs were cumulative.

(a) Standard of Review

An appellate court reviews the admission of photographs of victims' bodies for abuse of discretion.[38]

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[36] *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005).

[37] *Schrein, supra* note 29.

[38] *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

(b) Analysis

Under rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or if it is needlessly cumulative.[39]

We find no error in the admission of these photographs. First, the prejudicial effect of the exhibits does not substantially outweigh their probative value. Second, the photographs were not cumulative.

The photographs were highly probative to show the condition of McKee's body, the nature of her wounds, the cause of her death, and the intent of her attacker. Admittedly, the photographs contain graphic images. But Grant is convicted of stabbing McKee more than 50 times. As we noted in *State v. Dubray*,[40] "gruesome crimes produce gruesome photographs." Thus, any prejudicial effect of the gruesome photographs does not outweigh their probative value.

Furthermore, the photographs are not cumulative, because they each portray different wounds or angles. It is not unreasonable to expect that the State must show multiple pictures in order to document all or most of McKee's numerous wounds.

For these reasons, the district court did not abuse its discretion by finding that the photographs were not unfairly prejudicial or cumulative. Grant's eighth assignment of error is without merit.

7. Chain of Custody of Exhibits 291 and 292

In Grant's ninth assignment of error, he argues that the district court erred by admitting the maroon tank top and black pants into evidence. Grant asserts that there was improper foundation for these exhibits to prove the chain of custody.

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[39] See *Bauldwin, supra* note 8.

[40] *Dubray, supra* note 38, 289 Neb. at 219, 854 N.W.2d at 599.

(a) Standard of Review

[22] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. An appellate court reviews a trial court's ruling on authentication for abuse of discretion.[41]

(b) Analysis

At trial, the State introduced exhibits 291 and 292 through Helligso's testimony. When the State offered exhibit 291, the maroon tank top, Grant objected on "foundation." When the State offered exhibit 292, the black pants, Grant objected on "foundation, chain of custody." The bases of both objections were, apparently, that Helligso was not personally present when the exhibits were placed into protective plastic for trial.

[23] Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the possession of the object or article to the final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.[42] Proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence.[43]

The record shows the evidence was first collected at McKee's apartment by Queen and crime laboratory personnel. A crime laboratory technician brought the items from the duffelbag, including the maroon tank top and the black pants, to the police crime laboratory and packaged each item individually. Queen testified that he was present when the items were booked into property pursuant to Omaha police protocol. Hinsley then checked the maroon tank top out of property and delivered it, in accordance with police protocol, to UNMC

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[41] See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[42] *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

[43] *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

for DNA testing; Helligso documented receiving the tank top. After DNA testing was complete, Hinsley retrieved the evidence. There is no record that the black pants were ever removed from law enforcement custody.

We do not know who placed the exhibits into plastic, or when he or she did so. However, the sequence of events above provides a consistent chain of custody from initial collection until, presumably, the final transfer of the evidence to police property before trial.

In addition, both Helligso and Carter testified that the items were what the State purported them to be. The crime laboratory technician testified that other than some predictably lower visibility of bloodstains on the black pants, the items looked the same as when she saw them in September 2013.

In light of this evidence, it was not an abuse of discretion for the district court to admit exhibits 291 and 292. Therefore, Grant's ninth assignment of error is without merit.

8. Denial of Motions for Mistrial

In Grant's 10th assignment of error, he argues the district court erred by denying Grant's two motions for mistrial. Grant moved for mistrial on the sixth and seventh days of trial, after his violent outbursts in the courtroom.

(a) Standard of Review

[24] Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.[44]

(b) Analysis

[25] The district court properly denied Grant's motions for mistrial. A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by

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[44] *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

proper admonition or instruction to the jury and thus prevents a fair trial.[45]

In *State v. Blackwell*,[46] we upheld the denial of a motion for mistrial where a defendant's outbursts had caused the alleged prejudice. In *Blackwell*, the defendant had, on two separate occasions, stood during examination of witnesses and yelled, disrupting the proceedings. We held that a defendant's own conduct affords no basis for a new trial.

[26] A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial. Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.[47]

On the sixth day of Grant's trial, outside the presence of the jury, Grant struck a deputy. Jurors were questioned after the incident about whether they had perceived any of what occurred. Five jurors had witnessed law enforcement running in response to radio calls. Though two jurors thought that the incident might have had something to do with Grant's case, none had any idea what had actually occurred. Further, when the district court asked some of the jurors if they could remain fair and impartial, they all responded that they could.

On the seventh day of trial, this time in the presence of the jury, Grant stood up suddenly and punched his counsel in the head. According to Steenbock's offer of proof testimony, the district court signaled to the bailiff, sheriffs punched Grant, a county attorney yelled "'[t]ase him,'" and a juror yelled "stop it." After trial began again, the court admonished the jury and asked jurors to notify the court if they could no longer remain fair and impartial. None did.

Grant attempts to distinguish *Blackwell* by arguing that the reactions of others in the courtroom were independent causes

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[45] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[46] *State v. Blackwell*, 184 Neb. 121, 165 N.W.2d 730 (1969).

[47] *Dixon, supra* note 45.

of prejudice. We reject this argument. None of the reactions by counsel, the judge, the bailiff, the sheriffs, or the jurors would have occurred without Grant's own outburst. Accepting Grant's distinction would render the rule from *Blackwell* meaningless and permit a defendant to benefit from his or her own bad behavior during trial.

Furthermore, Grant has not shown that any prejudice resulted from the incidents. First, the jurors never learned what had occurred on the sixth day of trial. Additionally, the district court admonished the jury on both occasions. Finally, the jurors indicated they could remain fair and impartial after each incident.

Grant's 10th assignment of error is without merit.

9. Denial of Motion for Psychological Evaluation

In Grant's 11th assignment of error, he argues that the district court erred by denying his counsel's request for a short recess and for a second psychological evaluation.

(a) Standard of Review

[27] The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.[48]

(b) Analysis

[28,29] The means to be employed to determine competency or the substantial probability of competency within the foreseeable future are discretionary with the district court, and the court may cause such medical, psychiatric, or psychological examination of the accused to be made as he or she deems necessary in order to make such a determination under Neb. Rev. Stat. § 29-1823(1) (Reissue 2008).[49] A person is

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[48] *Walker, supra* note 6.

[49] *State v. Jones*, 258 Neb. 695, 605 N.W.2d 434 (2000).

competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.[50] A defendant's derangement or lack of mental ability is not sufficient to prove incompetence to stand trial.[51]

In support of Grant's motion, defense counsel submitted an affidavit averring that a member of Grant's family and Carter suggested Grant suffered from mental illness. The affidavit further stated that Grant had become paranoid during trial and that at one point, Grant had even ceased wanting to discuss the trial because he predicted that the world would end before trial began. Counsel argued that Grant had become incompetent during the course of trial, at some point after his initial evaluation. However, the district court found that counsel's affidavit was insufficient to overcome the findings of the pretrial evaluation. Implicit in this finding, the district court concluded that another psychological evaluation was not required to determine Grant's continuing competency to stand trial.

There was sufficient evidence to support the district court's finding. The initial psychological evaluation found Grant competent beyond question. The evaluation even took into account Grant's past experience taking medication normally used to treat mental illness.

Further, counsel's affidavit and Grant's behavior during trial did not truly raise questions about Grant's ability to understand the nature of the proceedings, his place in them, or to participate in his defense. In this case, Grant's mere impulsive behavior during trial is not sufficient to raise the issue of incompetence.

Therefore, Grant's 11th assignment of error is without merit.

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[50] *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

[51] See *State v. Crenshaw*, 189 Neb. 780, 205 N.W.2d 517 (1973).

10. Cooper's Testimony and Objection

In Grant's 12th assignment of error, he asserts that the district court violated his constitutional rights by refusing to force Cooper to testify at the hearing on the seventh day of trial and by permitting Cooper to object to Steenbock's testimony. Steenbock's testimony was offered in support of Grant's second motion for a mistrial and the motion for a recess and psychological evaluation.

(a) Standard of Review

[30] In Nebraska, a trial judge has broad discretion over the conduct of a trial.[52]

(b) Analysis

Although the events of the hearing on the seventh day of trial were curious, they do not appear to have deprived Grant of any constitutional right. Any error in the district court's conduct of the hearing was harmless. As discussed above under subheadings 8 and 9, the motions for mistrial and psychological evaluation on the seventh day of trial were without merit. The introduction of Cooper's statements offered in support of Grant's motions would not have had any impact on the propriety of the district court's rulings. Thus, the exclusion of Cooper's statements was harmless.

For these reasons, Grant's 12th assignment of error is without merit.

11. Intentional Manslaughter Jury Instruction

In Grant's 13th assignment of error, he argues that the jury instruction for intentional manslaughter violated his due process rights. Grant asserts that the language "without malice" should have been removed from the jury instruction.

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[52] *Pangborn, supra* note 13.

(a) Standard of Review

[31] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[53]

(b) Analysis

[32] When instructing the jury, it is proper for the court to describe the offense in the language of the statute.[54] Under Nebraska statute, "[a] person commits manslaughter if he or she kills another ***without malice*** upon a sudden quarrel . . . ."[55] In *State v. Cook*,[56] we affirmed a conviction for first degree murder where the jury was instructed to find manslaughter if "the killing was done 'upon a sudden quarrel' and 'without malice.'" Jury instruction No. 7 in the present case defined intentional manslaughter the same way as the trial court had in *Cook*.

Grant gives no argument why our law defining intentional manslaughter should be found unconstitutional. Thus, we apply our existing jurisprudence and hold that the district court did not err by giving jury instruction No. 7.

Grant's 13th assignment of error is without merit.

12. Insufficiency of Evidence

Finally, Grant assigns that his convictions were not supported by sufficient evidence.

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[53] *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

[54] *State v. Kass*, 281 Neb. 892, 799 N.W.2d 680 (2011).

[55] Neb. Rev. Stat. § 28-305 (Reissue 2008) (emphasis supplied).

[56] *State v. Cook*, 244 Neb. 751, 756, 509 N.W.2d 200, 204 (1993) (citing Neb. Rev. Stat. § 28-305(1) (Reissue 1989)). See, also, *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011) (holding that intentional killing committed upon sudden quarrel without malice is manslaughter; overruling *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), which had found that manslaughter was not intentional crime).

(a) Standard of Review

[33] When reviewing for sufficiency of the evidence to sustain a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[57]

(b) Analysis

Grant does not explain which essential elements of the crimes charged he believes were unproven. Instead, he raises concerns about the missing hair evidence, the number of surfaces not tested for DNA or fingerprints, and the fact that none of the law enforcement officials who saw Grant on September 17, 2013, noticed the drop of blood on his right shoe until the shoe was removed for evidence.

Logically, none of the concerns Grant raises necessarily create reasonable doubt. Just because more evidence could have been gathered does not mean that the evidence actually obtained was insufficient.

Taken in the light most favorable to the State, a reasonable juror could find every element of the crimes of which Grant was convicted. The elements of first degree murder, as given to the jury, were that (1) Grant killed McKee on September 17, 2013; (2) in Douglas County, purposely; (3) with deliberate and premeditated malice; and (4) not as a result of a sudden quarrel.

As discussed above, a reasonable juror could find beyond a reasonable doubt that Grant was the person who killed McKee. DNA evidence and Carter's testimony linked the maroon tank top, Adidas sneakers, and Nike sneakers to Grant. DNA testing suggested that the blood on each of these items was McKee's. Additionally, there was no sign of forced entry to the apartment, a juror could infer from Carter's testimony

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[57] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

that the door was locked from the outside after the killer left the apartment, and there was no sign that any valuables had been stolen. This evidence implicates Grant very strongly, because he had access to the apartment and the murder seems to have been personally motivated. Further, Grant's "'almost single'" T-shirt had been placed in Carter's bedroom as if to taunt her. Finally, Grant exhibited a consciousness of guilt when he attempted to sneak onto a bus to Chicago and then gave Partridge and Checksfield false information in order to avoid arrest. All of this evidence strongly incriminates Grant and supports the conviction.

Furthermore, because McKee was stabbed over 50 times with "a great deal of force," a reasonable juror could find beyond a reasonable doubt that Grant killed McKee deliberately and maliciously. One neighbor's testimony that there was a pause between the argument and the screaming could be the basis for a reasonable juror to find that McKee's murder was premeditated and that it was not upon a sudden quarrel. There is no dispute that McKee was killed on September 17, 2013, in Douglas County. Furthermore, sufficient evidence supports Grant's conviction for use of a deadly weapon to commit a felony, because the murder was clearly committed with a knife.

Therefore, the State presented sufficient evidence and Grant's 14th assignment of error is without merit.

V. CONCLUSION

Grant's convictions and sentences are affirmed.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Dylan Cardeilhac, appellant.

876 N.W.2d 876

Filed April 1, 2016. No. S-15-217.

1. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
3. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **Criminal Law: Jury Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.
6. **Witnesses: Juror Misconduct: Proof.** An appellate court reviews the trial court's determinations of witness credibility and historical fact for clear error and reviews de novo the trial court's ultimate determination whether the defendant was prejudiced by juror misconduct.
7. **Jury Misconduct: Trial: Appeal and Error.** When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it

was not prejudicial, adequate findings are to be made so that the determination may be reviewed.

8. **Jury Misconduct: Rules of Evidence.** The duty to hold an evidentiary hearing with regard to allegations of jury misconduct does not extend to matters which are barred from inquiry under Neb. Evid. R. 606(2), Neb. Rev. Stat. § 27-606(2) (Reissue 2008).
9. **Homicide: Sentences: Minors.** A juvenile convicted of a homicide offense cannot be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing.
10. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Scotts Bluff County: Travis P. O'Gorman, Judge. Affirmed.

James R. Mowbray and Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, and Cassel, JJ.

Miller-Lerman, J.

NATURE OF CASE

Dylan Cardeilhac was convicted by a jury of second degree murder in the district court for Scotts Bluff County. The court sentenced Cardeilhac, who was 15 years old at the time of the murder, to imprisonment for 60 years to life. Cardeilhac appeals his conviction and sentence. He claims that the court improperly instructed the jury that it would be required to deliberate until 9 p.m. before it could break for the day, that juror misconduct requires a new trial, and that his sentence should be vacated because the sentencing process failed to

comply with proper juvenile sentencing principles. We affirm Cardeilhac's conviction and sentence.

STATEMENT OF FACTS

In February 2014, when he was 15 years old, Cardeilhac was being detained in the juvenile section of the Scotts Bluff County Detention Center (SBCDC) awaiting trial on charges which included one count of robbery. At around 2 a.m. on February 14, Amanda Baker, a correctional officer employed at SBCDC, was performing a bed check in the juvenile males section of the facility. Videos from SBCDC show that Baker entered Cardeilhac's cell and that she leaned forward to look at something on the floor to which Cardeilhac was pointing. Baker got down on her hands and knees and took a closer look. As Baker rose to one knee and attempted to stand, Cardeilhac moved behind her and put his arms around her neck and face. The two fell to the ground, with Baker face down and Cardeilhac on her back. Cardeilhac kept his arms wrapped around Baker's neck and released his arms only after Baker stopped struggling. Cardeilhac then searched Baker's person and retrieved keys. He left his cell and was later found in another cell. Minutes after Cardeilhac left his cell, another correctional officer found Baker lying on the cell floor. Despite the efforts of other correctional offices and emergency responders to revive her, Baker died. An autopsy showed that Baker died of asphyxia due to manual strangulation.

Evidence at trial indicated that prior to February 14, 2014, Cardeilhac and other detainees in the juvenile section of SBCDC had discussed plans to escape from the facility. The plans included, inter alia, "choking out" a guard in order to get keys. Cardeilhac indicated during such discussions that he would be willing to choke a guard. Other evidence indicated that another juvenile detainee pressured Cardeilhac to take part in an escape. After Cardeilhac choked Baker and left his cell, he went to other juveniles' cells, but they declined to escape with him. He eventually went to another cell, where he was found by guards.

The State charged Cardeilhac with first degree murder. At trial, the jury was given the option of convicting Cardeilhac of first degree murder, second degree murder, or unintentional manslaughter. The evidence at trial included testimony by various witnesses. Videos from SBCDC depicting the events in Cardeilhac's cell on February 14, 2014, were received into evidence and played for the jury.

At the jury instruction conference, Cardeilhac objected to an instruction in which the court was to advise the jury regarding its deliberations. Cardeilhac objected to the portion of the instruction that stated, "If you do not agree on a verdict by 9:00 o'clock p.m., you may separate and return for further deliberations at 8:30 o'clock a.m. tomorrow." Cardeilhac's counsel argued that requiring the jury to deliberate until 9 p.m., rather than 5 p.m., put undue pressure on the jurors and would "force them into a decision because they are told they have to be here until nine o'clock, which is not typical business hours." The court stated that its practice was to give the jury the option of staying until 9 p.m., but that "if the jur[ors] tell[] me at 4:30 they have had a long day and they would like to separate, I have no problem with that either." The court overruled Cardeilhac's objection and gave the instruction as written.

After closing arguments, the case was submitted to the jury at 11:03 a.m. At approximately 7:30 p.m. that same day, the jury returned to the courtroom and delivered its verdict finding Cardeilhac guilty of second degree murder.

Cardeilhac thereafter filed a motion for a new trial. At the hearing on the motion, Cardeilhac contended that a new trial was required because of juror misconduct. In support of his allegations, Cardeilhac offered the affidavit of one of the jurors into evidence. In the affidavit, the juror stated, inter alia, that after approximately 6 hours of deliberation, she was the sole juror who wanted to convict Cardeilhac of manslaughter rather than second degree murder. She stated that some other jurors made statements trying to persuade her to change her vote and

that two of the jurors were "extremely belittling and belligerent" to her. The juror stated the following:

> One female juror asked if she could show [A]ffiant what it would be like to [be] choked. Affiant agreed to this. While Affiant was sitting in a chair, the juror came up behind her and started to demonstrate on Affiant what it was like to be chocked [sic] from behind. The juror had her arm in front of [A]ffiant's throat and was blocking her air passage, but that choking did not cause her to panic. It was when the juror then pushed her chest against the back of Affiant's head, pushing it forward causing the pressure on the neck to increase that Affiant began to panic.

The juror stated that soon after this demonstration, she changed her vote from manslaughter to second degree murder; the juror stated, however, that she did not feel pressured to change her vote. The juror also stated that she did not believe that what she called the "re-enactment of the choking performed on her" accurately conformed to the evidence presented in court, which evidence included the video that showed Cardeilhac choking Baker.

The State objected to receipt of the affidavit into evidence on the basis of Neb. Evid. R. 606, Neb. Rev. Stat. § 27-606 (Reissue 2008), which generally precludes a juror from testifying as to matters or statements occurring during the course of the jury's deliberations. Section 27-606, however, allows a juror to "testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

The district court ruled that most of the juror's affidavit was not admissible under § 27-606. The court stated that the only portions of the affidavit that were possibly admissible were those wherein the juror described the "re-enactment" of the choking and where she later stated that she did not think the "re-enactment" accurately conformed to the evidence. The

court concluded, however, that even those portions of the affidavit did not show by a preponderance of the evidence that extraneous prejudicial information had been considered by the jury. The court stated that the "re-enactment" was "not information that originated outside of the jury room or the record" and that instead it was "simply a critical examination of the evidence and nothing extraneous." The court stated that an evidentiary hearing was not necessary and overruled the motion for a new trial.

A sentencing hearing was conducted at which considerable evidence was received. Cardeilhac presented live testimony by two witnesses. The first witness was the mother of a friend of Cardeilhac; she testified regarding Cardeilhac's character and problems that he had had at home. The second witness was Dr. Kayla Pope, who was certified in child and adolescent psychiatry. Dr. Pope testified generally regarding differences in brain development and brain functioning between adults and adolescents and, as a result of her examination of Cardeilhac's treatment records and interviews, testified specifically regarding Cardeilhac's development and behavior.

Dr. Pope had talked with Cardeilhac, his mother, and his friend's mother, and so she testified regarding Cardeilhac's particular circumstances. Dr. Pope testified, inter alia, that Cardeilhac had "become much more emotionally reactive" after his parents divorced when he was 7 or 8 years old and that he suffered further trauma when he was placed into foster care after a finding of abuse and neglect. Dr. Pope opined that at the time he choked Baker, Cardeilhac was "only thinking in the moment" and "reacting to this impulsive need to get out of detention," and that he was "not thinking like a mature adult as to the consequences and whether this was a realistic plan." She also opined that because of his particular circumstances, Cardeilhac was "more susceptible to peer pressure than a normally developing adolescent," and that "there was a lot going on with other peers in the detention center and . . . he was affected by that." Dr. Pope speculated that

Cardeilhac's behavior and maturity would have developed by the time he reached age 25 or 30, but she acknowledged that she was not a forensic psychiatrist and that she did not do risk assessments.

After the parties presented their arguments at sentencing, and before it imposed sentence, the court stated, inter alia:

> In arriving at your sentence I have considered your age, your mentality, your education, your experience, your social and cultural background, your past criminal record, the motivation for your offense, and the amount of violence involved. I have also considered the testimony that I heard this afternoon as well.

In addition to the live testimony presented by Cardeilhac at the sentencing hearing, the court considered other evidence, including the presentence investigation report. The court set forth the reasoning behind its sentencing decision and stated that the crime for which Cardeilhac was convicted was "just a senseless act of violence" that resulted in a child losing a mother, parents losing a child, and a community losing one of its members. The court stated that in reviewing the record, it could not find an indication of remorse on Cardeilhac's part. Instead, the court stated the record showed that Cardeilhac's behavior in jail had been "rude, offensive, [and] noncompliant" and that Cardeilhac was "somebody who is very dangerous at this point in time and somebody that society needs protection from." The court acknowledged that the case was "also tragic . . . from [Cardeilhac's] standpoint," because his life had "gone very wrong very early."

The court sentenced Cardeilhac to imprisonment for not less than 60 years and not more than life. The court indicated that by virtue of the sentence imposed, Cardeilhac would "be eligible for parole at some point in time." The court ordered the sentence to be served consecutively to a sentence that Cardeilhac was serving for a separate robbery crime.

Cardeilhac appeals his conviction and sentence.

ASSIGNMENTS OF ERROR

Cardeilhac claims, restated and reordered, that the district court erred when it instructed the jury that it would be required to deliberate until 9 p.m. before it could break for the night and when it overruled his motion for a new trial based on alleged juror misconduct. He also claims that the court imposed an excessive sentence, because the sentence did not comply with constitutional requirements for sentencing a juvenile.

STANDARDS OF REVIEW

[1,2] Whether the jury instructions given by a trial court are correct is a question of law. *State v. Armagost*, 291 Neb. 117, 864 N.W.2d 417 (2015). When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court. *Id*.

[3] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Ballew*, 291 Neb. 577, 867 N.W.2d 571 (2015).

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

ANALYSIS

Court Did Not Err When It Instructed Jury That It Would Be Required to Deliberate Until 9 p.m.

Cardeilhac claims that the district court erred when it instructed the jury that it would be required to deliberate until 9 p.m. before it could break for the night. Cardeilhac argues that forcing the jurors to stay beyond normal business hours coerced them to come to a decision sooner than they might have had they been able to break at 5 p.m. and resume deliberations the next morning. We conclude that the instruction was not coercive and that the court did not err in giving it.

Cardeilhac cites to cases such as *State v. Garza*, 185 Neb. 445, 176 N.W.2d 664 (1970), and *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727, in which deadlocked juries were directed to continue deliberating in ways that this court concluded unfairly prejudiced the defendant. In *Garza*, after over 15 hours of deliberation, the jury reported that it was deadlocked at 11 to 1; the trial court instructed the jury to continue deliberations. The trial court stated that the case should be disposed of by the jury and that the trial court could not be convinced there was no possibility the jury could not reach agreement. In *Garza*, we concluded that the trial court's admonition had the purpose of peremptorily directing an agreement and had "prevented the defendant from having his fate determined by an impartial and uncoerced jury." 185 Neb. at 449, 176 N.W.2d at 667.

In *Floyd,* a bailiff told the lone dissenting member of a jury that had been instructed by the court to continue deliberations that the court would "'"keep sending the jury back until you reach a unanimous decision."'" 272 Neb. at 905, 725 N.W.2d at 826. This court concluded that the bailiff's statement "could have pressured the average juror to change his or her vote in order to avoid protracted deliberations." *Id*. at 911, 725 N.W.2d at 830.

Cardeilhac contends that the court's instruction in this case had an effect similar to *Garza, supra*, because jurors knew that they would be required to stay until 9 p.m. if they had not reached a verdict sooner. We believe that Cardeilhac overstates the effect of this instruction. The instruction in the present case is significantly different from those in the cases relied upon by Cardeilhac both as to timing and content. The instruction was as follows: "If you do not agree on a verdict by 9:00 o'clock p.m., you may separate and return for further deliberations at 8:30 o'clock a.m. tomorrow." The instruction was given before the jury started deliberations as part of the instructions the court would routinely give to inform the

jury of how deliberations would proceed. Although the record indicates that at one point in the deliberations there was a juror who had not come to agreement with the other jurors, there is no indication that the jury ever reported to the court that it was deadlocked or that the court gave the instruction at issue as part of an admonition for the jury to continue deliberations. Considering the context in which it was given, it is unlikely that jurors would have taken the instruction as being coercive or as pressuring them to reach an agreement in order to avoid protracted deliberations.

Cardeilhac notes that in response to his objection to the instruction, the court stated that it would consider allowing the jury to break sooner if the jury so requested. He takes issue with the fact that the court did not revise the instruction and explicitly instruct the jury that the court would be willing to consider such a request. However, as the State notes, the court concluded the instruction regarding jury deliberations by setting forth the procedure by which the jury could submit written questions to the court through the bailiff. Therefore, had the jury wished to break from deliberations at an earlier hour, it was made aware that it had the ability to make such a request, but it did not do so.

The record shows that deliberations commenced at approximately 11 a.m. and that the jury returned its verdict at approximately 7:30 p.m. the same day. There is no indication that the jury expressed a desire to break at an earlier hour or any indication that it was pressured to reach agreement when it did.

We find no error in the district court's instruction, and we reject this assignment of error.

Court Did Not Abuse Its Discretion When It Overruled Motion for New Trial in Which Cardeilhac Alleged Juror Misconduct.

Cardeilhac claims that the district court erred when it overruled his motion for a new trial in which he claimed juror

misconduct. We determine that no juror misconduct was shown, and we therefore conclude that the district court did not abuse its discretion when it overruled Cardelihac's motion for a new trial.

Cardeilhac asserts that he should have been granted a new trial because jurors participated in a reenactment of the choking of Baker, which reenactment was not consistent with the evidence presented at trial. He contends that the reenactment violated the prohibition against bringing extraneous prejudicial material to the jury's attention and therefore constituted jury misconduct. The district court concluded, however, that Cardeilhac did not show by a preponderance of the evidence that extraneous prejudicial information had been considered by the jury, because the reenactment was "not information that originated outside of the jury room or the record" and instead it was "simply a critical examination of the evidence and nothing extraneous."

[5,6] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015). We review the trial court's determinations of witness credibility and historical fact for clear error and review de novo the trial court's ultimate determination whether the defendant was prejudiced by juror misconduct. *Id*.

[7] We have held that when an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that the defendant was denied a fair trial. *Stricklin, supra*. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed. *Id*. Consistent with the

foregoing, in the present case, the district court determined that Cardeilhac had not made a showing that tended to prove that serious misconduct had occurred, and therefore the court did not hold an evidentiary hearing.

[8] Referring to the rules of evidence, we have further held that the duty to hold an evidentiary hearing with regard to allegations of jury misconduct does not extend to matters which are barred from inquiry under § 27-606(2). *Stricklin, supra*. Section 27-606(2) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

In the present case, Cardeilac offered the affidavit of a juror regarding, inter alia, the "re-enactment of the choking performed on her." The district court in this case properly refused to consider much of the juror's affidavit, because it was not admissible under § 27-606. The court considered only the portions of the affidavit that were possibly admissible as indicating that extraneous prejudicial information may have been improperly brought to the jury's attention. The portions of the affidavit considered by the court were those regarding the alleged reenactment of the choking, which Cardeilhac contends show that the jury considered extraneous prejudicial information, and a later portion regarding the juror's statement to the effect that she did not think the reenactment accurately conformed to the evidence.

We have said that the key phrase in § 27-606(2) is "extraneous prejudicial information" and that within this phrase, the crucial word is "extraneous," which means "'"existing or originating outside or beyond: external in origin: coming from the outside . . . brought in, introduced, or added from an external source or point of origin."'" *State v. Thomas*, 262 Neb. 985, 999, 637 N.W.2d 632, 650 (2002). In *Thomas*, we stated that when "[n]one of the jurors brought extraneous information to the jury or obtained extra information about the facts of the case," then extraneous prejudicial information was not brought to the jury's attention and we further noted that information provided by a member of the jury from his or her direct knowledge was not considered as coming from an external source. *Id*. at 1000, 637 N.W.2d at 650.

Reenactments or other exercises by which the jury tests the evidence presented at trial are generally considered appropriate jury conduct. It has been said:

> It is not expected that jurors should leave their common sense and cognitive functions at the door before entering the jury room. Nor is it expected that jurors should not apply their own knowledge, experience, and perceptions acquired in the everyday affairs of life to reach a verdict. . . .
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> . . . .
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> Reenactments in the jury room based on the jury's recollection of the testimony are usually allowed as an application of the jury's common sense and deductive reasoning to determine the truth of the facts in dispute.

Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. Rev. 322, 331, 333 (2005). Cases from other jurisdictions are in accord. For example, in *State v. Balisok*, 123 Wash. 2d 114, 866 P.2d 631 (1994), jurors attempted to reenact a struggle between the defendant and the victim in order to test whether it could have happened in the manner described by the defendant, who claimed self-defense. The Supreme Court of Washington determined in

Balisok that the jurors' reenactment did not constitute extrinsic evidence, because it did not involve evidence outside of, or extrinsic to, the evidence that was presented at trial, and that the reenactment was "nothing more than a critical examination of [the defendant's] self-defense theory." 123 Wash. 2d at 120, 866 P.2d at 634. See, also, *State v. Pease*, 163 P.3d 985, 989 (Alaska App. 2007) ("[c]ourts have repeatedly upheld jurors' efforts to test the credibility or plausibility of trial testimony by . . . re-enacting the events or conditions described by witnesses").

We agree with the district court's determination that the reenactment in this case did not constitute extraneous prejudicial information. The choking demonstration in this case was part of the jury's critical examination of an aspect of the evidence. The juror stated in her affidavit that the other juror "asked if she could show affiant what it would be like to [be] choked" and that after the affiant-juror consented, the other juror demonstrated a choking from behind on the affiant-juror, because the evidence in the case was to the effect that Baker was choked from behind. The other juror did not bring any extraneous information to the jury, and it was not extra information about the facts of the case. There is no indication that the reenactment was seen by jurors as providing or generating new information directly related to the facts of this case; in fact, the affiant-juror stated that she did not think the reenactment was consistent with the evidence of how Baker was choked. Therefore, the reenactment was merely an exercise engaged in to critically examine the evidence.

We conclude that Cardeilhac did not show the existence of juror misconduct and that therefore, the district court did not err when it decided not to hold an evidentiary hearing. Because Cardeilhac did not show juror misconduct, the district court did not abuse its discretion when it overruled his motion for a new trial. We reject this assignment of error.

Court Did Not Impose an Excessive Sentence.

[9] Cardeilhac claims generally that the sentence of imprisonment for 60 years to life imposed by the district court was excessive. In contending that his sentence was excessive, Cardeilhac, who was 15 years old at the time of his crime, specifically claims that the sentencing process failed to comply with constitutional requirements for sentencing juveniles set forth in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and that this court should therefore vacate his sentence. "In *Miller v. Alabama*, [*supra*], the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 725, 193 L. Ed. 2d 599 (2016). Although Cardeilhac acknowledges that he was not sentenced to life in prison without the possibility of parole, he nevertheless urges us to adopt and apply the sentencing process announced in *Miller* to lengthy term-of-years sentences imposed on juveniles. For several reasons, including the fact that Cardeilhac had the full benefit of the individualized sentence decisionmaking prescribed by *Miller*, it is unnecessary for us to decide the extent of the cases to which the *Miller* sentencing principles apply and we affirm Cardeilhac's sentence.

Cardeilhac was convicted of second degree murder, which is a Class IB felony under Neb. Rev. Stat. § 28-304(2) (Reissue 2008). The penalty for a Class IB felony is imprisonment for a minimum of 20 years and a maximum of life. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014). Cardeilhac's sentence of imprisonment for 60 years to life is therefore within statutory limits.

[10] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as

any applicable legal principles in determining the sentence to be imposed. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015). With regard to the relevant factors that must customarily be considered and applied, we have stated that when imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *Id*.

We note in this case that the court in fact considered each of these factors and so stated at the sentencing hearing. The court further set forth its reasoning for the sentence it imposed. The court emphasized the senselessness of the act of violence, the effect it had on others, and the perceived lack of remorse on Cardeilhac's part. The court noted that Cardeilhac was shown to be dangerous and that society needed to be protected from such dangerousness. The court also indicated that it had considered the mitigating factors presented by Cardeilhac's evidence related to his status as a person under age 18, including the evidence that Cardeilhac's life had "gone very wrong very early."

Having reviewed the record and the evidence considered by the court at sentencing, we cannot say that the sentence imposed was an abuse of discretion under the standards set forth above. However, Cardeilhac contends that because he was a juvenile, additional legal principles are applicable in this case, and that such additional principles are constitutional in nature as set forth by the U.S. Supreme Court in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). Thus, Cardeilhac contends we should vacate his sentence and remand his cause for a hearing consistent with *Miller*.

In *Miller, supra*, the Court held that mandatory sentences of life imprisonment without parole for those under age 18

at the time they committed homicides violates the Eighth Amendment's prohibition on cruel and unusual punishment. As we recognized in *State v. Mantich*, 287 Neb. 320, 339-40, 842 N.W.2d 716, 730 (2014), *Miller* did not "categorically bar" the imposition of a sentence of life imprisonment without parole but instead "held that a sentencer must consider specific, individualized factors before handing down a sentence of life imprisonment without parole for a juvenile." The U.S. Supreme Court stated in *Miller* that "we do not foreclose a sentencer's ability to make that judgment [of life imprisonment without parole] in homicide cases, [however] we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." 567 U.S. at 480.

As we noted in *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014), in response to *Miller*, the Nebraska Legislature enacted Neb. Rev. Stat. § 28-105.02 (Cum. Supp. 2014), regarding sentencing for certain murderers convicted of crimes classified as Class IA felonies. Section 28-105.02 provides:

> (1) Notwithstanding any other provision of law, the penalty for any person convicted of a Class IA felony for an offense committed when such person was under the age of eighteen years shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment.
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> (2) In determining the sentence of a convicted person under subsection (1) of this section, the court shall consider mitigating factors which led to the commission of the offense. The convicted person may submit mitigating factors to the court, including, but not limited to:
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> (a) The convicted person's age at the time of the offense;
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> (b) The impetuosity of the convicted person;
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> (c) The convicted person's family and community environment;

> (d) The convicted person's ability to appreciate the risks and consequences of the conduct;
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> (e) The convicted person's intellectual capacity; and
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> (f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional licensed in this state. The evaluation shall include, but not be limited to, interviews with the convicted person's family in order to learn about the convicted person's prenatal history, developmental history, medical history, substance abuse treatment history, if any, social history, and psychological history.

Section 28-105.02 applies specifically to sentences for Class IA felonies, and therefore by its terms, does not apply to the present sentence resulting from Cardeilhac's conviction for second degree murder, a Class IB felony. Arguably, because a person convicted of a Class IB felony could be sentenced to imprisonment for a term of life to life, the Legislature might have chosen to require a court to consider the mitigating factors listed in § 28-105.02(2) when sentencing a juvenile for a Class IB felony, as well as for a Class IA felony. However, the Legislature did not so provide and therefore the district court could not have violated § 28-105.02 by failing to consider such specific statutory factors in sentencing Cardeilhac in this Class IB felony case.

Although consideration of the statutory factors in § 28-105.02 was not required, Cardeilhac nevertheless argues that because a juvenile convicted of a Class IB felony can be sentenced to life imprisonment, *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), requires a sentencing court to consider the factors set forth in § 28-105.02 before it sentences a juvenile for a Class IB felony. Because the court in this case did not explicitly state it was following the factors listed in § 28-105.02, Cardeilhac contends that *Miller* juvenile sentencing principles dictate that his sentence be vacated. We reject this argument for several reasons, including the fact that

Cardeilhac was not sentenced to life imprisonment without parole, and in any event, he received the full benefit of *Miller* juvenile sentencing principles.

We note first that unlike the focus of *Miller, supra*, i.e., mandatory life in prison without parole, Cardeilhac was not in fact sentenced to imprisonment for life without the possibility of parole. Instead, Cardeilhac was sentenced to imprisonment for a minimum of 60 years to life to be served consecutively to an 8- to 15-year sentence in a separate robbery case that he was already serving. Therefore, he will be eligible for parole as the district court noted at sentencing. See Neb. Rev. Stat. § 83-1,110(1) (Reissue 2014) ("[e]very committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence"). Cf. *State v. Castaneda*, 287 Neb. 289, 842 N.W.2d 740 (2014) (offender sentenced to minimum of life imprisonment is not eligible for parole). Strictly read, *Miller* forbids only the imposition of a mandatory sentence of life imprisonment without parole on a person under age 18 who has committed a homicide. And according to the U.S. Supreme Court in its recent opinion, "[a] state may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 736, 193 L. Ed. 2d 599 (2016) (citing approvingly of Wyoming legislation providing that juvenile offenders sentenced to life imprisonment are eligible for parole after 25 years (Wyo. Stat. Ann. § 6-10-301(c) (2013))). Because the sentence imposed on Cardeilhac allows him to be considered for parole, *Miller* would not be offended on this basis.

We are aware that other courts have discussed whether the sentencing principles of *Miller, supra*, apply when a juvenile is not sentenced to life imprisonment but instead is sentenced to a term of years that is lengthy or, when aggregated with other sentences, the term of imprisonment is so long that the defendant will have effectively served a term of life

imprisonment before he or she is eligible for parole. Such opinions tend to note that the Court's decision in *Miller* was based in part on *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), which generally held that life imprisonment without the possibility of parole for juveniles convicted of nonhomicide offenses was unconstitutional. In particular, *Graham* stated that such juveniles must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 U.S. at 75. Even though the U.S. Supreme Court has not addressed whether imprisonment for a lengthy term of years triggers *Miller* sentencing principles, these courts have reasoned that a meaningful opportunity to obtain release requires that a lengthy term of years be considered the equivalent of a life sentence and that *Miller* sentencing protections relating to life sentences for juveniles apply to such lengthy terms of imprisonment. See, e.g., *Casiano v. Commissioner of Correction*, 317 Conn. 52, 115 A.3d 1031 (2015); *State v. Null*, 836 N.W.2d 41 (Iowa 2013); *Bear Cloud v. State*, 334 P.3d 132 (Wyo. 2014). Other courts have decided that at some point, a term of years might become the equivalent of imprisonment for life or life without parole and reduced the sentence on appeal. See *Brown v. State*, 10 N.E.3d 1 (Ind. 2014) (ruling that 150-year aggregate sentence for two counts of murder and one count of robbery is similar to life without parole, Supreme Court of Indiana reduced sentence to 80 years).

Other courts have found that even a lengthy term of years is not the equivalent of a life sentence if parole is possible within the defendant's expected lifetime. In *State v. Zuber*, 442 N.J. Super. 611, 126 A.3d 335 (2015), the Superior Court of New Jersey considered the case of a defendant who was serving consecutive sentences for numerous offenses arising out of two incidents when he was a juvenile. Although the sentences of imprisonment totaled 110 years, the defendant would be eligible for parole in 55 years. The court in *Zuber* assumed without deciding that the principles of

Graham could apply to the defendant's total aggregated sentences. The court concluded that because the defendant's predicted lifespan exceeded his parole eligibility date, the defendant had a meaningful and realistic opportunity to obtain release, and that therefore, the sentence was not de facto a life sentence.

The court in *Zuber, supra*, specifically disagreed with *Null, supra*, and *Bear Cloud, supra*, and what it characterized as the holdings in those cases to the effect that a defendant's "'geriatric release'" was sufficient to trigger the protections of *Graham, supra*, and *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). The court in *Zuber* also disagreed with what it characterized as the holding in *Casiano, supra*, that *Graham* required that a defendant have an opportunity for a meaningful life outside of prison in which to engage in a career or to raise a family. See, also, *Thomas v. State*, 78 So. 3d 644 (Fla. App. 2011) (deciding under *Graham*, that while at some point term-of-years sentence may become functional equivalent of life, 50-year sentence is not functional equivalent). The *Zuber* opinion is consistent with the recent case of *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 737, 193 L. Ed. 2d 599 (2016), in which the Court characterized the period after release on parole not in terms of the quality of life but of consisting merely of "some years of life outside prison walls."

The foregoing and similar cases are concerned initially with whether the nature of the sentence imposed triggers *Graham* and *Miller* juvenile sentencing protections such that the sentences should be vacated and the causes remanded for sentencing hearings consistent with *Miller*. In this case, we need not decide whether *Miller* applies to a sentence having a minimum other than life imprisonment or, if it does, whether the minimum sentence here is of such a nature or length that the *Miller* protections of individualized sentencing apply and require an order of remand, because the sentencing hearing in this case did in fact comply with *Miller* principles.

Considerable evidence was offered at the sentencing hearing regarding Cardeilhac's life, maturity, abilities, history, and environment. At the sentencing, in addition to stating that it considered the usual factors, including the defendant's age, maturity, experience, and background, the court stated that it considered the testimony it heard at the sentencing hearing. Such testimony included two witnesses presented by Cardeilhac. The first was the mother of a friend of Cardeilhac who testified regarding Cardeilhac's character and problems that he had had at home. In addition, Cardeilhac called Dr. Pope, specifically as a witness regarding sentencing. Dr. Pope was certified in child and adolescent psychiatry. Dr. Pope's testimony included general testimony regarding differences in brain development and brain functioning between adults and adolescents as well as specific observations about Cardeilhac based on her review of his records and interviews with Cardeilhac, his mother, and his friend's mother. Dr. Pope testified regarding Cardeilhac's particular circumstances. Her testimony incorporated the features of a *Miller* sentencing hearing.

Although, as we noted above, the court was not required to follow § 28-105.02(2), because, by its terms, the statute applies to Class IA felonies and Cardeilhac was sentenced for a Class IB felony, the testimony presented by Cardeilhac at sentencing covered numerous factors set forth in § 28-105.02(2). Such evidence related to, inter alia, Cardeilhac's age, impetuosity, family and community environment, and ability to appreciate risks. Therefore, although the court did not explicitly state that it considered the factors set forth in § 28-105.02(2), it did consider evidence which addressed those statutory factors. In addition, the sentencing decision comported with the principles and purposes of juvenile sentencing and the process prescribed in *Miller, supra*, which directs the sentencing court to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," 567 U.S. at 480. Therefore, although

we need not decide whether *Miller* applies, we determine that the court in this case did in fact take into account the considerations required by *Miller* before it sentenced Cardeilhac. Cardeilhac's assignment of error challenging his sentence is without merit.

CONCLUSION

Having rejected Cardeilhac's assignments of error, we affirm his conviction for second degree murder and the sentence of imprisonment of 60 years to life.

Affirmed.

McCormack and Stacy, JJ., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Andrei Tchikobava, appellant, v. Albatross Express, LLC, appellee.

876 N.W.2d 610

Filed April 1, 2016. No. S-15-411.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence.
3. **Workers' Compensation: Evidence: Appeal and Error.** Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion.
4. **Workers' Compensation.** Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact.
5. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
6. **Workers' Compensation: Rules of Evidence: Due Process.** As a general rule, the Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence, but its discretion to admit evidence is subject to the limits on constitutional due process.

7. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
8. ____: ____: ____. The exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.
9. ____: ____: ____. Where evidence is cumulative to other evidence received by the court, its exclusion will not be considered prejudicial error.
10. **Workers' Compensation: Stipulations: Evidence.** Before an order for future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease.
11. **Workers' Compensation: Evidence.** An award of future medical expenses requires explicit evidence that future medical treatment is reasonably necessary to relieve the injured worker from the effects of the work-related injury.
12. **Workers' Compensation: Words and Phrases.** Temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident.
13. **Workers' Compensation.** Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform.
14. ____. As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
15. **Workers' Compensation: Expert Witnesses.** If the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability.
16. ____: ____. Although an expert witness may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.
17. ____: ____. Although medical restrictions or impairment ratings are relevant to a claimant's disability, the trial judge is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Affirmed in part, and in part reversed and remanded with directions.

James C. Bocott, of Law Office of James C. Bocott, P.C., L.L.O., for appellant.

Patrick B. Donahue and Dennis R. Riekenberg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Miller-Lerman, J.

NATURE OF CASE

On November 12, 2013, Andrei Tchikobava filed a petition in the Nebraska Workers' Compensation Court seeking temporary and permanent disability benefits for injuries he sustained in an accident that occurred on August 9, 2010, that arose out of and in the course and scope of his employment as a truckdriver with Albatross Express, LLC. A hearing was held in February 2015, and on April 1, 2015, the compensation court awarded Tchikobava (1) temporary total disability benefits for the period from August 10, 2010, to and including December 8, 2010, and (2) permanent total disability benefits starting May 2, 2014, and continuing for so long as Tchikobava remains permanently and totally disabled. The compensation court did not award temporary total disability benefits for the period of December 9, 2010, through May 1, 2014, and it found that Tchikobava was not entitled to future medical care expenses or penalties, attorney fees, or interest. Tchikobava appeals.

We determine that there was no reversible error in the compensation court's evidentiary ruling excluding the deposition of Dr. Leon Reyfman and that the compensation court did not err when it did not award future medical expenses. These rulings are affirmed. However, we reverse the denial

of temporary total disability benefits for the period from December 9, 2010, through May 1, 2014, and remand this cause to the compensation court to again rule on this issue based on the existing record and to provide an explanation which forms the basis for its ruling.

STATEMENT OF FACTS

The parties in this case do not dispute that Tchikobava was employed by Albatross Express as a truckdriver and that on August 9, 2010, Tchikobava sustained injuries in an accident arising out of and in the course and scope of his employment. On that day, Tchikobava and his team driver were driving a semi-trailer truck from New Jersey to California. They had stopped in Chicago, where the team driver began driving and Tchikobava entered the sleeper berth and fell asleep. While in Nebraska, Tchikobava was sleeping and his team driver was driving, when their semi-trailer truck was struck from behind by another semi-trailer truck. The force of the impact caused Tchikobava to be thrown from the sleeping area of the semi-trailer truck into the front of the driving compartment.

Tchikobava was transported to a hospital in Seward, Nebraska. Once he was at the hospital, Tchikobava complained of chest pain in the left rib area. He testified at the hearing that he had pain in his back, his ribs, and the area around his heart and stomach. Tchikobava was diagnosed with left chest wall pain, left pleural effusion, and paracervical tenderness. The compensation court found that Tchikobava weighed approximately 400 pounds at the time of the accident. Tchikobava testified he was discharged after a couple of hours.

Tchikobava was taken to a hotel. After falling asleep, Tchikobava later awoke and was in a lot of pain. An ambulance was called and drove Tchikobava back to the hospital. The emergency room records from August 10, 2010, show that Tchikobava complained of severe leg pain and rib pain, and it was noted that he was having some discomfort in his chest

and pain with breathing. Tchikobava was prescribed medication for the pain. A chest x ray showed a probable fracture of one of Tchikobava's ribs, and a CT scan of the chest showed "[n]o obvious displaced rib fracture . . . ."

Albatross Express paid for Tchikobava to fly to his home in New York. Tchikobava testified that it was a painful flight home. When Tchikobava arrived in New York on August 12, 2010, his wife took him to a hospital there. The admitting diagnosis was heart attack, and admission records also show complaints of backache and chest pain. Three views of the chest showed no evidence of acute left-sided rib fractures; however, this was in contrast to another medical record which noted there was a fracture of the seventh and eighth ribs on the left side. X rays taken of the lower back and hip revealed degenerative changes. A neurology consult was also performed on August 12. Pain management was ordered by the consulting doctor, and Tchikobava was admitted for a possible heart attack.

On August 18, 2010, Tchikobava was transferred to another New York hospital for a cardiac catheterization, which was negative. During the course of his stay at the hospital, Tchikobava complained of bilateral leg and back pain, left-sided chest pain, and vertigo. The medical reports noted that Tchikobava had intact alertness, orientation, attention, and memory.

While he was admitted to the second New York hospital, Tchikobava participated in physical therapy, but his ability to participate in the therapy was limited by his pain. Tchikobava was discharged on September 2, 2010, with a rolling walker, home care to be provided by social services, and medication, including oxycodone and antihypertensive agents.

On October 18, 2010, Tchikobava was examined by Dr. Pushp R. Bhansali, an orthopedic surgeon. Dr. Bhansali noted that Tchikobava had continued pain in his lower back and his left rib cage, but he could not assess Tchikobava's range of motion due to Tchikobava's obesity. Dr. Bhansali ordered "EMG/NCV" testing, physiotherapy, and medications.

Tchikobava was instructed to return in 6 weeks, but he did not do so.

On October 22, 2010, an MRI of Tchikobava's lumbar spine was performed, and the MRI confirmed that Tchikobava had a muscle spasm, mild degenerative disk disease, and a possible broad-based disk herniation at L5-S1. However, the herniation could not be confirmed due to Tchikobava's movement during the MRI.

At some point, Tchikobava began seeing Dr. Alexander Berenblit, a board-certified neurologist, for treatment, and he continued physical therapy with Dr. Berenblit's office through December 22, 2010. Dr. Berenblit ordered EMG/NCV testing, which occurred on December 8, and the test results were consistent with a bilateral L5-S1 radiculopathy. Dr. Berenblit recommended further physical therapy.

Tchikobava testified that Dr. Berenblit retired, so he began seeing Dr. Reyfman, a pain management specialist. Dr. Reyfman first examined Tchikobava on November 22, 2010, and at that visit, Tchikobava stated that he had low-back pain which radiated to both legs and that the pain was made worse by movement. Dr. Reyfman reviewed the MRI from October 22 and the EMG/NCV test results, and he diagnosed Tchikobava with lumbar disk displacement, lumbosacral neuritis radiculopathy, a sprain of the ribs, and a fracture of one rib. Dr. Reyfman recommended that Tchikobava continue with physical therapy and advised him to avoid certain movements, including bending, lifting, or carrying anything heavy.

With regard to causation, Dr. Reyfman stated in his report: "No pre-existing conditions exist that affects the causality. I feel that there is a direct causal relationship between the accident described and the patient's current injuries. The patient's symptoms and clinical findings are consistent with musculoskeletal injuries to the described areas." Dr. Reyfman instructed Tchikobava to return in 2 to 3 weeks. The only other report from Dr. Reyfman contained in the record is from Tchikobava's office visit approximately 3½ years later, on April 30, 2014.

At the hearing, Tchikobava testified that he visited Dr. Reyfman more than twice, but only these two reports from Dr. Reyfman are in the record.

Tchikobava testified that he sought treatment with his family doctor, Dr. Iouri Sobol, from the period between January 2011 and April 2013, and he testified that Dr. Sobol prescribed him pain medication. The record does not contain any medical records or reports from Dr. Sobol. Furthermore, the record does not contain any medical reports or records regarding any treatment that Tchikobava received in 2011 or 2012.

The only medical report regarding Tchikobava's treatment in 2013 is an office note from Dr. Wayne A. Gordon, a neuropsychologist, who examined Tchikobava on August 16 and 19, 2013. Tchikobava's lawyer requested that Tchikobava be seen by Dr. Gordon. Dr. Gordon administered a series of tests regarding Tchikobava's memory and coordination. Dr. Gordon stated that based upon the results of these tests, he believed Tchikobava was suffering from cognitive deficits, and he determined that the cognitive deficits were "secondary to the accident."

The next evidence of Tchikobava's medical treatment in the record is Dr. Reyfman's report dated April 30, 2014. Dr. Reyfman stated in this report that Tchikobava complained of low-back pain radiating out to his legs, along with numbness and tingling in his feet and toes. He also complained of neck pain radiating to his shoulders, along with a headache. Dr. Reyfman ordered EMG/NCV testing on the arms and legs, which showed evidence of a bilateral cervical radiculopathy at C5-C6 and bilateral mild and chronic L4-5 and L5-S1 lumbosacral radiculopathy. He also ordered another MRI of the lumbar spine, which showed disk space collapse at L5-S1 leading to lateral recess stenosis.

In a report dated May 2, 2014, Dr. Reyfman stated that Tchikobava was at maximum medical improvement. He stated that Tchikobava suffered permanent impairment and could work only in the "less than sedentary" demand category.

Tchikobava was instructed to return in 1 week. The record does not contain other medical reports from Dr. Reyfman.

On May 28, 2014, Tchikobava visited Dr. Vadim Lerman and stated he had low-back pain and neck pain. Dr. Lerman reviewed the MRI from April 30, 2014, and he diagnosed Tchikobava with a lumbar radiculopathy, lumbar pain, spinal stenosis of the lumbar region, and a lumbar herniated disk. Dr. Lerman stated that he did not feel surgery was warranted, and he recommended that Tchikobava continue physical therapy, lose weight, and consider bariatric surgery.

At the hearing, Tchikobava testified that none of the treatment he received relieved him of his pain and that physical therapy made his pain worse. He testified that he cannot bathe himself, dress himself, or go to the bathroom or get out of his wheelchair without assistance. He further testified that he cannot drive and that his wife had given up her job as a nurse's aide in order to stay home and take care of him. Tchikobava also testified that he was informed that he cannot have surgery until he loses weight.

At the request of Albatross Express, Dr. Malcolm G. Coblentz, a general surgeon, examined Tchikobava on August 6, 2012. Dr. Coblentz reviewed several of Tchikobava's medical records, but he did not review the EMG/NCV testing from December 2010. Dr. Coblentz noted that his examination was limited by Tchikobava's obesity and lack of cooperation. Dr. Coblentz stated that he found no evidence of disability, based on his observations and limited physical examination. In a report dated June 12, 2014, Dr. Coblentz agreed with Dr. Reyfman that Tchikobava had reached maximum medical improvement on May 2, 2014.

On November 12, 2013, Tchikobava filed his petition in the workers' compensation court. In his petition, Tchikobava alleged that as a result of the August 9, 2010, accident, he suffered "broken ribs; head and neck injuries, including a traumatic brain injury . . . ; an exacerbated heart condition; a herniated disc at the L5-S1 level, resulting in bilateral radiculopathy;

and various other less serious injuries." Tchikobava sought temporary and permanent disability benefits, past and future medical expenses, and attorney fees and penalties for nonpayment of medical expenses and indemnity.

Albatross Express filed its answer on December 6, 2013. In its answer, Albatross Express generally denied the allegations set forth in Tchikobava's petition. Albatross Express further stated that Tchikobava's injuries and disabilities were "the result of the natural progression of preexisting conditions or arise out of independent intervening incidents entirely unrelated to" Tchikobava's employment with Albatross Express.

A hearing was held on February 24, 2015. At the hearing, Tchikobava offered exhibit 20, which was a deposition of Dr. Reyfman that was taken in connection with a separate negligence action that Tchikobava had brought against the employer of the driver who Tchikobava alleged was responsible for the accident. Albatross Express was a party in the negligence case, evidently for subrogation interests. With respect to Dr. Reyfman's deposition, Tchikobava had served notice of Dr. Reyfman's deposition upon the attorney representing Albatross Express in the negligence case. That attorney was in the same office as Albatross Express' attorney in the present workers' compensation case. The attorney for Albatross Express in the negligence case did not attend the deposition of Dr. Reyfman.

Tchikobava initially offered this deposition of Dr. Reyfman at the beginning of the hearing in this case, and Albatross Express objected to it on the bases of hearsay, foundation, and relevancy. The compensation court stated:

> It's a close call here because Exhibit 20 [the deposition] is not signed, as I see it. If it were signed by the doctor, I think it could come in as a Rule 10 report.
>
> Given that it's not signed, I have to consider it for what it is, a deposition taken in another case where [Albatross Express' attorney in the compensation case] was not given an opportunity to cross-examine him and may constitute

> hearsay, although the Court is not governed by the rules of hearsay.
>
> So it gets to be a little bit of a close call as to whether it's going to come in or not.

After some discussion, Tchikobava's attorney stated he would withdraw the offer of the deposition, "with the opportunity to offer it at the close of my evidence, if I think it's necessary after the cross-examination of . . . Tchikobava."

At the close of evidence, Tchikobava reoffered Dr. Reyfman's deposition. Albatross Express again objected, stating: "Objection, hearsay, pursuant to Rule 27 — Section 27-804 and particularly 27-804, subpart two, subpart A, as well as lack of evidence of unavailability. I think that covers it." In determining to sustain Albatross Express' objection, the compensation court stated:

> So my concern is we have this deposition that [Albatross Express' attorney in the compensation case] did not attend in a case that is captioned in another court being offered as evidence against his client.
>
> On the other hand, the hearsay rules don't necessarily apply to this court, but I have concerns of due process.
>
> I'm going to sustain the objection as to — as to hearsay. And the reasoning is I just don't think that due process allows this out of court statement to be admitted to prove the truth of the matter asserted when [Albatross Express' attorney in the compensation case] did not have the opportunity to cross-examine Dr. Reyfman.

Accordingly, Dr. Reyfman's deposition was not received into evidence in this case.

Following the hearing, on April 1, 2015, the compensation court filed its award, in which it generally awarded Tchikobava temporary total disability benefits and permanent total disability benefits, and it denied future medical expenses, penalties, attorney fees, and interest. In its award, the workers' compensation court stated that it found Tchikobava "proved he suffered lumbar disc displacement (herniated disc), lumbosacral

neuritis radiculopathy and a sprain of the ribs." In making these findings, the court stated that it relied on Dr. Reyfman's report dated November 22, 2010. The court further stated that it "was not convinced" that Tchikobava had suffered a neck injury in the accident.

With respect to temporary total disability benefits, the court determined that Tchikobava was entitled to temporary total disability benefits from August 10, 2010, to and including December 8, 2010. The court stated that Dr. Reyfman imposed restrictions upon Tchikobava at the November 22, 2010, office visit and that those restrictions support Tchikobava's claim for temporary total disability benefits between August 10 and December 8 because Tchikobava's physical condition during that period was "virtually identical" to his physical condition when Dr. Reyfman examined him on November 22.

The court went on to state that it

> cannot award [Tchikobava] any further [temporary total disability] benefits, because there is simply a lack of persuasive proof that [Tchikobava] was treating and recuperating from his injuries and disabled after December 8, 2010, which is the last medical record documenting medical treatment for his lower back until the office visit with Dr. Reyfman on April 30, 2014.

The court further stated that even though Tchikobava testified that he saw his family doctor, Dr. Sobol, during that period, the record does not contain any reports or records from Dr. Sobol regarding the treatment Tchikobava received, Tchikobava's pain or injuries that were being treated, or the success or failure of such treatment. The court further stated that "[w]hile Dr. Reyfman examined [Tchikobava] on April 30, 2014, he placed [Tchikobava] at maximum medical improvement only two days later. This single exam was not sufficient to convince the Court [Tchikobava] had been disabled for the three years prior." Accordingly, the court determined that Tchikobava "failed to prove he was entitled to any indemnity benefits from December 9, 2010 to and through May 1, 2014."

With respect to permanent disability benefits, the court found that Tchikobava "suffered a low back injury, which is an injury to the body as a whole." The court stated that Tchikobava offered evidence of permanent restrictions as imposed by Dr. Reyfman on April 30, 2014, and that this was sufficient to meet his burden of proof that he had been permanently impaired as a result of the accident on August 9, 2010.

The court then discussed the report completed by Karen Stricklett, the agreed-upon vocational counselor in this case. The court noted that in her report, Stricklett "provided two opposing opinions regarding [Tchikobava's] loss of earning capacity based upon the two differing medical opinions of Dr. Coblentz and Dr. Reyfman." Stricklett opined that if the court accepted Dr. Coblentz' opinion that Tchikobava suffered no impairment and no restrictions, then Tchikobava suffered a 0-percent loss of earning capacity. Conversely, if the court accepted Dr. Reyfman's opinions, then Tchikobava suffered a 100-percent loss of earning capacity.

In its award, the court stated that it was ultimately persuaded by Tchikobava's testimony and the medical opinion of Dr. Reyfman, and therefore, given Stricklett's report, the court found Tchikobava to be permanently and totally disabled. The court stated that Tchikobava was entitled to permanent total disability benefits starting on May 2, 2014, and continuing for so long as he remains permanently and totally disabled.

With respect to future medical care, the compensation court noted, citing *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001), that before an order for future medical care may be entered, there should be either a stipulation of the parties to that effect or evidence in the record sufficient to support a determination that future medical treatment will be reasonably necessary. The compensation court stated that because there was no stipulation between the parties regarding an award of future medical treatment, Tchikobava had the burden to prove that he was entitled to such an award.

The compensation court determined that Tchikobava "failed to meet his burden of proof for ongoing medical care for his rib and back injuries." The court stated that there was "little to no evidence from a medical doctor" that Tchikobava required ongoing medical care. The court noted that Tchikobava's last medical treatment was from Dr. Lerman on May 28, 2014, and that Dr. Lerman had stated that Tchikobava did not need surgery and should continue with physical therapy. However, the court declined to award physical therapy for Tchikobava, because the evidence showed that Tchikobava had not done physical therapy since 2010 and because Tchikobava testified that physical therapy only made his pain worse. The court stated that "[t]here was simply an absence of evidence proving [Tchikobava] would require or need additional medical care for his low back injury or his rib injury." Therefore, given the record, the court determined that Tchikobava was not entitled to any future medical care to be paid for by Albatross Express.

In sum, in its award filed April 1, 2015, the compensation court determined that Tchikobava was entitled to temporary total disability benefits from August 10, 2010, to and including December 8, 2010. The court determined that Tchikobava was entitled to permanent total disability benefits starting on May 2, 2014, and continuing for so long as Tchikobava remains permanently and totally disabled. The court stated that Albatross Express is entitled to a credit for indemnity benefits already paid to Tchikobava. The court also determined that Tchikobava was not entitled to future medical expenses to be paid for by Albatross Express and that Tchikobava was not entitled to an award of penalties, attorney fees, or interest.

Tchikobava appeals.

ASSIGNMENTS OF ERROR

Tchikobava claims, restated, that the compensation court erred when it (1) sustained Albatross Express' objection to the receipt of Dr. Reyfman's deposition taken in a separate case,

(2) failed to award future medical expenses to Tchikobava, and (3) determined that Tchikobava was not entitled to temporary total disability indemnity benefits for the period of December 9, 2010, through May 1, 2014.

STANDARDS OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015). Determinations by a trial judge of the Workers' Compensation Court will not be disturbed on appeal unless they are contrary to law or depend on findings of fact which are clearly wrong in light of the evidence. *Id*.

[3] Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Id*.

[4,5] Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact. *Kim v. Gen-X Clothing*, 287 Neb. 927, 845 N.W.2d 265 (2014). In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Id*.

ANALYSIS

Dr. Reyfman's Deposition.

Tchikobava generally argues that the compensation court erred when, at the hearing in this matter, it did not receive

Tchikobava's offer of Dr. Reyfman's deposition, which had been taken in connection with a separate negligence action that Tchikobava brought against the employer of the driver who Tchikobava alleged was responsible for the accident. Tchikobava contends that Dr. Refyman's deposition was admissible pursuant to the Nebraska Workers' Compensation Court rules of procedure, specifically Workers' Comp. Ct. R. of Proc. 10 (2011), regarding evidence. Tchikobava further argues for admissibility under Neb. Rev. Stat. §27-804(2)(a) (Reissue 2008), which generally provides that a deposition is not excluded by the hearsay rule if the declarant is unavailable as a witness and if the deposition was taken in a different proceeding at the insistence of or against a party with an opportunity to develop the testimony with motive and interest similar to those of the party against whom it is now offered. Tchikobava argues that Dr. Reyfman's deposition is not excluded by the hearsay rule, because Dr. Reyfman was unavailable in this case and because Albatross Express had received notice of the deposition in the negligence action and therefore had the opportunity to cross-examine Dr. Reyfman.

In response, Albatross Express generally argues that the compensation court did not err when it refused to admit Dr. Reyfman's deposition, and that even if the refusal was incorrect, such error was not reversible error, because there was nothing new or significant contained in Dr. Reyfman's deposition that would have changed the compensation court's ruling. We determine that even if the compensation court erred when it refused to receive Dr. Reyfman's deposition, such error was not reversible error.

[6] Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015). We have stated that as a general rule, the compensation court is not bound by the usual common-law or statutory rules of evidence, but its discretion to admit

evidence is subject to the limits on constitutional due process. See *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013).

With respect to the admission of evidence in workers' compensation cases, rule 10 of the Nebraska Workers' Compensation Court rules of procedure provides:

> The Nebraska Workers' Compensation Court is not bound by the usual common law or statutory rules of evidence; and accordingly, with respect to medical evidence on hearings before a judge of said court, written reports by a physician or surgeon duly signed by him, her or them . . . may, at the discretion of the court, be received in evidence in lieu of . . . the personal testimony of such physician or surgeon . . . . A sworn statement or deposition transcribed by a person authorized to take depositions is a signed, written report for purposes of this rule.
>
> A signed narrative report by a physician or surgeon . . . setting forth the history, diagnosis, findings and conclusions of the physician or surgeon . . . which is relevant to the case shall be considered evidence on which a reasonably prudent person is accustomed to rely in the conduct of serious affairs. The Nebraska Workers' Compensation Court recognizes that such narrative reports are used daily by the insurance industry, attorneys, physicians and surgeons and other practitioners, and by the court itself in decision making concerning injuries under the jurisdiction of the court.
>
> Any party against whom the report may be used shall have the right, at the party's own initial expense, of cross examination of the physician or surgeon . . . either by deposition or by arranging the appearance of the physician or surgeon . . . at the hearing.

Workers' Comp. Ct. R. of Proc. 10(A).

At the hearing before the compensation court, Tchikobava offered the deposition of Dr. Reyfman taken in the separate

negligence case. Pursuant to rule 10 and our case law, it was within the compensation court's discretion whether to receive Dr. Reyfman's deposition, subject to the limits on constitutional due process. For purposes of this case, we need not decide whether the compensation court abused its discretion when it denied admission of Dr. Reyfman's deposition, because even if the ruling was incorrect, any such error was not reversible error.

[7-9] In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015). The exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection. *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015). Where evidence is cumulative to other evidence received by the court, its exclusion will not be considered prejudicial error. *Scott v. Khan*, 18 Neb. App. 600, 790 N.W.2d 9 (2010).

In the present case, although the compensation court denied Tchikobava's offer of Dr. Reyfman's deposition, it received Tchikobava's evidence of medical records from Dr. Reyfman. A comparison of Dr. Reyfman's medical records to his deposition shows that other than an explanation of his qualifications, there was nothing new or substantial in Dr. Reyfman's testimony in his deposition. In the deposition, Dr. Reyfman explained and defined certain medical procedures and terminology, and he testified to Tchikobava's injuries and restrictions, which information was also contained in the admitted medical records. Thus, evidence substantially similar to Dr. Reyfman's deposition was in evidence and the exclusion of the deposition was not prejudicial. See *Steinhausen v. HomeServices of Neb., supra*.

Tchikobava seems to argue that Dr. Reyfman's deposition would have been influential in connection with his claims that the compensation court erred when it did not award him temporary total disability benefits for the period from

December 2010 to May 2014 and when it did not award him future medical expenses. We reject this argument. Nothing in Dr. Reyfman's deposition testimony meaningfully relates to either of these two issues. In his deposition, Dr. Reyfman did not discuss whether Tchikobava was disabled for the time period Tchikobava asserts he should have been awarded temporary total disability benefits, and Dr. Reyfman did not testify regarding the need for future medical care and expenses.

Because Dr. Reyfman's deposition did not contain information that would have altered the compensation court's decision to reject temporary total disability benefits for the period from December 2010 to May 2014 and future medical expenses, the exclusion of Dr. Reyfman's deposition did not unfairly prejudice a substantial right of Tchikobava. Thus, even assuming that the compensation court erred when it did not admit Dr. Reyfman's deposition into evidence, we determine that any such error was not reversible error.

Future Medical Expenses.

Tchikobava claims that the compensation court erred when it did not award him future medical expenses. Tchikobava asserts that he presented evidence that his doctors recommended that Tchikobava undergo bariatric surgery to help facilitate weight loss. He also argued that Dr. Reyfman's records indicated that Tchikobava took pain medication for his injuries, and Tchikobava argues that "[i]t is clear that [Tchikobava] will require pain treatment for the remainder of his life." Brief for appellant at 21. We determine that the compensation court did not err when it did not award future medical expenses to Tchikobava.

[10,11] Before an order for future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease. *Sellers v. Reefer Systems*, 283 Neb. 760,

811 N.W.2d 293 (2012). An award of future medical expenses requires explicit evidence that future medical treatment is reasonably necessary to relieve the injured worker from the effects of the work-related injury. *Adams v. Cargill Meat Solutions*, 17 Neb. App. 708, 774 N.W.2d 761 (2009).

In the current case, there was no stipulation between the parties regarding an award of future medical treatment, and therefore, Tchikobava was required to present evidence showing he was entitled to an award of future medical expenses. In its award, the compensation court noted that "[t]here is little to no evidence from a medical doctor that [Tchikobava] requires ongoing medical care." The compensation court noted that Tchikobava's last medical treatment was from Dr. Lerman on May 28, 2014, and in his report, Dr. Lerman stated that Tchikobava did not need surgery and that he should continue with physical therapy. The compensation court declined to award physical therapy for Tchikobava, stating that Tchikobava had not done physical therapy since 2010 and that Tchikobava had testified that physical therapy only made his pain worse. Based on the lack of evidence demonstrating that Tchikobava would need additional medical care for his injuries, the compensation court determined that Tchikobava was not entitled to any future medical expenses.

Tchikobava asserts that Drs. Reyfman, Lerman, and Coblentz recommended that he undergo bariatric surgery in order to facilitate weight loss, and that accordingly, he should have been awarded future medical expenses with respect to such surgery. However, the record shows that although weight loss was recommended, none of the recommendations were attributed to Tchikobava's compensable injury.

Tchikobava also argues that Dr. Reyfman's records show Tchikobava has been prescribed pain medication and that "[i]t is clear that [Tchikobava] will require pain treatment for the remainder of his life." Brief for appellant at 21. We note that pain medication is mentioned in Dr. Reyfman's medical report dated April 30, 2014, and at trial, during his testimony,

Tchikobava mentioned that he was taking pain medication. However, there is no indication in the record that Tchikobava would need to continue taking the medication in the future.

In *Adams v. Cargill Meat Solutions, supra*, an employee, who had brought a workers' compensation action against her employer, presented evidence at trial that she was currently taking pain medication, but she did not present evidence that she would need to take such medication in the future. The Nebraska Court of Appeals determined that the employee had failed to present sufficient evidence to prove that future medical treatment would be reasonably necessary to relieve the effects of her work-related injury, and accordingly, it reversed the decision of the three-judge review panel that had affirmed the trial court's award of future medical expenses. In making its determination, the Court of Appeals stated:

> The evidence does not support the trial court's determination that [the employee] required further medical treatment for her back injury. In awarding future medical expenses, the trial court relied on [the employee's] testimony that she was taking medication at the time of trial and notations in [the employee's] medical records indicating her history of taking prescription pain medication. Evidence that [the employee] currently takes pain medication or that she has a history of taking such medication is not enough to demonstrate that she requires future medical treatment to relieve the effects of her injury. As such, the trial court's finding that [the employee] "carried her burden of proof and persuasion" as to an award of future medical expenses is not supported by sufficient evidence.
>
> The review panel affirmed the trial court's award of future medical expenses after concluding that the evidence presented at trial was sufficient to support an "inference" that [the employee] will continue to take pain medication after the time of trial. Such an inference is simply not supported by the evidence in the record. There

> is no evidence that [the employee] intends to continue to take her prescription pain medication. In fact, there is no indication that [the employee] finds the medication to be beneficial. She testified that even when she took the medication, she was in constant pain and she could not complete basic daily tasks. In addition, she testified that her pain had increased, rather than decreased, since the time of the accident.
>
> Simply stated, an award of future medical expenses requires explicit evidence that future medical treatment is reasonably necessary to relieve the injured worker from the effects of the work-related injury. Here, there is no evidence that [the employee] requires any future medical treatment or that future medical treatment would be in any way beneficial in relieving the effects of her back injury.

Adams v. Cargill Meat Solutions, 17 Neb. App. 708, 713-14, 774 N.W.2d 761, 765 (2009).

We apply the analysis in *Adams* to the present case. In this case, the fact that Tchikobava was taking pain medication at the time of trial and had taken pain medication in the past does not constitute sufficient explicit evidence that he would need to continue taking such medication in the future or that he would need to be awarded future medical expenses.

Because Tchikobava failed to present sufficient evidence to support a determination that future medical treatment would be reasonably necessary to relieve him from the effects of his work-related injury, we determine that the compensation court did not err when it did not award future medical expenses to Tchikobava.

Temporary Total Disability Benefits.

Tchikobava claims that the compensation court erred when it did not award him temporary total disability benefits for the period from December 9, 2010, through May 1, 2014. For the reasons explained below, we reverse this ruling and remand the

cause to the compensation court on the existing record with directions to the compensation court to rule on this issue and to clarify its reasoning regarding its disposition of Tchikobava's claim for temporary total disability benefits for the period from December 9, 2010, through May 1, 2014.

[12,13] We have stated that temporary disability is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. *Kim v. Gen-X Clothing*, 287 Neb. 927, 845 N.W.2d 265 (2014). Total disability exists when an injured employee is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the employee's mentality and attainments could perform. *Id*.

[14] Whether a plaintiff in a Nebraska workers' compensation case is totally disabled is a question of fact. *Id*. In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013). Moreover, as the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015).

[15-17] We have held that if the nature and effect of a claimant's injury are not plainly apparent, then the claimant must provide expert medical testimony showing a causal connection between the injury and the claimed disability. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Although an expert witness may be necessary to establish the cause of a claimed injury, the Workers' Compensation Court is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant. *Id*. We have further stated that although medical restrictions

or impairment ratings are relevant to a claimant's disability, the trial judge is not limited to expert testimony to determine the degree of disability but instead may rely on the testimony of the claimant. *Id*.

In its award, with respect to the period of December 9, 2010, to May 1, 2014, the compensation court stated:

> There is no evidence by way of medical records to prove [Tchikobava] was seeking medical treatment for his low back injury that was aiding to his recovery during the calendar years of 2011, 2012, 2013 or 2014. While [Tchikobava] testified he saw his family doctor, Dr. Sobol, the Court does not have one record from that doctor's office to document what treatment [Tchikobava] was receiving, the nature and extent of [Tchikobava's] pain or injuries for which he was treating or to document the success or failure of that treatment he received. Moreover, not one doctor limited [Tchikobava] or took [Tchikobava] off work in the calendar years of 2011, 2012, 2013 or 2014. While Dr. Reyfman examined [Tchikobava] on April 30, 2014, he placed [Tchikobava] at maximum medical improvement only two days later. This single exam was not sufficient to convince the Court [Tchikobava] had been disabled for the three years prior. The Court finds [Tchikobava] failed to prove he was entitled to any indemnity benefits from December 9, 2010 to and through May 1, 2014.

As noted by the compensation court, there are no medical records that were received into evidence regarding the period from December 9, 2010, until a report by Dr. Reyfman dated April 30, 2014. However, Tchikobava provided evidence regarding the status of his injury for the period of December 9, 2010, through May 1, 2014, by way of his testimony at the trial. At trial, Tchikobava testified that he regularly saw Dr. Sobol, who prescribed him medication, and he testified that because of his pain, it was difficult for him to move and he did not try to apply for employment.

It has been stated that a compensation court may refuse to follow uncontradicted evidence in the record,

> but when it does so, its reasons for rejecting the only evidence in the record should appear—e.g., that the testimony was inherently improbable, or so inconsistent as to be incredible, that the witness was interested, or that the witness' testimony on the point at issue was impeached by falsity in his statements on other matters. Unless some explanation is furnished for the disregard of all the uncontradicted testimony or other evidence in the record, the [compensation court] may find its award reversed as arbitrary and unsupported. This sometimes occurs when the [compensation court] denies compensation on a record that contains nothing but testimony favorable to the claimant, with no indication whether all or part of the testimony was disbelieved, and if so, why.

12 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 130.05[3] at 130-38.1 (2015). We agree with the commentary just quoted and apply it to this case.

As stated, Tchikobava's testimony is the only evidence contained in the record regarding the status of his injuries for the period from December 9, 2010, through May 1, 2014. There is no other evidence, such as medical records, that affirm or contradict the testimony Tchikobava gave at the hearing regarding this period. The compensation court's award fails to state what weight, if any, the court gave to Tchikobava's testimony. It is also unclear whether the compensation court denied temporary total disability benefits for the period from December 9, 2010, through May 1, 2014, because it found Tchikobava's testimony incredible or unreliable or because the court simply disregarded Tchikobava's testimony as evidence of the extent of his disability for that period and it had no medical records for the period at issue to assist it in making a ruling. Accordingly, we reverse the compensation court's ruling on this issue and remand this cause to the compensation court on the existing record with

directions to again rule on Tchikobava's claim for temporary total disability benefits for the period of December 9, 2010, through May 1, 2014, and to provide an explanation which forms the basis for its ruling.

CONCLUSION

Assuming, without deciding, that it was error for the compensation court to refuse to admit Dr. Reyfman's deposition into evidence, such error was not reversible error. We determine that the compensation court did not err when it did not award future medical expenses to Tchikobava. These rulings are affirmed. With respect to the temporary total disability issue, we reverse the denial of benefits and we remand the cause to the compensation court on the existing record with directions to the court to again rule on Tchikobava's claim for temporary total disability benefits for the period from December 9, 2010, to May 1, 2014, and to provide an explanation which forms the basis for its ruling.

Affirmed in part, and in part reversed and remanded with directions.



Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

Abdul H. Al-Ameen, appellant, v. Scott R. Frakes, director, Nebraska Department of Correctional Services, et al., appellees.

876 N.W.2d 635

Filed April 1, 2016. No. S-15-452.

1. **Moot Question: Jurisdiction: Appeal and Error.** Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, appellate courts review mootness determinations under the same standard of review as other jurisdictional questions.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Courts: Jurisdiction.** While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power.
5. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
6. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
7. **Habeas Corpus.** The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
8. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Appeal dismissed.

Gerald L. Soucie for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellees.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Wright, J.

NATURE OF CASE

This is an appeal from the denial of a petition for a writ of habeas corpus. The petitioner, Abdul H. Al-Ameen, was erroneously discharged from the custody of the Nebraska Department of Correctional Services (Department) prior to completing his lawful sentence. He was later taken back into custody after the Department realized that his mandatory discharge date had been erroneously calculated by giving good time credit on the 10-year mandatory minimum portion of his sentence.

Al-Ameen filed a petition for a writ of habeas corpus, challenging the Department's continuing exercise of custody. The district court dismissed Al-Ameen's petition with prejudice. Al-Ameen appeals. Because Al-Ameen has since been released from the Department's custody, we dismiss this appeal as moot.

FACTS

Al-Ameen was convicted of possession of a deadly weapon by a felon and found to be a habitual criminal. He was sentenced to 10 to 15 years' imprisonment with 446 days' credit for time served. His sentence carried a mandatory minimum of 10 years' imprisonment due to the habitual criminal enhancement.[1]

[1] See Neb. Rev. Stat. § 29-2221 (Reissue 2008).

On August 15, 2013, Al-Ameen was erroneously discharged by the Department prior to completing his lawful sentence. At the time of discharge, he had served the 10-year mandatory minimum prison sentence but still had 2½ years remaining before he would be eligible for mandatory discharge.

Upon discovery of the error in June 2014, the State sought an arrest and commitment warrant for the return of Al-Ameen to the Department to serve the remainder of his sentence. The State's motion was supported by the affidavit of Michael Kenney, the then director of the Department, which affidavit stated that the Department "erroneously released [Al-Ameen] from custody prior to his mandatory discharge date by erroneously deducting good time credit from [Al-Ameen's] mandatory minimum sentence." The district court issued an arrest and commitment warrant on June 26, 2014, and Al-Ameen was taken back into custody the following day.

Al-Ameen petitioned for a writ of habeas corpus in the district court for Lancaster County challenging the Department's continuing exercise of custody. The district court dismissed Al-Ameen's habeas petition with prejudice. Al-Ameen appeals from that judgment.

ASSIGNMENTS OF ERROR

Al-Ameen assigns that the district court erred in denying his petition for writ of habeas corpus. He asserts that the commitment order entered on June 26, 2014, was void and unlawful for the following reasons: (1) the motions and orders relating to Al-Ameen's rearrest and recommitment were filed under the wrong case number, (2) the unconditional discharge of Al-Ameen was within the discretion of the Department and consistent with the Department's policy that had been in existence since at least September 1996, (3) the affirmative actions of the Department established a waiver such that Al-Ameen could not be returned to custody, and (4) the procedures used to obtain the arrest and commitment warrant were so lacking in fundamental due process rights so as to be void and without jurisdiction.

STANDARD OF REVIEW

[1,2] Mootness does not prevent appellate jurisdiction. But, because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, we have reviewed mootness determinations under the same standard of review as other jurisdictional questions.[2] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[3]

ANALYSIS

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power.[5]

[5,6] A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.[6] A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.[7] As a general rule, a moot case is subject to summary dismissal.[8]

[7] On appeal, Al-Ameen asserts the district court erred in denying his petition for a writ of habeas corpus. The habeas

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[2] *State v. York*, 278 Neb. 306, 770 N.W.2d 614 (2009).

[3] *Id.*

[4] *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a person's detention, imprisonment, or custodial deprivation of liberty.[9] However, Al-Ameen is no longer being detained or deprived of liberty. The record before us contains an affidavit from the Department's records administrator indicating that Al-Ameen's mandatory release date was January 13, 2016. Because Al-Ameen has been mandatorily discharged and there is no evidence that he has not been discharged, this appeal is moot.

[8] An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.[10] This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.[11] We decline to apply the public interest exception here because the issues presented in this appeal are virtually identical to those we addressed in the companion case of *Evans v. Frakes*.[12]

CONCLUSION

Because Al-Ameen has been mandatorily discharged and is no longer in the custody of the Department, we dismiss his appeal as moot.

Appeal dismissed.

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[9] *Caton v. State*, 291 Neb. 939, 869 N.W.2d 911 (2015).

[10] *Davis v. Settle*, 266 Neb. 232, 665 N.W.2d 6 (2003).

[11] *Id.*

[12] *Evans v. Frakes, post* p. 253, 876 N.W.2d 626 (2016).

Nebraska Supreme Court
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Thomas Evans, appellant, v. Scott R. Frakes, director, Nebraska Department of Correctional Services, et al., appellees.

876 N.W.2d 626

Filed April 1, 2016. No. S-15-453.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Habeas Corpus.** The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
3. **Habeas Corpus: Probation and Parole.** A parolee is in custody under sentence and may seek relief through Nebraska's habeas corpus statute.
4. **Habeas Corpus: Proof.** To secure habeas corpus relief, the prisoner must show that he or she is being illegally detained and is entitled to the benefits of the writ.
5. **Habeas Corpus.** In a petition for writ of habeas corpus, if the plaintiff sets forth facts which, if true, would entitle him or her to discharge, then the writ is a matter of right, the plaintiff should be produced, and a hearing should be held thereon to determine questions of fact presented. If the plaintiff fails to show by the facts alleged in the petition that he or she is entitled to relief, then the relief is denied.
6. **Habeas Corpus: Jurisdiction.** A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held.
7. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.

8. **Habeas Corpus.** A writ of habeas corpus is a proper remedy only upon a showing that the judgment, sentence, and commitment are void.
9. ____. To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.
10. **Due Process.** Applying the Due Process Clause to the facts of any given case is an uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.
11. ____. Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Gerald L. Soucie for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellees.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Wright, J.

NATURE OF CASE

This is an appeal from the denial of a petition for a writ of habeas corpus. The petitioner, Thomas Evans, was found to be a habitual criminal and was sentenced to a mandatory minimum of from 10 to 15 years' imprisonment.

Evans was erroneously discharged before serving the required sentence. Upon discovery of the error, the State sought an arrest and commitment warrant for the return of Evans to the Nebraska Department of Correctional Services (Department).

The district court ordered Evans recommitted to serve the remainder of his sentence. Evans filed an amended petition for writ of habeas corpus, which was dismissed with prejudice. Evans appeals. We affirm.

BACKGROUND

Evans was convicted of burglary and determined to be a habitual criminal. His sentence carried a mandatory minimum of 10 years' imprisonment due to the habitual criminal enhancement.[1] He was sentenced to 10 to 15 years' imprisonment with 269 days' credit for time served.

On November 19, 2013, Evans was erroneously discharged by the Department prior to completing his lawful sentence. At the time of discharge, he had served the 10-year mandatory minimum sentence, but still had 2½ years remaining before he would be eligible for mandatory discharge.

Upon discovery of the error in June 2014, the State sought an arrest and commitment warrant for the return of Evans to the Department to serve the remainder of his sentence. The State's motion was supported by the affidavit of Michael Kenney, the then director of the Department, which affidavit stated that the Department "erroneously released [Evans] from custody prior to his mandatory discharge date by erroneously deducting good time credit from [Evans'] mandatory minimum sentence." The district court issued an arrest and commitment warrant on June 26, 2014, and Evans was taken back into custody on June 29. He has since been paroled and is projected to be released from parole on May 19, 2016.

Evans petitioned for a writ of habeas corpus in the district court for Lancaster County, Nebraska, challenging the Department's continuing exercise of custody. During the hearing on the writ, Evans offered numerous exhibits that had been disclosed during the Nebraska Legislature's special investigative committee hearings on this matter, including a memorandum written by a Department official regarding the Department's policy for calculating an inmate's discharge date involving a mandatory minimum term. It states, in part:

> If the court-imposed maximum term is the same as the statutory mandatory minimum term, the inmate must

[1] See Neb. Rev. Stat. § 29-2221 (Reissue 2008).

> serve the entire mandatory minimum term, minus any credit for time served towards his mandatory discharge. If the court imposed maximum term is longer than the mandatory minimum term, the mandatory discharge date with good time is compared to mandatory minimum without good time. The mandatory discharge date will be the longer of the two dates.
>
> For example, if the court imposed a maximum term of 15 years for a habitual criminal conviction, the discharge date would be changed to 10 years. If the court[-]imposed . . . maximum term was 20 years or longer, then the discharge date would be calculated in the normal manner.

This policy had been in existence since at least 1996, and the Department had continued to calculate discharge dates in this manner even after our decision in *State v. Castillas*.[2] In *Castillas*, we held that good time reductions did not apply to mandatory minimum sentences and we set forth the specific method for computing parole eligibility and mandatory discharge dates for sentences involving a mandatory minimum. Good time credit cannot be applied to the maximum portion of the sentence before the mandatory minimum sentence has been served.[3] It applies only after the mandatory minimum has been served.[4]

The district court dismissed Evans' habeas petition with prejudice. Evans appeals from that judgment.

ASSIGNMENTS OF ERROR

Evans assigns that the district court erred in denying his petition for writ of habeas corpus. He asserts that the commitment order entered on June 26, 2014, was void and unlawful for the following reasons: (1) the unconditional discharge of Evans was within the discretion of the Department and

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[2] *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013).

[3] *Id.*

[4] *Id.*

consistent with the Department's policy that had been in existence since at least September 1996, (2) the affirmative actions of the Department established a waiver such that Evans could not be returned to custody, and (3) the procedures used to obtain the arrest and commitment warrant were so lacking in fundamental due process rights so as to be void and without jurisdiction.

STANDARD OF REVIEW

[1] On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.[5]

ANALYSIS

[2,3] Evans claims the commitment order directing his reincarceration was void and unlawful. The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a person's detention, imprisonment, or custodial deprivation of liberty.[6] Although Evans has been paroled, we have held that a parolee is "'in custody under sentence'" and may seek relief through our habeas corpus statute.[7] It is Evans' position that his sentence has been fully served and that he is being held illegally.

[4,5] To secure habeas corpus relief, the prisoner must show that he or she is being illegally detained and is entitled to the benefits of the writ.[8] In a petition for writ of habeas corpus, if the plaintiff sets forth facts which, if true, would entitle him or her to discharge, then the writ is a matter of right, the plaintiff should be produced, and a hearing should be held thereon to determine questions of fact presented.[9] If

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[5] *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

[6] *Caton v. State*, 291 Neb. 939, 869 N.W.2d 911 (2015).

[7] *Id.* at 942, 869 N.W.2d at 914.

[8] *Anderson v. Houston, supra* note 5.

[9] *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999).

the plaintiff fails to show by the facts alleged in the petition that he or she is entitled to relief, then the relief is denied.[10]

Jurisdiction

Evans argues that once an inmate has completed the mandatory minimum sentence, the determination of discretionary release on parole and/or unconditional discharge is within the exclusive jurisdiction of the Department. He therefore asserts the district court lacked jurisdiction to issue an arrest and commitment warrant once the Department issued him a certificate of discharge. In support of this argument, Evans points to Neb. Const. art. IV, § 19, which directs that the management and control of all state penal institutions shall be vested as determined by the Legislature. He argues that pursuant to Neb. Rev. Stat. § 83-1,118 (Reissue 2014), the Legislature vested the authority to determine an inmate's release date with the Department.

Evans' argument is misplaced. Section 83-1,118(4) provides that "[t]he [D]epartment shall discharge a committed offender from the custody of the [D]epartment when the time served in the facility equals the maximum term less good time." Evans' maximum term less good time was 12½ years, but he was discharged after serving only 10 years. The error was in the computation of the amount of credit for good time. Because Evans was not entitled to good time credit on the 10-year mandatory minimum portion of his sentence, the Department had no authority to credit him with good time for that portion of his sentence. Therefore, the Department acted beyond its authority in discharging Evans prior to the completion of his lawful sentence. It had the authority to parole Evans after he served the mandatory minimum term of 10 years, but it did not have the authority to absolutely discharge him until he had served 12½ years.

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[10] *Id.*

[6,7] A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense and the person of the defendant, and the sentence was within the power of the court to impose, unless the sentence has been fully served and the prisoner is being illegally held.[11] Here, it is not disputed that the district court had jurisdiction of the offense and of Evans' person at the time of his conviction and sentencing in 2004, and the sentence was within the power of the district court to impose. A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.[12] The court had jurisdiction to sentence Evans, and it had the power to enforce its sentencing order.

Waiver Doctrine

Evans argues that the Department's longstanding policy of allowing credit for good time against mandatory minimum sentences constituted a waiver of the requirement that those inmates be returned to custody to serve the remainder of the sentences imposed. Evans relies upon *Shields v. Beto*,[13] in which a Texas inmate was extradited to Louisiana and then released on parole in Louisiana 10 years later, before having completed his sentence in Texas. Eighteen years after his release in Louisiana, the State of Texas sought to compel the inmate to serve the remainder of his Texas sentence. The Fifth Circuit held that Texas had demonstrated such a lack of interest in the inmate as to waive jurisdiction over him. A similar waiver theory was accepted by the Eighth Circuit in a case involving the inaction of a U.S. marshal for 7 years before seeking to arrest the petitioner.[14] These cases are

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[11] *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

[12] *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994).

[13] *Shields v. Beto*, 370 F.2d 1003 (5th Cir. 1967).

[14] See *Shelton v. Ciccone*, 578 F.2d 1241 (8th Cir. 1978).

readily distinguishable, because they were based upon inaction by state or government officials for such a length of time and evidenced such a lack of interest in the defendant as to constitute a waiver of jurisdiction over the defendant.

We reject Evans' claim of waiver. We previously analyzed waiver and other doctrines designed to grant relief to prematurely released prisoners in *Anderson v. Houston*.[15] David J. Anderson was an inmate at the Nebraska State Penitentiary. He was serving a prison sentence of 3 to 5 years. The Department mistakenly released Anderson after 3 months of his sentence. When the Department discovered its mistake, it moved for capias and notice of hearing. After the hearing, the court ordered law enforcement to arrest Anderson. For reasons unknown, the clerk did not issue the warrant for about 14 months. Subsequently, Anderson was arrested during a routine traffic stop and was returned to the penitentiary. He then filed a writ of habeas corpus in the district court. The court held an evidentiary hearing to address the merits of Anderson's habeas claim and granted the writ. The Department appealed.

On appeal, Anderson argued that he was entitled to day-for-day credit toward his sentence for the time he spent at liberty due to his erroneous early release. He claimed that the Department was obligated to release him no later than the date his sentence was originally set to expire and that detaining him beyond that date was illegal. The Department claimed that he was not entitled to such credit and that the time spent at liberty should be added to the sentence.

In *Anderson*, we discussed three distinct theories employed by courts for granting relief to a prematurely released prisoner.[16] The first theory was based on the notions of due process and was referred to as the "'waiver of jurisdiction theory.'"[17]

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[15] *Anderson v. Houston, supra* note 5.

[16] *Id.*

[17] *Id.* at 925, 744 N.W.2d at 418 (quoting *Schwichtenberg v. ADOC*, 190 Ariz. 574, 951 P.2d 449 (1997)).

This waiver was applied when the premature release resulted from gross negligence by prison officials and lasted for a long period of time.[18] The government was said to have waived its right to reincarcerate the prisoner, and the remedy was a complete exoneration of the prisoner's sentence.[19]

The second theory was known as the "'estoppel theory.'"[20] Under this theory, the government was estopped from reincarcerating the prisoner if (1) the government knew the facts surrounding the release, (2) the government intended that the prisoner would rely on the government's actions or acted in a manner that the prisoner had a right to rely on them, (3) the prisoner was ignorant of the facts, and (4) the prisoner relied on the government's actions to his or her detriment.[21]

The third theory was to grant a prisoner day-for-day credit for the time spent at liberty.[22] In our analysis, we noted that numerous federal appellate courts have held that the Due Process Clause did not require credit for the time spent at liberty.[23] We stated that credit for time spent at liberty was a common-law doctrine known as the "'equitable doctrine.'"[24]

In *Anderson*, we declined to adopt the waiver of jurisdiction or the estoppel theory. We concluded that a prematurely released prisoner could be granted day-for-day credit for the

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[18] See *In re Roach*, 150 Wash. 2d 29, 74 P.3d 134 (2003). See, also, *Schwichtenberg v. ADOC, supra* note 17.

[19] See *id.*

[20] *Anderson v. Houston, supra* note 5, 274 Neb. at 925, 744 N.W.2d at 419 (quoting *U.S. v. Martinez*, 837 F.2d 861 (9th Cir. 1988)).

[21] *Id.* (citing *Green v. Christiansen*, 732 F.2d 1397 (9th Cir. 1984)).

[22] See *In re Roach, supra* note 18.

[23] *Anderson v. Houston, supra* note 5. See, e.g., *Vega v. U.S.*, 493 F.3d 310 (3d Cir. 2007); *Thompson v. Cockrell*, 263 F.3d 423 (5th Cir. 2001) (superseded by statute as stated in *Rhodes v. Thaler*, 713 F.3d 264 (5th Cir. 2013)); *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999); *Dunne v. Keohane*, 14 F.3d 335 (7th Cir. 1994).

[24] *Anderson v. Houston, supra* note 5, 274 Neb. at 926, 744 N.W.2d at 419 (quoting *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007)).

time spent at liberty where equity demanded such application. Such credit is unavailable to prisoners who are aware of the error in their early release and do not inform the Department of the error. Such credit would not be given if the individual committed additional crimes while at liberty.

In the case at bar, the Department did not have the authority to release Evans prior to the completion of his sentence imposed by the court. The appropriate remedy would be to credit Evans' time spent at liberty to the remaining time on his sentence provided Evans commits no crimes while at liberty. The State does not contest the determination that Evans should receive credit for his time spent at liberty.

Due Process

Evans claims he was denied due process in the manner in which the State sought the arrest and commitment warrant for his return to custody. He asserts that he was not afforded notice, a hearing, the right to confrontation, or the right to counsel before his rearrest and reincarceration. He argues due process should have allowed him to contest the conclusory affidavit of then Director Kenney, have an evidentiary hearing, and raise the jurisdictional claims now being raised on appeal. He claims that the failure to provide any due process renders the arrest and commitment warrant void and beyond the authority and jurisdiction of the district court.

[8] Evans' claims of denial of due process involving his rearrest and recommitment do not challenge the validity of the original judgment of conviction or sentence. A writ of habeas corpus is a proper remedy only upon a showing that the judgment, sentence, and commitment are void.[25]

[9] To release a person from a sentence of imprisonment by habeas corpus, it must appear that the sentence was absolutely void.[26] Evans' due process assertion is based upon his

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[25] *Berumen v. Casady, supra* note 11.

[26] *Piercy v. Parratt*, 202 Neb. 102, 273 N.W.2d 689 (1979).

claim that he had completed his sentence and was being held illegally. Evans claims that he had a constitutionally protected "liberty" interest in the June 26, 2014, proceedings wherein the court ordered his rearrest and reincarceration.[27]

[10,11] Applying the Due Process Clause to the facts of any given case is an "'uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.'"[28] Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.[29]

The governmental function was the rearrest and reincarceration of Evans who had been erroneously discharged 2½ years before his mandatory release date. The private interest affected was Evan's liberty interest in being free from confinement. We conclude that the rearrest and reincarceration of Evans did not offend due process because Evans had not completed his sentence and did not yet have a right to be free from confinement.

Evans was not given a hearing before he was rearrested. But before an arrest and commitment warrant could be issued, the Department was required to make a prima facie case before an impartial judge that Evans had not fully served his sentence and should not have been released from the Department's custody. The process did not end with Evans' rearrest. He was subsequently given an evidentiary hearing on his petition for a writ of habeas corpus. At that hearing, Evans was

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[27] Brief for appellant at 43.

[28] *State v. Shambley*, 281 Neb. 317, 324, 795 N.W.2d 884, 891 (2011) (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)).

[29] *State v. Shambley, supra* note 28.

given the opportunity to contest the actions taken by the State and to have a determination of whether he had completed the requirements of his sentence.

We agree with the district court's conclusion that the predetention procedures coupled with the postdetention hearing on the petition satisfied due process.

CONCLUSION

Evans has not shown that he completed the terms of his sentence and that he is being illegally detained. We conclude that his petition for writ of habeas corpus should be dismissed with prejudice as a matter of law.

We affirm the judgment of the district court that dismissed with prejudice Evans' amended petition for writ of habeas corpus.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Adam T. Woldt, appellant.

876 N.W.2d 891

Filed April 8, 2016. No. S-14-573.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Trial: Investigative Stops: Warrantless Searches: Appeal and Error.** The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
3. **Constitutional Law: Search and Seizure: Arrests: Police Officers and Sheriffs.** Whether a seizure that is less intrusive than a traditional arrest is otherwise reasonable depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. Consideration of the constitutionality of such seizure involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.
4. **Constitutional Law: Search and Seizure.** A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Irwin and Riedmann, Judges, on

appeal thereto from the District Court for Cuming County, James G. Kube, Judge, on appeal thereto from the County Court for Cuming County, Michael L. Long, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Thomas B. Donner for appellant.

Douglas J. Peterson and Jon Bruning, Attorneys General, and Austin N. Relph for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Heavican, C.J.

I. INTRODUCTION

Adam T. Woldt was convicted in the county court for Cuming County of driving under the influence and was sentenced to 6 months' probation. His conviction and sentence were affirmed by the district court. On appeal, the Nebraska Court of Appeals found that police did not act reasonably in stopping Woldt. Accordingly, the Court of Appeals reversed Woldt's conviction and remanded the cause with directions.[1] Upon further review, we reverse the decision of the Court of Appeals.

II. FACTUAL BACKGROUND

The facts leading up to Woldt's stop are as follows: Officer Randy Davie of the Wisner, Nebraska, police department received a report from dispatch of multiple traffic cones having been knocked down on Highway 275, the main street in Wisner. Dispatch indicated that the party responsible was driving a white Chevrolet pickup.

Davie stopped to pick up the cones. While doing so, he heard squealing tires nearby. Davie finished picking up the cones, returned to his cruiser, and began looking for the

[1] See *State v. Woldt*, 23 Neb. App. 42, 867 N.W.2d 637 (2015).

pickup. He found the pickup nearby and, recognizing the driver as Jacob Biggerstaff, made eye contact and motioned with his arm for Biggerstaff to pull over. Biggerstaff pulled up about four or five car lengths farther and parked along the opposite curb from Davie's location. Following Biggerstaff by one car length or less was another pickup, driven by Woldt. When Biggerstaff pulled his pickup over, Woldt also pulled his pickup over.

Davie approached Biggerstaff's vehicle, smelled the odor of alcohol, and saw signs that Biggerstaff might have been impaired. Davie brought Biggerstaff back to his patrol car.

At that time, the pickup driven by Woldt reversed into the intersection as if to drive away. Davie testified that he recognized Woldt "[b]y sight" as an employee of the city of Wisner. Davie motioned for Woldt to stop and to come over to Davie. Davie testified that he did not recall whether he verbally requested that Woldt stop, but both Woldt and Biggerstaff testified that he did so. Davie testified that he wanted to talk to Woldt because he thought that Woldt might have information about Biggerstaff's activities.

Davie approached Woldt's vehicle and smelled the odor of alcohol. Davie asked Woldt if he had been drinking, and Woldt put his head down. Davie asked Woldt if he was drunk, and Woldt turned off his vehicle and handed Davie his keys. Woldt was arrested for driving under the influence. Woldt stipulated that chemical test results of his breath registered an alcohol content of .148.

III. PROCEDURAL BACKGROUND

On September 26, 2013, Woldt was charged in the county court for Cuming County with misdemeanor driving under the influence. He pled not guilty. Woldt then filed a motion to suppress his stop, detention, arrest, and any statements he had made. The motion to suppress was denied on December 3. Woldt was found guilty following a trial on stipulated facts and was sentenced to 6 months' probation.

Woldt appealed to the district court, sitting as an intermediate court of appeal. The district court affirmed.

Woldt then appealed to the Court of Appeals, which reversed his conviction and remanded the cause with directions. The Court of Appeals concluded that law enforcement's stop was not reasonable under *Brown v. Texas*[2] and *Illinois v. Lidster*.[3] Specifically, the Court of Appeals focused on the balancing test set forth in *Brown*, which requires a "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[4]

The Court of Appeals agreed that it was "reasonable for Davie to believe that Woldt was a potential witness to any crimes by Biggerstaff and might have information for Davie that would advance his investigation of those crimes," but also stated that because Davie recognized Woldt as a city employee, he could have contacted Woldt at a later date if necessary.[5] The Court of Appeals further noted that "the degree of intrusion on Woldt's liberty interest was not great."[6] But the Court of Appeals found that the "matters under investigation under the circumstances of this case were not of grave public concern"[7] and concluded that the intrusion still was not "outweighed by the degree of public concern and the extent to which questioning Woldt at that time advanced any investigation of Biggerstaff."[8]

We granted the State's petition for further review.

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[2] *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

[3] *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004).

[4] *Brown v. Texas, supra* note 2, 443 U.S. at 51.

[5] *State v. Woldt, supra* note 1, 23 Neb. App. at 60, 867 N.W.2d at 650.

[6] *Id.* at 61, 867 N.W.2d at 650.

[7] *Id.* at 60, 867 N.W.2d at 649.

[8] *Id*. at 61, 867 N.W.2d at 650.

IV. ASSIGNMENTS OF ERROR

On further review, the State assigns that the Court of Appeals erred in (1) concluding that the stop of Woldt was not reasonable, and thus unconstitutional, under *Brown* and (2) refusing to address the State's alternative argument that the stop of Woldt was reasonable based upon Davie's observation of conduct by Woldt that amounted to traffic violations.

V. STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[9] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination.[10] The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.[11]

VI. ANALYSIS

[3] The issue presented by this case is whether Davie's stop of Woldt was reasonable. The U.S. Supreme Court addressed the "reasonableness of seizures that are less intrusive than a traditional arrest" in *Brown v. Texas*.[12] The Court held that such reasonableness

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[9] *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014).

[10] *Id.*

[11] *State v. Dalland*, 287 Neb. 231, 842 N.W.2d 92 (2014).

[12] *Brown v. Texas, supra* note 2, 443 U.S. at 50.

> depends "'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" [Citations omitted.] Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.[13]

The Court applied *Brown* in *Illinois v. Lidster*.[14] In *Lidster*, law enforcement conducted a checkpoint in order to gather information about a hit-and-run accident that had occurred a week earlier at a location near the checkpoint. During the course of the operation of the checkpoint, the defendant was stopped and determined to be driving under the influence.

The Court declined to apply *Indianapolis v. Edmond*[15] to the checkpoint at issue in *Lidster*. In *Edmond*, the Court found that the intent of the checkpoint was to detect criminal activity and that such violated the Fourth Amendment. The Court distinguished *Lidster* from *Edmond*, because the purpose of the checkpoint was for information gathering purposes, and noted that such did "not mean the stop is automatically, or even presumptively, constitutional. It simply means that we must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances."[16] The Court then applied the *Brown* balancing test and held that the checkpoint advanced a grave public concern, was narrowly tailored to fit law enforcement's investigatory needs, and interfered only minimally with a driver's liberty.

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[13] *Id.*, 443 U.S. at 50-51.

[14] *Illinois v. Lidster, supra* note 3.

[15] *Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).

[16] *Lidster, supra* note 3, 540 U.S. at 426.

1. Was There Seizure for Fourth Amendment Purposes?

[4] The State concedes that Woldt was seized for purposes of the Fourth Amendment. A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.[17] We agree that on these facts, Davie seized Woldt for purposes of the Fourth Amendment when Davie motioned to Woldt and possibly verbally requested Woldt to not leave the scene.

2. Does *Lidster* Apply to Non-Checkpoint Cases?

Having concluded that the Fourth Amendment is implicated here, we turn to Woldt's contention that *Lidster* and *Brown* are inapplicable because this case is not a checkpoint case.

We have found multiple cases where a court discussed or applied *Lidster* to a non-checkpoint stop.[18] And in any case, by its terms, *Brown* envisions that its balancing test should be applied when assessing "the reasonableness of seizures that are less intrusive than a traditional arrest."[19] The situation presented by these facts is such a seizure, and the application of the *Brown* balancing test is appropriate here.

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[17] *State v. Gilliam*, 292 Neb. 770, 874 N.W.2d 48 (2016).

[18] See, e.g., *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013); *Manzanares v. Higdon*, 575 F.3d 1135 (10th Cir. 2009); *State v. Whitney*, 54 A.3d 1284 (Me. 2012); *State v. LaPlante*, 26 A.3d 337 (Me. 2011); *Gipson v. State*, 268 S.W.3d 185 (Tex. App. 2008); *State v. Mitchell*, 145 Wash. App. 1, 186 P.3d 1071 (2008); *State v. Watkins*, 207 Ariz. 562, 88 P.3d 1174 (Ariz. App. 2004); *State v. Wilson*, No. 22001, 2007 WL 4305715 (Ohio App. Dec. 7, 2007) (unpublished decision). See, also, *State v. Pierce*, 173 Vt. 151, 787 A.2d 1284 (2001) (applying factors used in *Brown* in pre-*Lidster* case); *In re Muhammed F.*, 94 N.Y.2d 136, 722 N.E.2d 45, 700 N.Y.S.2d 77 (1999) (applying *Brown* factors in pre-*Lidster* case).

[19] *Brown v. Texas, supra* note 2, 443 U.S. at 50.

3. Was Stop Reasonable Under *Brown*?

Under *Brown*, a court should consider the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty, in order to determine whether a stop was reasonable.

In this case, the district court concluded that the stop was reasonable. The Court of Appeals disagreed. The Court of Appeals agreed that "the degree of intrusion on Woldt's liberty interest was not great," but further concluded that the "matters under investigation under the circumstances of this case were not of grave public concern" and that "the evidence does not show that stopping and questioning Woldt at that time would have advanced the investigation to a greater degree than contacting him the following day at his workplace would have."[20] As such, the Court of Appeals found the stop unreasonable.

(a) Gravity of Public Concern

We turn first to the public concern at issue. The Court of Appeals concludes that the public concern here was the knocking down of the traffic cones as creating a potential hazard. The State disagrees and concludes that the public concern was not just the hazard the cones presented, but the hazard the driver who knocked down the cones presented. The State argues that the public concern presented here was Biggerstaff's driving under the influence.

In support of his argument on appeal that the public concern was not grave, Woldt directs us to *State v. LaPlante*[21] and *State v. Whitney*.[22] In *LaPlante*, the Maine Supreme Judicial

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[20] *State v. Woldt, supra* note 1, 23 Neb. App. at 60, 61, 867 N.W.2d at 649, 650.

[21] *State v. LaPlante, supra* note 18.

[22] *State v. Whitney, supra* note 18.

Court concluded that a civil speeding infraction was not a sufficient grave public concern. And in *Whitney*, the court noted that leaving the scene of an accident, as a misdemeanor, was more serious than speeding, but was still not a sufficiently grave public concern. These cases are distinguishable.

Contrary to the conclusion of the Court of Appeals, the investigation of the downed cones was not the public concern presented by these facts. While Davie might have originally stopped Biggerstaff to investigate the cones, his investigation went from concern for that minor violation to a much more serious concern when Davie smelled alcohol on Biggerstaff and suspected him of driving under the influence. Driving under the influence can rise to the level of a Class II felony[23] and presents a threat to everyone sharing the road with a drunk driver. As such, we conclude that the circumstances here presented a grave public concern.

(b) Degree to Which Seizure Advances Public Interest

As to the second factor of the *Brown* balancing test, the Court of Appeals concluded that it was "reasonable for Davie to believe that Woldt was a potential witness to any crimes by Biggerstaff and might have information for Davie that would advance his investigation of those crimes"[24] But the Court of Appeals nevertheless concluded that the seizure did not sufficiently advance the public interest, because Davie recognized Woldt as a city employee and could have gone to talk to him about the incident at a later date.

We agree that Davie could have sought out Woldt at a later time, but such does not make unreasonable the officer's decision to instead talk to Woldt at the scene. As the Court of Appeals noted, questioning Woldt might have advanced the investigation against Biggerstaff. Because Woldt was following

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[23] See Neb. Rev. Stat. § 60-6,197.03(10) (Supp. 2015).

[24] *State v. Woldt, supra* note 1, 23 Neb. App. at 60, 867 N.W.2d at 650.

closely behind Biggerstaff's pickup and waited throughout the stop of Biggerstaff, it was reasonable for Davie to conclude that Woldt might have information to share.

Moreover, at that point in time, Woldt's memory was fresh, and any statement he might give at the scene would arguably be more reliable. Speaking to Woldt immediately would also limit any ability of Woldt and Biggerstaff to collude with each other regarding any statements they might give Davie. Other considerations, including making sure Davie was correct in his identification of Woldt, obtaining Woldt's contact information, and possibly setting up a later time to make a statement, suggest that Davie's decision to stop Woldt briefly at the scene was not unreasonable.

These facts are similar to the facts presented in *State v. Pierce*.[25] There, the Vermont Supreme Court applied the factors used in *Brown* to the stop of a driver whom the officer believed was a witness to another driver's erratic driving. The court noted that drunk driving was a "'serious threat to public safety'" and found that the witness had the "perfect vantage point" to "observe the erratic operation" of the other vehicle.[26] Finally, the court noted that a brief stop to ensure that the witness could be properly identified and could provide a "fresh witness account" was reasonable.[27]

Meanwhile, *LaPlante*, which Woldt relies on, is factually distinguishable. There, stopping another motorist would not have necessarily advanced the speeding investigation. But here, Davie had specific information that the cones had been knocked down by someone driving a white pickup. He then heard squealing tires and, following the sound, found a white pickup driven by Biggerstaff. When Davie motioned Biggerstaff to pull his pickup over, Woldt, who was

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[25] *State v. Pierce, supra* note 18.

[26] *Id.* at 156, 787 A.2d at 1289 (citing prior case law regarding risks of driving under influence).

[27] *Id.*

following the pickup closely, also pulled his pickup over. Woldt then waited as Davie approached Biggerstaff's pickup and led Biggerstaff back to Davie's patrol car. Thus, Woldt's involvement is far less attenuated than the random driver in *LaPlante* who might have had information about a speeding motorist.

(c) Severity of Interference With Individual Liberty

As to the last factor, the Court of Appeals acknowledged that in this case, the interference with Woldt's liberty interest with respect to the informational stop was "not great."[28] The record supports this conclusion—Woldt was parked behind Biggerstaff as the stop of Biggerstaff occurred. This was not a question of Davie sounding his patrol car's siren and activating its lights to pull over Woldt while Woldt was operating his vehicle. Rather, this was Davie waving, and possibly verbally requesting, that Woldt stay where he was so that Davie could ask him questions relating to Biggerstaff's activities.

Woldt cites to *State v. Wilson*,[29] an unpublished opinion of the Ohio Court of Appeals, in support of his position that the interference with his liberty interest was great. But *Wilson* is distinguishable. The officers in *Wilson* approached the defendant's vehicle with guns drawn, purportedly to obtain information from the defendant about another individual's possession of a firearm while being a felon. Nothing approaching this situation occurred in this case.

(d) Balancing *Brown* Factors

In balancing the *Brown* factors, the Court of Appeals found that the stop was not reasonable. But when considering, de novo, the *Brown* balancing test in light of the above, we disagree. The public concern was not just the traffic cone

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[28] *State v. Woldt, supra* note 1, 23 Neb. App. at 61, 867 N.W.2d at 650.

[29] *State v. Wilson, supra* note 18.

hazard; rather, the concern was driving under the influence, for which Biggerstaff was under investigation. This weighs heavily in favor of the reasonableness of the stop.

And stopping Woldt to see if he had any information about Biggerstaff's possible crimes would advance Davie's investigation. This is particularly so on these facts, where Woldt also stopped when Davie pulled Biggerstaff over. It was reasonable for Davie to conclude that because Woldt stopped, he had information to provide to Davie. Again, this weighs in favor of reasonableness.

Finally, the interference was slight, because Woldt was already stopped, weighing in favor of reasonableness.

We note that in *State v. Ryland*,[30] this court held that a stop to obtain a statement from the defendant about an accident the defendant had witnessed 1 week earlier was not reasonable because the officer lacked reasonable suspicion or probable cause to stop the defendant. *Ryland* is distinguishable, both factually and because it was decided prior to the authorization in *Lidster* of information gathering stops. To the extent that *Ryland* holds that an information gathering stop requires reasonable suspicion or probable cause, it is disapproved.

When all the factors are weighed, we conclude that the stop was reasonable under *Brown v. Texas*.[31] We therefore hold that the Court of Appeals erred in its balancing of the *Brown* factors. Because we conclude that the stop was reasonable under *Brown*, we need not address the State's alternative grounds that the stop was otherwise reasonable.

VII. CONCLUSION

The judgment of the Court of Appeals is reversed, and the cause is remanded to that court with directions to affirm the judgment of the district court.

Reversed and remanded with directions.

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[30] *State v. Ryland*, 241 Neb. 74, 486 N.W.2d 210 (1992).

[31] *Brown v. Texas, supra* note 2.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Kevin P. Pearce, appellant, v. Mutual of Omaha Insurance Company and Continuum Worldwide Corporation, appellees.

876 N.W.2d 899

Filed April 8, 2016. No. S-14-947.

1. **Jurisdiction: Appeal and Error.** Before reaching the issues presented on appeal, an appellate court must determine whether it has jurisdiction, even where no party has raised the issue.
2. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court lacks jurisdiction to entertain appeals from nonfinal orders.
3. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
5. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
6. ____: ____. Numerous factors determine when an order affects a substantial right for purposes of an interlocutory appeal. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue. It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.
7. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not merely a technical right.
8. **Final Orders: Appeal and Error.** An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.

9. **Final Orders: Arbitration and Award.** To affect a substantial right, an order denying arbitration must affect an essential legal right that was available prior to the order, such as depriving the moving party of the contractual benefits of an arbitration agreement.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Appeal dismissed.

Rodney K. Vincent, of Vincent Law Offices, for appellant.

James M. Bausch, Richard P. Jeffries, and Adam W. Barney, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

Heavican, C.J., Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Stacy, J.

I. NATURE OF CASE

Kevin P. Pearce filed this replevin action seeking the return of computers and files he alleges were wrongfully retained by his former principal after Pearce's agency relationship was terminated. The issues on appeal do not involve the replevin action directly, but instead involve the district court's denial of Pearce's motion to compel arbitration. Because we conclude there is no final, appealable order for us to review, we dismiss the appeal.

II. BACKGROUND

Pearce worked as an agent of Mutual of Omaha Insurance Company (Mutual) and was a registered representative of Mutual of Omaha Investor Services, Inc. (MOIS). Pearce used his own personal computers to conduct work for Mutual and MOIS and stored both personal and client information on the computers.

In January 2014, Pearce's agency relationship was terminated by both Mutual and MOIS for reasons which do not appear in our record. Mutual retained Pearce's personal computers and files, allegedly to protect confidential client

information stored therein. Pearce refused to give Mutual and MOIS the passwords to his computers, and Mutual refused to return the computers to Pearce until the confidential information was removed. Pending resolution of the dispute, Mutual turned Pearce's computers and files over to a security firm, Continuum Worldwide Corporation (Continuum), for safekeeping.

1. Arbitration Between Pearce and MOIS

On March 27, 2014, MOIS initiated an arbitration proceeding against Pearce before a dispute resolution tribunal of the Financial Industry Regulatory Authority (FINRA). FINRA rules require any broker-dealer such as MOIS to arbitrate disputes with any "associated person" such as Pearce. The arbitration initiated by MOIS involved the dispute over the confidential information stored on Pearce's computers and sought to compel Pearce to provide passwords to the computers so that MOIS could recover confidential information and return the computers to Pearce. Pearce filed a counterclaim against MOIS in the arbitration, asking that MOIS be compelled to return Pearce's computers. The record indicates Pearce and MOIS have been actively participating in the arbitration proceeding, and during oral argument, this court was advised an arbitration hearing had been set for February 2016.

2. Replevin Action Between Pearce, Mutual, and Continuum

In April 2014, after arbitration proceedings were underway, Pearce filed this replevin action against Mutual and Continuum in district court. MOIS is not a party to the replevin action. The replevin action seeks return of the same computers and personal property at issue in the pending arbitration with MOIS. Before filing an answer, Mutual and Continuum filed a joint motion to stay and compel arbitration, asking the district court to stay the replevin action and order Pearce to participate in the already-filed arbitration with

MOIS. Pearce resisted the motion, explaining his opposition in a written response filed with the court:

> It is unique in that Mutual and Continuum are not claimants in the arbitration action brought against Plaintiff Pearce by MOIS. In fact, pursuant to FINRA Arbitration Rules, Mutual is exempt from FINRA arbitration . . . .
>
> . . . .
>
> . . . There is no contract, written or otherwise, between the Plaintiff Pearce and the Defendant Mutual that requires disputes between Pearce and Mutual be arbitrated. . . .
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> . . . There is no contract between Plaintiff Pearce and Defendant Continuum, therefore no contract between the parties to arbitrate exists.

On August 19, 2014, the district court granted the motion to stay the replevin action, finding it involved the same operative facts and issues as those in the pending FINRA arbitration and reasoning that "[o]nce right of ownership is determined in the Pending Arbitration, this Stay would be lifted and Pearce could proceed with this replevin lawsuit, if the panel has not already ordered return of the personal property." The district court did not explicitly rule on the separate request that Pearce be compelled to arbitrate with MOIS, essentially finding the request moot and reasoning that arbitration was a "fait accompli" because Pearce already was participating in arbitration with MOIS.

On September 10, 2014, Pearce filed a motion to reconsider the August 19 order staying the replevin action. The district court denied the motion to reconsider, and Pearce did not appeal from that order.

Also on September 10, 2014, Pearce filed his own motion to compel arbitration in the replevin action. In his motion, Pearce sought an order requiring Mutual and Continuum to participate in the pending arbitration already underway between Pearce and MOIS. Pearce did not allege the existence of an arbitration agreement requiring either Mutual or

Continuum to arbitrate the dispute with Pearce, nor did Pearce allege the Uniform Arbitration Act (UAA)[1] was applicable. Instead, Pearce based his motion to compel arbitration on the claim that "the Court's reasoning and decision [in its order staying the replevin action] goes both ways." And Pearce expressed concern that Mutual and Continuum "should not be allowed to hide behind the stay granted in this action allowing their strawman, MOIS [to arbitrate] the matter, and, if MOIS is unsuccessful argue they were not parties to the Arbitration action."

In an order entered on September 29, 2014, the district court denied Pearce's motion to compel arbitration, explaining:

> The Court's power to compel arbitration is defined by Neb. Rev. Stat. § 25-2603(a), which requires the moving party to make a "showing of an agreement" to arbitrate. Here, [Pearce] has unequivocally denied the existence of such an agreement. Accordingly, he cannot make the showing required by the statute, and his motion to compel arbitration against [Mutual and Continuum] must be and is hereby denied.

Pearce timely appealed from the order denying his motion to compel arbitration. We moved the case to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

III. ASSIGNMENTS OF ERROR

Pearce assigns, restated, that the district court erred in (1) denying his motion to compel Mutual and Continuum to arbitrate the issues in this matter and (2) failing to follow the law of the case established when the court granted the motion to stay filed by Mutual and Continuum.

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[1] Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2008 & Cum. Supp. 2014).

[2] Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

IV. JURISDICTION

[1,2] Before reaching the issues presented on appeal, an appellate court must determine whether it has jurisdiction.[3] That is so even where, as here, no party has raised the issue.[4] Because an appellate court lacks jurisdiction to entertain appeals from nonfinal orders,[5] we first consider whether the order denying Pearce's motion to compel arbitration was a final, appealable order.[6]

1. Standard of Review

[3,4] A jurisdictional issue that does not involve a factual dispute presents a question of law.[7] When reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[8]

2. Analysis of Jurisdiction

To determine whether the district court order denying Pearce's motion to compel arbitration is appealable, we first consider whether it is an appealable order under the UAA and next whether it is a final order under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2008).

(a) Final, Appealable Orders Under UAA

The UAA authorizes a party to a judicial proceeding to apply for an order compelling arbitration of the dispute,[9] and

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[3] See *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[4] *Wilczewski v. Charter West Nat. Bank*, 290 Neb. 721, 861 N.W.2d 700 (2015).

[5] *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

[6] See *Wilczewski, supra* note 4.

[7] *Id.*

[8] *Id.*

[9] § 25-2603.

further provides that an appeal may be taken from an order denying such an application.[10] Specifically, "[a]n appeal may be taken from . . . [a]n order denying an application to compel arbitration made under section 25-2603."[11] An application under § 25-2603 is one "showing an agreement described in section 25-2602.01."[12] Section 25-2602.01 describes a variety of arbitration agreements. Pearce's motion did not reference the UAA, nor did Pearce allege the existence of an arbitration agreement, as § 25-2603 requires. And although Pearce's brief on appeal raises the possibility of a contractual obligation to arbitrate, we decline to consider that possibility, because Pearce did not raise it before the district court. Quite to the contrary, Pearce instead affirmatively represented to the district court that no arbitration agreement, "written or otherwise," existed between Pearce and Mutual or Continuum. An appellate court will not consider an issue on appeal that the trial court has not decided.[13]

Because Pearce made no showing of an arbitration agreement as described in the UAA, his motion to compel arbitration was not made pursuant to § 25-2603. As a result, the order denying Pearce's motion to compel arbitration is not appealable under § 25-2620 of the UAA.

(b) Final Orders Under § 25-1902

[5] We next consider whether the order denying Pearce's motion to compel arbitration is a final order under § 25-1902. Under § 25-1902, an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding,

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[10] § 25-2620(a)(1).

[11] *Id.*

[12] § 25-2603(a).

[13] *Speece v. Allied Professionals Ins. Co.*, 289 Neb. 75, 853 N.W.2d 169 (2014).

or (3) is made on summary application in an action after judgment is rendered.[14]

We have held that motions to compel arbitration invoke a specific statutory remedy that is neither an action nor a step in an action, and as such, the statutory remedy is properly characterized as a "special proceeding."[15] Here, no statutory remedy was invoked by Pearce, but assuming without deciding that Pearce's motion to compel arbitration was made in a special proceeding, we nevertheless conclude that the order denying arbitration did not affect a substantial right as defined in our jurisprudence.

[6] Numerous factors determine when an order affects a substantial right for purposes of an interlocutory appeal. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue.[16] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[17]

[7,8] Regarding the importance of the right affected, we often state that a substantial right is an essential legal right, not merely a technical right.[18] It is a right of "'substance.'"[19] We have elaborated further that an order affects a substantial right if it "'affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.'"[20]

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[14] *Wilczewski, supra* note 4.

[15] *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[16] *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015).

[17] *Id.*

[18] *Id.*

[19] *Id.* at 913, 870 N.W.2d at 138.

[20] *Id.* at 914, 870 N.W.2d at 138.

In *Webb v. American Employers Group*,[21] we held that an order denying a motion to compel arbitration was a final, appealable order because it affected a substantial right and was made during a special proceeding. In reaching that conclusion, we reasoned that the order affected the moving party's substantial rights by preventing it from enjoying the contractual benefit of arbitrating the dispute between the parties as an alternative to litigation.[22]

In *Speece v. Allied Professionals Ins. Co.*,[23] we cited *Webb* for the general proposition that "denial of a motion to compel arbitration is a final, appealable order because it affects a substantial right and is made in a special proceeding." But in *Speece*, as in *Webb*, it was clear from the record that the parties had a contractual agreement to arbitrate the dispute, and it was clear that the order denying arbitration deprived the moving party of the benefits of that arbitration agreement.

[9] We take this opportunity to clarify that our holdings in *Webb* and *Speece* do not stand for the broad proposition that every order denying arbitration will necessarily affect a substantial right. Rather, *Webb* and *Speece* illustrate that to affect a substantial right, an order denying arbitration must affect an essential legal right that was available prior to the order, such as depriving the moving party of the contractual benefits of an arbitration agreement.

Our recent opinion in *Wilczewski v. Charter West Nat. Bank*[24] further illustrates this point. In *Wilczewski*, we held that an order denying a motion to compel arbitration without prejudice was not a final, appealable order, because the order we were asked to review made no final determination one way or the other as to whether the arbitration clause

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[21] *Webb, supra* note 3.

[22] *Id.*

[23] *Speece, supra* note 13, 289 Neb. at 80, 853 N.W.2d at 174.

[24] *Wilczewski, supra* note 4.

was enforceable under the Federal Arbitration Act.[25] As such, we concluded the order did not affect a substantial right of the appellant and was not a final, appealable order under § 25-1902.[26]

In the present case, it is key to our "substantial right" analysis that the district court denied Pearce's motion to compel arbitration only after concluding Pearce had failed to show the existence of any arbitration agreement or legal authority upon which to premise a right to arbitrate the dispute with Mutual and Continuum. Unlike the orders we considered in *Webb* and *Speece*, the order here cannot fairly be characterized as depriving Pearce of any contractual right to arbitrate that existed prior to the order from which he appeals, because Pearce relied on none. And like the order we considered in *Wilczewski*, the order here made no determination, one way or another, regarding the enforceability of an arbitration agreement, because the court was not presented with evidence from which it could make such a determination. In fact, when the district court asked Pearce for legal authority supporting his request to compel Mutual and Continuum to participate in the ongoing arbitration between Pearce and MOIS, Pearce admitted he had none. Provided with no arbitration agreement and cited to no legal authority, the district court denied Pearce's motion to compel arbitration. That is the order from which Pearce appeals.

On this record, we cannot find that the district court's order affected an essential legal right, or indeed any right of substance, nor can we find that the order affected the subject matter of the litigation by diminishing a claim or defense that was available to Pearce prior to the order from which he appeals.[27] On these facts, we conclude the order denying

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[25] 9 U.S.C. § 1 et seq. (2012).

[26] *Wilczewski, supra* note 4.

[27] See *Jackson, supra* note 16.

arbitration did not affect a substantial right and, as such, is not a final order under § 25-1902 from which Pearce can appeal at this time.

For the sake of completeness, we note Pearce points out on appeal that other jurisdictions have applied equitable principles of estoppel to compel nonsignatories to participate in an arbitration. But Pearce did not present this argument to the district court. Consequently, the order denying arbitration neither analyzed nor made any final determination one way or the other regarding the applicability of equitable principles of estoppel to Pearce's motion to compel arbitration. Because the issue was not raised in the district court, and because the court's order did not consider or finally resolve any such claim, Pearce's attempt to argue principles of estoppel on appeal does not change our conclusion that the district court's order denying arbitration did not affect a substantial right. Like the order we considered in *Wilczewski*, the order here did not purport to make a final determination of the legal issue on which appellate review is sought, and as such, there is no final order on that issue for appellate review.

V. CONCLUSION

The order denying Pearce's motion to compel arbitration is not an appealable order under the UAA and is not a final, appealable order under § 25-1902. In the absence of a final order, we lack jurisdiction and dismiss this interlocutory appeal.

Appeal dismissed.

Wright and McCormack, JJ., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Daunte L. Goynes, appellant.

876 N.W.2d 912

Filed April 8, 2016. No. S-15-352.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
3. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
4. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court gives statutory language its plain and ordinary meaning, and the court will not look beyond the statute to determine legislative intent when the words are plain, direct, and unambiguous.
5. **Statutes: Legislature: Intent.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute.
7. **Postconviction.** States are not obligated to provide a postconviction relief procedure.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

Daunte L. Goynes, pro se.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Miller-Lerman, J.

NATURE OF CASE

Daunte L. Goynes was convicted of murder in the second degree and use of a deadly weapon to commit a felony for the death of Aaron Lofton. Goynes was sentenced to imprisonment for a term of 60 years to life for the murder conviction and a term of 10 to 20 years for the weapon conviction, to be served consecutively. On direct appeal, we affirmed Goynes' convictions and sentences. See *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009).

On August 27, 2012, Goynes filed his first motion for postconviction relief, which the district court for Douglas County denied. On August 28, 2013, we dismissed his appeal to this court in case No. S-13-464.

On February 5, 2015, Goynes filed a second motion for postconviction relief, which the district court denied without holding an evidentiary hearing. The district court thereafter denied Goynes' motion to alter or amend. Goynes appeals. We determine that Goynes' second motion for postconviction relief was barred by the limitation period set forth in the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014), and therefore, we affirm the district court's order denying Goynes' second motion for postconviction relief.

STATEMENT OF FACTS

The events underlying Goynes' convictions and sentences involve the shooting death of Lofton. The shooting occurred in February 2007, on the day before Goynes turned 18 years old. In our opinion on direct appeal, we set forth the facts of the case in detail. See *State v. Goynes, supra*.

After a trial, the jury found Goynes guilty of murder in the second degree and use of a deadly weapon to commit a felony. Goynes was sentenced to imprisonment for a term of 60 years to life for the murder conviction and a term of 10 to 20 years for the weapon conviction, to be served consecutively.

Goynes had the same counsel at trial and on direct appeal. Goynes assigned two errors on direct appeal, generally arguing that the trial court erred when it excluded certain evidence and when it denied his motion for a new trial. In our opinion on direct appeal, we found no merit to Goynes' assignments of error and affirmed his convictions and sentences. See *State v. Goynes, supra*.

On August 27, 2012, Goynes filed his first motion for postconviction relief, claiming that his counsel at trial and on appeal was ineffective for various reasons. In his first motion for postconviction relief, Goynes did not allege that his sentence was unconstitutional pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), which had been decided within the year preceding the filing of his first motion for postconviction relief.

On January 23, 2013, the district court filed an order in which it denied Goynes' first postconviction motion without holding an evidentiary hearing. On August 28, 2013, his appeal to this court was dismissed in case No. S-13-464.

On February 5, 2015, Goynes filed his second motion for postconviction relief. This is the motion at issue in this appeal. In his second motion for postconviction relief, Goynes claimed that his constitutional right to be free from cruel or unusual punishment was violated because the sentencing court failed to hold an individualized hearing regarding possible

mitigating factors based on his juvenile status and because he received the functional equivalent of a life sentence without parole. Goynes further alleged that his constitutional rights to effective counsel and due process were violated because his attorney failed to request, and the trial court failed to give, a jury instruction regarding Goynes' culpability to commit second degree murder because of his juvenile status and mental and emotional development at the time of the crime. On appeal, Goynes has abandoned his claims with respect to the jury instructions.

On February 17, 2015, the district court filed an order in which it denied Goynes' second motion for postconviction relief without conducting an evidentiary hearing. The district court determined that Goynes' motion was barred by the limitation period found in the Nebraska Postconviction Act, § 29-3001(4), which provides:

> A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or
>
> (e) August 27, 2011.

The district court noted that Goynes was sentenced on July 2, 2008, and that his convictions were affirmed by this court on July 31, 2009. See *State v. Goynes*, 278 Neb. 230, 768 N.W.2d 458 (2009). The district court reasoned that § 29-3001(4)(e) applied and that Goynes had 1 year from August 27, 2011, to file his postconviction motion. The court determined that because Goynes filed his second motion for postconviction relief on February 5, 2015, his second motion was barred by the August 27, 2011, deadline contained in § 29-3001(4)(e). Alternatively, the district court determined that Goynes' second motion for postconviction relief was procedurally barred as a successive motion, because Goynes' claims were known or knowable at the time of his first postconviction proceeding.

On February 27, 2015, Goynes filed a motion to alter or amend in which he contended that his second motion for postconviction relief was not untimely or barred as a successive motion, because he was asserting a constitutional claim filed within 1 year of recognition of a new right. See § 29-3001(4)(d). Goynes asserted he was relying on new case law from *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), which was filed on June 25, 2012, and *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014), which was filed February 7, 2014. In *Miller*, the U.S. Supreme Court held that it is unconstitutional to sentence a juvenile who was younger than 18 years old at the time of the homicide to a mandatory sentence of life imprisonment without the possibility of parole. In *Mantich*, we held that the rule in *Miller* should be applied retroactively to collateral proceedings. In his motion to alter or amend, Goynes argued that his second postconviction motion was timely pursuant to § 29-3001(4)(d), because it was filed on February 5, 2015, which was within 1 year after *Mantich* was filed on February 7, 2014. Goynes further argued that his second postconviction motion should not be barred as a successive motion, because

Mantich was not filed until after his first postconviction proceeding had concluded.

On March 23, 2015, the district court filed an order in which it denied Goynes' motion to alter or amend. The court reasoned that Goynes' second motion for postconviction relief "never makes any reference to *Mantich*" and that in any event, *Miller* and *Mantich* "are not applicable to the case at hand, because [Goynes] did not receive a mandatory life sentence without the consideration of parole."

Goynes appeals.

ASSIGNMENT OF ERROR

Goynes assigns, restated, that the district court erred when it denied his motion for postconviction relief without holding an evidentiary hearing on his claim that his constitutional right to be free from cruel and unusual punishment was violated when he received "a sentence of the functional equivalent of life for an offense [Goynes] committed when [Goynes] was a juvenile."

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *State v. Irish*, 292 Neb. 513, 873 N.W.2d 161 (2016).

ANALYSIS

Goynes generally claims that the district court erred when it denied his second motion for postconviction relief without holding an evidentiary hearing. Specifically, Goynes asserts that his motion should have been granted or that at least the court should have conducted an evidentiary hearing on his motion, because his constitutional right to be free from cruel and unusual punishment was violated when he received a sentence that is the functional equivalent to life for a crime that he committed when he was under the age of 18. Although our

reasoning differs from that of the district court, for the reasons set forth below, we determine that the district court did not err when it found Goynes' motion time barred and denied Goynes' second motion for postconviction relief.

[2,3] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. DeJong*, 292 Neb. 305, 872 N.W.2d 275 (2015). If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*.

In this case, Goynes, who was 17 years old at the time of the crime, was convicted of second degree murder and use of a deadly weapon to commit a felony. He was sentenced to imprisonment for a term of 60 years to life for the murder conviction and a consecutive term of 10 to 20 years for the weapon conviction. Relying on *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), Goynes asserts that his cumulative sentence of imprisonment of 70 years to life violates his right to be free from cruel and unusual punishment. "In *Miller v. Alabama*, [*supra*], the Court held that a juvenile convicted of a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 725, 193 L. Ed. 2d 599 (2016). *Miller* further "held that mandatory life without parole for juvenile homicide offenders violates the Eighth Amendment's prohibition on '"cruel and unusual punishments."'" *Montgomery v. Louisiana*, 136 S. Ct. at 726, quoting *Miller v. Alabama, supra*.

On appeal, the State contends that *Miller* does not apply and that Goynes is not entitled to relief, because neither second degree murder nor use of a deadly weapon are mandatorily

punishable by a sentence of life imprisonment without parole. See Neb. Rev. Stat. §§ 28-304, 28-1205(2)(b), and 28-105 (Reissue 2008 & Cum. Supp. 2014). And Goynes will be eligible for parole. See Neb. Rev. Stat. § 83-1,110 (Reissue 2014). Goynes acknowledges that he was not sentenced to life in prison without the possibility of parole; however, he nevertheless urges us to adopt and apply the sentencing process announced in *Miller* to lengthy term-of-years sentences imposed on juveniles, such as his sentence. Because we determine that Goynes' second motion for postconviction relief asserts a constitutional claim initially recognized in *Miller*, it is barred by the limitation period set forth in § 29-3001(4)(d), and it is unnecessary for us to decide whether *Miller* applies, or if it does, the extent of the cases and sentences to which the *Miller* individualized sentencing principles apply.

The statutory limitation periods regarding postconviction motions are found at § 29-3001(4) and provide that a 1-year limitation period applies to the filing of a motion for postconviction relief and that such period begins to run on the later of one of five dates. Section § 29-3001(4) controls the outcome of this case and provides:

> A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> . . . .
>
> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review[.]

[4-6] In interpreting § 29-3001(4)(d), we set forth some familiar principles of statutory interpretation. We give statutory language its plain and ordinary meaning, and we will not look beyond the statute to determine legislative intent when the words are plain, direct, and unambiguous. *State v. Hansen*, 289 Neb. 478, 855 N.W.2d 777 (2014). In reading a statute, a

court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Mucia*, 292 Neb. 1, 871 N.W.2d 221 (2015). It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute. *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004). Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Carman*, 292 Neb. 207, 872 N.W.2d 559 (2015).

According to Goynes, the claim he asserts in his second postconviction motion filed February 5, 2015, seeks individualized sentencing based on *Miller*, which was decided on June 25, 2012, and found to be retroactive on collateral review in our case of *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014), filed February 7, 2014, and the U.S. Supreme Court case of *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), filed January 25, 2016. The issue before us is whether Nebraska's postconviction statute is available to Goynes to adjudicate his claim asserted under the U.S. Supreme Court case of *Miller*.

To determine the postconviction limitation period applicable to this case, we look to the plain language of § 29-3001(4). The introductory language of § 29-3001(4) provides that "[a] one-year period of limitation shall apply to the filing of a verified motion for postconviction relief." And the core provision of § 29-3001(4), which, as noted, controls the outcome in this case, provides that "[t]he one-year limitation period shall run from . . . . (d) [*t*]*he date on which* a constitutional claim asserted was *initially recognized* by the Supreme Court of the United States . . . ." (Emphasis supplied.) The availability of relief under § 29-3001(4)(d) is limited to "newly recognized right[s which have] been made applicable retroactively to cases on postconviction collateral review."

The newly recognized right at issue in this case, initially recognized by the U.S. Supreme Court in *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), is that a juvenile convicted of a homicide offense cannot be sentenced to life imprisonment without parole without consideration of the juvenile's special circumstances at sentencing. *Miller* was decided on June 25, 2012. Accordingly, pursuant to the plain language of § 29-3001(4)(d), Goynes had 1 year from June 25, 2012, to file a postconviction motion asserting his constitutional claim based on this newly recognized right. In fact, Goynes filed his first postconviction motion within 1 year after the *Miller* decision, but asserted no claims based on *Miller*. Goynes did not file the instant second postconviction motion based on rights recognized in *Miller* until February 5, 2015, which was outside the 1-year limitation period set forth in § 29-3001(4)(d). Therefore, his motion was barred by § 29-3001(4)(d) as untimely and the district court did not err when it found Goynes' second motion for postconviction relief untimely and denied the motion.

For completeness, we note that Goynes argues that the 1-year period for filing his second postconviction motion should not have begun until our decision in *Mantich* finding retroactivity was filed. Goynes asserts that his second motion for postconviction relief, which was filed within the year after *Mantich*, was timely. We reject Goynes' argument. Goynes' assertion is not consistent with the plain language of § 29-3001(4), which provides that the "one-year limitation period shall run from . . . (d) [t]he date on which the constitutional *claim asserted was initially* recognized." (Emphasis supplied.) Goynes' *Miller* claim was initially recognized in 2012. Further, to the extent the language in our opinion in *State v. Wetherell*, 289 Neb. 312, 855 N.W.2d 359 (2014), suggests that day one is a retroactivity decision, it is disapproved.

Our reading of the limitation period in § 29-3001(4)(d) is consistent with the U.S. Supreme Court's reading of the

comparable limitation period found at 28 U.S.C. § 2255(f)(3) (2012), formerly codified at 28 U.S.C. § 2255, ¶ 6(3) (2006). See *Dodd v. United States*, 545 U.S. 353, 125 S. Ct. 2478, 162 L. Ed. 2d 343 (2005). Section 2255 establishes a "1-year period of limitation" within which a federal prisoner may file a motion to vacate, set aside, or correct his or her sentence under that section. Specifically, § 2255(f) provides:

> A 1-year period of limitation shall apply to a motion under this section [§ 2255]. The limitation period shall run from the latest of—
>
> . . . .
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]

In *Dodd*, the petitioner argued that the limitation period did not begin to run until the right at issue had been found to apply retroactively to cases on collateral review. The Government argued that the limitation period began to run on the date the U.S. Supreme Court initially recognized the right, a position with which the Court of Appeals for the 11th Circuit and the U.S. Supreme Court agreed. *Dodd v. United States, supra*; *Dodd v. U.S.*, 365 F.3d 1273 (11th Cir. 2004).

In affirming the decision of the 11th Circuit, the Court stated:

> We believe that the text of [§ 2255(f)(3)] settles this dispute. It unequivocally identifies one, and only one, date from which the 1-year limitation period is measured: "the date on which the right asserted was initially recognized by the Supreme Court." We "must presume that [the] legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank* v. *Germain*, 503 U.S. 249, 253-254[, 112 S. Ct. 1146, 117 L. Ed. 2d 391] (1992). What Congress has said in [§ 2255(f)(3)] is clear: An applicant has one year from the

> date on which the right he asserts was initially recognized by this Court.

Dodd v. United States, 545 U.S. at 357.

In *Dodd*, the Court made clear that the second clause—"'if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review'—imposes a condition on the applicability of this subsection." 545 U.S. at 358. *Dodd* continues: "As long as the conditions in the second clause are satisfied so that [§ 2255(f)(3)] applies in the first place, that [second] clause has no impact whatsoever on the date from which the 1-year limitation period . . . begins to run." *Id*. In *Dodd*, the Court recognized it was a legislative decision that § 2255(f)(3) established "'stringent procedural requirements for retroactive application of new rules'" on collateral review and that the Court did "'not have license to question the decision on policy grounds.'" 545 U.S. at 359. The same reasoning applies to our reading of the limitation period set by the Legislature in the Nebraska Postconviction Act found at § 29-3001(4)(d).

[7] It is well recognized that states are not obligated to provide a postconviction relief procedure. *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009). See, also, *Murray v. Giarratano*, 492 U.S. 1, 10, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) (stating that "[s]tate collateral proceedings are not constitutionally required as an adjunct to the state criminal proceeding and serve a more limited purpose than either the trial or appeal"). In a concurring opinion in *Giarratano*, Justice O'Connor observed that "[a] postconviction proceeding is not a part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment" and is not constitutionally required. 492 U.S. at 13 (O'Connor, J., concurring). Nevertheless, the Nebraska Postconviction Act provides a defendant in custody with a civil procedure by which a defendant can present a motion alleging "there was such a denial or infringement of the rights of

the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States." § 29-3001(2). But the collateral procedure has limitations, and as noted above, § 29-3001(4) places a 1-year period of limitation on the filing for relief.

With respect to state statutes regarding postconviction review, we agree with the Missouri Supreme Court which has stated:

> States have substantial discretion to develop and implement programs for prisoners seeking post-conviction review. *Pennsylvania v. Finley*, 481 U.S. 551, 559, 107 S.Ct. 1990, 1995, 95 L.Ed.2d 539 (1987). A state may erect reasonable procedural requirements for triggering the right to an adjudication, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265 (1982), including reasonable procedures governing post-conviction relief. *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 717 (Mo. banc 1976).

Day v. State, 770 S.W.2d 692, 695 (Mo. 1989) (en banc). See, also, 39 Am. Jur. 2d *Habeas Corpus* § 179 at 394 (2008) (stating that "[l]imitation periods for seeking postconviction relief are generally set by statute. Such limitations have withstood constitutional challenge, even in death penalty cases"). Our research is in accord.

We are mindful that our determination that Goynes' second motion for postconviction relief based on his rights under *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), is untimely under the Nebraska Postconviction Act, will prevent Goynes from availing himself of this collateral remedy. And we are aware of the Court's recent statement that "when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 729, 193 L. Ed. 2d 599 (2016). Nevertheless, we believe our decision is in harmony with the holding in *Montgomery*, because

we have decided only that the collateral remedy Goynes invokes in this case is not available because it is not properly presented, but not because we would decline to give effect to a constitutional right if properly before us.

In this regard, we note that in *Montgomery*, the Court stated that "[*w*]*here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement*, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." 136 S. Ct. at 731-32 (emphasis supplied). And the Court further recognized that state collateral review may not be an available remedy when the Court stated that "[i]n adjudicating claims under its collateral review procedures a State may not deny a controlling right asserted under the Constitution, *assuming the claim is properly presented in the case*." 136 S. Ct. at 732 (emphasis supplied).

Pursuant to our state collateral review proceedings, namely the Nebraska Postconviction Act, Goynes was permitted to bring a postconviction motion setting forth his *Miller* claim. However, due to untimeliness under § 29-3001(4)(d), his second postconviction motion failed to properly present his claim, a potentiality recognized in *Montgomery*. In fact, Goynes could have raised his *Miller* claim in his first motion for postconviction relief, which was filed within 1 year after *Miller* was decided, but he did not do so. The Legislature has provided a postconviction procedure with its applicable time limitations. "Were we to recognize a common-law remedy for the purpose of asserting time-barred postconviction claims, we would be undermining the purpose of the Legislature in enacting § 29-3001(4)." *State v. Smith*, 288 Neb. 797, 803, 851 N.W.2d 665, 670 (2014).

In *Smith*, we indicated that a claim that a criminal sentence is void may be a ground for relief in the form of a writ of habeas corpus. And we are aware that it has been suggested that a claim alleging a sentence is cruel and unusual under *Miller* as a violation of the Eighth Amendment might

be brought as a federal habeas action. See *Montgomery v. Louisiana, supra* (Thomas, J., dissenting). In the present case, however, we determine only that Goynes' second motion for postconviction relief based on a *Miller* rights claim was not timely filed under § 29-3001(4)(d).

CONCLUSION

We determine that Goynes' second motion for postconviction relief is barred as untimely under § 29-3001(4)(d), and therefore, we affirm the order of the district court which denied Goynes' second motion for postconviction relief without holding an evidentiary hearing.

Affirmed.

McCormack, J., not participating.

Nebraska Supreme Court
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State of Nebraska, appellee, v. Scott Shannon, appellant.

876 N.W.2d 907

Filed April 8, 2016. No. S-15-582.

1. **Limitations of Actions.** If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.
3. **Constitutional Law: Prisoners: Courts.** Prisoners have a constitutional right to adequate, effective, and meaningful access to the courts.
4. **Public Officers and Employees: Prisoners.** Prison authorities must assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.
5. **Public Officers and Employees: Prisoners: Courts: Proof.** To prove a violation of the right to access the court, an inmate must show the alleged shortcomings in the prison library have hindered, or are currently hindering, his or her efforts to pursue a nonfrivolous legal claim.

Appeal from the District Court for Lancaster County: John A. Colborn, Judge. Affirmed.

Nancy K. Peterson for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Stacy, and Kelch, JJ.

Stacy, J.

Scott Shannon appeals from an order dismissing his verified motion for postconviction relief as untimely. We affirm.

FACTS

In 2010, Shannon was convicted of two counts of attempted robbery. He was sentenced to concurrent terms of 15 to 25 years in prison. On July 28, 2011, in case No. A-10-1050, the convictions and sentences were affirmed by the Nebraska Court of Appeals. The Court of Appeals issued its mandate in Shannon's direct appeal on September 20, 2011.

On October 19, 2012, Shannon filed a petition for postconviction relief along with a motion for leave to file the petition out of time. In his motion asking to file out of time, Shannon alleged he was unable to file his petition for postconviction relief within the 1-year limitation period set forth in Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2014) because the prison where he was being housed was locked down for a period of time. Specifically, Shannon alleged that on August 2, 2012, the prison "was put on a modified lockdown status, at which time all access to the Institutional Law Library ceased completely." At a hearing on the motion to file out of time, Shannon informed the court he was not allowed access to the prison law library from August 2 to September 9, 2012. The district court ultimately dismissed Shannon's petition as untimely, finding the lockdown did not prevent Shannon from filing his postconviction action within the statutory 1-year period. Shannon timely filed this appeal.

ASSIGNMENT OF ERROR

Shannon assigns it was error for the district court to dismiss his petition for postconviction relief as untimely.

STANDARD OF REVIEW

[1,2] If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of

law.[1] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.[2]

ANALYSIS

Shannon concedes that his motion for postconviction relief is subject to the statute of limitations set forth in § 29-3001(4):

> A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> . . . .
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action; [or]
>
> . . . .
>
> (e) August 27, 2011.

There is no dispute that Shannon's judgment of conviction became final on September 20, 2011, when the Court of Appeals issued the mandate on his direct appeal.[3] He contends, however, that the prison lockdown was an "impediment created by state action" which "prevented [him] from filing a verified motion" within the meaning of § 29-3001(4)(c), such that the 1-year statute of limitations did not begin to run

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[1] *State v. Huggins*, 291 Neb. 443, 866 N.W.2d 80 (2015); *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006).

[2] *Huggins, supra* note 1; *Kotrous v. Zerbe*, 287 Neb. 1033, 846 N.W.2d 122 (2014).

[3] See *Huggins, supra* note 1 (issuance of mandate by appellate court is date judgment of conviction becomes final for purposes of § 29-3001(4)).

until he gained access to the law library again on September 9, 2012.

In *State v. Huggins*,[4] an inmate alleged the fact he was in federal custody and lacked access to a Nebraska law library was an impediment under § 29-3001(4)(c) which prevented him from filing a postconviction motion. We rejected his argument, finding in part that he failed to claim his federal imprisonment was in violation of either the state or the federal Constitution. Here, Shannon argues the restriction on his access to the law library violated his constitutionally protected due process right of access to the courts.

[3-5] It is undisputed that prisoners have a constitutional right to "adequate, effective, and meaningful" access to the courts.[5] This right requires prison authorities "to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[6] To prove a violation of this right, an inmate must show the alleged shortcomings in the prison library have hindered, or are currently hindering, his or her efforts to pursue a nonfrivolous legal claim.[7]

Here, Shannon contends the prison's restriction on his access to the law library violated his constitutional right to access the courts. But we need not decide whether Shannon's right of access to the courts was violated by the prison lockdown. The plain language of § 29-3001(4)(c) requires both the existence of an impediment created by state action and a showing that the impediment prevented the inmate from filing the verified motion. It is clear from the record that the second

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[4] *Id.*

[5] *Bounds v. Smith*, 430 U.S. 817, 822, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977); *Jones v. Jones*, 284 Neb. 361, 821 N.W.2d 211 (2012).

[6] *Bounds, supra* note 5, 430 U.S. at 828.

[7] *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

requirement has not been met, because the lockdown did not prevent Shannon from filing his postconviction motion.

As noted, the mandate was issued on September 20, 2011. There is no allegation that Shannon lacked access to the law library before the prison lockdown began on August 2, 2012, and Shannon concedes that by September 9, he once again had access to the law library. On these facts, Shannon's access to the law library was restricted for only 5 weeks out of the 1-year period he had for filing his postconviction motion. We conclude that any impediment created by the lockdown did not, as a matter of law, prevent Shannon from filing his postconviction action. We therefore agree with the district court that the impediment exception of § 29-3001(4)(c) does not apply. Shannon's postconviction action was filed outside the 1-year statute of limitations, and we affirm its dismissal.

Affirmed.

Cassel, J., not participating.

Nebraska Supreme Court
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First Nebraska Educators Credit Union, appellant, v. U.S. Bancorp and U.S. Bank National Association, N.D., appellees.

877 N.W.2d 578

Filed April 8, 2016. No. S-15-617.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. ____: ____. When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Trusts: Deeds: Statutes: Appeal and Error.** Because the Nebraska Trust Deeds Act made a change in common law, appellate courts strictly construe the statutes comprising the act.
6. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
7. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed.

Justin A. Roberts, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Patrick R. Turner, of Stinson, Leonard & Street, L.L.P., for appellees.

Heavican, C.J., Wright, Connolly, Cassel, and Kelch, JJ.

Heavican, C.J.

INTRODUCTION

First Nebraska Educators Credit Union (First Nebraska) filed an amended complaint against U.S. Bancorp and U.S. Bank, National Association, N.D. (U.S. Bank), alleging that U.S. Bank failed to provide it with notice of a foreclosure sale pursuant to Neb. Rev. Stat. § 76-1008 (Reissue 2009). First Nebraska sought damages in the amount of $41,203.94. The district court dismissed First Nebraska's amended complaint for the failure to state a claim. First Nebraska appeals. We affirm.

FACTUAL BACKGROUND

Jack E. Cotton and Vickie L. Cotton owned real property located in Sarpy County, Nebraska. A deed of trust was filed by U.S. Bank on the Cottons' property on February 10, 2006.

On April 2, 2007, the Cottons executed and delivered a note to First Nebraska in the amount of $27,401.50, plus interest of 9.99 percent per year. As security for this note, the Cottons delivered a deed of trust to their same Sarpy County property. That deed was recorded on April 5. Thus, U.S. Bank was the senior lienholder and First Nebraska's interest was junior to U.S. Bank's.

The First Nebraska trust deed included the following language:

REQUEST FOR NOTICE OF DEFAULT AND FORECLOSURE UNDER SUPERIOR MORTGAGES OR DEEDS OF TRUST

> Request is hereby made that a copy of any notice of default and a copy of any notice of sale under the deed of trust filed for record . . . and recorded in Book . . . , Page . . . , or . . . , Records of Sarpy County, Nebraska, executed by . . . as Trustor, in which . . . is named as beneficiary and as Trustee, be mailed to First Nebraska Educators Credit Union at 10655 Bedford Avenue Omaha, NE 68134-3613

The ellipses represent blank spaces in the original document, and the underlined information was typed in a typeface different from the original.

On May 17, 2009, the trustee filed a notice of default on the 2006 deed of trust held by U.S. Bank. On September 21, the trustee executed a trust deed to grant and convey the real property to an investment company for the sum of $48,566. A deed of trust to this effect was filed with the register of deeds. That trust deed indicated that notice of sale had been provided as required by law.

First Nebraska filed suit, alleging that it did not receive notice of the sale and did not attend the sale. As such, First Nebraska was not able to bid on the property and its second lien interest was extinguished with the sale of the property. First Nebraska sought damages in the amount of $41,203.94.

U.S. Bank filed a motion to dismiss, which the district court granted. The court reasoned that the request given by First Nebraska for notice of sale did not comply with § 76-1008(1); thus, First Nebraska was not entitled to notice. First Nebraska appeals.

ASSIGNMENT OF ERROR

First Nebraska assigns, restated and consolidated, that the district court erred in dismissing its amended complaint.

STANDARD OF REVIEW

[1-3] A district court's grant of a motion to dismiss is reviewed de novo.[1] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[2] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[3] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[4]

[4] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[5]

ANALYSIS

The sole issue presented by this appeal is whether U.S. Bank was required to mail a notice of sale to First Nebraska under § 76-1008. That section provides:

> (1) Any person desiring a copy of any notice of default and of any notice of sale under any trust deed may, at any time subsequent to the filing for record of the trust deed and prior to the filing for record of a notice of default

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[1] *SID No. 1 v. Adamy*, 289 Neb. 913, 858 N.W.2d 168 (2015).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Hauxwell v. Henning*, 291 Neb. 1, 863 N.W.2d 798 (2015).

thereunder, file for record in the office of the register of deeds of any county in which any part or parcel of the trust property is situated a duly acknowledged request for a copy of any such notice of default and notice of sale. The request shall set forth the name and address of the person or persons requesting copies of such notices and shall identify the trust deed by stating the names of the original parties thereto, the date of filing for record thereof, and the book and page or computer system reference where the same is recorded and shall be in substantially the following form:

Request is hereby made that a copy of any notice of default and a copy of notice of sale under the trust deed filed for record . . . , 20 . . . , and recorded in book . . . , page . . . , (or computer system reference . . . .) Records of . . . County, Nebraska, executed by . . . as trustor, in which . . . is named as beneficiary and . . . as trustee, be mailed to . . . (insert name) . . . at . . . (insert address) . . . .

Signature . . . .

(2) Not later than ten days after recordation of such notice of default, the trustee or beneficiary or the attorney for the trustee or beneficiary shall mail, by registered or certified mail with postage prepaid, a copy of such notice with the recording date shown thereon, addressed to each person whose name and address is set forth in a request therefor which has been recorded prior to the filing for record of the notice of default, directed to the address designated in such request. At least twenty days before the date of sale, the trustee or the attorney for the trustee shall mail, by registered or certified mail with postage prepaid, a copy of the notice of the time and place of sale, addressed to each person whose name and address is set forth in a request therefor which has been recorded prior to the filing for record of

the notice of default, directed to the address designated in such request.

(3) Each trust deed shall contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to each person who is a party thereto at the address of such person set forth therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as provided in this section.

(4) If no address of the trustor is set forth in the trust deed and if no request for notice by such trustor has been recorded as provided in this section, a copy of the notice of default shall be published at least three times, once a week for three consecutive weeks, in a newspaper of general circulation in each county in which the trust property or some part thereof is situated, such publication to commence not later than ten days after the filing for record of the notice of default.

(5) No request for a copy of any notice filed for record pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to trust property or be deemed notice to any person that any person requesting copies of notice of default or of notice of sale has or claims any right, title, or interest in or lien or claim upon the trust property.

On appeal, First Nebraska contends that it complied with § 76-1008(3) when it included the request for notice of default language at the end of its trust deed and that this substituted for any obligation it had under subsection (1). First Nebraska relies on the following language in subsection (3) which states that "a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required *as though a separate*

request therefor had been filed by each of such persons as provided in this section."[6]

U.S. Bank disagrees, and argues that notice is required under § 76-1008(3) only to those parties to that particular trust deed. It points to language in subsection (3) that provides, "Each trust deed shall contain a request that a copy of any notice of default and a copy of any notice of sale *thereunder shall be mailed to each person who is a party thereto . . . .*"[7]

[5-7] This appeal requires us to interpret § 76-1008. Because the Nebraska Trust Deeds Act made a change in common law, we strictly construe the statutes comprising the act.[8] Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.[9] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[10]

The purpose of § 76-1008 is to set forth who is entitled to notice of default and sale and how that notice should be effected. Subsection (1) provides that "any person" who desires notice of default or notice of sale may file for such notice using the language set forth in the statute. It is this language which was set forth, albeit incompletely, at the end of the trust deed between First Nebraska and the Cottons. Subsection (2) provides that no later than 10 days after a notice of default is recorded, persons seeking notice must be given that notice.

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[6] § 76-1008(3) (emphasis supplied).

[7] *Id.* (emphasis supplied).

[8] See *First Nat. Bank of Omaha v. Davey*, 285 Neb. 835, 830 N.W.2d 63 (2013).

[9] *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015).

[10] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015).

As noted above, § 76-1008(3) is primarily at issue in this case. It provides that "[e]ach trust deed shall contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to each person who is a party thereto" and that these notices shall be mailed to "each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons." From this language, we know that a trust deed must contain a request for notice, but that request is for notice "thereunder" and is to be sent to "each person who is a party thereto."

The problem with First Nebraska's argument, then, is that while it was a party to its own trust deed and would be contractually entitled to notice in the event of default of that underlying trust deed, it was not a party to U.S. Bank's trust deed and is not entitled to notice under that deed. It is that deed which was foreclosed upon. A proper reading of the statute provides that unless the person or institution is a party to the trust deed at issue, that person or institution is not entitled to notice unless it is requested under § 76-1008(1).

First Nebraska did not adequately request notice under § 76-1008(1). As noted, this court strictly construes the statutes comprising the act.[11] While the language at the conclusion of First Nebraska's trust deed with the Cottons purported to make a request for notice under subsection (1), it was ineffective, because the request failed to comply with the requirements of subsection (1) in a number of particulars. Specifically, the request did not detail the precise information regarding the trust deed for which the requesting party sought notice, did not include the date the prior deed was recorded, and did not include the book and page (or reference) number of that deed.

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[11] *First Nat. Bank of Omaha v. Davey, supra* note 8.

Compliance with § 76-1008(1) triggers the requirement that notice be given; without such a request under subsection (1), U.S. Bank had no obligation to provide notice of sale to First Nebraska. First Nebraska's arguments to the contrary are without merit.

CONCLUSION

U.S. Bank was not required to serve notice of foreclosure sale upon First Nebraska. As such, the district court did not err in dismissing First Nebraska's amended complaint for the failure to state a claim. The decision of the district court is affirmed.

Affirmed.

Stacy, J., participating on briefs.
Miller-Lerman, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Joseph A. Kishiyama, respondent.

876 N.W.2d 911

Filed April 8, 2016. No. S-16-227.

Original action. Judgment of disbarment.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Per Curiam.

INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Joseph A. Kishiyama, on March 3, 2016. The court accepts respondent's voluntary surrender of his license and enters a judgment of disbarment.

STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on January 10, 2008. The law firm at which respondent had been employed sent a grievance letter regarding respondent dated October 2, 2015, to the Counsel for Discipline of the Nebraska Supreme Court. The grievance letter generally alleged that respondent had mishandled the representation of certain clients, including that respondent had lied to clients regarding filing certain pleadings, had provided clients with false court filings, and had delayed reporting to clients the status of their cases. The grievance letter

alleged that by his actions, respondent violated several of the Nebraska Court Rules of Professional Conduct.

On March 3, 2016, respondent filed a voluntary surrender of license, in which he stated that he knowingly does not challenge or contest the truth of the suggested allegations set forth in the grievance letter. Respondent further stated that he freely and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the suggested allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the suggested allegations being made against him. The court accepts

respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of disbarment.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Rosa Moreno, appellee, v. City of Gering and Scotts Bluff County, political subdivisions, appellants.

878 N.W.2d 529

Filed April 15, 2016. No. S-15-216.

1. **Judgments: Jurisdiction.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
4. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
5. **Motions for Continuance: Appeal and Error.** An appellate court reviews a judge's ruling on a motion to continue for an abuse of discretion.
6. **Political Subdivisions Tort Claims Act: Judgments: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong. And in such actions, when determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
7. **Mandamus.** Mandamus lies only to enforce the performance of a mandatory ministerial act or duty and is not available to control judicial discretion.
8. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced

a substantial right of the complaining party. The exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection. In particular, where the information contained in an exhibit is, for the most part, already in evidence from the testimony of witnesses, the exclusion of the exhibit is not prejudicial.

9. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

Appeal from the District Court for Scotts Bluff County: Randall L. Lippstreu, Judge. Affirmed.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., and Howard P. Olsen, Jr., of Simmons Olsen Law Firm, P.C., for appellants.

Michael W. Meister for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Miller-Lerman, J.

NATURE OF CASE

After being injured in a motor vehicle accident, Rosa Moreno filed this negligence action against the City of Gering, Nebraska (the City), and Scotts Bluff County, Nebraska (the County). The district court for Scotts Bluff County entered judgment in Moreno's favor. The City and the County appeal. The City and the County claim, inter alia, that the court erred when it overruled their motion to compel discovery of information regarding other surgeries performed by a doctor who they contend performed an unnecessary surgery on Moreno, the cost of which should not be their responsibility. We affirm the judgment of the district court.

STATEMENT OF FACTS

On January 12, 2011, Moreno was a passenger in a handibus operated by the County when the handibus was hit by a van operated by the City's volunteer fire department. Moreno

was ejected from the handibus and landed on the street pavement. Moreno was transported by ambulance to Regional West Medical Center.

Moreno brought this personal injury action against the City and the County under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 2012). Both the City and the County admitted liability, and therefore, Moreno's claim for damages was the only matter at issue in the bench trial held in the district court.

A major contested issue regarding damages was whether a cervical fusion surgery performed in June 2011 by Dr. Omar Jimenez, a neurosurgeon, was necessary to treat Moreno for an injury caused by the accident. A few months before the trial was set to begin, the City and the County learned of published news reports which indicated that in 2011 and 2012, Dr. Jimenez had performed an unusually high number of spinal fusion surgeries similar to the surgery performed on Moreno. The reports indicated that there existed a debate over whether some surgeons were performing spinal fusions that were unnecessary and potentially dangerous. The reports also stated that malpractice claims had been brought against Dr. Jimenez and that his medical privileges had been suspended by a network of hospitals in Georgia. The news reports cited and quoted a medical expert who contended that surgeons who performed high numbers of spinal fusions "should be looked at closely and asked to explain themselves."

After learning of the news reports, the City and the County issued medical records subpoenas to Regional West Physicians Clinic and Regional West Medical Center (collectively Regional West). They sought records that documented, inter alia, information regarding similar surgeries performed by Dr. Jimenez, including the number and types of surgeries performed by Dr. Jimenez, discussions among Regional West staff and administrators regarding the surgeries performed by Dr. Jimenez, and communications to Dr. Jimenez regarding surgeries he performed at Regional West.

Although Moreno did not object, Regional West objected to the subpoenas. The City and the County filed a motion to compel Regional West to produce the records. They also filed a motion to continue the trial in order to allow them time to conduct discovery of the requested information and to perform any followup discovery after reviewing the information. At a hearing on the motion to compel, Regional West objected to certain exhibits offered by the City and the County in support of the motion. In its order ruling on the motion, the court first sustained Regional West's hearsay objection to portions of the exhibits, including the news reports regarding the number of spinal fusions performed by Dr. Jimenez and the controversy regarding such surgeries. The court overruled other objections raised by Regional West.

After the hearing, the court overruled the motion to compel. The court reasoned that the records were not relevant to this case, because they related to nonparty patients and were to be used only as character evidence regarding Dr. Jimenez and his alleged propensity to perform unnecessary surgeries. The court noted that such nonparty records would not normally be admissible under Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014), regarding character evidence, and Neb. Rev. Stat. § 27-403 (Reissue 2008), regarding the probative value of evidence. The court acknowledged that the "concept of relevancy is broader in the discovery context than in the trial context" and that a "party may discover relevant evidence that would be inadmissible at trial, so long as it may lead to the discovery of admissible evidence." However, the court reasoned that even without such nonparty records, the City and the County would still be able to introduce direct evidence regarding whether the surgery performed on Moreno was necessary. The court therefore concluded that the motion to compel discovery should be overruled.

The court also overruled the City and the County's motion to continue the trial. The court noted that Moreno served tort claim notices on the City and the County in May 2011, that

she filed her complaint in November 2012, and that in March 2014, trial had been set for August. The court reasoned that efforts by the City and the County to discover information regarding Dr. Jimenez' treatment of other patients "did not have to wait for" the news reports of which the City and the County learned in April or May 2014.

At the trial on damages, Moreno presented evidence regarding expenses she incurred for medical treatment following the accident. Such evidence included testimony by various medical professionals who treated her, including Dr. Jimenez, who began his testimony by reviewing his qualifications and experience. He then testified regarding his treatment of Moreno. Dr. Jimenez opined that Moreno suffered an injury in the accident that aggravated a preexisting condition and caused compression of the nerves in her spinal cord. He further opined that the cervical fusion surgery was necessary to treat the condition. The City and the County cross-examined Dr. Jimenez at length. The cross-examination made reference to medical records and reports by other medical professionals for the purpose of undermining Dr. Jimenez' opinions.

In their defense, the City and the County presented the video deposition of Dr. Charles Taylon generally for the purpose of showing that the cervical fusion surgery was unnecessary. Dr. Taylon stated that he was a neurosurgeon, and he testified regarding his training and experience, which included being educated in medicine at Creighton University in Omaha, Nebraska, and at the University of Wisconsin in Madison, Wisconsin, and being a professor of neurosurgery at the Medical College of Wisconsin in Milwaukee, Wisconsin. Dr. Taylon had reviewed Moreno's medical records and other information in order to offer opinions regarding the cervical fusion surgery performed on Moreno. Dr. Taylon opined that the surgery was unnecessary, that it was unrelated to the accident, and that the accident had not aggravated a preexisting cervical problem. During cross-examination by Moreno, Dr. Taylon testified that Dr. Jimenez' treatment of Moreno was

"worse than malpractice," that Dr. Jimenez was "a criminal," and that the cervical fusion surgery was "unnecessary" and an "assault."

Following trial, the court entered judgment in favor of Moreno in the amount of $575,203.62. The court found, inter alia, that the accident aggravated Moreno's preexisting medical condition and that medical treatment, including the surgery performed by Dr. Jimenez, was necessary and was proximately caused by the accident. In its written memorandum order and judgment, the court reviewed the testimonies of both Dr. Jimenez and Dr. Taylon and concluded that it generally accepted the testimony of Dr. Jimenez where it was in conflict with the testimony of Dr. Taylon. The court noted that "Dr. Taylon's testimony took a very unusual turn" when on cross-examination he "became overly adversarial, argumentative, and confrontational." The court specifically noted, among other examples, that Dr. Taylon had called Dr. Jimenez a "criminal" and accused him of assaulting Moreno. The court stated that such behavior "goes to bias and the weight to be given to the witness['] testimony," and the court further observed that "[t]hroughout his testimony, Dr. Taylon was as much an advocate as an unbiased, impartial expert witness."

The City and the County appeal from the judgment of the district court.

ASSIGNMENTS OF ERROR

The City and the County claim that the district court erred when it (1) overruled their motion to compel discovery of information from Regional West, (2) sustained Regional West's hearsay objection to evidence offered in support of the motion to compel discovery, (3) overruled the motion to continue the trial, (4) found that the surgery performed by Dr. Jimenez and related medical care were necessary to treat an injury Moreno suffered in the accident, and (5) awarded Moreno damages based on the surgery and related medical care.

STANDARDS OF REVIEW

[1,2] When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718 (2014). An appellate court reviews questions of law independently of the lower court's conclusion. *Id*.

[3,4] Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014). The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Id*.

[5] An appellate court reviews a judge's ruling on a motion to continue for an abuse of discretion. See *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995).

[6] In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong. *Williams v. City of Omaha*, 291 Neb. 403, 865 N.W.2d 779 (2015). And in such actions, when determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. See *id*.

ANALYSIS

The City and the County Were Not Required to Seek Immediate Review After the District Court Overruled Their Motion to Compel Discovery; Issues Related to the Motion Are Reviewable in This Appeal.

We note as an initial matter that Moreno contends in her brief that the City and the County waived issues relating to the motion to compel discovery because they failed to utilize what she asserts was the proper procedure to preserve such

issues for appellate review. She specifically contends that the appropriate procedure to gain review of such issues is to file a petition for a writ of mandamus after the district court overrules the motion to compel discovery, but she also suggests that an immediate appeal may be appropriate. Moreno basically argues that in this case, we lack jurisdiction to review the district court's ruling on the motion to compel discovery because the City and the County did not file for review of the ruling earlier. We reject Moreno's argument, and instead, we conclude that the order overruling the motion to compel discovery and issues related thereto are reviewable in this appeal from the final judgment.

Moreno does not cite direct precedent for her assertion that appellate review of the discovery ruling should have been invoked by a petition for a writ of mandamus. Instead, she relies heavily on *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 160, 794 N.W.2d 685, 693 (2011), and specifically to the portion of our decision in which we held that "an order granting discovery from a nonparty in an ancillary proceeding is not a final, appealable order" but noted that "some federal courts have recognized a limited exception . . . and permitted appeal by a party under the collateral order doctrine from an order *denying* discovery from a nonparty in an ancillary proceeding." This portion of *Schropp Indus.* refers to taking an appeal rather than petitioning for mandamus. So, we do not believe it supports Moreno's claim that the City and the County should have sought mandamus.

[7] To the extent Moreno argues that the City and the County should have petitioned for a writ of mandamus, we note that in civil cases, we have stated that decisions regarding discovery are directed to the discretion of the trial court and will be upheld in the absence of an abuse of discretion. *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014). As we stated in *Schropp Indus., supra*, and elsewhere, this court will issue a writ of mandamus upon a proper showing by a relator; however, mandamus lies only to enforce the

performance of a mandatory ministerial act or duty and is not available to control judicial discretion. Because the decision whether to compel discovery was directed to the district court's discretion, mandamus would not have been a proper vehicle for the City and the County to challenge the overruling of their motion. Cf. *Stetson v. Silverman*, 278 Neb. 389, 770 N.W.2d 632 (2009) (regarding availability of mandamus to limit discovery when privilege applies).

To the extent Moreno's argument is that, rather than filing a petition for a writ of mandamus, the City and the County should have immediately appealed from the order overruling their motion to compel discovery, Moreno's reliance on *Schropp Indus.* is not helpful. *Schropp Indus.* involved "an order of the Washington County District Court entered in an ancillary discovery proceeding enforcing compliance with a subpoena issued on behalf of a Douglas County court." 281 Neb. at 154, 794 N.W.2d at 689. In contrast, the present case involves a discovery ruling made in the district court for Scotts Bluff County, which is the same court in which the action was proceeding. Thus, the present case involves a significantly different context than the sort of ancillary proceeding at issue in *Schropp Indus.* and the federal cases referenced therein.

We stated in *Schropp Indus.* that it was "not disputed that, had this discovery dispute been litigated in Douglas County, the [Douglas County] district court's order would be neither final nor appealable," and we noted that if the discovery order at issue in that case had been entered in the Douglas County District Court, it could have been adequately reviewed on appeal from a final judgment and, thus, the discovery order would not have been appealable at the time of its issuance. 281 Neb. at 157, 794 N.W.2d at 691. The discovery ruling in this case, made by the same court in which the action was proceeding, can be adequately reviewed on appeal from the final judgment, and therefore, there was no basis for the order to have been immediately appealable.

We conclude that the City and the County were not required to seek immediate review of the overruling of the motion to compel discovery and that therefore, issues related to the motion were not waived and are reviewable in this appeal from the final judgment.

The District Court Did Not Err When It Sustained Objections to Evidence Offered in Support of the Motion to Compel Discovery, When It Overruled the Motion to Compel Discovery, or When It Denied the Motion to Continue the Trial.

The City and the County raise various issues relating to their motion to compel Regional West to provide records regarding Dr. Jimenez and surgeries he performed on other patients. They claim that the court erred when it (1) sustained Regional West's hearsay objection to certain evidence they offered in support of the motion, (2) overruled the motion, and (3) overruled their motion to continue the trial in order to allow them to complete the requested discovery. We conclude that the district court did not err in any of these respects.

Evidentiary Ruling.

At the hearing on the City and the County's motion to compel discovery, Regional West objected to certain exhibits offered by the City and the County in support of the motion. Specifically, Regional West objected to a portion of the affidavit of the County's attorney in which he referred to news reports about Dr. Jimenez, and to the news reports themselves, which were attached to the affidavit. The court took the objections under advisement, and in its order ruling on the motion, the court sustained Regional West's hearsay objection. The court went on to consider the merits of the motion to compel discovery, and it overruled the motion.

The City and the County contend that the evidence was not hearsay, because it was not offered to prove the truth of the matters asserted but was offered to show the relevance of the materials sought to be discovered, to show why discovery had

not been sought earlier than the publication of the news reports in May and April 2014, and to show why the trial should be continued to allow discovery. They argue that the truth of the news reports was not at issue in the hearing and that the relevance of the news reports was to explain and justify the need for discovery.

[8] We determine that whether or not the evidence was inadmissible hearsay, the court's sustaining Regional West's objection was not reversible error. In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015). The exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection. *Id*. In particular, where the information contained in an exhibit is, for the most part, already in evidence from the testimony of witnesses, the exclusion of the exhibit is not prejudicial. *Id*.

In the present case, it is clear from the court's order overruling the motion to compel discovery that the court understood what records the City and the County sought to discover, the nature of what they expected the records to show, and the purpose for which they wished to use the information. Portions of the evidence which were admitted, as well as the motion to compel itself, referred to the news reports and indicated the nature of the reports. The court had a full understanding of the discovery issue without the excluded material. We see nothing that would suggest that if the court had admitted the evidence to which Regional West objected, the court would have reached a different conclusion as to whether it should compel discovery of the records. Therefore, sustaining the objection did not unfairly prejudice a substantial right of the City and the County. We therefore reject this assignment of error.

Overruling Motion to Compel Discovery.

Regarding the merits of the motion to compel discovery, the district court determined that the requested records were not

relevant to this case, because they related to nonparty patients and were to be used only as character evidence regarding Dr. Jimenez. The court stated that such nonparty records would not normally be admissible. Although it acknowledged that the "concept of relevancy is broader in the discovery context than in the trial context" and that a "party may discover relevant evidence that would be inadmissible at trial, so long as it may lead to the discovery of admissible evidence," the court reasoned that even without such nonparty records, the City and the County would still be able to introduce direct evidence regarding whether the surgery performed on Moreno was necessary. The court therefore overruled the motion to compel discovery.

The City and the County contend that Dr. Jimenez' credibility was the central issue in this case and that discovery of the records was necessary to allow them to effectively cross-examine Dr. Jimenez. They argue that the district court erroneously focused on whether the records would be admissible at trial rather than applying the proper standard for discovery under Neb. Ct. R. Disc. § 6-326.

The City and the County refer to *Stetson v. Silverman*, 278 Neb. 389, 403, 770 N.W.2d 632, 644 (2009), in which discovery of other incidents involving a doctor was permitted, wherein we stated that

> under [Neb. Ct. R. Disc. § 6-326(b)(1)], information sought through discovery must also be "relevant to *the subject matter* involved in the pending action." This requirement differs significantly from the relevancy test for admission of evidence at trial: having a tendency to make the existence of any fact at issue more or less probable. Moreover, under [§ 6-326(b)(1)], the inadmissibility of the information at trial is not ground for objection if the information "appears reasonably calculated to lead to the discovery of admissible evidence."

In *Stetson*, we rejected a request for a writ of mandamus to quash a discovery order permitting discovery of information

regarding professional discipline against a doctor who was one of the defendants in the underlying action. Although we declined to comment on whether the information to be discovered would be admissible at trial, we concluded that we could not say that "at the discovery stage [the plaintiff] could not obtain further information that would be relevant to [the defendant-doctor's] credibility or a misleading characterization of him at trial" and that we could not "rule out [the plaintiff's] obtaining information that would be relevant to showing [the defendant-doctor's] medical judgment was impaired at the time he treated [the plaintiff]." *Stetson*, 278 Neb. at 405, 770 N.W.2d at 645.

The City and the County argue that the information they sought to discover was relevant to Dr. Jimenez' credibility in the same way that the information for which discovery was allowed in *Stetson, supra*, was relevant to the credibility of the doctor in that case and that therefore, the ruling in the present case was erroneous. The cases are dissimilar, and we do not agree with the argument asserted by the City and the County. Decisions regarding discovery are directed to the discretion of the trial court and will be upheld in the absence of an abuse of discretion; the party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014). In the present case, we cannot say that the district court abused its discretion when it overruled the City and the County's motion to compel discovery of records regarding Dr. Jimenez' treatment of other patients.

At issue in this case was the testimony of Dr. Jimenez, a nonparty, relating to whether the specific surgery performed on Moreno was necessary and caused by the accident. In contrast, *Stetson* was a medical malpractice action in which the plaintiff was allowed discovery of information regarding a disciplinary action against the doctor who was the defendant in the case. We believe information regarding other incidents involving the doctor-defendant in a medical malpractice case

are more probative of the underlying action than information regarding other surgeries performed by a nonparty witness in a personal injury action. As the district court in this case reasoned, even without records regarding surgeries performed on other patients by Dr. Jimenez, the City and the County would still be able to introduce direct evidence regarding the central issue in the case, i.e., Moreno's entitlement to damages and whether the surgery performed on Moreno was necessary as an element of damages.

With respect to Dr. Jimenez' credibility, it is clear from the record that in addition to cross-examining Dr. Jimenez regarding the necessity of the surgery performed on Moreno, the City and the County were permitted to question Dr. Jimenez regarding his reputation for performing unnecessary surgeries. We believe that had the City and the County been permitted to discover additional information regarding the other surgeries, additional questioning of Dr. Jimenez regarding surgeries performed on other patients would likely have been inadmissible as extrinsic evidence of specific conduct under Neb. Rev. Stat. § 27-608(2) (Reissue 2008). Although the anticipated inadmissibility of information at trial is not a reason to deny discovery of such information, it is still necessary that discovery "'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Stetson v. Silverman*, 278 Neb. 389, 403, 770 N.W.2d 632, 644 (2009). The City and the County have not shown how discovery of the requested records would have led to the discovery of admissible evidence.

Therefore, we cannot say that the district court abused its discretion when it overruled the motion to compel discovery. We reject this assignment of error.

Overruling Motion to Continue Trial.

The City and the County claim that the district court should have sustained their motion to continue the trial in order to allow them to conduct the requested discovery and to follow

up on any new information they learned from such discovery. Because we determine that the district court did not abuse its discretion when it overruled the motion to compel discovery, we further determine that there was no need to continue the trial in order to allow the City and the County to conduct and develop such requested discovery. We therefore conclude that the district court did not abuse its discretion when it overruled the motion to continue the trial.

The District Court Was Not Clearly Wrong When It Found That the Surgery Performed by Dr. Jimenez Was Necessary and Proximately Caused by the Accident, and the Court Did Not Err When It Awarded Damages Related to Such Surgery.

The City and the County claim that the district court erred when it found that the surgery performed by Dr. Jimenez was necessary and was proximately caused by the accident. The City and the County specifically contend that the district court was clearly wrong when it found that the accident caused an aggravation of preexisting conditions, including significant cervical stenosis, which made the surgery performed on Moreno by Dr. Jimenez necessary, and they therefore claim that the court erred when it awarded damages related to such surgery. We conclude that the district court's factual findings were not clearly wrong and that the court's judgment awarding damages was supported by sufficient evidence.

In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong. *Williams v. City of Omaha*, 291 Neb. 403, 865 N.W.2d 779 (2015). And in such actions, when determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. See *id*.

[9] In its order, the district court found, inter alia, that the accident aggravated Moreno's preexisting medical condition and that medical treatment, including the surgery performed by Dr. Jimenez, was necessary and was proximately caused by the accident. The court's findings in this regard depended in large part on its assessment of the credibility of the testimony of Dr. Jimenez and the credibility of the testimony of the City and the County's witness, Dr. Taylon, who opined that the surgery was unnecessary, that it was unrelated to the accident, and that the accident had not aggravated a preexisting cervical problem. In its written order setting forth its findings, the court specifically stated that it generally accepted the testimony of Dr. Jimenez where it was in conflict with the testimony of Dr. Taylon. Beyond simply stating that it found Dr. Jimenez' testimony more credible, the court set forth specific reasons it found Dr. Taylon's testimony less credible and it gave examples of portions of Dr. Taylon's testimony which led to its credibility determination. The court stated that Dr. Taylon "became overly adversarial, argumentative, and confrontational," calling Dr. Jimenez a "criminal" and accusing him of assaulting Moreno. The court stated that such behavior factored into its assessment of the witness' "bias and the weight to be given to the witness['] testimony" and gave the court the impression that "Dr. Taylon was as much an advocate as an unbiased, impartial expert witness." In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Elting v. Elting*, 288 Neb. 404, 849 N.W.2d 444 (2014). To the extent that the district court made credibility determinations regarding Dr. Jimenez' and Dr. Taylon's conflicting testimony, we defer to those determinations.

We also reject the City and the County's arguments that Dr. Jimenez' testimony did not support the district court's findings. In this connection, the City and the County assert that the necessity of the surgery was not established, because they contend there was a lack of evidence in the record that

Moreno reported neck pain prior to the surgery. However, Dr. Jimenez addressed the absence of reports of neck pain when he testified that Moreno reported thoracic, shoulder, and arm pain, which he determined were radicular symptoms caused by cervical stenosis, and that surgery was the proper treatment for the cause of that pain. In sum, if Dr. Jimenez' testimony was credible, which the district court clearly found it to be, then there was sufficient evidence to support the court's findings regarding the necessity of the surgery and its connection to the accident.

The foregoing contentions of the City and the County are all in service of its larger argument that the district court erred when it awarded damages related to the surgery performed by Dr. Jimenez. Their arguments in this respect are based on their contention that the district court was clearly wrong when it found that the surgery was necessary and was connected to the accident. Because we determine that such findings were not clearly wrong, it follows that the court did not err when it awarded damages related to the surgery. We reject this assignment of error.

CONCLUSION

We conclude that issues related to the motion to compel discovery are reviewable in this appeal from the final judgment. We further conclude that the district court did not err when it sustained hearsay objections to evidence offered in support of the motion to compel, when it overruled the motion to compel discovery, and when it overruled the motion to continue the trial in order to allow discovery. We finally conclude that the district court was not clearly wrong in its findings that Moreno's condition was caused by the accident and that the surgery performed by Dr. Jimenez was necessary. Finally, we determine that the district court did not err when it awarded damages related to the challenged surgery. We affirm the judgment of the district court.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska on behalf of Ja'Quezz G., a minor child, appellant, v. Teablo P., defendant and third-party plaintiff, appellee, and Sasha G., third-party defendant, appellee.

878 N.W.2d 358

Filed April 15, 2016. No. S-15-291.

1. **Appeal and Error.** An appellate court resolves questions of law and issues of statutory interpretation independently of the lower court's conclusion.
2. **Summary Judgment.** A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.
3. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Reversed and remanded for further proceedings.

Sarah E. Preisinger, of Child Support Services, for appellant.

Marian G. Heaney and Katherine H. Owen, of Legal Aid of Nebraska, for appellee Teablo P.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Wright, J.

NATURE OF CASE

This case presents the question of what method of service of process upon the putative father is required in a paternity proceeding brought under Neb. Rev. Stat. § 43-1411 (Reissue 2008). The district court determined that personal service of process was required in an action for paternity, and because Teablo P. had not been personally served, it granted Teablo's motion for summary judgment and vacated the default judgment of paternity and support. The State appeals.

BACKGROUND

Ja'Quezz G. is a minor child born out of wedlock and residing in the State of Nebraska. It is not disputed that Teablo is not Ja'Quezz' biological father, and there are no other material facts in dispute.

On September 28, 2008, Ja'Quezz' mother, Sasha G., completed a paternity questionnaire for the Nebraska Department of Health and Human Services. She affirmatively represented that she had not had sexual intercourse with any man other than Teablo either 2 months before or after the probable date of Ja'Quezz' conception. Based on that representation, the State of Nebraska sued Teablo on behalf of Ja'Quezz to establish paternity and an award for child support. The complaint was filed on December 12, 2008.

Notice

The State attempted twice to have Teablo personally served with notice of the paternity proceeding at two different street addresses in Omaha, Nebraska, and on two separate dates: December 12, 2008, and January 29, 2009. Both attempts were unsuccessful. The service returns indicated that Teablo did not reside at either location.

Having been unsuccessful in its attempts to personally serve Teablo, the State elected to serve Teablo with notice of the paternity proceeding by certified mail. It did not request the court's permission to change the manner of service upon

Teablo. On April 13, 2009, notice was mailed to a third address in Omaha. This was the address that Teablo had provided to his probation officer. At this address, Teablo's grandmother signed a return receipt indicating that she accepted delivery of the summons and complaint. In a subsequent proceeding to set aside the paternity and order for child support, Teablo filed a sworn statement stating that he was homeless and did not have an address of his own when the original complaint for paternity was filed.

Default

On or about May 20, 2009, notice of a default hearing to be held on May 27 was sent to Teablo at the same address provided to his probation officer. The hearing was held, but Teablo did not appear. On May 29, the court entered a default order finding Teablo to be Ja'Quezz' father and requiring him to pay $91 per month in child support.

After Default

On January 7, 2010, Teablo, acting pro se, moved to vacate the "Order of Support." The motion did not contain a certificate of service and was never set for hearing. The motion identified Teablo's current address in Omaha. At an October 2012 contempt proceeding, Teablo requested genetic testing. The testing conclusively determined that Teablo was not Ja'Quezz' father.

On January 3, 2014, with the aid of counsel, Teablo filed a complaint to set aside the order of paternity and the award of child support. Teablo moved to vacate the order for lack of service. Teablo subsequently filed an amended motion to vacate the order, because the order was obtained as a result of the fraudulent misrepresentation to the State by Ja'Quezz' mother, Sasha.

On July 17, 2014, Teablo moved for summary judgment, alleging that no material facts were in dispute that Teablo was not properly served with notice of the paternity action. He claimed the order should be vacated as a matter a law on the

ground that the district court lacked jurisdiction when the order was entered.

In support of that motion, Teablo argued that the applicable service statute, § 43-1411, required that defendants in paternity actions be provided with actual notice through personal service, and not by constructive notice by using another method of service. Teablo asserted that before service by another method other than personal service can be used in a paternity action, the party seeking alternative service must comply with Neb. Rev. Stat. § 25-517.02 (Reissue 2008), which states:

> Upon motion and showing by affidavit that service cannot be made with reasonable diligence by any other method provided by statute, the court may permit service to be made (1) by leaving the process at the defendant's usual place of residence and mailing a copy by first-class mail to the defendant's last-known address, (2) by publication, or (3) by any manner reasonably calculated under the circumstances to provide the party with actual notice of the proceedings and an opportunity to be heard.

Teablo asserted that the court never acquired jurisdiction over him, because he was not provided notice by personal service and because the State failed to obtain the court's permission before proceeding with service by another method of providing notice. As a result, Teablo claimed that the order establishing paternity and support was void. Teablo did not argue that summary judgment was appropriate on the issue whether the order should be vacated because it was obtained by fraud.

Teablo's motion for summary judgment was denied by the referee of the Douglas County District Court. Teablo timely filed his exception to the referee's report. After a hearing on Teablo's motion for summary judgment, the district court determined as a matter of law that § 43-1411 requires that the State either personally serve a putative father with notice of a paternity proceeding or receive approval from the court before

attempting another method of service. Therefore, it concluded that the district court did not have jurisdiction when it entered the order establishing paternity and support, and it vacated that order. The State appeals.

ASSIGNMENTS OF ERROR

The State assigns, combined and restated, that the district court erred (1) in finding that service of process was not proper under § 43-1411 and Neb. Rev. Stat. § 25-508.01 (Reissue 2008) and (2) by granting equitable relief to Teablo when he has an adequate remedy under the law at Neb. Rev. Stat. § 43-1412.01 (Reissue 2008).

STANDARD OF REVIEW

[1] An appellate court resolves questions of law and issues of statutory interpretation independently of the lower court's conclusion.[1]

ANALYSIS

[2] The issue presented is whether the district court properly granted Teablo's motion for summary judgment. A motion for summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[2] As noted, the parties agree on the material facts, but disagree whether Teablo was entitled to judgment as a matter of law. Specifically, the parties disagree whether Teablo was properly served with notice of the proceeding, such that the district court had personal jurisdiction over Teablo when it entered the order establishing paternity and support.

The Legislature has provided the method of service of process in paternity proceedings. Section 43-1411 provides, "Summons shall issue and be served as in other civil proceedings . . . ."

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[1] *Fox v. Whitbeck*, 280 Neb. 75, 783 N.W.2d 774 (2010).

[2] *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015).

Neb. Rev. Stat. § 25-505.01 (Reissue 2008) governs service in civil proceedings and, at the time relevant to this appeal, provided in part:

> (1) Unless otherwise limited by statute or by the court, a plaintiff may elect to have service made by any of the following methods:
>
> (a) Personal service which shall be made by leaving the summons with the individual to be served;
>
> (b) Residence service which shall be made by leaving the summons at the usual place of residence of the individual to be served, with some person of suitable age and discretion residing therein; or
>
> (c) Certified mail service which shall be made by (i) within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery, and (ii) filing with the court proof of service with the signed receipt attached.

[3] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.[3] An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[4] The plain language of §§ 43-1411 and 25-505.01 shows the Legislature's intent that a putative father may be served by any one of the three methods listed in § 25-505.01.

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[3] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006); *Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005); *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003); *Morello v. Land Reutil. Comm. of Cty. of Douglas*, 265 Neb. 735, 659 N.W.2d 310 (2003).

[4] *24th & Dodge Ltd. Part. v. Acceptance Ins. Co.*, 269 Neb. 31, 690 N.W.2d 769 (2005); *Mitchell v. French*, 267 Neb. 656, 676 N.W.2d 361 (2004); *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004); *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004); *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003).

The district court erred in concluding the language in § 25-505.01, "[u]nless otherwise limited by . . . the court," meant that the court must approve the method of service of process in cases involving a parent-child relationship. But although we have recognized that the parent-child relationship is afforded due process protection,[5] we have never held that due process requires that a party to a proceeding involving a parent-child relationship must be personally served with actual notice of those proceedings, as opposed to other methods of issuance of service of summons in civil proceedings.[6]

In determining whether due process requires that a putative father receive actual notice by personal service, the district court considered the factors outlined in the U.S. Supreme Court case *Mathews v. Eldridge*.[7] Those factors were generally to be considered in deciding what process was due a defendant, for example, in deciding whether a party was entitled to notice, a hearing, or appointed counsel.[8] But in determining whether the method used to give notice was constitutionally adequate, the U.S. Supreme Court has regularly turned to the test set forth in *Mullane v. Central Hanover Tr. Co*.[9]

In *Mullane*, the U.S. Supreme Court held that due process requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[10]

Under the circumstances herein presented, we conclude that the notice was reasonably calculated to apprise Teablo of the

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[5] See *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

[6] See § 25-505.01.

[7] *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct 893, 47 L. Ed. 2d 18 (1976).

[8] *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012); *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988).

[9] *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

[10] *Id.*, 339 U.S. at 314.

pendency of the paternity action. The notice was sent by certified mail to the address Teablo provided to his probation officer and was signed for by Teablo's grandmother at that address. Although Teablo claims he "was homeless and did not have an address of [his] own" at that time, due process does not require heroic efforts by the State in locating the defendant.[11]

Instead, "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[12] It is undisputed that the State attempted twice to personally serve Teablo at two different addresses. After those attempts failed, the State sent notice by certified mail to the address Teablo provided to his probation officer, and Teablo's grandmother signed for the notice. We find that the means employed by the State were permitted by statute and that the notice sent by certified mail was reasonably calculated to apprise Teablo of the pendency of the paternity action.

CONCLUSION

Because the State complied with both § 43-1411 and due process, we find that service was proper and that the district court erred in granting summary judgment in favor of Teablo. We therefore reverse the judgment and remand the cause for further proceedings consistent with this opinion.

Because we reverse, and remand for further proceedings, we do not reach the State's assignment that the district court erred in granting equitable relief when Teablo has an adequate remedy under the law.

Reversed and remanded for
further proceedings.

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[11] See *Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002).

[12] *Mullane v. Central Hanover Tr. Co., supra* note 9, 339 U.S. at 315.

Nebraska Supreme Court
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Jeannette L. McReynolds, appellant, v. RIU Resorts and Hotels, S.A., et al., appellees.

880 N.W.2d 43

Filed April 15, 2016. No. S-15-423.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
4. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.
5. **Negligence.** The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.
6. **Negligence: Words and Phrases.** A "duty" is an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another.
7. **Negligence.** If there is no duty owed, there can be no negligence.
8. **Agents: Negligence.** Travel agents do not owe a duty to disclose information about obvious or apparent dangers.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

James R. Place, of Place Law Office, for appellant.

Dan H. Ketcham and Sara K. Houston, of Engles, Ketcham, Olson & Keith, P.C., for appellees The Mark Travel Corporation, doing business as Funjet Vacations, and Ultimate Cruise and Vacation, Inc.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Cassel, J.

NATURE OF CASE

After Jeannette L. McReynolds' jewelry was stolen from a safe in her hotel room, she sued the companies that arranged her vacation, claiming that they should have warned her the hotel's key system did not meet industry standards and that they breached their contractual duty to provide a safe hotel room. The district court entered summary judgment in favor of the companies, and McReynolds appeals. Because we conclude that the companies did not owe a duty to warn McReynolds about the obvious defect of the key system and that McReynolds failed to produce evidence showing that a genuine issue of material fact exists regarding her breach of contract claim, we affirm.

BACKGROUND

Vacation

In February 2011, McReynolds traveled to a resort in Puerto Vallarta, Mexico. The trip was an all-inclusive vacation package arranged by two companies, Ultimate Cruise and Vacation, Inc., and The Mark Travel Corporation, doing business as Funjet Vacations (collectively the companies).

When McReynolds checked into the hotel in Mexico, she received a key to the safe in her room, and she began storing her jewelry and cash in the safe. A few days later, a traveling companion told her that she should not keep her room key in the same bag as her safe key, because her room number was engraved on her room key. He told her that she "should keep them separate because of [their] sitting down at the

beach, going in the water and how unattended [her] beach bag was." After receiving this advice, McReynolds continued to use the safe and began to hide the safe key in her room. She did not consider keeping the safe key on her person or giving it to another person for safekeeping, and she did not ask the companies for recommendations regarding where to keep the key.

Near the end of her stay, McReynolds left her room and stowed eight pieces of jewelry and some cash in the safe. She hid the safe key inside a purse and hid the purse inside a drawer in her room before she left. When McReynolds returned, she discovered that the safe key was missing and that the safe was locked. Hotel staff used a drill to open the safe, which was empty. There were no signs that entry into the room was forced.

Hotel staff reported the theft to the police, but McReynolds never recovered the items taken from the safe. She claims that the jewelry taken from the safe was valued at $63,985 and that $560 in cash was also taken.

When McReynolds returned from the trip, she contacted an employee of the companies. That employee told her that the other hotel at the resort "'included a credit card key system as opposed to the antiquated room key system'" used at the hotel where McReynolds stayed.

District Court

McReynolds filed a complaint in district court and named as defendants the companies and the local and corporate owners of the hotel. She stated four theories of recovery, including negligence and breach of contract.

McReynolds claimed that the companies were negligent in failing to warn her of the "defect in the key system of the hotel." According to McReynolds, a key system "in which the key displays the room number does not comply with the international hotel industry's standard . . . when the in-room safe also requires a key instead of a combination," because it

"necessitates the two (2) keys to be separated." She claimed that the companies should have warned her of "this industry standard violation."

Regarding her breach of contract claim, McReynolds claimed that she contracted with the companies for her hotel room and that they breached their duty under the contract to provide her with a secure room free from criminal acts. She did not point to any language in any contract to support this argument.

The companies moved for summary judgment. In support of the motion, they offered affidavits of their employees and their attorney. McReynolds offered her own affidavit in opposition to the motion.

The companies' employees averred in their affidavits that McReynolds "was charged for services which were limited to the booking of a hotel room in Mexico for the purpose of a vacation." They stated that the companies "did not undertake to contract with [McReynolds] or provide [McReynolds] with any other services." They also stated that they were not aware that McReynolds planned to take valuable jewelry with her to Mexico.

McReynolds stated in her affidavit that the companies provided her services beyond merely booking a hotel room. She claimed that they provided an all-inclusive vacation package that included airfare, lodging, meals and drinks, a sailing excursion, ground transportation, and a designated representative who was present at the resort and available to respond to inquiries from guests or arrange additional excursions. She also claimed that before her vacation, she communicated with an employee of the companies. According to McReynolds, the employee said that she had personal knowledge of the hotel because she had recently traveled there herself. The employee also provided a photograph of the companies' designated representative and promised to share "'travel tips.'" McReynolds did not make any claims in her affidavit regarding the promises the companies made to her by contract.

The district court granted summary judgment for the companies on all of McReynolds' theories of recovery. Regarding McReynolds' negligence claim, the district court first concluded that assuming that the key system was defective, the companies did not have a duty to warn McReynolds about the key system. Second, it concluded that even if the companies were negligent, McReynolds was also negligent in leaving her safe key in the room, and that her negligence superseded any negligent act by the companies. Third, it concluded further that the theft was the result of an intentional act by a third party, which also superseded any negligent act by the companies. Regarding her breach of contract claim, the district court found that there was no evidence that the companies contracted with McReynolds to protect her jewelry and cash.

McReynolds filed this timely appeal, and we moved the case to our docket.[1]

ASSIGNMENTS OF ERROR

McReynolds assigns, restated, that the district court erred in granting the companies' motion for summary judgment, because material issues of fact exist regarding (1) the nature of the services provided by the companies and their duty to disclose pertinent information and (2) whether they breached their contract with McReynolds by failing to disclose pertinent information.

STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

[2] *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015).

[2,3] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[3] When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.[4]

ANALYSIS

Duty to Warn

[4-7] On appeal, McReynolds claims that genuine issues of material fact exist regarding whether the companies acted as her special agents and whether they therefore owed her a duty to disclose pertinent information. An "agent may be subject to tort liability to the principal for failing to perform his duties."[5] In order to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty.[6] Thus, the threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.[7] A "duty" is an obligation, to which the law gives recognition and effect, to conform to a particular standard of conduct toward another.[8] If there is no duty owed, there can be no negligence.[9]

This court has never considered whether a travel agent owes a duty to disclose pertinent information to its clients.

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[3] *Olson v. Wrenshall*, 284 Neb. 445, 822 N.W.2d 336 (2012).

[4] *Id.*

[5] Restatement (Second) of Agency, ch. 13, topic 1, Introductory Note for §§ 376-398 at 171 (1958).

[6] *Olson v. Wrenshall, supra* note 3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

Courts from other jurisdictions generally agree that a travel agent who arranges vacation plans acts as more than a mere "ticket agent" and is a special agent of the traveler.[10] Those courts hold that as special agents, travel agents or tour operators are subject to the duties of care and skill imposed under the law of agency.[11] Under agency principles, travel agents do not owe a general duty to warn travelers of general safety precautions,[12] but they do owe a duty "'to use reasonable efforts to give [the] principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire.'"[13]

However, courts in other jurisdictions also agree that travel agents and tour operators do not owe a duty to disclose

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[10] *Afflerbach v. Cunard Line, Ltd.*, 14 F. Supp. 2d 1260 (D. Wyo. 1998); *Stafford v. Intrav, Inc.*, 841 F. Supp. 284 (E.D. Mo. 1993); *Maurer v. Cerkvenik-Anderson Travel, Inc.*, 181 Ariz. 294, 890 P.2d 69 (Ariz. App. 1994); *United Airlines, Inc. v. Lerner*, 87 Ill. App. 3d 801, 410 N.E.2d 225, 43 Ill. Dec. 225 (1980); *Grigsby v. O.K. Travel*, 118 Ohio App. 3d 671, 693 N.E.2d 1142 (1997); *Douglas v. Steele*, 816 P.2d 586 (Okla. App. 1991).

[11] See *Douglas v. Steele, supra* note 10 (citing Restatement, *supra* note 5, § 379(1)). See, also, 2 Restatement (Third) of Agency § 8.08 (2006).

[12] See, e.g., *Sova v. Apple Vacations*, 984 F. Supp. 1136 (S.D. Ohio 1997); *Davies v. General Tours, Inc.*, 63 Conn. App. 17, 774 A.2d 1063 (2001).

[13] *Maurer v. Cerkvenik-Anderson Travel, Inc., supra* note 10, 181 Ariz. at 296, 890 P.2d at 71 (quoting Restatement, *supra* note 5, § 381). See, also, *United Airlines, Inc. v. Lerner, supra* note 10; *Markland v. Travel Travel Southfield*, 810 S.W.2d 81 (Mo. App. 1991); 2 Restatement, *supra* note 11, § 8.11. But see, *Lavine v. General Mills, Inc.*, 519 F. Supp. 332, 335 (N.D. Ga. 1981) (stating that "the court can discern no duty that [tour package planner and seller] owed to plaintiff to warn her of or protect her from the hazard that caused her injury"); *Lachina v. Pacific Best Tour, Inc.*, No. 93 Civ. 6193 (HB), 1996 WL 51193, at *1 (S.D.N.Y. Feb. 7, 1996) (unpublished opinion) (holding that "[u]nder New York law, tour companies and travel agents . . . owe no duty to tour members to inform them of possible hazardous conditions on the property of others").

information about obvious or apparent dangers.[14] It appears well settled in other jurisdictions that an agent's duty to warn travelers of dangerous conditions "applies to situations where a tour operator [or travel agent] is aware of a dangerous condition not readily discoverable by the plaintiff. It simply does not apply to an obvious dangerous condition equally observable by plaintiff . . . ."[15]

This view appears consistent with § 18 of the Restatement (Third) of Torts,[16] which governs an actor's "Negligent Failure to Warn." Comment *f.* to that section provides:

> A defendant can be negligent for failing to warn only if the defendant knows or can foresee that potential victims will be unaware of the hazard. Accordingly, there generally is no obligation to warn of a hazard that should be appreciated by persons whose intelligence and experience are within the normal range.[17]

In the instant case, we do not need to decide whether the companies were McReynolds' special agents who therefore owed her a duty to disclose pertinent information. Assuming that they were McReynolds' special agents and that they owed her a duty to disclose pertinent information, we conclude that the companies did not owe a duty to warn her about the hotel's key system, because any dangers it may have posed were obvious.

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[14] *Hofer v. Gap, Inc.*, 516 F. Supp. 2d 161 (D. Mass. 2007); *Sachs v. TWA Getaway Vacations, Inc.*, 125 F. Supp. 2d 1368 (S.D. Fla. 2000); *Sova v. Apple Vacations, supra* note 12; *Passero v. DHC Hotels and Resorts, Inc.*, 981 F. Supp. 742 (D. Conn. 1996); *Stafford v. Intrav, Inc., supra* note 10; *Davies v. General Tours, Inc., supra* note 12; *Markland v. Travel Travel Southfield, supra* note 13.

[15] *Passero v. DHC Hotels and Resorts, Inc., supra* note 14, 981 F. Supp. at 744.

[16] 1 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 18 (2010).

[17] *Id.*, comment *f.* at 208.

We find two cases from other jurisdictions particularly instructive. Both cases addressed situations involving obvious dangers.

In *Hofer v. Gap, Inc.*,[18] the plaintiff was injured when she fell into a pond at a hotel. She sued the operator of the Web site that she used to book her hotel room, claiming that the Web site operator, as her agent, had a duty to warn her of dangerous hazards of which it was aware through its "'inside information.'"[19] The court concluded that the Web site operator had no duty to warn the plaintiff, because there was "no evidence to suggest that [the Web site operator] had 'inside information' about the conditions of the turtle pond and stairs that [the plaintiff] did not herself have. The alleged hazards were just as open and obvious to [the] plaintiff as they were to [the Web site operator]."[20]

The court in *McCollum v. Friendly Hills Travel Center*[21] reached a similar conclusion. There, the plaintiff used a travel agency to book a trip to a resort in order to water-ski. He asked the travel agent whether he would need to bring his own skiing equipment with him, and she told him that he did not. When he arrived, he discovered that the resort had only one pair of water skis, which was in disrepair. He also found that the resort did not provide water-skiers with an observer. The plaintiff inspected the skis, concluded that they were worn but safe, and used them to water-ski three times. The third time, the boat driver took the plaintiff into rough water, and he was injured. The plaintiff sued the travel agency, claiming that the agency should have warned him about the dangerous skiing conditions at the resort.

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[18] *Hofer v. Gap, Inc., supra* note 14.

[19] *Id.* at 176.

[20] *Id.* at 179.

[21] *McCollum v. Friendly Hills Travel Center*, 172 Cal. App. 3d 83, 217 Cal. Rptr. 919 (1985).

The California court, discussing the issue in terms of the breach of a duty rather than the existence of a duty, concluded that the travel agency did not breach its duty to warn. It reasoned that there was no breach, because

> if the equipment or skiing conditions, including, but not limited to the absence of an observer in the boat, are obviously unsafe it is incumbent upon the traveler to refrain from using those facilities. He cannot simply ski with impunity, mistakenly secure in the knowledge that the travel agent who arranged his vacation consulted a book, learned that the hotel had ski equipment and therefore assume that the equipment and conditions must be safe despite his observation of their obvious defective appearance.[22]

In the instant case, McReynolds claims that the hotel's key system was defective because her room key was engraved with her room number. She argues that the engraved number created a risk of theft, because if she kept the room key in the same bag as her safe key and the bag was stolen, "the thief would have access to both the room and the room safe." Therefore, the system "necessitate[d] the two (2) keys to be separated." She claims the companies negligently failed to warn her of this defect in the key system, but she also admits that she recognized the defect and that she continued to use the safe anyway.

[8] We adopt the majority rule that travel agents do not owe a duty to disclose information about obvious or apparent dangers and conclude that the companies had no duty to warn McReynolds of the obvious risk created by the key system. Because this particular risk of the defective key system was obvious, it was incumbent upon McReynolds to avoid the obvious danger it created. She apparently attempted to do so by hiding her safe key in her room. She does not claim that

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[22] *Id.* at 95, 217 Cal. Rptr. at 926.

the companies should have warned her that hiding the safe key in her room created a risk of theft. And even if she had made such an allegation, the risk of theft created by hiding the key to a safe in the same room as the safe itself is obvious. Because no duty was owed, there was no negligence, and the lower court properly granted summary judgment as to this claim.

McReynolds' arguments that the companies owed her a duty to disclose are unconvincing. She relies almost exclusively upon an unpublished opinion from Missouri, *Lewis ex rel. Houseworth v. Eisin*,[23] which we do not find persuasive. In *Eisin*, the mother of a boy who drowned in a hotel pool while on a school trip sued the man who organized and served as the tour guide for the trip, claiming that the tour guide had a duty to disclose information regarding the dangers of the pool. The tour guide had not disclosed that several days before the trip at issue, another boy on one of his guided trips had nearly drowned in the same hotel pool. The Missouri court concluded that the tour guide had a duty to disclose his "inside information" about the pool.[24]

We find the dissenting opinion in *Eisin* more persuasive than the majority opinion upon which McReynolds relies. The dissenting opinion noted that the law in Missouri is that a travel agent does not have a duty to disclose information if "'that information is so clearly obvious and apparent to the traveler that, as a matter of law, the travel agent would not be negligent in failing to disclose it.'"[25] It concluded that the tour guide had no duty to disclose, because the dangers of the pool were obvious and apparent to the tour group, and it noted that

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[23] *Lewis ex rel. Houseworth v. Eisin*, No. ED 79341, 2002 WL 337775 (Mo. App. Mar. 5, 2002) (unpublished opinion).

[24] *Id.* at *5.

[25] *Id.* at *6 (Ahrens, J., dissenting) (emphasis omitted) (quoting *Markland v. Travel Travel Southfield, supra* note 13).

the majority's analysis "implicitly overrule[d] the 'obvious and apparent' exception to the general rule."[26] If we adopted McReynolds' suggested analysis, we would be rejecting the majority rule. We decline to do so.

Our conclusion is consistent with our revised jurisprudence on duty.[27] In *A.W. v. Lancaster Cty. Sch. Dist. 0001*,[28] we adopted the approach of § 7 of the Restatement (Third) of Torts[29] and held that an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

But we also noted that § 7(b) of the Restatement provides that "in exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that a defendant has no duty or that the ordinary duty of reasonable care requires modification."[30] We explained that "[a] no-duty determination . . . is grounded in public policy and based upon legislative facts, not adjudicative facts arising out of the particular circumstances of the case."[31] This power to make a no-duty determination also applies to duties imposed under other Restatement sections.[32]

Thus, we make the no-duty determination in the instant case as a matter of policy, based upon a traveler's ability to perceive obvious dangers. Imposing a duty to warn of obvious dangers would be a waste of time and could actually

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[26] *Id.*

[27] See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[28] *Id.*

[29] 1 Restatement, *supra* note 16, § 7.

[30] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 27, 280 Neb. at 213, 784 N.W.2d at 915.

[31] *Id.*

[32] 2 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 42, comment *b*. (2012).

inhibit safety, because it "would produce such a profusion of warnings as to devalue those warnings serving a more important function."[33]

This no-duty determination applies only to the class of cases involving obvious dangers. We do not address any other duties owed by travel agents to their clients.

Breach of Contract

McReynolds fails to clearly articulate the basis for her breach of contract claim—citing one theory in her assignment but a different one in her argument. Her assignment of error states that the district court erred in granting summary judgment, because material issues of fact exist with respect to "the resulting breach of contract by [the companies] in failing to disclose pertinent and critical information to [McReynolds] prior to the herein vacation." But the argument in her brief does not mention any contractual duty to disclose information. It instead argues that the companies had a contractual duty to provide a safe hotel room. Under either theory, this claim fails.

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.[34] After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[35]

To support their motion for summary judgment, the companies presented affidavits in which they averred that they "did

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[33] 1 Restatement, *supra* note 16, § 18, comment *f.* at 208.

[34] *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014).

[35] *Id.*

not undertake to contract with [McReynolds] or provide [her] with any other services" other than booking her hotel room. This evidence was sufficient to shift the burden of production to McReynolds. McReynolds did not present any evidence to the contrary. As we noted above, McReynolds' responsive affidavit did not address the terms of any contract with the companies. Therefore, she did not meet her burden to produce evidence showing the existence of material issues of fact, and the district court did not err in granting summary judgment as to this claim.

CONCLUSION

McReynolds' negligence claim fails because, even if the companies were her special agents and owed a duty to disclose pertinent information, they did not owe a duty to warn her about the obvious risk of hiding the key to the safe in the room in view of the nature of the hotel's key system. And McReynolds did not show that a genuine issue of material fact exists regarding her breach of contract claim. Accordingly, we affirm the district court's order granting summary judgment for the companies.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Gregory S. Duncan, appellant.

878 N.W.2d 363

Filed April 15, 2016. No. S-15-668.

1. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
3. **Sentences: Words and Phrases: Appeal and Error.** An appellate court reviews criminal sentences for abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?
5. **Criminal Law: Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error.** In a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the

defendant proceeds with trial and introduces evidence. But the defendant may challenge the sufficiency of the evidence for the conviction.

6. **Directed Verdict: Appeal and Error.** When a defendant makes a motion at the close of the State's case in chief and again at the conclusion of all the evidence, it is proper to assign as error that the defendant's motion for directed verdict made at the conclusion of all the evidence should have been sustained.
7. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
8. **Jury Instructions.** In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
10. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
11. **Jury Instructions.** In instructing a jury, the trial court is not required to define language commonly used and generally understood.
12. **Sentences.** When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the offense. The sentencing court is not limited to any mathematically applied set of factors.
13. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
14. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does

not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.

15. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
16. ____: ____. To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.
17. ____: ____. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
18. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
19. **Effectiveness of Counsel: Proof.** In an ineffective assistance of counsel claim, deficient performance and prejudice can be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to lack of sufficient prejudice, that course should be followed.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Cindy A. Tate, and Korey T. Taylor for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Cassel, J.

I. NATURE OF CASE

A statute[1] enhances the penalty for third degree assault when it is committed because of the victim's association with

[1] Neb. Rev. Stat. § 28-111 (Cum. Supp. 2014).

a person of a certain sexual orientation. Gregory S. Duncan appeals from a conviction and sentence pursuant to this statute. There are two principal issues. We first consider whether the State introduced evidence sufficient to withstand Duncan's renewed motion for a directed verdict. It did. Second, we find no error in the district court's refusal of Duncan's requested jury instruction defining "sexual orientation." And finding no merit to Duncan's other assignments of excessive sentence and ineffective assistance of counsel, we affirm Duncan's conviction and sentence.

II. BACKGROUND

Duncan was convicted of third degree assault, discrimination based, for punching Ryan Langenegger outside a restaurant in Omaha, Nebraska. Third degree assault, discrimination based, is a Class IV felony punishable by a maximum of 5 years' imprisonment and a $10,000 fine.[2] He was sentenced to 12 to 18 months in prison and given credit for 53 days of time served.

The statute that provides enhanced penalties for discrimination based offenses provides, in relevant part:

> Any person who commits one or more of the following criminal offenses against a person or a person's property because of the person's . . . sexual orientation . . . or because of the person's association with a person of a certain . . . sexual orientation . . . shall be punished by the imposition of the next higher penalty classification than the penalty classification prescribed for the criminal offense, unless such criminal offense is already punishable as a Class IB felony or higher classification: . . . assault in the third degree, section 28-310 . . . .[3]

At trial, Duncan admitted that he punched Langenegger but claimed that the punch was not motivated by Langenegger's

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[2] Neb. Rev. Stat. § 28-310 (Reissue 2008); § 28-111; Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014).

[3] § 28-111.

association with a person of a certain sexual orientation. This is his direct appeal.

1. State's Case in Chief

The State presented testimony that before the assault, Langenegger attended a "drag show" at a "gay bar" with two friends, Joshua Foo and Jacob Gellinger. Langenegger is heterosexual, and Foo and Gellinger are homosexual. Langenegger was wearing a men's suit, Foo was wearing pants and a suit jacket over a women's sequined top, and Gellinger was wearing a dress, platform shoes, makeup, and a wig. Gellinger is a tall person, and the platform shoes made him appear around 6 feet 5 inches tall. When Gellinger is dressed in women's clothing, Gellinger "go[es] by Fendi Blu," which is an "alter ego" or "drag persona." Gellinger was generally identified as "Fendi Blu" at trial, and we do the same in this opinion.

Around 2 a.m., Foo, Langenegger, and Fendi Blu left the bar together and went to a restaurant. Fendi Blu was intoxicated, but Foo and Langenegger were not. While they were sitting at the restaurant, Foo noticed a group of three men who were "kind of like joking" and "kept looking over at our table and things." Foo, Langenegger, and Fendi Blu did not know who the men were at the time, but they were later identified at trial as Duncan, Joseph Adriano, and Paul Larson. The men's behavior made Foo feel "uneasy being there at the moment," so he asked Langenegger and Fendi Blu to leave.

While they waited for Langenegger to finish his food, Foo saw Adriano walk over to their table. Foo testified that Adriano looked over to his friends and said, "'Should I, should I?'" Foo thought Adriano's tone "wasn't . . . very good," and he told Langenegger and Fendi Blu, "'We need to go.'" Fendi Blu and Langenegger gathered their things, and as they were leaving, Foo heard the men laughing and calling out derogatory names as they walked away, including the word "'fag.'" At trial, counsel for the State asked Foo

whether "'fag'" is "a derogatory word for homosexuals," and Foo responded, "Yes."

Both groups exited the restaurant. Once outside, Foo helped put on Fendi Blu's shoes, and Duncan's group stopped in front of Foo's group. Foo testified that Adriano walked up to Fendi Blu, looked over at Duncan and Larson, and said, "'Should I?'" as they laughed behind him. Duncan and Larson stood a few feet behind Adriano. Langenegger heard Adriano say, "'Faggot,'" and Foo heard someone say the word "'queer.'" Langenegger and Foo both testified that Fendi Blu then looked down and said, "'I know. I'm just a boy in a dress,'" and Adriano responded, "'Yeah, it's fucking disgusting.'"

Langenegger then "tried to calm down the situation," saying, "'Listen, we just want to go home,'" and Adriano responded, "'Come on, you fucking pussy.'" Langenegger began to state again that they just wanted to go home, but before he could finish speaking, he was punched in the face by Duncan. Langenegger and Foo testified that Langenegger did not make any threatening gestures, raise his voice, or touch Adriano or anyone else during this exchange.

After the punch, Duncan, Adriano, and Larson walked away, and Foo and Langenegger heard them laughing. Langenegger touched his face, and his hands came away covered with blood. He had "blood coming from his nose, in between his eyes, coming down his chin." Foo, Langenegger, and Fendi Blu proceeded to Langenegger's car, where Foo called the 911 emergency dispatch service and reported the incident. When the police arrived, Langenegger decided not to file a report because he "didn't think [Duncan, Adriano, and Larson] were going to get caught."

After speaking with the police, Foo and Langenegger drove Fendi Blu home and then drove to Foo's house. Foo took a photograph of Langenegger "to kind of document, like, what happened," and he posted the photograph on his personal "Facebook" page. He hoped that by posting about the assault online, someone might identify the attacker.

The police communicated with Foo and Langenegger after the photograph was posted. Langenegger made a formal report of the incident, and detectives identified Larson after obtaining his credit card information from the restaurant. Through Larson, detectives identified Duncan and Adriano. A detective testified that when he arrested Duncan, Duncan "did not seem to be [surprised] at all" that he was being arrested for a "hate crime."

Adriano and Larson also testified during the State's case in chief. Adriano testified that he remembers drinking at several bars that night, but that he does not remember leaving the bars or anything that occurred at the restaurant because he had a "blackout" from drinking. He said that he does not recall using the word "faggot" and that he does not use that word because he has close friends and family friends who are homosexuals. He also testified that he was not aware until later that anyone was assaulted.

Larson testified that when they exited the restaurant, he and Duncan were a few feet behind Adriano, and that he observed Adriano and Langenegger talking to each other, but could not hear what they were saying. After Duncan punched Langenegger, Larson saw Langenegger fall and get back up, and he also saw Adriano fall or stumble, but he did not see Langenegger touch Adriano.

2. Motion for Directed Verdict

After this evidence was adduced, the State rested and Duncan moved for a directed verdict of acquittal on the charge of discrimination-based assault. He argued that the State had not met its burden "to show that there was some evidence that [Duncan] specifically targeted or selected [Langenegger] as a result or because he was associated with — he was associated with the gay people in this crowd."

The court stated that it had researched the interpretation of "'because of'" in other jurisdictions and discovered that they take one of three approaches. It said that some jurisdictions hold that sexual orientation must be the "sole reason" for the

assault, some jurisdictions apply a "'but-for' test," and others have stated that the victim must have been "selected substantially because of [his or her] association with a particular sexual orientation." The court concluded that a Nebraska court "would probably be in line with the substantial factor case law." And it overruled Duncan's motion, explaining that although the State had not presented direct evidence of Duncan's making outward slurs, the testimony presented was sufficient to support an inference of a discriminatory motive.

3. Duncan's Case in Chief and Renewed Motion

Duncan's case in chief consisted of his own testimony. He testified that Langenegger pushed Adriano and that he punched Langenegger to defend Adriano. He said he did not know or consider the sexual orientation of Langenegger or anyone else that night. He admitted that he was an arm's length away when Adriano was face-to-face with Langenegger, but he claimed that he did not hear what they said to one another.

Duncan also testified that he did not notice Foo's group or stare at them and that he had no idea that any homosexual people were in Foo's group. He did not hear Adriano make any slurs against homosexual people, and he does not remember seeing a man dressed as a woman in the restaurant.

After Duncan testified, he renewed his motion for a directed verdict of acquittal. He argued again that the evidence did not establish that he targeted Langenegger because of his association with people of a certain sexual orientation. The court overruled the motion.

III. ASSIGNMENTS OF ERROR

Duncan assigns, restated and consolidated, that the district court erred in (1) overruling his motions for a directed verdict, (2) denying his requested jury instruction, and (3) imposing an excessively harsh sentence. He also claims that he received ineffective assistance of counsel.

IV. STANDARD OF REVIEW

[1] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[4]

[2] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[5]

[3] An appellate court reviews criminal sentences for abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[6]

[4] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[7] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?[8]

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[4] *State v. Cook*, 266 Neb. 465, 667 N.W.2d 201 (2003).

[5] *Warner v. Simmons*, 288 Neb. 472, 849 N.W.2d 475 (2014).

[6] *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

[7] *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

[8] *Id.*

V. ANALYSIS

1. Directed Verdict

(a) Waiver

Duncan assigns that the district court erred in overruling both his motion for a directed verdict and his renewed motion for a directed verdict. In his assignments related to his motion for a directed verdict, he argues that the court misinterpreted the phrase "because of" in the enhancement statute and that it should have found that the State presented insufficient evidence to support a conviction under that statute. In his assignment related to his renewed motion, he argues again that the State presented insufficient evidence to support his conviction under the enhancement statute.

[5] The State responds that Duncan waived any right to challenge the district court's ruling on either motion because he proceeded with the trial and presented evidence. In support of its position, it cites *State v. Seberger*,[9] where we stated the well-established rule that in a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence, but the defendant may challenge the sufficiency of the evidence for the conviction.

The State's argument regarding Duncan's first motion for a directed verdict is correct. Because Duncan proceeded with the trial and presented evidence, he waived any right to challenge the district court's ruling on that motion.

[6] However, the State incorrectly argues that the waiver rule applies to Duncan's renewed motion. We said in *State v. Severin*[10] that

> [w]hen a defendant makes a motion at the close of the State's case in chief and again at the conclusion of all the

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[9] *State v. Seberger*, 284 Neb. 40, 815 N.W.2d 910 (2012).

[10] *State v. Severin*, 250 Neb. 841, 849, 553 N.W.2d 452, 457 (1996).

> evidence, it is proper to assign as error that the defendant's motion for directed verdict made at the conclusion of all the evidence should have been sustained."

Thus, it is proper for us to address whether the district court should have sustained Duncan's renewed motion for a directed verdict.[11] We clarify that this is the correct rule, but in the instant case, it makes little difference, because in Duncan's renewed motion, he complained only that the evidence was insufficient to support his conviction.

(b) Renewed Motion for Directed Verdict

Duncan claims that the district court should have granted his renewed motion for a directed verdict because the evidence was insufficient to support a conviction under the enhancement statute. In order to obtain an enhanced penalty, the State was required to prove that Duncan assaulted Langenegger because of Langenegger's association with a person of a certain sexual orientation.[12] Essentially, Duncan argues that the State did not meet its burden because it did not present direct evidence that he was aware that Foo and Fendi Blu were homosexual.

[7] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.[13] If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.[14]

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[11] See *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991).

[12] See § 28-111.

[13] *State v. Cook, supra* note 4.

[14] *Id.*

To determine whether there was a complete failure of evidence to establish that Duncan assaulted Langenegger because of his association with a person of a certain sexual orientation, we first consider the meaning of the phrase "because of." We have discussed the phrase on two previous occasions. In *Wymore v. Farmers Mut. Ins. Co. of Nebraska*,[15] we turned to the dictionary and concluded that in the context of an insurance contract, "because of" meant "'by reason of: on account of.'" Similarly, in *City of Gordon v. Ruse*,[16] we concluded that in the context of a statute requiring reimbursement of expenses incurred "because of" condemnation proceedings, "[t]he plain, ordinary, or common meaning of the phrase 'because of' is 'as a result of' or 'in connection with.'" Thus, the phrase "because of" in the enhancement statute requires the State to prove some causal connection between the victim's association with a person of a certain sexual orientation and the assault.[17]

We have often discussed causation in criminal cases. We have said that criminal conduct is a cause of an event if the event in question would not have occurred but for that conduct; conversely, conduct is not a cause of an event if that event would have occurred without such conduct.[18]

But this is the first time that we must apply the concept to a defendant's motive rather than his conduct. This concept of causation is ordinarily used to determine whether a

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[15] *Wymore v. Farmers Mut. Ins. Co. of Nebraska*, 182 Neb. 763, 764, 157 N.W.2d 194, 195 (1968) (quoting Webster's Third New International Dictionary, Unabridged 194 (1961)).

[16] *City of Gordon v. Ruse*, 268 Neb. 686, 691, 687 N.W.2d 182, 186 (2004).

[17] See, *In re M.S.*, 10 Cal. 4th 698, 896 P.2d 1365, 42 Cal. Rptr. 2d 355 (1995) (interpreting "because of" to require evidence of causal connection between victim's status and act); *State v. Hennings*, 791 N.W.2d 828 (Iowa 2010) (same); *Matter of Welfare of S.M.J.*, 556 N.W.2d 4 (Minn. App. 1996) (same); *State v. Plowman*, 314 Or. 157, 838 P.2d 558 (1992) (same).

[18] *State v. Muro*, 269 Neb. 703, 695 N.W.2d 425 (2005).

defendant's conduct is the cause of another's injury or loss. Under the language of the statute at issue here, we must adapt it to the context of a defendant's motive as a cause of his behavior.[19] Applying our causation principles by analogy, the phrase "because of" in the enhancement statute required the State to prove that Duncan would not have assaulted Langenegger but for his association with a person of certain sexual orientation. Under our highly deferential standard of review, the State did so.

The evidence was sufficient to prevent a directed verdict on the enhancement charge. First, although Duncan claimed that he did not know that Foo and Fendi Blu were homosexual, the State introduced evidence sufficient for a jury to infer that he did. The State presented testimony that Duncan, Adriano, and Larson were sitting together at the restaurant when Foo heard members of Duncan's group call out derogatory names for homosexuals as he, Langenegger, and Fendi Blu exited the restaurant. A rational jury could infer that even if Duncan did not say the derogatory names himself, he heard them. Additionally, while Duncan stood close enough to lunge and punch Langenegger outside the restaurant, Langenegger heard Adriano say, "'Faggot,'" and Foo heard someone say the word "'queer.'" A rational jury could find that Duncan did in fact hear those words and that he therefore believed that Langenegger was with people who were homosexual.

Second, the State presented evidence to show that Langenegger's association with homosexual people was the reason for the assault. The State's witnesses testified that there was no other apparent motivation. Langenegger testified that he had not spoken to Duncan before the assault, and Foo, Langenegger, and Larson all testified that Langenegger did not touch Adriano or anyone else in Duncan's group. A rational jury could infer from this evidence that Duncan's motivation

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[19] See *In re M.S., supra* note 17 (Kennard, J., concurring).

was his belief that Langenegger was associated with homosexual people. Therefore, the district court properly overruled Duncan's renewed motion for a directed verdict.

2. Jury Instruction

Duncan argues that the district court should have accepted his requested instruction, which provided: "'Sexual orientation' means heterosexuality, homosexuality, or bisexuality." Nebraska statutes do not define the term. The court declined to give the instruction, reasoning that "[p]articularly in light of the facts of this case," which involved only "homosexual and heterosexual" people, the term sexual orientation was a matter of common understanding. It instructed the jury that in order to find Duncan guilty of third degree assault, discrimination based, it had to find:

> 1. That [Duncan], on or about October 27, 2013, did intentionally or knowingly cause bodily injury to . . . Langenegger;
>
> 2. [Duncan] did so because of . . . Langenegger's association with a person of a certain sexual orientation;
>
> 3. That [Duncan] did so in Douglas County, Nebraska; and
>
> 4. That [Duncan] did not act in defense of another.

[8-10] In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.[20] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[21] All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues

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[20] *State v. Armagost*, 291 Neb. 117, 864 N.W.2d 417 (2015).

[21] *Id.*

supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[22]

[11] Jurors are accepted because they are men and women of common sense and have a common understanding of words ordinarily used in our language.[23] In instructing a jury, the trial court is not required to define language commonly used and generally understood.[24]

Under the facts of the instant case, the term "sexual orientation" was a word commonly used and generally understood. The term was used throughout the jury selection process and the trial, and there is no indication in the record that it produced confusion. For instance, during jury selection, counsel for the State told the jury: "I'm interested in knowing your thoughts regarding this discrimination-based law, as well as sexual orientation in general." He then asked if any juror either identified as "gay, lesbian, bisexual, or transgendered or [had] a close friend or family member who identifies themselves as such," and prospective jurors responded. No prospective juror asked what any of those terms meant. Furthermore, when the State's counsel asked whether "anyone here that does not personally know someone who identifies themsel[ves] as lesbian, gay, bisexual, or transgendered," no prospective juror responded that he or she did not. Clearly, the prospective jurors were familiar with the concept of sexual orientation.

Additionally, counsel for the State asked whether "anyone believe[d] that discrimination-based laws such as this should not include sexual orientation" and whether anyone felt "any

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[22] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[23] *Johnson v. Batteen*, 144 Neb. 384, 13 N.W.2d 625 (1944).

[24] *Omaha Nat. Bank v. Manufacturers Life Ins. Co.*, 213 Neb. 873, 332 N.W.2d 196 (1983). See, also, *Johnson v. Griepenstroh*, 150 Neb. 126, 33 N.W.2d 549 (1948) (concluding no need to define "right of way"); *Suiter v. Epperson*, 6 Neb. App. 83, 571 N.W.2d 92 (1997) (concluding no need to define "lookout" and "control").

type of conflict inside them about their ability to be fair and impartial in a case involving sexual orientation." Again, no juror asked him to define or explain the term. And Duncan's counsel also used the term "sexual orientation" with no apparent problems. He told the prospective jurors: "So what we're talking about here is a case involving an assault, an assault on somebody who was associated with a gay person or supposed gay person. Really, the term is sexual — sexual orientation. Gay is kind of a term we're loosely using here."

This is not a case where the court failed to instruct the jury on a legal concept with a particular meaning in the law.[25] The district court did not need to define "sexual orientation," because the term was a matter of common understanding under the facts of this case. Even if we assume that the proposed instruction was a statement of law and that it was a correct one, Duncan has shown no prejudice from the court's refusal of the instruction. This assignment of error is without merit.

3. Excessive Sentence

Duncan argues that the sentence of 12 to 18 months in prison was excessive. The 12- to 18-month sentence was well within the statutory limits for third degree assault, discrimination based, which is a Class IV felony and was at that time punishable by a maximum of 5 years' imprisonment and a $10,000 fine.[26] An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.[27]

[12,13] When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background,

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[25] See, e.g., *Danielsen v. Eickhoff*, 159 Neb. 374, 66 N.W.2d 913 (1954) (failing to define "proximate cause").

[26] §§ 28-310, 28-111, and 28-105.

[27] *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

(5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the offense.[28] The sentencing court is not limited to any mathematically applied set of factors.[29] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[30]

Duncan contends that the sentence was an abuse of discretion, because the court made a statement at trial that "it was a 'close call' that there was even enough there to go to the jury on the enhancement and make this more than a misdemeanor crime."[31] He notes that he maintained "even in apologizing to the court at sentencing that '[i]n absolutely no way was it intentionally to harm someone because of [his or her] sexual orientation.'"[32] And he claims that his "criminal convictions record was minimal."[33]

At sentencing, the district court stated that it considered Duncan's age, experience, background, criminal history, the type of offense, and his motivation for the offense. It noted that Duncan has a criminal history, including a prior felony arrest for possession with intent to deliver a controlled substance. It also explained that the presentence investigation report was incomplete because Duncan failed to participate, even though they "[c]ontacted [him] on a number of occasions." And it observed that because Duncan did not appear for sentencing, the court had to issue a warrant. The court stated

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Brief for appellant at 38.

[32] *Id.*

[33] *Id.*

that "those types of behaviors" showed that Duncan has a "disregard for court orders."

The court also considered the gravity of the offense. It explained that the Legislature has determined that crimes motivated by bias should be punished differently than those that are not and that "discrimination-motivated crimes do have a different impact on . . . our social fabric." But it also noted that Duncan's crime "did not involve significant violence."

The district court's statements show that it considered appropriate factors in fashioning Duncan's sentence. What Duncan is really arguing is that there was insufficient evidence to convict him under the enhancement statute. We have already concluded that the evidence was sufficient, and the jury found that Duncan targeted Langenegger because of his association with people of a certain sexual orientation. The district court did not abuse its discretion in imposing a sentence of 12 to 18 months' imprisonment.

4. Ineffective Assistance

Duncan contends that he received ineffective assistance of counsel. He complains that his counsel insinuated that Foo manipulated a photograph when he should have known that Foo did not do so and that he pursued an "inconsistent and arguably illogical or demeaning theory of defense," which prejudiced him.[34]

[14] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[35] The determining factor is whether the record is sufficient to adequately review the question.[36] We conclude that the record is sufficient to address all of Duncan's ineffective assistance claims.

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[34] *Id.* at 33.

[35] *State v. Watt, supra* note 22.

[36] *Id.*

[15-17] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[37] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[38] To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.[39] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[40]

[18,19] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.[41] Deficient performance and prejudice can be addressed in either order.[42] If it is more appropriate to dispose of an ineffectiveness claim due to lack of sufficient prejudice, that course should be followed.[43]

With these principles in mind, we examine each error that Duncan alleges his counsel committed. Duncan claims that his counsel was ineffective because he (1) asked Foo whether he manipulated a photograph, (2) introduced a "'sex on the sidewalk'" theory, and (3) made "demeaning and disparaging" comments about the victim and the State's witnesses during his closing argument. The record conclusively

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

[38] *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

[39] *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013).

[40] *Id.*

[41] *State v. Watt, supra* note 22.

[42] *Id.*

[43] *Id.*

shows that Duncan suffered no prejudice from any of these alleged deficiencies.

(a) Photograph

During Duncan's counsel's cross-examination of Foo, he insinuated that Foo used his photography "morphing" skills to manipulate the photograph of Langenegger that Foo then posted on his "Facebook" page. Foo denied manipulating the photograph, and the police officer who spoke to Langenegger that night later testified that the photograph showed Langenegger "[a]lmost exactly" as he appeared when he spoke to him. Duncan argues that his defense was prejudiced, because the State received "an advantage or point with the jury" when it rebutted the "morphing" theory through the officer's testimony.[44]

We conclude that there is no reasonable probability that but for Duncan's counsel's questions regarding "morphing," Duncan would have been acquitted. Duncan admitted that he assaulted Langenegger and only disputed the reason for the assault. The photograph of Langenegger had no bearing on Duncan's motivation for the assault. Therefore, the record establishes that this instance of counsel's conduct was not prejudicial to Duncan.

(b) "Sex on a Sidewalk" Theory

Duncan complains that his attorney attempted to introduce a "'sex on a sidewalk'" theory[45] at trial. Duncan claims this theory was "unsupported" and "like the defense was grasping at straws or throwing darts at a board to see what sticks so to speak when taken with the morphing and other things."[46] During the trial, Duncan's counsel asked Adriano, Langenegger, and Foo whether they saw what looked like sex

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[44] Brief for appellant at 34.

[45] *Id.* at 35.

[46] *Id.*

on the sidewalk between Foo and Fendi Blu when Foo helped put on Fendi Blu's shoes, and they all denied that it looked that way.

Once again, there is no reasonable probability that but for this conduct, Duncan would have been acquitted. Duncan's counsel's questions about "sex on a sidewalk" apparently related to Adriano's reason for engaging in an altercation with Langenegger, which had no bearing on Duncan's defense. Duncan's defense hinged on his claim that he had no idea why Adriano was upset and that he never heard Adriano say anything at all to Langenegger. Therefore, this claim is also refuted by the record.

(c) Demeaning Statements

Duncan points to nine statements made by his counsel during his closing argument that were "demeaning and disparaging to the victim and the State's witnesses."[47] He argues that his counsel's "illogical and/or demeaning theory of defense and characterization of the victim and witnesses in this case" prejudiced his defense.[48] The statements he complains of include the following: "[C]onsider the witnesses they are relying on. The man in drag, another gay man that lived a lie until he was 28 [when he told his parents he is homosexual], a person who has a political agenda"; and, "You got — their witnesses all were involved and they've got gay agendas."

Whether the State's witnesses had "gay agendas" had no bearing on Duncan's motivation for the assault, which was the issue in this case. Obviously, the jury did not believe Duncan's testimony that the assault had nothing to do with anyone's sexual orientation. We conclude that there is no reasonable probability that but for Duncan's counsel's disparaging statements, Duncan would have been acquitted. The

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[47] *Id.*

[48] *Id.* at 37.

record conclusively refutes that Duncan was prejudiced by his counsel's conduct.

VI. CONCLUSION

We conclude that there was sufficient evidence to prevent a directed verdict on the enhancement element. We also conclude that the district court did not err in denying Duncan's requested jury instruction, because "sexual orientation" was a matter of common understanding under the facts of this case. We conclude further that the district court's sentence was not an abuse of discretion and that Duncan did not receive ineffective assistance of counsel. We therefore affirm Duncan's conviction and sentence.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Timothy J. Britt, appellant.

881 N.W.2d 818

Filed April 22, 2016. No. S-14-551.

1. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection.
2. **Trial: Evidence.** Regardless of whether the proponent or the trial court articulated no theory or the wrong theory of admissibility, an appellate court may affirm the ultimate correctness of the trial court's admission of the evidence under any theory supported by the record, so long as both parties had a fair opportunity to develop the record and the circumstances otherwise would make it fair to do so.
3. **Rules of Evidence: Conspiracy.** Under Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 2008), a statement is excluded as nonhearsay if it is more likely than not that (1) a conspiracy existed, (2) the declarant was a member of the conspiracy, (3) the party against whom the assertion is offered was a member of the conspiracy, (4) the assertion was made during the course of the conspiracy, and (5) the assertion was made in furtherance of the conspiracy.
4. **Conspiracy.** The declarant conspirator who partners with others in the commission of a crime is considered the agent of his or her fellow conspirators, and the commonality of interests gives some assurance that the statements are reliable.
5. ____. It is well established that a conspiracy is ongoing—such that statements are considered made during the course of the conspiracy—until the central purposes of the conspiracy have either failed or been achieved.
6. ____. The federal courts and the overwhelming majority of state courts reject any argument that postcrime concealment is implicitly encompassed by the underlying conspiracy.

7. **Conspiracy: Hearsay: Rules of Evidence.** Absent an express original agreement among the conspirators to continue to act in concert in order to cover up or an independent coverup conspiracy, assertions are not excluded from the hearsay rule when made after the central aim of the conspiracy has ended and while the conspirators were acting in concert to conceal their prior criminal activity.
8. **Conspiracy: Hearsay: Time.** Every conspiracy is by its very nature secret and extending the conspiracy into the concealment phase by virtue merely of acts of covering up, even though done in the context of a mutually understood need for secrecy, would extend the life of a conspiracy indefinitely and concurrently extend indefinitely the time within which hearsay declarations will bind coconspirators.
9. **Conspiracy: Hearsay: Evidence.** To exclude statements from the hearsay prohibition under the theory that the declarant and the defendant formed a separate coverup conspiracy, the preponderance of the evidence must establish the separate conspiracy to conceal without relying on the facts of the original conspiracy to commit the underlying crime and without relying entirely on the hearsay statements themselves.
10. **Conspiracy.** A separate conspiracy to conceal cannot be implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment after the main objective has succeeded or failed.
11. **Conspiracy: Rules of Evidence: Case Disapproved.** *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), is disapproved insofar as it implies it is "well established" that statements made by a coconspirator in furtherance of avoiding capture or punishment fall under the coconspirator exclusion when the coconspirator is simply attempting to avoid arrest, which is the inevitable course of action following the success or failure of the principal aims of any conspiracy.
12. **Conspiracy.** A conspirator recounting past transactions or events having no connection with what is being done in promotion of the common design cannot be assumed to represent those conspirators associated with him or her. Such narrative statements are likely to be unreliable and self-serving, because they result from premeditation and design.
13. ____. Where a conspirator is not seeking through his or her statements to induce a listener to join the conspiracy, then the listener's subsequent role in the conspiracy does not retroactively convert the statements into declarations in furtherance of the conspiracy.
14. ____. Statements that further a speaker's own individual objective rather than the objective of a conspiracy are not made in furtherance of the conspiracy.
15. **Trial: Hearsay.** Alternate theories of admissibility for a statement objected to as hearsay and admitted for the truth of the matter asserted

are limited to theories under which the statement would be admissible for the truth of the matter asserted.

16. **Trial: Evidence: Appeal and Error.** The proponent of evidence who fails to present at trial alternative grounds for the admissibility of the evidence does so at his or her peril. If the record was inadequately developed to support foundation for alternate grounds or the opponent was not fairly given the opportunity to develop facts contrary to admissibility on the alternate grounds, then an appellate court will not affirm the ultimate correctness of the trial court's admission of the evidence under theories presented by the proponent for the first time on appeal.
17. **Rules of Evidence: Hearsay.** Excited utterances are an exception to the hearsay rule, because the spontaneity of excited utterances reduces the risk of inaccuracies inasmuch as the statements are not the result of a declarant's conscious effort to make them.
18. ____: ____. The justification for the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity for reflection and produces utterances free of conscious fabrication.
19. **Trial: Witnesses: Appeal and Error.** It would be inappropriate to attempt to ascertain the declarant's unavailability for the first time on appeal without evidence that the declarant was subpoenaed, that an actual claim of privilege was made, or that there was a ruling by the judge on the claimed privilege.
20. **Confessions.** While a self-inculpatory statement is more reliable under the theory that reasonable people do not make self-inculpatory statements unless they believe them to be true, the same cannot be said of a non-self-exculpatory statement.
21. **Confessions: Presumptions.** Statements of accomplices incriminating a defendant have traditionally been viewed with special suspicion and considered presumptively unreliable.
22. **Confessions.** Whether a particular remark within a larger narrative is "truly self-inculpatory"—such that a reasonable person would make the statement only if believed to be true—is a fact-intensive inquiry requiring careful examination of all the circumstances surrounding the criminal activity involved.
23. ____. A statement that is in part inculpatory by admitting some complicity, but that is exculpatory insofar as it places the major responsibility on others, does not meet the test of trustworthiness and is thus inadmissible.
24. **Criminal Law: Trial: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.

25. **Verdicts: Juries: Appeal and Error.** In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.
26. **Verdicts: Evidence: Appeal and Error.** Overwhelming evidence of guilt can be considered in determining whether the verdict rendered was surely unattributable to the error, but overwhelming evidence of guilt is not alone sufficient to find the erroneous admission of evidence harmless.
27. **Convictions: Evidence.** Where evidence is cumulative and other competent evidence supports the conviction, improper admission or exclusion of evidence may be harmless.
28. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Reversed and remanded.

Michael J. Wilson and Glenn Shapiro, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ., and Irwin and Bishop, Judges.

Wright, J.

I. NATURE OF CASE

Timothy J. Britt was convicted on three counts of first degree murder, three counts of use of a deadly weapon to commit a felony, and one count of possession of a deadly weapon by a prohibited person. These convictions were based in part upon the testimony of several witnesses as to statements made by an alleged coconspirator, Anthony Davis, after the murders. Britt appeals, arguing that the trial court erred in overruling his hearsay objections to these statements.

II. BACKGROUND

Britt's convictions arose out of the deaths of Miguel E. Avalos, Sr. (Miguel Sr.); Jose Avalos; and Miguel E. Avalos, Jr. (Miguel Jr.) Davis was convicted in a separate trial of three counts of first degree murder and three counts of use of a deadly weapon to commit a felony arising from the deaths of the same victims.[1] At the time of Britt's trial, Davis was awaiting sentencing.

1. Attempted Robbery

In the early morning hours of July 9, 2012, Miguel Sr., Jose, and Miguel Jr. were shot and killed during an attempted robbery of their house near the intersection of Ninth and Bancroft Streets in Omaha, Nebraska. At the time of the robbery, Miguel Sr.'s oldest son was living in the basement of the house with his wife and infant child. This son heard the shots and hid with his family. He testified that he believed he heard more than one intruder.

Miguel Sr. was a known drug dealer. Before Miguel Sr.'s death, a confidential informant, Greg Logemann, told police about Miguel Sr.'s drug dealings. Logemann was also a drug dealer and was friends with Davis. Britt's brother, Mike Britt, was also a friend of Davis.

Logemann testified that in early July 2012, he and Davis began plans to rob Miguel Sr. In exchange for his testimony at trial, Logemann was granted limited use immunity and not charged with the murders. Logemann was charged with criminal conspiracy to commit robbery, a Class II felony.

Logemann stated he thought Miguel Sr. would "be an easy lick." But there was no talk about killing anyone. The plan was that he would show Davis where Miguel Sr. lived and that Davis would then commit the robbery. Davis and Logemann agreed to split the profit from the robbery with "[w]hoever [Davis] took with him" to commit the robbery.

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[1] See *State v. Davis*, 290 Neb. 826, 862 N.W.2d 731 (2015).

On the evening of July 8, 2012, Davis and Logemann put their plan into action. Davis got a ride from his friend, Crystal Branch, and her roommate, Charice Jones. Both Branch and Jones testified at trial, and both were granted immunity in exchange for their testimony. Branch, who was driving her van, and Jones picked up Davis at his apartment. Britt's brother, Mike, was there, and Branch, Jones, Davis, and Mike left the apartment to pick up Logemann. According to Jones, they dropped Mike off before picking up Logemann, and Britt joined them in the van at that time.

Logemann testified Britt was in the van when he was picked up. But according to Branch, Mike—not Britt—was with them when they picked up Logemann and drove by the house on Ninth and Bancroft Streets. Logemann's participation in the robbery was to "show [Davis] where to go later on." Logemann, Branch, and Jones testified that, at Logemann's direction, they drove by a house in the area of Ninth and Bancroft Streets, which Logemann identified as Miguel Sr.'s house.

When they drove by Miguel Sr.'s house, Branch and Jones were in the front seats listening to music and drinking beer. Davis, Logemann, and the third person (being either Britt or Mike) sat in one of the back bench seats. Logemann sat near Britt (or Mike) and Davis in the van while Logemann discussed the planned robbery with Davis. Logemann's testimony regarding the specific details of the discussion was unclear.

Logemann, Branch, and Jones testified that Jones drove Logemann back to his apartment. According to Branch, they next dropped off Mike and picked up Britt.

Branch and Jones testified that shortly after dropping off Logemann, Davis and Britt went to the house where Branch and Jones lived. Branch and Jones testified that they all drank alcohol. Jones ingested methamphetamine, and Branch smoked marijuana.

Branch and Jones testified that in the early morning hours of July 9, 2012, Davis asked them to drive him and Britt back to the area of Ninth and Bancroft Streets. Branch and Jones

agreed and testified that the van contained only Branch, Jones, Davis, and Britt.

Once at Ninth and Bancroft Streets, Britt asked for the keys to the van and directed Branch and Jones to get in the back seat, which they did. Branch and Jones testified that Davis and Britt then left the van. Branch and Jones sat in the back of the van drinking alcohol and playing on their cell phones. Davis returned after approximately 5 minutes. He silently got into the van and said nothing. About 5 minutes later, Britt returned to the van and drove them back to Branch's house.

Branch testified that Britt ran back to the van, wearing a bandanna over his face and gloves on his hands. Jones stated that she did not notice Britt wearing a bandanna and gloves, and believed that she would have noticed if Britt had been wearing such items upon his return. Jones did not say that Britt ran to the van. No one saw Davis or Britt with a weapon. Upon arrival Britt said, "[D]id you hear anything"?

Logemann testified that Branch and Jones knew about the robbery and, "[a]s far as I know," they were "in on the cut of the action." Branch and Jones stated they believed Davis was going to buy drugs from whoever lived in the house and believed they had driven by the first time because the dealer was not home. Jones thought Britt had asked for her keys before going into the house on Ninth and Bancroft Streets because she had been drinking.

2. Police Investigation

During this same general timeframe, officers from the Omaha Police Department received a 911 emergency dispatch call reporting a shooting at the Avalos house. Upon arriving at the house, the officers discovered an older male, later identified as Miguel Sr., and two teenage males, later identified as Jose and Miguel Jr., lying in pools of blood on the floor. Miguel Sr. was found in the dining room, Jose was in the hallway, and Miguel Jr. was in his bedroom. All three victims had suffered multiple gunshot wounds to the head and/or chest.

It was determined that the shots had been fired by at least two guns—one shooting .22-caliber bullets, and another shooting .40-caliber bullets. Spent shell casings from .40-caliber bullets were found in the living room, dining room, and bedrooms. Jose was pronounced dead at the scene; Miguel Sr. and Miguel Jr. were taken to an Omaha hospital, where they subsequently died from their injuries.

The police confiscated various items from the house, including a .40-caliber semiautomatic handgun, methamphetamine, and over $5,000 in cash. The .40-caliber semiautomatic handgun was found on the floor in Miguel Sr.'s bedroom, which was in disarray. The DNA testing of the semiautomatic handgun was inconclusive as to Davis and Britt. They could neither be included nor excluded as having contributed DNA to the gun. The Avalos house was tested for fingerprints, but the only usable print recovered was that of Miguel Jr.

Logemann initially denied knowing anything about the murders. On July 20, 2012, Logemann told the police about the conspiracy to rob Miguel Sr., and the police thereafter contacted Branch and Jones. Initially, Branch and Jones were untruthful, but eventually reported to the police Davis' and Britt's movements on July 8 and 9.

The police also contacted Tiaotta Clairday, Davis' girlfriend, who provided information about Davis' and Britt's actions in the days following the murders. With Clairday's assistance, the police retrieved a .22-caliber revolver from a culvert near Ashland, Nebraska. Clairday reported that the gun came from Britt. Comparisons of the revolver to the .22-caliber bullets recovered during the autopsies were inconclusive. Logemann stated that before July 8, 2012, he had seen Davis with a .22-caliber revolver in the basement of Davis' apartment.

3. Period During Which Davis and Britt Avoided Apprehension

Britt was not apprehended until July 25, 2012. Before his apprehension, Britt stayed at the house where Branch and

Jones lived. Branch, Jones, Clairday, and Logemann testified about numerous statements made by Davis following the murders and preceding Britt's arrest. Davis did not testify at trial.

Over Britt's hearsay objection, the trial court admitted Davis' statements as nonhearsay statements by a coconspirator under Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 2008). The court apparently relied on *State v. Gutierrez*[2] for the proposition that the conspiracy does continue during the period of concealment after the principal aims of a conspiracy. The court did not find that Davis and Britt had formed a new coverup conspiracy.

(a) Branch

Branch testified that at approximately 4 a.m., she, Jones, Davis, and Britt arrived back at the house she shared with Jones. She witnessed Davis and Britt having an argument half a block from the house and before Davis and Britt came inside.

Once in the house, Davis went to the bathroom and appeared to be sick. Britt sat on the couch and was silent. When Davis reemerged from the bathroom, he said he was trying to find a ride to get home. Eventually, Clairday arrived to pick up Davis and Britt, and they left.

A couple of hours later, Branch saw on the news reports of a triple homicide near Ninth and Bancroft Streets. Branch contacted Davis and made arrangements to meet with Davis that afternoon. When Branch, Jones, and Davis met, Davis confiscated Jones' and Branch's cell phones to see who they had been texting.

Branch testified that at that time, Davis told her she "needed to get out of town" and asked how much money she had. When Branch asked Davis what he had gotten himself into, Davis responded that "he had to answer to other people, and he thought [Branch] and [her] kids' safety was in jeopardy";

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[2] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

that "he had to answer to higher-ups now"; that he "just wanted [Branch] and [her] kids out of town"; and that he "would deal with the rest later." Branch understood from the statements that Britt intended to kill her and Jones.

Branch further testified that Davis told her during that meeting that "Britt had brought a gun to the situation, and that that was never supposed to have went down like that." Branch said Davis told them to go home and wait for his telephone call.

Later that evening, Davis and Britt visited Branch and Jones at their home. Davis eventually left, but Britt stayed. He began living in the basement with Jones and her two children until he was arrested. Branch testified that she did not have much contact with Britt when she was in the house, but that Britt went with her and Jones any time they left the house. Branch stated that she was not comfortable with Britt's staying in the house.

(b) Jones

Jones' testimony concerning the period of time after the murders was similar to Branch's. She said the day after the murders, Davis "asked if we could get out of town" and offered to "help come up with some money," and he told her "it was out of his hands, he was answering to somebody else." Jones admitted that Davis did not specifically mention Britt during that conversation.

A couple of days after the murders, Davis and Britt returned to the house where Branch and Jones lived. Britt spoke privately with Jones, asking her questions about her children, her age, and the children's father, which made Jones feel nervous. Britt began staying with Jones in the basement, sleeping in her bedroom. Jones described Britt as "scary" and stated that she was nervous and scared while he was staying with her.

(c) Clairday

Clairday testified that when Davis asked her to come pick him up in the early morning hours of July 9, 2012, he seemed upset. He was talking low and fast. Clairday did not wish to

pick Davis up, because doing so would violate the curfew that was a condition of her probation. When Clairday insisted Davis tell her what was going on, Davis told her that "something had happened that shouldn't have happened, and that some people got hurt that shouldn't have got hurt." This statement was not objected to, and is the only statement at issue that was made before Britt obtained a standing hearsay objection.

Clairday testified that when she arrived at Branch and Jones' house, Davis told her that "they had went to rob somebody, and some things had happened that weren't supposed to happen" and that "some people got hurt that shouldn't have got hurt." Clairday testified that she and Davis engaged in a heated argument, "mostly because he was at another woman's house."

Davis eventually explained that she had to give Britt a ride also. Davis told Clairday that Britt had a gun. Clairday was not enthusiastic about giving Britt a ride, but she relented. When Britt entered her car, Clairday asked him if he had anything he was not supposed to have. Britt responded by handing her a revolver.

Clairday testified that she drove first to the apartment of her friend, Larry Lautenschlager. The revolver was in her handbag, and Clairday handed it to Lautenschlager and asked him to get rid of it. She asked Lautenschlager for two changes of clothes for Davis and Britt. Clairday denied noticing anything amiss with the clothing either Davis or Britt wore.

Clairday said that while this was occurring, Davis was standing by the door looking at her and "shaking his head, like asking me what I was doing." Then Davis asked to speak with Clairday privately in the bathroom. Clairday testified that in the bathroom, Davis was "rambling." He appeared nervous, scared, and "like he had the shakes." Davis told Clairday that "he wanted [Clairday] to stay by him, he didn't want [her] by [Britt]," and that "something happened." Clairday helped Davis change his clothes. When they exited the bathroom and went outside, Clairday saw Britt burning a pair of gloves on the grill.

Davis, Britt, and Clairday left Lautenschlager's apartment and went to Clairday's apartment. Britt stayed downstairs, while Davis and Clairday went upstairs. Clairday testified that she and Davis spoke about Davis' leaving town. Davis was scared and crying. Clairday "wasn't understanding what he was trying to tell me." At some point during the conversation, Britt called up the stairs and asked Davis "if he was losing him." After packing a bag for Davis, they all left and went to Logemann's apartment.

At Logemann's apartment, Britt and Clairday stayed in the car, while Davis went inside. Clairday testified that she asked Britt what was going on, but Britt did not respond.

Clairday contacted an aunt in California to make arrangements for Davis to stay with her. Davis and Clairday then dropped off Britt. As Clairday's conversation with Davis continued, Clairday testified that "[i]t had started dawning on me what had happened. He was talking, he was just telling me how much he loved me, and if I was going to leave him if he went to jail."

Clairday dropped Davis off at her apartment and went back to Lautenschlager's apartment to consume methamphetamine. Lautenschlager had not yet disposed of the revolver, and she became upset with Lautenschlager and took the revolver back. Clairday returned to her apartment, she showed the gun to Davis, and they argued.

Clairday left and eventually hid the gun in her car. When Clairday returned, she lied to Davis and told him that she had thrown the gun in the river. Clairday then took Davis to a friend's apartment.

After dropping off Davis, Clairday drove to a house in Ashland where she had been living with another man, Eugene Cates. Cates hid the revolver under his bed. A couple of days later, Clairday moved back to the apartment she shared with Davis; she was on probation, and her request to relocate to Ashland was denied. Britt visited the apartment, and Clairday testified that Davis and Britt spoke in "hush tones." Clairday

also testified that she once overheard Davis ask on the telephone "where the other gun was." Clairday did not specifically identify to whom Davis was speaking.

Clairday continued to tell Davis that she had thrown the gun in the river. Then Clairday went with Cates and Lautenschlager and hid the gun in such a manner that neither Cates nor Lautenschlager would know where she had hidden it.

Clairday testified that shortly before Davis was arrested, "we had started talking a little bit about everything." During that time, Davis explained to her that

> they had went to the house to rob somebody, and that when they had gotten there, he was inside of a room going through stuff and he heard gunshots. He ran out into the hall, and [Britt] had met him in the hall. Somebody was coming down the hall and they started shooting.

She also testified that she understood from these conversations that it was Britt, not Davis, who had started shooting first. Clairday testified that Davis said that "[Britt] was trigger happy."

On redirect, Clairday admitted that she had told the police Davis had said that while Davis was searching through one of the rooms of the Avalos house, "[Britt] went pop, pop, pop in the other room." She eventually kicked Davis out of her apartment.

(d) Logemann

Logemann testified that around 5 a.m. on July 9, 2012, he received a text message from Davis informing him that "they didn't do the robbery because his girlfriend caught him with some other women." Davis texted Logemann later that day stating, again, that nothing had happened.

After Logemann's police contact asked him about the murders, Logemann confronted Davis. Logemann testified that on the afternoon of July 9, 2012, Davis finally explained to him that "everything went wrong" and that "Cuz started shooting."

Logemann explained that he believed "Cuz" was a reference to Britt. But Logemann admitted on cross-examination that he had spoken to the police about a person named "Mike Jones," a man with whom Davis frequently associated and whom people referred to as "Cuz." This "Mike Jones" was apparently not the same Mike who was Britt's brother. Logemann admitted that he did not know whether Britt was the person that Logemann took with him to commit the robbery, because he "wasn't there."

Several days after the murders, Davis and Britt visited Logemann at his apartment. Logemann testified that Britt asked him about pictures of his children on the refrigerator, which made him feel nervous.

At some other point in time after the murders, Davis told Logemann that "he was worried about DNA because a gun got dropped." Logemann admitted that Davis did not specify whose DNA he was worried about or who dropped the gun.

4. Defense Witness Lautenschlager

Britt called only one witness in his defense. Lautenschlager testified that he was friends with Clairday, but he denied that in July 2012, she had given him a gun to hide.

5. Closing Arguments

(a) State

In closing arguments, the State described how Davis and Britt had "used a couple of unwitting girls" who "weren't directly involved" and who likely did not hear any robbery plan discussed in the van due to the loud music. The State argued that Davis and Britt used Branch and Jones to get them to the location of an attempted robbery that "went horribly wrong."

After the State emphasized that a .40-caliber semiautomatic handgun apparently used in the shootings was found at the scene, it referenced Davis' "co-conspirator statement" that he was worried about DNA being found on a gun left at the

scene. In the context of discussing the fact that .22-caliber bullets were also used in the shooting, the State pointed out that Britt had given Clairday a .22-caliber revolver. The State described the positions of the bodies and the number of wounds, then the State emphasized various other "co-conspirator statements" made by Davis, including that "Cuz started shooting" and that Davis had heard "pop, pop, pop" when he was in another room.

The State described how the murders had "affected" Davis; he was "freaking out and getting sick." The State described that for Davis, this was a "most dire of times in a situation where you have just been part of what is the worse as he described something that never should have happened."

In that situation, Davis "calls the single most important person that he can think of at the time to try to get away." The State characterized Clairday's demand of the gun as "a prepay" for the "cab" and stated that the scenario described by Clairday was "not anything except what it is described." According to the State, Clairday kept the gun Britt handed her in order to keep it away from him. The State further described Clairday's actions in hiding the gun as "trying to help someone she loved."

While at Clairday's apartment, Britt was "concerned that . . . Davis now is the person that's going to come in and testify because he can't handle it because he's breaking down because of the tragedy and events that those two had performed."

The State described that Britt "coldly and more calculatingly starts thinking for himself." Britt was "tracking Davis from down the stairs." The State clarified that Britt's asking Davis if he was still with him was not "innocent and innocuous words." Rather, "[t]he turn is taking place; . . . the people who were the planner[s] are getting intimidated by this person [Britt] who is just watching and staring."

While Britt was "not talking directly about escape at that point, he does end up in a position with the two girls where he's able to monitor them daily and regularly." The State

suggested that Britt deliberately tried to scare, intimidate, and keep an eye on Branch, Jones, and Logemann, because they were the only three people that linked Davis and Britt to the murders.

The State explained that Logemann originally lied to the police because he was worried about being implicated in a robbery. The State noted that Logemann did not even understand the concept of felony murder.

(b) Defense

The defense argued that Branch and Jones were part of the conspiracy to rob Miguel Sr.—not Britt—and that they possibly went into the Avalos house rather than wait in the van. The defense illustrated the contradictions between Branch's and Jones' testimonies, and also the fact that Jones had three unrelated robbery charges pending against her at the time of Britt's trial. The defense pointed out that there was no reason for Logemann to lie about Branch's and Jones' knowledge of the robbery.

The defense suggested that Davis' friend, "Mike Jones," rather than Britt, may have been involved in the attempted robbery and murders. Either way, the defense argued that Branch, Jones, Logemann, and Davis wanted to shift the blame away from themselves and onto Britt.

The defense asserted that Clairday would do whatever it took to protect Davis. The defense argued that it would be unbelievable that Britt would have handed Clairday his gun at her request: "[S]ome lady, stranger just says you got something for me? Yeah, sure, here's the murder weapon, go ahead and hang on to that, I'll put my life in your hands." The defense argued that the gun belonged to Davis and was given to Clairday by Davis. The defense also noted in this regard that Lautenschlager denied that Clairday gave him a gun to get rid of.

The defense pointed out that only Davis appeared concerned with trying to get out of town and with checking whether

Branch or Jones had incriminating evidence on their cell phones. The defense suggested that this was because Britt had no reason to hide.

The defense found it "[u]nbelievable" that Britt moved into the house where Branch and Jones lived against their will, noting that they could have called the police at any time. The defense emphasized that there was no physical evidence linking Britt to the crime, despite the fact that several physical items were handled during the attempted robbery.

III. ASSIGNMENT OF ERROR

Britt assigns that the trial court erred by admitting hearsay testimony under the coconspirator exception to the hearsay rule.

IV. STANDARD OF REVIEW

[1] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection.[3]

V. ANALYSIS

We are asked to determine whether the trial court erred in admitting Davis' out-of-court statements to Logemann, Branch, Jones, and Clairday in the weeks following the murders. Britt asserts that the trial court erred in failing to grant his hearsay objections to these statements.

The hearsay rule is premised on the theory that out-of-court statements are subject to particular hazards.[4] The declarant could have misperceived events, be lying, or have a faulty memory.[5] The declarant's statements could be taken out of

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[3] *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[4] *Williamson v. United States*, 512 U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994).

[5] *Id.*

context or misunderstood.[6] Because the statements were made out of court, these dangers are not minimized by the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and cross-examination.[7] The exclusions and exceptions to the hearsay rule recognize, however, that some kinds of out-of-court statements are less subject to the particular hazards that the hearsay prohibition protects against.[8]

[2] The State argues that most of Davis' statements were properly admitted under the coconspirator exclusion to the hearsay rule. To the extent the statements do not meet the criteria for the coconspirator exclusion, the State urges this court to affirm their admission under the excited utterance and against interest exceptions to the hearsay rule, which were neither presented to nor determined by the trial court. We have said that regardless of whether the proponent or the trial court articulated no theory or the wrong theory of admissibility, an appellate court may affirm the ultimate correctness of the trial court's admission of the evidence under any theory supported by the record, so long as both parties had a fair opportunity to develop the record and the circumstances otherwise would make it fair to do so.[9]

1. Coconspirator Exclusion

[3] We turn first to the coconspirator exclusion. The coconspirator exclusion, found in § 27-801(4), provides that "[a] statement is not hearsay if . . . (b) The statement is offered against a party and is . . . (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Under this rule, a statement is excluded as nonhearsay if it is more likely than not that (1) a conspiracy existed,

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[6] *Id.*

[7] See *id.*

[8] See *id.*

[9] *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016).

(2) the declarant was a member of the conspiracy, (3) the party against whom the assertion is offered was a member of the conspiracy, (4) the assertion was made during the course of the conspiracy, and (5) the assertion was made in furtherance of the conspiracy.[10]

[4] The underlying theory of the coconspirator exclusion is that because the conspirators are all partners in the commission of the crime, they have a collective responsibility for the acts and declarations of each other directed toward the accomplishment of the common purpose.[11] The declarant conspirator is considered under such circumstances to be the agent of his or her fellow conspirators, and the commonality of interests gives some assurance that the statements are reliable.[12]

[5] It is well established that a conspiracy is ongoing—such that statements are considered made during the course of the conspiracy—until the central purposes of the conspiracy have either failed or been achieved.[13] Here, the central purpose of the conspiracy between Davis, Britt, and Logemann was to rob Miguel Sr. All the statements Britt objected to at trial were made after that robbery had failed. There is no evidence that after the robbery failed, Davis, Britt, and Logemann still intended to carry it out.

(a) Majority Rule

[6,7] The federal courts and the overwhelming majority of state courts reject any argument that postcrime concealment is implicitly encompassed by the underlying conspiracy. The

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[10] See David F. Binder, Hearsay Handbook, 4th § 35:9 (2015-16 ed.). See, also, *Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987).

[11] Annot., 4 A.L.R.3d 671, § 2[a] (1965).

[12] See, e.g., *Lutwak v. United States*, 344 U.S. 604, 73 S. Ct. 481, 97 L. Ed. 593 (1953); *State v. Henry, supra* note 9; *Commonwealth v. Bongarzone*, 390 Mass. 326, 455 N.E.2d 1183 (1983).

[13] See *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1949).

majority rule is that the agreement or understanding that forms the conspiracy does not include an implied agreement that the conspirators will try to avoid apprehension after the crime has been committed.[14] Therefore, absent an "express original agreement among the conspirators to continue to act in concert in order to cover up"[15] or an independent "coverup conspiracy,"[16] assertions are not excluded from the hearsay rule when made after the central aim of the conspiracy has ended and while the conspirators were acting in concert to conceal their prior criminal activity.[17]

The U.S. Supreme Court has weighed in on this issue several times, "consistently refus[ing] to broaden that very narrow [coconspirator exclusion] to the traditional hearsay rule"[18] and specifically rejecting any argument that an implicit subsidiary phase of a conspiracy continues after the central objectives have succeeded or failed.[19]

The Court reasons that "acts of covering up can by themselves indicate nothing more than that the conspirators do not wish to be apprehended—a concomitant, certainly, of every crime since Cain attempted to conceal the murder of Abel from the Lord."[20] Furthermore, implying a postcrime concealment

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[14] See, Binder, *supra* note 10, § 35:13 (and cases cited therein); G. Michael Fenner, The Hearsay Rule 84-85 (2013) (and cases cited therein); 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:60 (4th ed. 2013) (and cases cited therein).

[15] *Grunewald v. United States*, 353 U.S. 391, 404, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957).

[16] See *U.S. v. DiDomenico*, 78 F.3d 294, 303-04 (7th Cir. 1996).

[17] See, Binder, *supra* note 10, § 35:13 (and cases cited therein); Fenner, *supra* note 14 (and cases cited therein); 4 Mueller & Kirkpatrick, *supra* note 14 (and cases cited therein).

[18] *Wong Sun v. United States*, 371 U.S. 471, 490, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

[19] *Id.*; *Grunewald v. United States, supra* note 15; *Lutwak v. United States, supra* note 12; *Krulewitch v. United States, supra* note 13.

[20] *Grunewald v. United States, supra* note 15, 353 U.S. at 405-06.

phase to conspiracies would unacceptably broaden the limits of the exception:

> It is difficult to see any logical limit to the "implied conspiracy," either as to duration or means, nor does it appear that one could overcome the implication by express and credible evidence that no such understanding existed, nor any way in which an accused against whom the presumption is once raised can terminate the imputed agency of his associates to incriminate him. Conspirators, long after the contemplated offense is complete, after perhaps they have fallen out and become enemies, may still incriminate each other by deliberately harmful, but unsworn declarations, or unintentionally by casual conversations out of court.[21]

[8] In *Grunewald v. United States*,[22] the Court summarized that the "crucial teaching" of its case law was that

> after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment.

"[E]very conspiracy is by its very nature secret" and extending the conspiracy into the concealment phase by virtue merely of "[a]cts of covering up, even though done in the context of a mutually understood need for secrecy," "would extend the life of a conspiracy indefinitely" and concurrently "extend indefinitely the time within which hearsay declarations will bind co-conspirators."[23]

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[21] *Krulewitch v. United States, supra* note 13, 336 U.S. at 456 (Jackson, J., concurring; Frankfurter and Murphy, JJ., join).

[22] *Grunewald v. United States, supra* note 15, 353 U.S. at 401-02.

[23] *Id.*, 353 U.S. at 402.

(b) Davis' Statements Inadmissible Under Majority Rule

The State all but concedes that under this majority rule, none of Davis' statements would be admissible under the coconspirator exclusion to the hearsay rule. The record demonstrates that the events following the murders were not part of an explicit escape or concealment plan that was formed before the murders. Rather, in the original plan, it was presumed that Miguel Sr., being a drug dealer, would never report the robbery. A conspiracy to commit a series of objectives as part of an ongoing operation does not end until the entire sequence of planned aims have failed or been achieved,[24] and a conspiracy to commit a robbery continues until the illegally obtained cash has been divided among the conspirators.[25] But there were no proceeds to be distributed at the time Davis' statements were made, and there was no evidence that the original conspiracy contemplated a series of crimes in which the attempted robbery was but one part.

(c) Coverup Conspiracy

[9] The State instead argues that there was sufficient evidence of an independent coverup conspiracy. To exclude statements from the hearsay prohibition under such a theory, the preponderance of the evidence must establish the separate conspiracy to conceal without relying on the facts of the original conspiracy to commit the underlying crime[26]

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[24] See, *U.S. v. Moses*, 148 F.3d 277 (3d Cir. 1998); *U.S. v. DiDomenico, supra* note 16; *United States v. Del Valle*, 587 F.2d 699 (5th Cir. 1979).

[25] See, *U.S. v. Franklin*, 415 F.3d 537 (6th Cir. 2005); *United States v. Davis*, 766 F.2d 1452 (10th Cir. 1985); *United States v. Hickey*, 596 F.2d 1082 (1st Cir. 1979); *United States v. Knuckles*, 581 F.2d 305 (2d Cir. 1978).

[26] See, Fenner, *supra* note 14; *Lutwak v. United States, supra* note 12; *Krulewitch v. United States, supra* note 13; *Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978); *Wells v. State*, 492 So. 2d 712 (Fla. App. 1986).

and without relying entirely on the hearsay statements themselves.[27]

[10] A separate conspiracy to conceal cannot be implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment after the main objective has succeeded or failed.[28] There must instead be direct evidence showing an agreement among the conspirators to continue to act in concert in order to cover up the crimes, in addition to an overt act.[29] The essence of the crime of conspiracy is the agreement.[30] Both Davis (the declarant) and Britt (the party against whom the statement is offered) must have agreed to be members of this alleged second coverup conspiracy.

Leaving aside the fact that an independent coverup conspiracy was never found below, the record does not support such a conspiracy. There was little evidence of an agreement or understanding between any of the original conspirators after the murders. The record indicates to the contrary that the original conspirators, particularly Davis and Britt, had ceased thinking or acting in concert. After the murders, Davis immediately lied to Logemann, saying that they did not attempt to carry out the robbery. Davis then urged Branch and Jones to get away from Britt, acting contrary to Britt's apparent plan to either kill or shadow Branch and Jones in order to ensure their silence. Davis made plans to escape to California that did not include Britt. Britt worried that he was "losing" Davis. Even the State described Britt during this period as "thinking for himself." The preponderance of the evidence

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[27] See *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999). See, also, *Bourjaily v. United States, supra* note 10.

[28] See *Grunewald v. United States, supra* note 15.

[29] See *id.*

[30] See *Braverman v. United States*, 317 U.S. 49, 63 S. Ct. 99, 87 L. Ed. 23 (1942).

does not establish that Davis and Britt conspired to cover up the murders.

(d) Minority View

Alternative to its coverup conspiracy argument, the State urges us to adopt the minority view that allows an implied concealment phase to be considered a continuation of the underlying conspiracy. This position is recognized by only a small minority of state courts.[31]

(i) State v. Gutierrez

We acknowledge that in *State v. Gutierrez*,[32] we said it is well established that statements made by a coconspirator in furtherance of avoiding capture or punishment are made in furtherance of the conspiracy within the meaning of § 27-801. It is unclear what we meant by this broadly worded proposition. But we did not adopt in *Gutierrez* the minority view that implicit plans of postcrime concealment constitute a continuation of the original conspiracy.

When we made this statement in *Gutierrez*, we had already held that the defendant's general hearsay objection was insufficient to preserve the issue of whether the statements fell under the coconspirator exclusion.[33] Furthermore, we did not specifically discuss in *Gutierrez* whether, at the time that the

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[31] See, *Reed v. People*, 156 Colo. 450, 402 P.2d 68 (1965); *State v. Camacho*, 282 Conn. 328, 924 A.2d 99 (2007); *People v. Meagher*, 70 Ill. App. 3d 597, 388 N.E.2d 801, 26 Ill. Dec. 800 (1979); *State v. Kidd*, 239 N.W.2d 860 (Iowa 1976); *State v. Moody*, 35 Kan. App. 2d 547, 132 P.3d 985 (2006); *Com. v. Bright*, 463 Mass. 421, 974 N.E.2d 1092 (2012); *Com. v. Cull*, 540 Pa. 161, 656 A.2d 476 (1995); *State v. Helmick*, 201 W. Va. 163, 495 S.E.2d 262 (1997). See, also, Binder, *supra* note 10, § 35:13 (and cases cited therein); Fenner, *supra* note 14 (and cases cited therein); 4 Mueller & Kirkpatrick, *supra* note 14 (and cases cited therein).

[32] *State v. Gutierrez, supra* note 2.

[33] *Id.*

relevant statements were made, the conspiracy was ongoing such that the statements were made in the course of the conspiracy. The issue discussed was whether the statements were in furtherance of the conspiracy.

Gutierrez is readily distinguishable, because the statements in *Gutierrez* were the defendant's statements, telling a fellow drug dealer that the defendant's drug business associate had been involved in a murder and asking for shelter and advice. This was, however, complicated by the fact that the coconspirators were tried together. A codefendant objected to statements made by the defendant to a participant in a marijuana distribution operation in the participant's apartment while seeking refuge from the police and to a friend of the codefendant while both were in jail. The defendant asked the friend why he had "told" on the defendant. We concluded that the statement made in jail did not implicate the codefendant in any way and that its admission was at worst harmless error. The statement was clearly admissible as to the defendant, and the codefendant did not request a limiting instruction. Those statements were admissible as statements by a party opponent.[34] Furthermore, as statements of the defendant, the statements did not raise the concern articulated by the U.S. Supreme Court that conspirators would be able to incriminate each other by deliberately harmful, but unsworn declarations, or unintentionally by casual conversations out of court, after the contemplated offense is complete.[35]

We cited three cases in support of the proposition that statements made by a coconspirator in furtherance of avoiding capture or punishment are made in furtherance of the conspiracy within the meaning of § 27-801.[36]

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[34] See, e.g., *State v. Henry, supra* note 9.

[35] See, *Wong Sun v. United States, supra* note 18; *Grunewald v. United States, supra* note 15; *Krulewitch v. United States, supra* note 13.

[36] See *State v. Gutierrez, supra* note 2.

In the first case, *U.S. v. Triplett*,[37] the court found admissible statements of the defendant made while in jail, threatening to kill a coconspirator if she testified against the defendant. With no discussion of whether the statements were during the course of an ongoing conspiracy, the court concluded these statements were in furtherance of avoiding punishment and, therefore, in furtherance of the conspiracy.[38] But the statements were made by a party opponent.

In the second case, *U.S. v. Garcia*,[39] a conspiracy to pass counterfeit money was still ongoing at the time of the statements at issue and the only question was whether the statements were in furtherance of that ongoing conspiracy. The court held that statements designed to enlist the listener's assistance by preventing the listener from unintentionally revealing the existence of the conspiracy were not merely narratives informing the listener of the counterfeit activities.[40] The court concluded that other statements to a security guard made by the defendant's son when confronted with the counterfeit money were designed to delay or prevent arrest and thus to allow the conspiracy to continue, and were, accordingly, also in furtherance of the ongoing conspiracy.[41]

In the third case, *United States v. Sears*,[42] the statements were made after a robbery and while the defendant and his coconspirators were at a friend's house for the purposes of showering, changing clothes, counting the proceeds of the robbery, and disposing of their disguises. The stop was planned in advance of the robbery, although the robbers did not expect the friend and owner of the house to be home. When the

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[37] *U.S. v. Triplett*, 922 F.2d 1174 (5th Cir. 1991).

[38] *Id.*

[39] *U.S. v. Garcia*, 893 F.2d 188 (8th Cir. 1990).

[40] See *id.*

[41] *Id.*

[42] *United States v. Sears*, 663 F.2d 896 (9th Cir. 1981).

robbers discovered that the owner was home, the defendant told the friend about the robbery in order to induce the friend into allowing them to use her home to further their escape and also in order to dissuade her from informing the police about the robbery. The court held that these statements were in furtherance of the conspiracy. The court did not explicitly discuss whether the conspiracy was still ongoing at the time the statements were made.

We were correct in *Gutierrez* inasmuch as a statement made in furtherance of avoiding capture or punishment is made in furtherance of the conspiracy when the conspiracy is ongoing at the time of the statement; i.e., if the central criminal object or objects that the conspirators conspired to achieve are still being pursued. In both *Garcia* and *Sears*, the originally planned conspiracy was still ongoing at the time the statements were made, either because the original conspiracy was to commit a series of objectives or because the proceeds of the robbery had not yet been divided.[43] Also, in *Sears*, the coverup was agreed upon as a part of the original plans for the conspiracy.[44]

[11] But we disapprove of our statement in *Gutierrez* insofar as we implied it is "well established" that statements made by a coconspirator in furtherance of avoiding capture or punishment fall under the coconspirator exclusion when the coconspirator is simply attempting to avoid arrest, which is the inevitable course of action following the success or failure of the principal aims of any conspiracy.[45] *Triplett* is the only case of the three cited in *Gutierrez* that involved statements after the originally agreed-upon conspiracy ended, and it is seen as an anomaly.[46]

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[43] See, *U.S. v. Moses, supra* note 24; *U.S. v. DiDomenico, supra* note 16; *United States v. Del Valle, supra* note 24.

[44] See *Grunewald v. United States, supra* note 15.

[45] See *State v. Gutierrez, supra* note 2, 272 Neb. at 1021, 726 N.W.2d at 567.

[46] See Binder, *supra* note 10, § 35:13.

And, like in *Gutierrez*, the statements at issue in *Triplett* were made by the defendant and not by a coconspirator. Therefore, the statements were admissible as statements by a party opponent and they did not raise the reliability concerns present for statements by coconspirators after the success or failure of the principal criminal purpose.

(ii) We Follow Federal Case Law for Similar Rules

We decline the State's invitation to follow the minority rule in this case. We normally take guidance from federal cases interpreting a federal rule with language similar to a Nebraska rule.[47] We see no reason to depart from our existing procedure to deny admission of coconspirators' statements after the object of the conspiracy has ended. In fact, our legislative history indicates a specific intent to have uniformity between our state and the federal rules of evidence—particularly with regard to "'the position of the Supreme Court in denying admissibility to statements made after the objective of the conspiracy have either failed or been achieved.'"[48]

Moreover, we are persuaded by the U.S. Supreme Court's reasoning that the necessary commonality of interests between conspirators is no longer present when the central purpose of the conspiracy has succeeded or failed. Thus, statements made after the central purpose of the conspiracy have succeeded or failed lack the reliability that justifies the exclusion. And we agree with the concern that implicitly extending conspiracies into a concealment phase sets no logical limit on the duration or the means of former conspirators' incrimination of one another through out-of-court statements.

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[47] See *State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

[48] Neb. Supreme Ct. Comm. on Practice & Procedure, Proposed Nebraska Rules of Evidence, rule 801 at 132 (1973).

(iii) Davis' Statements Inadmissible Even Under Minority Rule

Even if we were to consider adopting some variation of the minority's implied concealment phase, Davis' statements would not qualify as being in the course and furtherance of any concealment phase of this conspiracy.

Courts that recognize an implied continuing conspiracy to conceal appear to view the component elements of the coconspirator exclusion more narrowly once the agreed-upon crime has been committed, and they add temporal limits to the concealment period.[49] These minority courts are presumably attempting to cordon the slippery slope of infinite time and means for conspirators to incriminate each other through out-of-court statements.[50]

Thus, under the minority view that recognizes an implied concealment phase, the conspirators must actually be acting in concert at the time of the coverup in order for the conspiracy to be continuing.[51] The presumption that the conspiracy continues as to all its members until affirmative withdrawal[52] apparently no longer applies.

Also, for a statement made in the concealment phase to be admissible, it must be in furtherance of concealment.[53] The statement must specifically continue the aims of concealing

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[49] See, *Krulewitch v. United States, supra* note 13 (and discussion therein); *Mares v. United States*, 383 F.2d 805 (10th Cir. 1967); *State v. Kidd, supra* note 31; *State v. Rivenbark*, 311 Md. 147, 533 A.2d 271 (1987) (and discussion therein).

[50] See, *Grunewald v. United States, supra* note 15; *Krulewitch v. United States, supra* note 13 (Jackson, J., concurring; Frankfurter and Murphy, JJ., join).

[51] See, *Mares v. United States, supra* note 49; *State v. Kidd, supra* note 31.

[52] See *State v. Henry, supra* note 9.

[53] *State v. Cornell*, 314 Or. 673, 842 P.2d 394 (1992); *State v. Helmick, supra* note 31.

the conspiracy, such as eluding detection for, disposing of, or protecting the fruits of the crime.[54]

[12] Finally, as under the majority rule, a conspirator recounting past transactions or events having no connection with what is being done in promotion of the common design cannot be assumed to represent those conspirators associated with him or her.[55] Such narrative statements are likely to be unreliable and self-serving, because they result from premeditation and design.[56] This is especially true for statements that attempt to shift blame after the central purpose of the conspiracy has succeeded or failed.[57]

We have already discussed that in the period after the murders, there was a notable lack of concert of action and meeting of the minds. The State described Britt as coldly and calculatingly "thinking for himself," while Davis was "breaking down" because of the "tragedy" that had occurred. Davis' out-of-court statements were all outside of Britt's presence and contrary to Britt's desired strategy of concealment. In fact, Davis repeatedly urged Branch, Jones, and Clairday to get away from Britt's reach. During this time, Britt expressed concerns about whether Britt was "losing him."

Many of Davis' statements, moreover, were mere narratives of the crime. While some such statements could have been deemed in furtherance of the conspiracy had they been made during the traditional phase of the conspiracy,[58] they warrant special scrutiny in an alleged, implied concealment phase. The

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[54] *Id.*

[55] *State v. Gilmore*, 151 Iowa 618, 132 N.W. 53 (1911).

[56] *State v. Warren*, 242 Iowa 1176, 47 N.W.2d 221 (1951).

[57] See, *U.S. v. Blakey*, 960 F.2d 996 (11th Cir. 1992); 4 A.L.R.3d, *supra* note 11, § 3 (and cases cited therein).

[58] See, e.g., *U.S. v. Phillips*, 219 F.3d 404 (5th Cir. 2000); *U.S. v. Monus*, 128 F.3d 376 (6th Cir. 1997); *U.S. v. Simmons*, 923 F.2d 934 (2d Cir. 1991); *United States v. Ammar*, 714 F.2d 238 (3d Cir. 1983). See, also, Fenner, *supra* note 14, pp. 82-83.

fact that all of the narrative statements made by Davis shifted blame to Britt for the murders is antithetical to a finding that they were in furtherance of an ongoing conspiracy between Davis and Britt. These statements were more in keeping with the "'reality of the criminal process . . . that once partners in a crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.'"[59]

[13] Davis' revelations of the crimes to Branch, Jones, and Clairday did not further the aims of concealment insofar as Davis revealed incriminating information that those women would not have otherwise known.[60] While the State asserts on appeal that Branch and Jones were coconspirators, this position is directly contrary to the position the State took at trial, describing Branch and Jones as "a couple of unwitting girls." The State also points out that Clairday provided some assistance to Davis by concealing the gun Britt gave to her and that Branch and Jones may have been intimidated into silence by Davis' warnings to get away from Britt. But it does not appear that Davis' statements were for those purposes. Where a conspirator is not seeking through his or her statements to induce a listener to join the conspiracy, then the listener's subsequent role in the conspiracy does not retroactively convert the statements into declarations in furtherance of the conspiracy.[61]

[14] Whatever occurred as a result of Davis' statements, the statements appeared, from the testimony and under the State's theory of the case, to be in furtherance of Davis' concern for the women he was speaking to and Davis' individually serving narrative that he was not morally culpable for the victims' deaths. Statements that further a speaker's own individual

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[59] *Miller v. Miller*, 784 F. Supp. 390, 395 (E.D. Mich. 1992).

[60] See *State v. Helmick, supra* note 31.

[61] See *U.S. v. Fielding*, 645 F.2d 719 (9th Cir. 1981).

objective rather than the objective of a conspiracy are not made in furtherance of the conspiracy.[62]

Thus, even under the minority rule, it would be difficult to conclude that a concealment phase of the underlying conspiracy was ongoing at the time of Davis' statements. And even if such an ongoing concealment phase existed, Davis' statements would not be in furtherance of it.

(e) Conclusion

We find the majority rule persuasive. In any event, this is not an appropriate case to consider straying from the majority rule. We reject the State's suggestion that there was enough evidence to find an independent coverup conspiracy. Therefore, we hold that the trial court erred in admitting Davis' statements under § 27-801(4)(b)(v).

2. Alternative Grounds for Ultimate Correctness of Admission of Evidence

The State points out that we may affirm the ultimate correctness of the trial court's admission of the evidence under any theory supported by the record so long as both parties had a fair opportunity to develop the record and the circumstances otherwise would make it fair to do so.[63] The State thus urges us to affirm the admission of Davis' statements under alternate hearsay exceptions not presented below.

[15,16] Having obtained a favorable ruling on the admission of the evidence under the coconspirator exclusion, the State did not waive alternate theories of admissibility by failing to raise them below.[64] Nevertheless, alternate theories of admissibility for a statement objected to as hearsay and

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[62] *U.S. v. Salgado*, 250 F.3d 438 (6th Cir. 2001).

[63] See, *U.S. v. Paulino*, 13 F.3d 20 (1st Cir. 1994); *U.S. v. Williams*, 837 F.2d 1009 (11th Cir. 1988); *United States v. Rosenstein*, 474 F.2d 705 (2d Cir. 1973); *State v. Henry, supra* note 9; *State v. Draganescu, supra* note 3.

[64] See *State v. Henry, supra* note 9.

admitted for the truth of the matter asserted are limited to theories under which the statement would be admissible for the truth of the matter asserted.[65] And the proponent of evidence who fails to present at trial alternative grounds for the admissibility of the evidence does so at his or her peril. If the record was inadequately developed to support foundation for alternate grounds or the opponent was not fairly given the opportunity to develop facts contrary to admissibility on the alternate grounds, then an appellate court will not affirm the ultimate correctness of the trial court's admission of the evidence under theories presented by the proponent for the first time on appeal.[66]

(a) Excited Utterances

[17,18] The State's first proposed alternate theory is that Davis' statements made to Clairday within 24 hours of the shootings were excited utterances. Excited utterances are an exception to the hearsay rule, because the spontaneity of excited utterances reduces the risk of inaccuracies inasmuch as the statements are not the result of a declarant's conscious effort to make them.[67] The justification for the excited utterance exception is that circumstances may produce a condition of excitement which temporarily stills the capacity for reflection and produces utterances free of conscious fabrication.[68]

For a statement to be an excited utterance, the following criteria must be met: (1) There must be a startling event; (2) the statement must relate to the event; and (3) the declarant must make the statement while under the stress of the event. The true test is not when the exclamation was made, but whether, under all the circumstances, the declarant was still

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[65] See, *United States v. Rosenstein, supra* note 63; *State v. Henry, supra* note 9.

[66] See *State v. Henry, supra* note 9.

[67] See *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993).

[68] See *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

speaking under the stress of nervous excitement and shock caused by the event.[69] Excited utterances are one of many enumerated exceptions to the hearsay rule for which the unavailability of the declarant is immaterial.[70]

The only statements at issue under this alternate theory are the statements that "they had went to rob somebody, and some things had happened that weren't supposed to happen"; that "some people got hurt that shouldn't have got hurt"; that Davis "wanted [Clairday] to stay by him, he didn't want [her] by [Britt]"; and that "something happened." We find that the record does not demonstrate Davis made these statements while under a condition of excitement that temporarily stilled his capacity for reflection and produced utterances free of conscious fabrication.[71]

The first statement was made when Clairday picked Davis up from the house where Branch and Jones lived. There was little testimony regarding Davis' emotional state other than that he had spoken rapidly earlier on the telephone. The testimony indicates that Davis and Clairday were engaged in an argument around the time of the statement, mostly about the fact that Davis was at another woman's apartment. There is little indication that Davis was speaking with spontaneity and under the stress of nervous excitement and shock.

The remaining statements were made at Lautenschlager's apartment after Davis observed Clairday speaking with Lautenschlager about getting rid of the gun that Britt handed her. Clairday described that Davis was standing by the door, "shaking his head, like asking me what I was doing." Davis then asked Clairday to step into the bathroom with him in order to speak privately, which is when the statements were made. The fact that Davis asked to speak with Clairday privately,

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[69] *Id.*

[70] See Neb. Rev. Stat. § 27-803 (Reissue 2008).

[71] See *State v. Hale, supra* note 68.

as well as the statements themselves, indicate Davis' conscious reflection.

While Clairday testified that Davis appeared nervous, scared, and "like he had the shakes" when he made these statements at Lautenschlager's apartment, manifestations of stress and physical condition are not dispositive.[72] Besides, it would be unfair to rely too heavily upon testimony concerning Davis' physical manifestations of stress when Britt was not on notice at trial that an excited utterance exception was being litigated. The witnesses could have been questioned in more depth about Davis' mental state and his physical manifestations of distress, and we cannot speculate as to what additional testimony would have been adduced.

(b) Statements Against Interest

The State also argues that the admissibility of Davis' statements should be affirmed on the alternate theory that they were statements against interest. Though the State's argument is not entirely clear, it appears the State believes this exception applicable to all of Davis' statement.

Neb. Rev. Stat. § 27-804(2)(c) (Reissue 2008), provides that if the declarant is unavailable as a witness, the following is not excluded by the hearsay rule: "A statement which was at the time of its making . . . so far tended to subject [the declarant] to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

Unavailability as a witness is defined by the statute as including situations in which the declarant (1) "[i]s exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement," (2) "[p]ersists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so," (3) "[t]estifies to lack of memory of the subject matter of his

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[72] See *id.*

statement," (4) "[i]s unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity," or (5) "[i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means."[73]

The against interest exception is "of quite recent vintage" insofar as it encompasses confessions of an accomplice, which incriminate a criminal defendant.[74] Common law admitted statements against the declarant's pecuniary or proprietary interests but refused to extend the exception to statements against penal interests.[75] And before Congress' adoption of Fed. Evid. R. 804(b)(3), the U.S. Supreme Court rejected a penal interests exception.[76] While most courts allow accomplice statements under the against interest exception, the exception is viewed narrowly.[77]

(i) Unavailability

We turn first to the element of unavailability. Because the State never presented the against interest exception below as a theory of admissibility for Davis' out-of-court statements, the trial court never determined that Davis was unavailable. The State argues that this is not an impediment to affirming the admission of Davis' statements, because a finding that Davis was unavailable was "inevitable."[78] The State describes as "virtually nonexistent" any possibility that Davis would have

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[73] § 27-804(1)(a) through (e).

[74] *Lilly v. Virginia*, 527 U.S. 116, 130, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999).

[75] See John P. Cronan, *Do Statements Against Interests Exist? A Critique of the Reliability of Federal Rule of Evidence 804(b)(3) and a Proposed Reformulation*, 33 Seton Hall L. Rev. 1 (2002).

[76] *Donnelly v. United States*, 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913).

[77] See *Williamson v. United States, supra* note 4.

[78] Brief for appellant at 30.

agreed to testify.[79] Relying on the record in *State v. Davis*,[80] the State notes that Davis' sentencing was pending for his own convictions at the time of Britt's trial. The State also asserts without citation to the record that Davis was not voluntarily cooperating in Britt's prosecution.

The State does not specify under which grounds it would have been "inevitable" that the trial court would have found Davis unavailable, but presumably the State relies on the first statutory ground for unavailability: unavailability based on privilege. By referring to the fact that sentencing for Davis' convictions was still pending, the State references the weight of authority that permits a witness whose conviction has not been finalized on direct appeal to invoke the privilege against self-incrimination and to refuse to testify about the subject matter which formed the basis of his conviction.[81]

The State presents no particular authority for its assertion that we can assume for the first time on appeal that the declarant would have been deemed unavailable had the against interest exception been presented below. In other words, the State presents no authority holding that it is fair to affirm the

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[79] *Id.*

[80] *State v. Davis, supra* note 1.

[81] See, *Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999); *Ottomano v. United States*, 468 F.2d 269 (1st Cir. 1972); *State v. Gretzler*, 126 Ariz. 60, 612 P.2d 1023 (1980); *People v. Lopez*, 110 Cal. App. 3d 1010, 168 Cal. Rptr. 378 (1980) (superseded by statute as stated in *People v. Gibbs*, 145 Cal. App. 3d 794, 193 Cal. Rptr. 681 (1983)); *People v. Villa*, 671 P.2d 971 (Colo. App. 1983); *Landeverde v. State*, 769 So. 2d 457 (Fla. App. 2000); *Landenberger v. State*, 519 So. 2d 712 (Fla. App. 1988); *State v. Linscott*, 521 A.2d 701 (Me. 1987); *Ellison v. State*, 310 Md. 244, 528 A.2d 1271 (1987); *People v Robertson*, 87 Mich. App. 109, 273 N.W.2d 501 (1978); *State v. Pearsall*, 38 N.C. App. 600, 248 S.E.2d 436 (1978); *State v. Crislip*, 110 N.M. 412, 796 P.2d 1108 (N.M. App. 1990), *overruled on other grounds, Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993); *State v. Sutterfield*, 45 Or. App. 145, 607 P.2d 789 (1980); *Davis v. State*, 501 S.W.2d 629 (Tex. Crim. App. 1973); *State v. Marks*, 194 Wis. 2d 79, 533 N.W.2d 730 (1995).

admission of evidence under a hearsay exception for which unavailability must be shown, when the evidence was admitted under an exclusion or an exception for which unavailability is irrelevant.

We have found only one case affirming admission of evidence under the against interest exception that was erroneously admitted under an exception for which unavailability is irrelevant. In that case, unavailability was based on the undisputed evidence that the declarant had been murdered.[82] But in *State v. Stuit*,[83] the Montana Supreme Court found it inappropriate to entertain for the first time on appeal the question of a declarant's unavailability due to lack of memory. And we can find no support for the proposition that it would be appropriate to affirm the correctness of the trial court's admission of hearsay by determining for the first time on appeal that the declarant was unavailable due to a claim of privilege.

In fact, when the lower court has been presented with and has determined such unavailability, it has been held that a trial court cannot rely simply on the State's assurances of unavailability.[84] Nor can the court rely on the declarant's invocation of the privilege against self-incrimination and the failure to call the declarant to testify as a result.[85] Instead, before a declarant may be excused as unavailable based on a claim of privilege, the declarant must appear at trial, assert the privilege, and have that assertion approved by the trial judge.[86] In addition, the witness must be exempted from testifying by a ruling of the court.[87]

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[82] *U.S. v. Maliszewski*, 161 F.3d 992 (6th Cir. 1998).

[83] *State v. Stuit*, 277 Mont. 227, 921 P.2d 866 (1996).

[84] Fenner, *supra* note 14, pp. 220-23.

[85] *Id.*

[86] See, *United States v. Udey*, 748 F.2d 1231 (8th Cir. 1984); *Marshall v. Com.*, 60 S.W.3d 513 (Ky. 2001); Fenner, *supra* note 14, pp. 220-23. Compare *State v. McHenry*, 250 Neb. 614, 550 N.W.2d 364 (1996).

[87] Fenner, *supra* note 14, pp. 220-23.

In *United States v. Udey*,[88] the Eighth Circuit Court of Appeals accordingly refused to find error in the exclusion of hearsay purportedly admissible under the against interest exception when there was no claim of privilege, nor a ruling by the court below. The court observed that the definition of unavailability due to privilege plainly requires a "ruling of the court."[89] The court further pointed out that the advisory committee notes to the federal rule strictly state that "'a ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.'"[90]

In *United States v. Fernandez-Roque*,[91] the Fifth Circuit Court of Appeals similarly affirmed the inadmissibility of hearsay because the proponent failed to sustain his burden to show that the declarant was unavailable as a component of the against interest exception. The court noted that the proponent had failed to create a record of his efforts to produce the declarant as a witness, because there was no evidence that the declarant was subpoenaed, or any request of the judge for a ruling on unavailability on account of privilege or for an order to testify.[92]

The court in *Fernandez-Roque* explained that "[t]here was thus no opportunity for the trial court to evaluate [the declarant's] alleged refusal to testify and propensity to invoke the [F]ifth [A]mendment, or to ascertain whether some type of immunity was available to [the declarant] from the effects of his possible incrimination by his testimony."[93] The court refused to speculate on appeal as to the factual merits of the proponent's claim that the declarant was unavailable when

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[88] *United States v. Udey, supra* note 86.

[89] *Id.* at 1243.

[90] *Id.*

[91] *United States v. Fernandez-Roque*, 703 F.2d 808 (5th Cir. 1983).

[92] *Id.*

[93] *Id.* at 813.

the issue of unavailability was never brought into the "ambit of the 'discretion of the trial court to accept or reject counsel's representations' concerning [the declarant's] privilege or refusal to testify."[94]

[19] We hold that it would be inappropriate to attempt to ascertain Davis' unavailability for the first time on appeal, especially under the record before us. There is no evidence that Davis was subpoenaed, that an actual claim of privilege was made, or that there was a ruling by the judge on the claimed privilege. Thus, the record was insufficiently developed for this court to affirm the admission of Davis' statements under an exception that was never presented below. We therefore cannot accept the State's invitation to affirm the alleged correctness of the admission of Davis' statements under the State's alternate theory that the statements fell under the against interest exception to the hearsay rule.

(ii) Against Interest

Even if we were to somehow overlook the absence of the requisite showing of unavailability, we observe that under § 27-804(2)(c), many of Davis' statements did not "so far tend[] to subject [Davis] to civil or criminal liability" that a reasonable person in Davis' position would not have made them lest believing them to be true.

In *State v. Phillips*,[95] we adopted the U.S. Supreme Court's narrow interpretation of "statement" to refer to only the specific declaration or remark incriminating the speaker and not more broadly to the entire narrative portion of the speaker's confession.

[20] In *Williamson v. United States*,[96] the U.S. Supreme Court explained that while a self-inculpatory statement is more reliable under the theory that reasonable people do not make

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[94] *Id.*

[95] *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013).

[96] *Williamson v. United States, supra* note 4.

self-inculpatory statements unless they believe them to be true, the same cannot be said of a non-self-exculpatory statement. "One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature."[97]

[21] The Court has noted further in this context that statements of accomplices incriminating a defendant have traditionally been viewed with special suspicion and considered presumptively unreliable.[98] Such statements are not ordinarily unambiguously adverse to the penal interest of the declarant.[99] As we said in *Phillips*, "while there is no clear motivation to lie about a fact that could expose one to criminal liability, there is clear motivation to lie about something that lessens one's culpability."[100] This motivation exists even if a reasonable person in the accomplice's position would believe that lessening culpability will have only a mitigating effect on sentencing—as opposed to exculpating the accomplice of the underlying crime.[101]

[22,23] Whether a particular remark within a larger narrative is "truly self-inculpatory"—such that a reasonable person would make the statement only if believed to be true—is a fact-intensive inquiry requiring careful examination of all the circumstances surrounding the criminal activity involved.[102] When considering statements of a mixed nature, one court has described the question as being whether the statement has a net exculpatory versus net inculpatory effect.[103] A statement

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[97] *Id.*, 512 U.S. at 599-600.

[98] *Lilly v. Virginia, supra* note 74.

[99] See *id.*

[100] *State v. Phillips, supra* note 95, 286 Neb. at 993, 840 N.W.2d at 517.

[101] *Williamson v. United States, supra* note 4.

[102] *Id.*, 512 U.S. at 604.

[103] See *People v. Duarte*, 24 Cal. 4th 603, 12 P.3d 1110 (2000). See, also, e.g., *United States v. Lilley*, 581 F.2d 182 (8th Cir. 1978).

that is in part inculpatory by admitting some complicity, but that is exculpatory insofar as it places the major responsibility on others, does not meet the test of trustworthiness and is thus inadmissible.[104]

We find that Davis' statements to Branch that she and her children were in jeopardy, to Clairday that he did not want her by Britt and wanted her to stay by him, and to Jones that it was out of his hands, were not self-inculpatory at all. These statements implicated Britt as dangerous and as having criminal intentions with regard to Branch, Jones, and Clairday, but did not subject Davis to criminal liability.

We find that Davis' statements to Branch that "Britt had brought a gun to the situation, and that that was never supposed to have went down like that"; to Logemann that "everything went wrong" because "Cuz started shooting"; and to Jones that "some things had happened that weren't supposed to happen," that "some people got hurt that shouldn't have got hurt," that "[Britt] was trigger happy," and that "[Britt] went pop, pop, pop in the other room" were attempts to shift blame to Britt. These statements, while partially inculpatory in the sense that they revealed Davis participated in a plan to rob Miguel Sr., are not sufficiently against Davis' penal interests that a reasonable person in Davis' position would not have made them unless believing they were true.

These statements were not directly designed to curry favor with the authorities insofar as they were made to acquaintances, but they had a net exculpatory effect such that they were not "truly self-inculpatory."[105] Through these statements, Davis shifted blame to Britt for the fact that a robbery turned into a triple homicide. Particularly with regard to the statements

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[104] *Id.*

[105] See, *Williamson v. United States, supra* note 4, 512 U.S. at 603. Accord *U.S. v. Smalls*, 605 F.3d 765 (10th Cir. 2010). See, also, *United States v. Lang*, 589 F.2d 92 (2d Cir. 1978); *United States v. Bagley*, 537 F.2d 162 (5th Cir. 1976).

made to Logemann, a reasonable person in Davis' position could be motivated to lie and shift the blame to Britt as the person responsible for the "easy lick" going awry, causing complications that were never part of the original plan. Davis also appeared generally less culpable through these statements to Branch, Jones, and Clairday, possibly in an attempt to garner their sympathy. And even if we assume a reasonable person in Davis' position would be familiar with the concept of felony murder, such person would believe that if any of these statements shifting blame were reported to the authorities, he would have a greater chance of striking a plea bargain and of receiving a lesser punishment for his crimes.

We need not examine the incriminating nature of the remainder of Davis' statements that were entered into evidence at trial over Britt's hearsay objection. At least some, such as Davis' statements to Clairday that "they" went to the house to rob somebody and that "they started shooting," appear sufficiently self-inculpatory to qualify under the against interest exception. But the very statements the State relied upon most heavily at trial to paint Britt as the most morally culpable coconspirator do not qualify as truly self-inculpatory. Suffice it to say that even if we could determine for the first time on appeal that Davis was unavailable, the result of this appeal would not be different.

3. Harmless Error

[24] The trial court erred in admitting Davis' hearsay statements. In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[106] We consider whether the erroneous admission of evidence is harmless beyond a reasonable doubt so that convictions are not set aside "for small errors or defects that

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[106] See, *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015); *State v. Hughes, supra* note 67.

have little, if any, likelihood of having changed the result of the trial."[107]

[25] In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.[108] In conducting this analysis, we look to the entire record and view the erroneously admitted evidence relative to the rest of the untainted, relevant evidence of guilt.[109]

[26,27] Overwhelming evidence of guilt can be considered in determining whether the verdict rendered was surely unattributable to the error, but overwhelming evidence of guilt is not alone sufficient to find the erroneous admission of evidence harmless.[110] We have also said that where evidence is cumulative and other competent evidence supports the conviction, improper admission or exclusion of evidence may be harmless.[111] Cumulative evidence tends to prove the same point of which other evidence has been offered; testimony lending credibility to a crucial witness' testimony will not necessarily be considered cumulative simply because another witness testifies similarly, however.[112]

While the untainted, relevant evidence without the inadmissible hearsay presented a "reasonably strong 'circumstantial web of evidence'"[113] against Britt, such evidence was not

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[107] *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

[108] *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016).

[109] See *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014).

[110] See *id.*

[111] See *State v. Trice*, 292 Neb. 482, 874 N.W.2d 286 (2016).

[112] See, *id.*; *State v. Armstrong*, 290 Neb. 991, 863 N.W.2d 449 (2015).

[113] See *Chapman v. California, supra* note 107, 386 U.S. at 25.

overwhelming. And that circumstantial web of evidence rested entirely on the credibility of witnesses who were all implicated in the crime and granted immunity for their testimony. Moreover, there was no physical evidence directly connecting Britt to the murders and Britt made no admissions.

Without Davis' inadmissible statements, the evidence concerning Britt's guilt consisted of the following: Logemann testified that he conspired with Davis to rob Miguel Sr. and that the money would be split with whomever Davis took with him to commit the robbery. Logemann testified that Britt was in the van when he showed Davis where Miguel Sr. lived and when Logemann and Davis discussed the planned robbery. This left the implication that Britt was the person Davis would take with him to commit the robbery. Jones, in constrast, testified that Britt was not in the van at that time.

Branch and Jones testified that Britt went into the Avalos house with Davis, with the understanding that they were going to buy drugs. When they returned, Branch said Britt asked if she had heard anything. Branch also testified that Britt ran back to the van wearing a bandanna over his face and gloves on his hands, but this was contradicted by Jones. At no point did Branch and Jones see either Davis or Britt with a weapon. The approximate time that Branch and Jones said they went to the Avalos house was the same approximate time that Miguel Sr.'s oldest son reported to the police that he heard intruders in the house.

Davis and Britt argued. Later, Davis was sick. Clairday picked Davis and Britt up, and Britt handed her a .22-caliber revolver when asked if he was carrying a gun. Davis was nervous and scared, and Britt at one point asked Davis "if he was losing him." Without objection, Clairday testified that Davis told her obliquely that "some things had happened that weren't supposed to happen" and that "some people got hurt that shouldn't have got hurt."

Clairday testified that she saw Britt burning gloves when they were at Lautenschlager's apartment. Once, in the days

after the murders, she heard Davis and Britt converse in "hush tones."

At Clairday's direction, the .22-caliber revolver that Britt allegedly handed her was recovered by the police. There was no definitive forensic evidence connecting the gun to Britt or the murders, but .22-caliber bullets were used in the shootings.

Britt stayed in the basement with Jones until his arrest, and he was with Branch and Jones wherever they went. Jones and Logemann both testified that Britt made them nervous when he asked them personal questions, and Jones described Britt as "scary."

Relative to the above untainted, relevant evidence of guilt, the inadmissible hearsay statements were both numerous and significant. The State presented to the jury the following inadmissible hearsay statements by Davis:

Davis told Branch and Jones they needed to get out of town, because he "had to answer to other people," "it was out of his hands," and their safety was in jeopardy. Davis told Clairday he did not want her near Britt.

Davis explained that "Britt had brought a gun to the situation, and that that was never supposed to have went down like that"; that "they had went to rob somebody, and some things had happened that weren't supposed to happen"; and that "[Britt] was trigger happy." Davis said that while he was searching through one of the rooms of the Avalos house, "[Britt] went pop, pop, pop in the other room." Davis said that "everything went wrong" and that "[Britt] started shooting." Finally, Davis described in detail that

> they had went to the house to rob somebody, and that when they had gotten there, he was inside of a room going through stuff and he heard gunshots. He ran out into the hall, and [Britt] had met him in the hall. Somebody was coming down the hall and they started shooting.

Davis was heard asking over the telephone "where the other gun was." Davis was "worried about DNA because a gun got dropped."

The State relied heavily on these inadmissible hearsay statements in its closing argument. The statements provided the most direct eyewitness account of what occurred inside the Avalos house on the morning of the murders. The State also used these statements to place the bulk of the moral, if not legal, culpability upon Britt for the robbery's having gone so "horribly wrong."

Finally, the State relied upon these statements to connect Britt to the murder weapons. The State attempted to illustrate how the positions of the bodies and the number of shots fired from which weapons corresponded with Davis' narration of how the shootings took place. They also connected Davis' statements concerning a gun that was left at the scene and his worry about DNA being found on it with the fact that a gun apparently used in the murders was, in fact, found at the scene. Without these statements describing in detail how Britt started shooting and how Davis was concerned about where one of the guns was and whether DNA was on it, the only evidence connecting the presumed murder weapons to Britt were the facts that Britt handed Clairday a .22-caliber revolver later that day and that .22-caliber bullets were used in the shootings.

The State does not actually attempt to argue that the admission of all the hearsay statements we have deemed inadmissible would be harmless. The State's harmless error analysis instead relied on the assumption that most of these statements were admissible and that only a few statements were inadmissible and would be cumulative to the admissible statements. The State does not argue, and we cannot find, that the inadmissible hearsay statements, numbering over 30 in total, are cumulative to the one properly admitted hearsay statement that "something" had happened that should not have happened and that "some people" were hurt who should not have been hurt. Nor are they cumulative to the other admissible circumstantial evidence.

Britt's connection to the crimes is much clearer with the inadmissible hearsay statements than without those statements. The weight of the erroneously admitted evidence relative to the rest of the untainted, relevant evidence of guilt is significant. Therefore, we cannot conclude that the guilty verdict rendered in this trial was surely unattributable to the erroneous admission of Davis' inadmissible hearsay statements.

[28] We find that the admission of Davis' hearsay statements was reversible error. The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.[114] Because the evidence presented at trial was sufficient to support the verdict against Britt, we conclude that double jeopardy does not preclude a remand for a new trial.

VI. CONCLUSION

For the foregoing reasons, we reverse the judgment and remand the cause for a new trial consistent with this opinion.

Reversed and remanded.

Heavican, C.J., not participating.

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[114] *State v. Esch*, 290 Neb. 88, 858 N.W.2d 219 (2015).

Nebraska Supreme Court
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Jody A. Hill and Dean Owen Thorsen, appellees, v. Mark Tevogt, appellant.

879 N.W.2d 369

Filed April 22, 2016. No. S-15-311.

1. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** The determination of an appropriate discovery sanction rests within the discretion of the trial court, and an appellate court will not disturb it absent an abuse of discretion.
2. **Judgments: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Rules of the Supreme Court: Pretrial Procedure.** The court may sanction a party under Neb. Ct. R. Disc. § 6-337, despite the absence of a prior discovery order.
4. ____: ____. The appropriate sanction under Neb. Ct. R. Disc. § 6-337 depends on the facts.
5. ____: ____. Factors which are relevant to sanctions under Neb. Ct. R. Disc. § 6-337 include the prejudice or unfair surprise suffered by the party seeking sanctions, the importance of the evidence which is the root of the misconduct, whether the court warned the sanctioned party about the consequences of its misconduct, whether the court considered less drastic sanctions, the sanctioned party's history of discovery abuse, and whether the sanctioned party acted willfully or in bad faith.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Reversed and remanded for further proceedings.

James D. Sherrets and Jared C. Olson, of Sherrets, Bruno & Vogt, L.L.C., for appellant.

Brian J. Muench for appellees.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Connolly, J.

SUMMARY

In 2012, Mark Tevogt purchased the interests of Jody A. Hill and Dean Owen Thorsen in a business formed as JGP, LLC. Tevogt financed the purchase by executing a promissory note under which Hill and Thorsen are the payees. Tevogt soon defaulted, and Hill and Thorsen (collectively the plaintiffs) sued him for damages under the promissory note. Tevogt alleged in his answer that the plaintiffs had made misrepresentations and committed fraud. The court overruled the plaintiffs' first motion for summary judgment because of statements Tevogt made in his affidavit about the plaintiffs' failure to inform him of business debts.

The plaintiffs moved for summary judgment again after Tevogt twice failed to attend his deposition. At a hearing on the motion, the plaintiffs asked the court to sanction Tevogt because he had not given them an opportunity to depose him about the statements in his affidavit. The court sanctioned Tevogt by excluding the statements Tevogt made in his affidavit, and ultimately entered summary judgment for the plaintiffs. Tevogt appeals and argues that the court imposed an unduly harsh discovery sanction. We conclude that the severity of the sanction was an abuse of discretion. We therefore reverse the summary judgment and remand the cause for further proceedings.

BACKGROUND

In 2013, the plaintiffs sued Tevogt, alleging that he had defaulted on a promissory note payable to them. The plaintiffs claimed that the unpaid principal was about $120,000. They asked the court to award them damages for the unpaid principal, with interest accruing from the date of default.

Tevogt listed 12 affirmative defenses in his answer, including "fraud and/or fraud in the inducement." He also included a

"Counterclaim" which set out four causes of action: fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and breach of contract. He alleged that the plaintiffs had misrepresented or concealed the financial status of JGP.

The plaintiffs moved for summary judgment and offered an affidavit that Hill signed in February 2014. Hill averred that Tevogt had defaulted on a promissory note with an unpaid principal of about $120,000 and a default interest rate of 6 percent per year. Hill stated that she and Thorsen did not misrepresent JGP's finances or withhold information from Tevogt. She acknowledged that "there was $65,000.00 due" to an underwriter, but stated that JGP's manager told Tevogt about the shortfall.

Tevogt offered his own affidavit. He claimed that the plaintiffs told him that "all bills/expenses/accounts were current." He alleged that after he executed the promissory note, he learned that the "account used for holding premiums collected to be paid to the insurer/underwriter" was "approximately $60,000.00 short." Tevogt further stated that the plaintiffs gave JGP's employees large raises and failed to pay income taxes, which he learned "at the 11th hour before the closing."

The court overruled the plaintiffs' motion for summary judgment. It stated that Tevogt's allegation in his affidavit that the plaintiffs failed to pay income taxes did not create a genuine issue of material fact, because Tevogt knew about the problem before he signed the promissory note. The court was also not impressed by Tevogt's allegation that the plaintiffs gave JGP's employees large raises, because it reasoned that Tevogt could simply reverse the raises. But the court concluded that Tevogt's statements about a shortfall in the underwriting account created a genuine issue of material fact preventing a summary judgment.

In February 2015, the plaintiffs again moved for summary judgment. They claimed that they had "attempted twice to take [Tevogt's] deposition and [Tevogt] twice failed to appear for said deposition."

At the hearing on their motion, the plaintiffs offered an affidavit signed by Hill in February 2015. The affidavit was largely the same as Hill's February 2014 affidavit, but it included more details about Tevogt's relationship with JGP's business manager. Hill stated that Tevogt learned of the underwriting account shortfall before he executed the promissory note.

The court also received a notice that the plaintiffs sent to Tevogt stating that they intended to depose him on November 4, 2014. The plaintiffs' attorney signed the notice and mailed it to Tevogt's attorney on October 24.

The November 4, 2014, deposition shows that Tevogt's attorney was present, but not Tevogt himself. The plaintiffs' attorney said that the plaintiffs had tried to contact Tevogt's attorney twice before mailing the notice on October 24. On October 29, the plaintiffs' attorney received a postal notification that the notice of deposition sent to Tevogt's attorney had been forwarded to another address. On November 3, Tevogt's attorney left a message for the plaintiffs' attorney stating that Tevogt was "'out of the country all week.'" Tevogt's attorney claimed that he had tried to reschedule.

On December 11, 2014, the plaintiffs tried to depose Tevogt again. Their attorney mailed a notice of deposition to Tevogt's attorney on December 1. Neither Tevogt nor his attorney arrived at the scheduled location.

In the plaintiffs' attorney's affidavit, he stated that Tevogt's attorney had been unresponsive. The plaintiffs' attorney claimed that he had asked Tevogt's attorney for dates when Tevogt would be available after November 4, 2014, but that Tevogt's attorney did not answer.

At the summary judgment hearing, the plaintiffs asked the court to sanction Tevogt:

> [W]e're asking the Court that, based upon our inability to question . . . Tevogt on his — the allegations in his affidavit and the affirmative defense that he raised and that the Court has found previously that there's a factual dispute regarding, that he not be allowed to testify or to offer

> evidence as to that alleged lack of knowledge, because he hasn't showed up twice for a deposition. I mean, we're trying to cross-examine him as to what he knew and when he knew it.

Tevogt's attorney said that Tevogt was "out of town" for the first deposition. Tevogt's attorney said that when he tried to reschedule, the plaintiffs' attorney "[b]asically said no." As for the second deposition, Tevogt's attorney said he never received the notice. Tevogt's attorney suggested that the court continue the trial so the plaintiffs could depose Tevogt. He promised to "make sure that [Tevogt is] there for it." The plaintiffs' attorney responded that the address of Tevogt's attorney was hard to pin down and that his "trial calendar for the next three weeks is just loaded."

On March 5, 2015, the court entered an order sanctioning Tevogt by excluding the statements in his affidavit that the plaintiffs had misrepresented the financial status of JGP and did not disclose that JPG's "underwriting account was short $60,000.00." A week later, the court entered a summary judgment for the plaintiffs and dismissed Tevogt's "Counterclaim."

ASSIGNMENTS OF ERROR

Tevogt assigns, restated, that the court erred by (1) sanctioning him for his failure to attend his depositions and (2) sustaining the plaintiffs' second motion for summary judgment.

STANDARD OF REVIEW

[1,2] The determination of an appropriate discovery sanction rests within the discretion of the trial court, and an appellate court will not disturb it absent an abuse of discretion.[1] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a

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[1] See *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007).

litigant of a substantial right and denying just results in matters submitted for disposition.[2]

ANALYSIS

Tevogt argues that the court abused its discretion by sanctioning him for his failure to attend two depositions. The parties agree that the court sanctioned Tevogt by excluding the statements in his affidavit that the plaintiffs misrepresented the financial status of JGP and did not disclose an approximately $60,000 shortfall in the underwriting account. This was the only evidence offered by Tevogt to support his affirmative defense of fraud and his counterclaims.

The main purpose of the discovery process is to narrow the factual issues in controversy so that the trial is efficient and economical.[3] The discovery process helps the litigants conduct an informed cross-examination and avoid tactical surprise, a circumstance which might lead to a result based more on legal maneuvering than on the merits of the case.[4]

[3] If the parties fall short of their discovery obligations, Neb. Ct. R. Disc. § 6-337 (rule 37) allows the court to sanction them. In relevant part, rule 37 states:

> (b) Failure to Comply with Order.
>
> . . . .
>
> (2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
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> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

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[2] *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015).

[3] See *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001).

[4] See *id.*

> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> . . . .
>
> (d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party . . . fails
>
> (1) To appear before the officer who is to take his or her deposition, after being served with a proper notice, or
>
> . . . .
>
> (3) . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Unlike under rule 37(b),[5] the court may sanction a party under rule 37(d), despite the absence of a prior discovery order.[6] Rule 37 resembles Fed. R. Civ. P. 37, so we may look to federal decisions for guidance.[7]

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[5] See 7 James Wm. Moore, Moore's Federal Practice § 37.90 (3d ed. 2016).

[6] See, *Paulk v. Central Lab. Assocs., supra* note 3; *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). See, also, *Guidry v. Continental Oil Co.*, 640 F.2d 523 (5th Cir. 1981); *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975); *Robison v. Transamerica Insurance Co.*, 368 F.2d 37 (10th Cir. 1966); *Alexander v. FBI*, 186 F.R.D. 6 (D.D.C. 1998); *Woodstock Ventures LC v. Perry*, 164 F.R.D. 321 (N.D.N.Y. 1996); 7 Moore, *supra* note 5; 8B Charles Alan Wright et al., Federal Practice and Procedure § 2290 (3d ed. 2010).

[7] See, *Behrens v. Blunk*, 280 Neb. 984, 792 N.W.2d 159 (2010); *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000); *Stanko v. Chaloupka*, 239 Neb. 101, 474 N.W.2d 470 (1991).

Rule 37 sanctions serve several purposes. First, they punish a litigant or counsel who might be inclined to frustrate the discovery process.[8] Second, they deter those who are tempted to break the rules.[9] Finally, they prevent parties who have failed to meet their discovery obligations from profiting from their misconduct.[10]

[4,5] Even if the court imposes a discovery sanction that amounts to a "death sentence," we review the court's decision for an abuse of discretion.[11] The appropriate sanction under rule 37 depends on the facts.[12] Relevant factors include the prejudice or unfair surprise suffered by the party seeking sanctions, the importance of the evidence which is the root of the misconduct, whether the court warned the sanctioned party about the consequences of its misconduct, whether the court considered less drastic sanctions, the sanctioned party's history of discovery abuse, and whether the sanctioned party acted willfully or in bad faith.[13]

Tevogt notes that federal courts are reluctant to dismiss a complaint or enter a default judgment as a discovery sanction

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[8] *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994).

[9] See, *Behrens v. Blunk, supra* note 7; *Norquay v. Union Pacific Railroad, supra* note 6.

[10] *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997).

[11] *Behrens v. Blunk, supra* note 7, 280 Neb. at 991, 792 N.W.2d at 165.

[12] *Paulk v. Central Lab. Assocs., supra* note 3; *Booth v. Blueberry Hill Restaurants, supra* note 8; *Stanko v. Chaloupka, supra* note 7; *Norquay v. Union Pacific Railroad, supra* note 6.

[13] See, *Tisdale v. Federal Exp. Corp.*, 415 F.3d 516 (6th Cir. 2005); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2001); *LeGrande v. Adecco*, 233 F.R.D. 253 (N.D.N.Y. 2005); *Paulk v. Central Lab. Assocs., supra* note 3. See, also, *Hyde & Drath v. Baker*, 24 F.3d 1162 (9th Cir. 1994); *Mut. Federal Sav. & Loan v. Richards & Associates*, 872 F.2d 88 (4th Cir. 1989).

unless the sanctioned party showed bad faith, willfulness, or fault.[14] We have said that dismissal may be an appropriate sanction for an "inexcusably recalcitrant" party.[15] In a hierarchy of harshness, the exclusion of evidence lies somewhere between the payment of expenses caused by the misconduct and dismissal or default judgment.[16]

We conclude that the court abused its discretion by excluding statements Tevogt made in his affidavit as a sanction for his failure to attend two depositions. The exclusion of the evidence was particularly harsh in this case because it was the only evidence adduced by Tevogt. The court's order did not consider less drastic sanctions, and the court did not warn Tevogt that he faced such a severe penalty. And the willfulness of Tevogt's failure is questionable. His attorney attended the first deposition, despite receiving notice only 1 day earlier, and told the plaintiffs that Tevogt was unable to attend. Tevogt's attorney claimed that he never received notice of the second deposition. Tevogt could, of course, be feigning ignorance as part of a "cagey defense strategy," but that is far from clear on the record before us.[17] Cases in which the court entered a "death sentence" for the sanctioned party's failure to attend his or her deposition tend to involve a pattern of disregard for the discovery rules, prior imposition of less severe sanctions, and warnings that continued noncompliance

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[14] See, *Collins v. Illinois*, 554 F.3d 693 (7th Cir. 2009); *Archibeque v. Atchison, Topeka & Santa Fe Ry. Co.*, 70 F.3d 1172 (10th Cir. 1995); *Hyde & Drath v. Baker, supra* note 13; *Beil v. Lakewood Engineering and Mfg. Co.*, 15 F.3d 546 (6th Cir. 1994); 7 Moore, *supra* note 5, § 37.96; 8B Wright et al., *supra* note 6, § 2284; Annot., 156 A.L.R. Fed. 601, § 2[a] (1999).

[15] See *Stanko v. Chaloupka, supra* note 7, 239 Neb. at 103, 474 N.W.2d at 471.

[16] *Norquay v. Union Pacific Railroad, supra* note 6.

[17] See *Woodstock Ventures LC v. Perry, supra* note 6, 164 F.R.D. at 323.

will be severely dealt with.[18] A party's failure to attend depositions may sometimes warrant a drastic sanction, but this is not such a case.

Because the district court erred in excluding the evidence, it also erred in its order granting summary judgment for the plaintiffs, as the evidence creates a genuine issue of material fact about a shortfall in the underwriting account.

CONCLUSION

We conclude that the court abused its discretion by excluding statements in Tevogt's affidavit as a sanction for his failure to attend depositions, and further erred in granting summary judgment for the plaintiffs. We express no opinion whether Tevogt's conduct warranted a lesser sanction. We reverse the judgment entered for the plaintiffs and remand the cause for further proceedings.

Reversed and remanded for
further proceedings.

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[18] See, *Collins v. Illinois, supra* note 14; *Stars' Desert Inn Hotel & Country Club v. Hwang*, 105 F.3d 521 (9th Cir. 1997); *Hyde & Drath v. Baker, supra* note 13; *Viswanathan v. Scotland Cty. Bd. of Educ.*, 165 F.R.D. 50 (M.D.N.C. 1995).



Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

Elizabeth A. White, appellee, v. James F. White and James McGough, appellees, and Douglas County, Nebraska, intervenor-appellant.

884 N.W.2d 1

Filed April 22, 2016. No. S-15-350.

1. **Constitutional Law: Due Process: Judgments: Appeal and Error.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
3. **Attorney Fees: Appeal and Error.** A finding of indigency under Neb. Rev. Stat. § 42–358(1) (Reissue 2008) is a matter within the initial discretion of the trial court, and such a finding will not be set aside on appeal in the absence of an abuse of discretion by the trial court.
4. **Constitutional Law: Due Process: Counties: Political Subdivisions.** U.S. Const. amend. XIV and Neb. Const. art. I, § 3, prohibit the State from depriving any "person" of life, liberty, or property without due process of law. A county, as a creature and political subdivision of the State, is neither a natural nor an artificial person.
5. **Attorney Fees: Guardians Ad Litem.** For purposes of Neb. Rev. Stat. § 42–358(1) (Reissue 2008), a person is indigent if he or she is unable to pay the guardian ad litem or attorney fees without prejudicing, in a meaningful way, his or her financial ability to provide the necessities of life, such as food, clothing, shelter, and medical care for himself or herself or his or her legal dependents.
6. **Judgments: Time.** When an indigence hearing takes place last in the chain of events, a district court's determination of indigence should depend upon a party's finances at the time of the indigence hearing.

Appeal from the District Court for Douglas County: W. Mark Ashford, Judge. Reversed.

Donald W. Kleine, Douglas County Attorney, and Meghan M. Bothe for intervenor-appellant.

James McGough, of McGough Law, P.C., L.L.O., guardian ad litem.

Heavican, C.J., Wright, Connolly, Cassel, and Stacy, JJ.

Heavican, C.J.

INTRODUCTION

This case comes to us as a dispute between James McGough and Douglas County, Nebraska (the County). During the underlying suit for dissolution of marriage, Elizabeth A. White was ordered to pay McGough $2,073.12 in guardian ad litem (GAL) fees. After White failed to comply and subsequently had her debts discharged in bankruptcy, the district court found White to be indigent and ordered the County to pay the fees. The County appeals. We reverse.

BACKGROUND

In July 2012, White filed a complaint for dissolution of marriage. The district court appointed McGough as GAL for the couple's minor children. In February 2014, on McGough's motion, the district court ordered that White and her husband each individually pay $2,073.12 to McGough. The order did not hold White and her ex-husband jointly and severally liable for the fees. In April, McGough filed a motion for contempt, alleging that White had not paid any portion of the fees she owed to him under the February order. White's ex-husband paid his portion of the fees owed.

In April 2014, White gave notice that she had filed for bankruptcy. McGough was notified and listed as a creditor in White's bankruptcy proceedings. About 1 month after White

gave notice that she had filed for bankruptcy, McGough made another motion for attorney fees in the district court, this time requesting that the district court find White indigent and order the County to pay the fees, pursuant to Neb. Rev. Stat. § 42-358(1) (Reissue 2008). Section 42-358(1) states that when a court appoints an attorney to represent the interests of minor children, "[i]f the court finds that the party responsible is indigent, the court may order the county to pay the costs."

In accordance with Rules of Dist. Ct. of Fourth Jud. Dist. 4-11 (rev. 1995) (Rule 4-11), McGough gave the County written notice and appeared at a hearing in June 2014. The County requested a stay of proceedings, ostensibly required by bankruptcy laws. At the hearing, the County also asserted that the stay was necessary because indigence could not be determined until White's debts were discharged, and also because McGough might obtain his payment through the bankruptcy proceedings.

The district court granted the stay. McGough took no action in the bankruptcy proceedings. Eventually, White's debts, including the debt to McGough, were discharged. The district court then resumed proceedings, and a hearing on the issue of White's indigence was held in September 2014, with the County present.

During the September 2014 hearing, the County argued that it did not have notice or the opportunity to oppose the reasonableness of McGough's fees when the amount was determined in February 2014. The County also disputed White's indigence. It had moved for leave to serve discovery upon parties in order to determine indigence, but the district court denied the motion. In lieu of discovery, the County made a record by calling White to testify.

The table below shows a rough estimate of White's various income and expenses in September 2014 based upon the record.

INCOME AND EXPENSES IN SEPTEMBER 2014	
Income	
Gross income	$3,416.67
Government assistance	804.00
Approximate taxes	(389.94)
Approximate after-tax income	**$3,830.73**
Expenses	
Retirement	($ 175.63)
Health insurance	(151.52)
Dental insurance	(25.00)
Vision insurance	(19.37)
Other payroll deductions	(32.88)
Gym and locker	(0.00)
Parking fee	(26.33)
Rent	(900.00)
Electric/heat/gas	(240.00)
Telephone/cell phone/Internet/cable	(395.00)
Food and home	(600.00)
Children's education	(100.00)
Clothing/laundry/dry cleaning	(75.00)
Personal care	(80.00)
Medical/dental	(175.00)
Gas and automobile care	(160.00)
Charity	(45.00)
Automobile insurance	(110.00)
Additional childcare and activities	(95.00)
Total of expenses	**$3,405.73**
TOTAL REMAINING	**$ 425.00**

In December 2014, the district court found that White was indigent and ordered the County to pay McGough's fees. The County appealed, but because of an oversight in the order, the appeal was dismissed for lack of a final order. In April 2015, the district court filed a revised final order. The County again appealed, and we moved the case pursuant to our authority to regulate the docket of this court and the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

The County assigns, restated and renumbered, that the district court erred by (1) failing to give notice and opportunity to be heard on the issues of indigence and reasonableness of fees as required by due process, (2) using the discharge of White's debts as a basis for finding White indigent, and (3) finding that White was financially unable to pay the GAL fees.

STANDARD OF REVIEW

[1] The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.[1]

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.[2]

[3] A finding of indigency under § 42-358(1) is a matter within the initial discretion of the trial court, and such a finding will not be set aside on appeal in the absence of an abuse of discretion by the trial court.[3]

ANALYSIS

County's Right to Notice and Opportunity for Hearing.

In the County's first assignment of error, it argues that the district court violated its rights under the Due Process Clauses of U.S. Const. amend. XIV and Neb. Const. art. I, § 3. We find this argument to be without merit.

[4] The County has no right to due process. U.S. Const. amend. XIV and Neb. Const. art. I, § 3, prohibit the State from

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[1] *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011).

[2] *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015).

[3] *Mathews v. Mathews*, 267 Neb. 604, 676 N.W.2d 42 (2004).

depriving any "person" of life, liberty, or property without due process of law. A county, as a creature and political subdivision of the State, is neither a natural nor an artificial person.[4]

But Rule 4-11 does provide:

> When a court-appointed [GAL] makes application for payment of fees, if the indigence of either party to the action is at issue such that the county may be ordered to pay the fees and costs, the guardian shall serve a copy of the fee application and notice of hearing upon the County Attorney. The County Attorney may appear at the hearing to represent the interests of the county or may file a written waiver of appearance.

Though we conclude that the County has no right to constitutional due process, we consider whether the procedure under Rule 4-11 was violated. We find that the procedure was followed.

First, the County argues that it was denied proper notice when the district court considered White's financial status dating back to November 2012, before the County had notice that indigence was at issue. The County appears to argue that even though it had notice and an opportunity to be heard on the issue of indigence, this process was insufficient because the district court used some evidence about White's past financial status.

This argument fails because the County did receive actual notice as soon as indigence was at issue in May 2014. And the County had an opportunity to be heard on the issue before the district court ruled. Parties are often, in fact usually, required to argue about facts as they existed prior to the time of a hearing or trial. Just because the County was required to analyze past events does not mean that it was denied proper notice that those past facts were at issue. To rule otherwise would forever limit all courts to the consideration of facts contemporaneous

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[4] *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002).

with the hearing. Additionally, such a holding would require that notice be given to the County in every single suit in which GAL fees arise, just in case indigence may later become an issue. These results would be unsound. The County's first argument lacks merit.

Second, the County asserts that the district court denied the County notice and opportunity to be heard when it allegedly contradicted its February 2014 order. Essentially, the County argues that in February 2014—by ordering White to pay half of McGough's fees—the district court impliedly found that White was not indigent. The County argues that when the district court later explicitly found that White was indigent, the court violated principles of due process.

This argument lacks merit. The County cites no authority to support its legal contention that once a court impliedly finds a party has sufficient funds, a later reversal of that finding violates another party's right to notice and hearing. Further, the February order did not imply that White was not indigent. The order merely required White and her ex-husband to pay McGough. There was no determination of the parties' abilities to pay, because indigence was not yet at issue.

Third, the County argues that it was deprived of notice and opportunity to be heard on the issue of reasonableness of McGough's fees. This argument is distinct from the County's first argument, because the district court did actually make a determination that McGough's fees were reasonable before the County received notice in the case. But, to the extent the County is entitled to notice and a hearing on the issue of indigence, this right does not also extend to notice and opportunity to be heard on reasonableness of fees. Rule 4-11 requires only that, "if the *indigence* of either party to the action is at issue such that the county may be ordered to pay the fees and costs, the guardian shall serve a copy of the fee application and notice of hearing upon the County Attorney." (Emphasis supplied.) The rule is silent as to reasonableness.

In sum, the County has no due process rights. Rule 4-11 requires only notice that indigence is at issue and an opportunity for the County to be heard on that question. The County received notice as soon as indigence was raised and had the opportunity to argue against a finding of indigence. Thus, the County's first assignment of error is without merit.

Alleged Improper Basis for District Court's Order.

In its second assignment of error, the County argues that the district court erred by finding White to be indigent solely because the debt to McGough had been discharged in bankruptcy, and not because White was actually incapable of paying the GAL fees. We disagree.

[5] In *Mathews v. Mathews*,[5] we stated:

> [F]or purposes of § 42-358(1), a person is indigent if he or she is unable to pay the GAL or attorney fees without prejudicing, in a meaningful way, his or her financial ability to provide the necessities of life, such as food, clothing, shelter, and medical care for himself or herself or his or her legal dependents.

In its order, the district court found:

> White is a person who is indigent and unable to pay her attorney's fees in a meaningful way, based upon her financial ability to provide the necessity of life, such as food, clothing, shelter and medical care for herself or her dependents.
>
> This Court has considered the bankruptcy proceedings in determining whether . . . White is indigent.

The district court's order is ambiguous. The order does not explain how the court factored White's bankruptcy into its decision. The court could have meant that it used the bankruptcy as an indication that before the discharge, White met the *Mathews* standard of indigence. In the alternative, the district

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[5] *Mathews, supra* note 3, 267 Neb. at 612, 676 N.W.2d at 52.

court may have been using the fact of White's bankruptcy as the basis for finding White indigent because McGough could not legally collect payment from White.

We believe the former interpretation is correct. The district court was clearly aware of the *Mathews* standard and explicitly found that White's ability to provide the necessities of life would be prejudiced by paying the fees. Therefore, the district court apparently referenced White's bankruptcy merely as circumstantial evidence that White met the *Mathews* test for indigence. Even though the standards for bankruptcy and indigence are not the same, the district court's reasoning was not improper as a rule so long as the district court did not abuse its discretion by finding that White met the *Mathews* test.

Thus, the County's second assignment of error is without merit and we now turn to its third.

White's Financial Ability to Pay Fees.

In its third assignment of error, the County argues that the district court erred by finding that White was unable to pay the GAL fees. First, it argues that the district court should have considered White's finances only after her debts had been discharged in bankruptcy. Second, the County argues that in any time period, either before or after White's debts were discharged, White had sufficient funds to pay McGough's fees without prejudicing her ability to provide the necessities of life. We agree with the County.

We have never addressed which time period a court should consider in order to determine whether a party is indigent. Nor can the court locate any analogous authority from other jurisdictions. Therefore, we must look to statutory interpretation of § 42-358(1) to determine whether the district court should have looked to White's finances in May 2014 (when McGough raised the indigence issue), September 2014 (during the indigence hearing), or at some other time.

The language of § 42-358(1) is in the present tense: "If the court finds that the party responsible *is* indigent, the court may order the county to pay the costs." (Emphasis supplied.) Alone, this may suggest that courts should look to the party's finances at the time of the indigence hearing. But § 42-358(1) could also apply at the time that fees are fixed and ordered, because the preceding sentence states: "The court shall by order fix the fee, including disbursements, for such attorney, which amount shall be taxed as costs and paid by the parties as ordered."

Considering this ambiguity in the statute, we turn to secondary sources. The legislative history of § 42-358(1) is silent on this question. But an Alaska statute defining indigence, which this court cited parenthetically in *Mathews*,[6] defines an indigent party as "a person who, *at the time need is determined*, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter."[7] The phrase appears to require that the test be applied to the party's finances at the time of the indigence hearing or determination.

We agree as a matter of policy that it is best to apply the test for indigence to the party's finances at the time the court is making the determination. In some cases, as in the present one, there may be a significant amount of time between the appointment of a GAL, the ordering of fees, and the actual determination of indigence. In these cases, a party's financial status could change significantly, either for better or for worse. It would be unfair to hold a party to their past financial situation if they are presently unable to pay the GAL fees. And it would also be wasteful and unfair to hold the County responsible for fees because a party used to be indigent, even though the party may be more financially secure at the time of the determination.

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[6] *Id.*

[7] Alaska Stat. § 18.85.170(4) (2004) (emphasis supplied).

[6] For these reasons, we hold that when an indigence hearing takes place last in the chain of events, a district court's determination of indigence should depend upon a party's finances at the time of the indigence hearing.

We turn next to the question of White's indigence. As discussed above, in *Mathews*, we held:

> [F]or purposes of § 42-358(1), a person is indigent if he or she is unable to pay the GAL or attorney fees without prejudicing, in a meaningful way, his or her financial ability to provide the necessities of life, such as food, clothing, shelter, and medical care for himself or herself or his or her legal dependents.[8]

We review the district court's finding of indigence for abuse of discretion.[9] A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.[10]

In its December 2014 order, the district court found that White was unable to pay the GAL fees "based upon her financial ability to provide the necessity of life." This finding is untenable based upon the record.

We decline to delineate an exclusive list of expenses that constitute the necessities of life or that impact one's ability to provide those necessities. However, White clearly had sufficient funds to pay the GAL fees even after any expenses conceivably related to the necessities of life. As reflected in the table above, the record shows that as of September 2014, White had an income of approximately $3,830 after taxes. We acknowledge that a portion of this income was from government assistance. However, that fact is not relevant to the standard we set forth in *Mathews*, except that we account for the assistance as another source of income. White spent approximately $1,929.21 per month on food, clothing, clothing care,

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[8] *Mathews, supra* note 3, 267 Neb. at 612, 676 N.W.2d at 52.

[9] See *Mathews, supra* note 3.

[10] *Farnsworth v. Farnsworth*, 276 Neb. 653, 756 N.W.2d 522 (2008).

rent, and medical insurance and care—the expenses explicitly listed in *Mathews*. White also spent an additional $930 on somewhat related expenses, such as gasoline and automobile care, automobile insurance, dental insurance, utilities, and a telephone and Internet bundle. While we do not now hold that these additional expenses should factor into the determination of indigence, we find it informative that after all of these costs, White still had $999.52 remaining of her monthly pay after taxes. In fact, after accounting for all of White's expenditures contained in the record, she had approximately $425 remaining each month.

We do not intend to establish a bright-line rule for indigence based upon an amount of income or remaining funds after regular expenses. But the record in this particular case establishes very clearly that White was capable of paying the GAL fees without meaningfully prejudicing her ability to provide the necessities of life for herself or her dependents.

The County's third assignment of error has merit.

CONCLUSION

We reverse the district court's finding that White was indigent.

Reversed.

Miller-Lerman, J., participating on briefs.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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In re Interest of Dale L., a child under 18 years of age. State of Nebraska, appellee, v. Dale L., appellant.

878 N.W.2d 53

Filed April 28, 2016. No. S-15-205.

Appeal from the Separate Juvenile Court of Lancaster County: Reggie L. Ryder, Judge. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Sarah Safarik for appellant.

Joe Kelly, Lancaster County Attorney, and Ashley J. Bohnet for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Per Curiam.

The February 20, 2015, order of the separate juvenile court of Lancaster County is affirmed by an equally divided court.

Affirmed.

McCormack, J., not participating.

Nebraska Supreme Court
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State of Nebraska, appellee, v. Laron M. Jones, appellant.

878 N.W.2d 379

Filed April 28, 2016. No. S-15-370.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether the jury instructions given by a trial court are correct is a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
2. **Criminal Law: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.
3. ____: ____: ____. The relevant question when an appellate court reviews a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Sentences: Words and Phrases: Appeal and Error.** An appellate court reviews criminal sentences for an abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
5. **Criminal Law: Pretrial Procedure: Motions to Suppress: Appeal and Error.** In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress, the defendant, to preserve the issue on appeal, must object at trial to the admission of the evidence which was the subject of the suppression motion.
6. **Appeal and Error.** Asserting or arguing plain error does not relieve a defendant of properly preserving errors for appellate review.

7. ____. Plain error exists where there is error, plainly evident from the record but not complained of at trial, that prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
8. ____. Where an issue is raised and complained of at trial, it cannot be the basis of a finding of plain error on appeal.
9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
10. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, an appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
11. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motion for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the offense.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Jessica C. West for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ., and Moore, Chief Judge.

Wright, J.

I. NATURE OF CASE

Following a jury trial, Laron M. Jones was convicted of first degree murder, use of a deadly weapon (firearm) to commit

a felony, and possession of a deadly weapon by a prohibited person for the shooting death of Brandon Samuels. He was sentenced to life imprisonment for murder, and consecutive terms of 10 to 20 years' imprisonment on each of the other two convictions. Finding no merit to the errors assigned on appeal, we affirm Jones' convictions and sentences.

II. BACKGROUND

1. Events Surrounding Shooting

In the early morning hours of March 7, 2014, a group of friends gathered at the home of Alanna Delaney for an "after-hours" party. Those in attendance included Delaney; Saraha Richards; Jamie Thiem; Dale Gaver; Josue Sanchez; Giovanni Barrios; D'Angelo Goods; and the decedent, Samuels, among others. Around 2:30 a.m., three black males and one black female arrived uninvited at the party. One of the black males was Milton Butler, who came to the party to confront Thiem, his ex-girlfriend and the mother of his child. One of the black males was identified as Jones. The other black male and black female were never identified.

Butler barged into the residence and began yelling at Thiem. Then he pulled her out of the house by her hair, banging her head against a doorframe on the way out. Others at the party were concerned and followed them outside. Sanchez came to Thiem's aid, and a fight ensued in the front yard with Butler, Jones, and the unidentified black male teaming up against Sanchez. Jones brandished a gun and stated that anyone who jumped in to help Sanchez would be shot. The fight dissipated after Sanchez was knocked unconscious and taken back into the house by his friends.

Butler, Jones, and the unidentified black male and black female got into their vehicles and began leaving the scene. Most of the people from the party went back inside the house. As Butler was backing his vehicle out of the driveway, Goods came outside to retrieve something from the front yard. Butler

then stopped his vehicle, got out, and began a second altercation with Goods. Just as the altercation was about to turn physical, several shots were fired into the air, followed by a pause, and then several more shots were fired toward the house. Samuels was standing on the porch and suffered gunshot wounds in his lower right leg and in the right side of his neck. He died from those injuries.

2. Witness Testimony

(a) Alanna Delaney

Delaney testified that during the initial altercation with Sanchez, an individual she knew as "Clown" flashed a gun from his waistband and told her not to interfere with the fight or she would be shot. She was standing in the middle of the yard when shots rang out. Gaver pushed her to the ground and told her to stay down. While lying on the ground, she lifted her head and clearly observed "Clown" shooting the gun toward the porch.

Delaney testified that she was familiar with both "Clown" and Butler and that there was no doubt in her mind it was "Clown" shooting the gun, not Butler. Delaney knew Butler due to Butler's relationship with Thiem, and she had met him approximately 5 to 10 times. She was familiar with "Clown" from having met him at a location she described as a haunted house and a couple of times at her house or a bar when he was with Butler. Delaney described Butler as "skinnier" and having a "fade or a brush cut" hairstyle. By contrast, Delaney stated that "Clown" was "thicker," and she described his hairstyle as "French braided to the scalp." She stated that "Clown" was wearing a black T-shirt and blue jeans. Delaney identified Jones in court as "Clown."

(b) Saraha Richards

Richards knew Butler through Thiem and described him as being skinny and having short hair. She had also met "Clown" on a couple of prior occasions, including a New

Year's Eve party approximately 3 months prior to this incident. She described "Clown" as similar in height to Butler, but "heavier." Richards stated that before the shooting occurred, "Clown" said that if anyone interfered with the fight that was going on, that person was going to get shot. She said that "Clown" fired the first few shots in the air, then lowered the gun and started shooting at the house. Richards identified Jones in court as "Clown."

(c) Dale Gaver

Gaver testified that he saw "Clown" display the gun prior to the shooting and then observed him fire the gun three times into the air. Gaver started running toward the side of the house and heard more shots fired. As he got to the corner of the house, he turned around and saw "Clown" aiming and shooting the gun at the house. He explained that although it was dark outside, he could see what was going on because a street light was on, and that he was only about 10 feet away when he observed "Clown" flash the gun. Gaver described "Clown" as wearing a hoodie and a darker shirt. Gaver stated that "Clown" was wearing a hat initially, but was no longer wearing the hat once he became involved in the altercation with Sanchez. Gaver identified Jones in court as "Clown."

(d) D'Angelo Goods

Goods described the shooter as shorter and stockier with "nappy" braided hair that looked as if it had not been freshly done. Goods testified that during his altercation with Butler, the shorter, stockier individual approached the yard and asked, "'What's up?'" Goods observed the man firing shots into the air, then aiming and shooting at the house. He did not see Butler or anyone else with a gun, other than the stockier black male with nappy hair.

(e) Giovanni Barrios

Barrios testified that he attempted to stop the fight, but that one of the black men flashed a gun and told him to back

up. Barrios described this man as having a "[b]igger build, stockier, facial hair" and wearing jeans and a hoodie. Barrios identified Jones in court as that man.

3. Investigation

The witnesses were separated at the scene and individually transported to police headquarters to be interviewed. Jones was developed as a suspect as a result of those interviews. Delaney, Richards, and Gaver each identified Jones in a photographic lineup as the shooter. Barrios identified Jones as the man that brandished a gun during the initial altercation.

The following day, officers executed a search warrant at a residence Jones shared with his girlfriend, Jenna McBride. She confirmed that Jones' nickname is "Clown." She described Jones as "a little bit shorter, stockier with longer hair" that is "braided back." McBride directed officers to the clothes Jones had been wearing the night before, which included a pair of dark jeans, a black T-shirt, and a light gray zip-up hoodie with a broken zipper.

McBride was taken in and interviewed by law enforcement. She testified that she received a text message from Jones at 3:04 a.m. on March 7, 2014, asking her to pick him up at his aunt's house as soon as possible. When she picked him up approximately 15 minutes later, he was with Butler and another older black male who went by the name of "Mario." McBride described Jones' demeanor as "mad and irritated." Jones told McBride about the fight and mentioned that someone had been shot.

Jones was arrested and charged with first degree murder, use of a deadly weapon (firearm) to commit a felony, and possession of a deadly weapon by a prohibited person.

4. Motion to Suppress

Prior to trial, Jones moved to suppress witness identification testimony, alleging that the identification procedure used by police was unnecessarily suggestive and tainted the

identifications. The evidence adduced at the hearing showed that a lineup consisting of six photographs was used, which accidentally included two photographs of Jones: one in position No. 5, and one in position No. 6. The detective who created this lineup attributed the error to sloppiness on his part.

This lineup was shown to at least two witnesses, including Delaney, who identified Jones in position No. 5. The other witness did not identify anyone in the lineup and did not identify Jones at trial. It is unknown whether any other witnesses were shown this flawed lineup.

At the suppression hearing, the State offered the following testimony: The police separated the witnesses at the scene and transported them to the police station in separate cruisers, the witnesses were kept in separate areas at the station, and officers were standing by to make sure they did not converse with one another.

Delaney testified that the fact that "Clown" was depicted twice in the photographic lineup did not affect her identification of him. In fact, she did not even notice "Clown's" photograph in position No. 6 until she was reviewing the lineup later in the county attorney's office. The detective that administered the lineup was also unaware of the mistake until she returned to her desk after showing it to Delaney. At that point, a new photographic lineup was created in which the photograph in position No. 6 was replaced with a different photograph; however, the other photograph of Jones remained in position No. 5.

Richards, Gaver, and Barrios were shown the corrected lineup. Richards and Gaver identified the shooter in position No. 5. Richards wrote on the comments section that she was "110,000%" sure he was the shooter. Barrios identified the person who flashed the gun in position No. 5.

The witnesses' cell phones were confiscated, and they were told not to communicate with other witnesses until all of them had been interviewed. All of the witnesses were admonished not to speak to other witnesses about their

identifications. Delaney, Richards, Gaver, and Barrios testified that they did not talk to any other witnesses prior to being interviewed and did not discuss their identifications with any other witnesses.

The district court issued a written order denying Jones' motion to suppress. The court found that Delaney was the only witness who saw the photographic lineup that had two pictures of Jones. The other witnesses were shown photographic lineups that contained only one photograph of Jones.

5. Trial

The evidence at trial was consistent with the facts stated above. In addition, there was evidence regarding DNA testing that was performed on a "Brooklyn Nets" ball cap found at the scene. Although it produced only a partial DNA profile, Jones could not be excluded as the major contributor. The probability of a random individual matching that DNA profile is 1 in 7 billion for Caucasians, 1 in 4.28 billion for African-Americans, and 1 in 16.6 billion for American Hispanics. The parties also stipulated that Jones had been convicted of a felony and was a person prohibited from possessing a deadly weapon.

After all the evidence had been presented, a jury instruction conference was held. Jones offered the following proposed instruction: "Research has shown that people may have greater difficulty in accurately identifying the members of a different race. You should consider whether the fact that the witness and the suspect are not of the same race may have influenced the accuracy of the witnesses' identification." The State objected, and the district court refused to give the proposed instruction.

The jury found Jones guilty of first degree murder, use of a deadly weapon (firearm) to commit a felony, and possession of a deadly weapon by a prohibited person. He was sentenced to life imprisonment for murder, and consecutive terms of 10 to 20 years' imprisonment on each of the other two convictions. Jones appeals.

III. ASSIGNMENTS OF ERROR

Jones assigns that the district court (1) committed plain error in denying his motion to suppress witness identification testimony, (2) erred in refusing his proposed jury instruction regarding cross-racial identification, (3) abused its discretion by accepting the jury's guilty verdicts when the evidence was insufficient to sustain his convictions, and (4) imposed excessive sentences on the weapon convictions.

IV. STANDARD OF REVIEW

[1] Whether the jury instructions given by a trial court are correct is a question of law.[1] When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.[2]

[2,3] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[3] The relevant question when an appellate court reviews a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[4]

[4] An appellate court reviews criminal sentences for an abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[5]

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[1] *State v. Casterline, ante* p. 41, 878 N.W.2d 38 (2016).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

V. ANALYSIS

1. Motion to Suppress Identification

Jones argues that the district court committed plain error in overruling his pretrial motion to suppress witness identification testimony, because the identification procedure used by police was unnecessarily suggestive and tainted the identifications. The evidence showed that a lineup consisting of six photographs was shown to at least two witnesses, which included two photographs of Jones: one in position No. 5, and one in position No. 6.

Jones argues that officers made little effort to remedy the error once it was discovered. They created a new photographic lineup, but left Jones' photograph in position No. 5, which was the same position used when Delaney identified Jones in the earlier flawed lineup. Once the new lineup was created, Richards, Gaver, and Barrios also identified Jones in position No. 5. Jones claims the placement of his photograph in position No. 5 was significant, because Delaney could have easily disseminated information about her identification to other witnesses who were being detained at the police station in hallways, cubicles, and unlocked interview rooms. There was no evidence that Delaney talked to other witnesses.

Jones further argues that the identification testimony was unreliable, because the witnesses' degree of attention and certainty was low, they were under the influence of alcohol and/or narcotics on the night in question, and they are all of a different race than Jones, which results in less reliable identification than if both persons are of the same race.

[5] We agree with the State that Jones has waived any error with respect to the district court's denial of his motion to suppress witness identification testimony because he failed to object at trial when the State's witnesses identified him in court as the shooter. In a criminal trial, after a pretrial hearing and order overruling a defendant's motion to suppress, the defendant, to preserve the issue on appeal, must object at

trial to the admission of the evidence which was the subject of the suppression motion.[6] Because Jones failed to object to the identification testimony at trial, he failed to preserve this issue for appeal.

[6,7] We decline Jones' invitation to address this issue under the plain error doctrine. Asserting or arguing plain error does not relieve a defendant of properly preserving errors for appellate review.[7] Plain error exists where there is error, plainly evident from the record but not complained of at trial, that prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[8]

[8] Where an issue is raised and complained of at trial, it cannot be the basis of a finding of plain error on appeal.[9] Here, the issue was raised via Jones' motion to suppress and a full suppression hearing was held in the district court. Thus, we decline Jones' request that we consider the failure to object under a plain error analysis.

2. Jury Instruction

Jones asserts the district court erred in refusing his proposed jury instruction regarding cross-racial identification, which states as follows: "Research has shown that people may have greater difficulty in accurately identifying the members of a different race. You should consider whether the fact that the witness and the suspect are not of the same race may have influenced the accuracy of the witnesses' identification."

[9] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to

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[6] *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

[7] *State v. Williams*, 247 Neb. 878, 530 N.W.2d 904 (1995).

[8] *State v. Kays*, 289 Neb. 260, 854 N.W.2d 783 (2014).

[9] *Wilson v. Wilson*, 23 Neb. App. 63, 867 N.W.2d 651 (2015), citing *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995).

show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[10]

Jones cannot show that the tendered instruction is a correct statement of the law. There is no precedent in Nebraska for giving such an instruction, and Jones presented no evidence to support the theory asserted in his instruction. Given this lack of record, the district court had no basis upon which it could determine that the tendered instruction was a correct statement of the law.

In addition, Jones cannot show that the tendered instruction was warranted by the evidence, because while there may be an inference, the record does not reflect the race of the witnesses. Therefore, we cannot determine whether there were in fact any cross-racial identifications that might warrant the giving of such an instruction. The district court did not err in refusing to give Jones' proposed instruction.

3. Sufficiency of Evidence

Jones next assigns that the district court erred in accepting the jury's guilty verdicts because the entire case was based upon unreliable and inconsistent eyewitness identification. He argues that the eyewitness testimony was not sufficient to support a finding of guilt beyond a reasonable doubt, because the identification testimony was tainted by the flawed lineup; the witnesses were vague and inconsistent in their descriptions of the suspect; and only two of the witnesses had previously met Jones, and their contact with him was limited.

In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on

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[10] *State v. Casterline, supra* note 1.

the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[11] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[12]

In order to convict Jones of first degree murder, the State had to prove that Jones killed Samuels purposely and with deliberate and premeditated malice.[13] Jones was also charged with use of a deadly weapon (firearm) to commit a felony and possession of a deadly weapon by a prohibited person. To find him guilty of those offenses, the State had to prove that Jones knowingly and intentionally used a firearm to murder Samuels and that he had previously been convicted of a felony.[14]

Jones' arguments on appeal are limited to the sufficiency of the evidence to prove his identity, and he does not specifically challenge the sufficiency of the evidence as to the remaining elements of these offenses. We find that a rational trier of fact could conclude that those elements were satisfied.

Regarding Jones' identity, he was identified as the shooter by three separate eyewitnesses: Delaney, Richards, and Gaver. Each of those witnesses testified that Jones brandished a gun and threatened to shoot anyone that interfered in the fight. They each observed Jones fire the first few shots in the air, then lower the gun and fire shots at the house, striking and killing Samuels. Both Delaney and Richards had met "Clown" on multiple prior occasions and were familiar with his physical appearance. This evidence, viewed in the light most favorable to the prosecution, was sufficient to establish beyond a reasonable doubt Jones' identity as the shooter.

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[11] *Id.*

[12] *Id.*

[13] See Neb. Rev. Stat. § 28-303(1) (Reissue 2008).

[14] See Neb. Rev. Stat. §§ 28-1205 and 28-1206 (Cum. Supp. 2014).

4. Excessive Sentences

Jones' final assignment of error is that the district court abused its discretion by imposing excessive sentences.

Jones was convicted of first degree murder, which carries a mandatory life sentence.[15] Use of a firearm to commit a felony is a Class IC felony, punishable by 5 to 50 years' imprisonment.[16] Possession of a firearm by a prohibited person is a Class ID felony for a first offense, punishable by 3 to 50 years' imprisonment.[17] Jones was sentenced to consecutive terms of 10 to 20 years' imprisonment for each of the weapon offenses. As such, his sentences are well within the statutory limits.

[10] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, an appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[18] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[19]

[11] In imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the offense.[20] There is no evidence that the district

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[15] See § 28-303(1) and Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014).

[16] See §§ 28-1205(1)(c) and 28-105(1).

[17] See §§ 28-1206(3)(b) and 28-105(1).

[18] *State v. Collins, supra* note 5.

[19] *Id.*

[20] *Id.*

court failed to consider the appropriate factors in determining Jones' sentences on the weapon offenses.

Jones argues that if the district court had properly suppressed the identification testimony and found that there was insufficient evidence to convict him of murder, then at worst, he would have been convicted of possession of a firearm by a prohibited person and would have been facing a much lesser sentence. We find no merit in this argument, given that we have rejected his assignments of error regarding the identification testimony and the sufficiency of the evidence. We find no abuse of discretion in the sentences imposed.

VI. CONCLUSION

For the reasons set forth above, we affirm Jones' convictions and sentences.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Brenda R. Rice, appellant, v. Terrance A. Poppe, an individual, and Morrow, Poppe, Watermeier & Lonowski, P.C., a limited liability organization, appellees.

881 N.W.2d 162

Filed April 28, 2016. No. S-15-528.

1. **Summary Judgment: Appeal and Error.** An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Issue Preclusion.** The applicability of claim and issue preclusion is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the trial court.
5. **Summary Judgment: Proof.** The party moving for summary judgment must make a prima facie case by producing enough evidence to show that the movant is entitled to judgment if the evidence were uncontroverted at trial.
6. ____: ____. If the party moving for summary judgment makes a prima facie case, the burden shifts to the nonmovant to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.
7. **Malpractice: Attorney and Client: Proof: Negligence: Proximate Cause.** To succeed in a legal malpractice claim, a plaintiff must ultimately prove three elements: (1) the attorney's employment, (2) the

attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff.

8. **Attorney and Client.** Attorneys owe their clients the duty to exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances.
9. **Attorney and Client: Compromise and Settlement.** Lawyers must advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks.
10. **Malpractice: Attorney and Client.** The general standard of an attorney's conduct is established by law, but whether an attorney's conduct fell below the standard in a particular case is a question of fact.
11. **Attorney and Client: Expert Witnesses.** Expert testimony is generally required to show whether an attorney's performance conformed to the standard of conduct.
12. **Malpractice: Attorney and Client: Expert Witnesses: Negligence.** Under the common-knowledge exception, expert testimony is not needed to show whether an attorney's performance conformed to the standard of conduct if the alleged negligence is within the comprehension of laypersons.
13. **Malpractice: Attorney and Client.** A client cannot recover in a legal malpractice case if the client's own conduct caused his or her injury.
14. ____: ____. In a legal malpractice claim, whether a client's failure to read or understand a disputed document is a superseding cause depends on the facts.
15. **Issue Preclusion: Judgments.** Issue preclusion applies if (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.

Appeal from the District Court for Lancaster County: Daniel E. Bryan, Jr., Judge. Reversed and remanded for further proceedings.

James R. Welsh and Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellant.

Randall L. Goyette and Colin A. Mues, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

Heavican, C.J., Wright, Connolly, Miller-Lerman, and Cassel, JJ.

Connolly, J.

SUMMARY

In 2011, the district court dissolved the marriage of Brenda R. Rice and Dale E. Rice. Attorney Terrance A. Poppe represented Brenda in the dissolution action. Later, Dale died and Brenda made a claim for the death benefits under life insurance policies owned by Dale. The court determined that Brenda was not entitled to the benefits, because she waived her beneficiary interest under the property settlement agreement. Brenda sued Poppe for legal malpractice, alleging that he had failed to advise her that the property settlement agreement waived her beneficiary interest in Dale's life insurance policies. The trial court sustained Poppe's motion for summary judgment, reasoning that Poppe had no duty to advise Brenda of the legal effect of an unambiguous agreement. We conclude that Poppe, the summary judgment movant, did not establish a prima facie case entitling him to judgment as a matter of law. We therefore reverse the judgment and remand for further proceedings.

BACKGROUND

In 2011, Brenda filed a complaint to dissolve her marriage to Dale. She retained Poppe to represent her.

Brenda and Dale ultimately signed a property settlement agreement drafted by Poppe. Brenda testified that before she signed the agreement, Dale told her that he was "'going to keep [her] on as [his] beneficiary'" for the life insurance policies he owned. Brenda testified that Poppe never asked about the parties' life insurance beneficiary designations. Nor did she discuss Dale's intentions with Poppe before he drafted the agreement.

In the agreement, Brenda and Dale divided the marital estate and waived whatever interest they had in certain property owned by the other spouse. Paragraph VI provided:

STOCKS, BANK ACCOUNTS, LIFE INSURANCE POLICICES [sic]**, PENSION PLANS AND RETIREMENT PLANS**

[Brenda] shall be awarded all interest in all pension plans, stocks, retirement accounts, 401(k), IRA, life insurance policy and checking or savings account in [Brenda's] name, free from any claim of [Dale]. [Dale] shall be awarded all interest in any pension plans, stocks, retirement accounts, 401(k), IRA, life insurance policy and checking or savings account in [Dale's] name, free from any claim of [Brenda].

Paragraph IX provided:

PROPERTY PROVISIONS AND SETTLEMENT OF PROPERTY RIGHTS OF PARTIES

It is expressly understood by and between the parties hereto that the provisions of this agreement relating to the property and liabilities of each, set aside and allocate to each party his or her respective portions of the properties belonging to the parties and of the liabilities of the parties at the date hereto; and each party acknowledges that the properties set aside to him or her, less the liabilities so allocated to him or her, will be in full, complete and final settlement, release and discharge, as between themselves, of all rights, claims, interests and obligations of each party in and to the said properties and the same in their entirety constitute a full, fair and equitable division and the partition of their respective rights, claims and interests in and to the said properties of every kind and nature.

And, in relevant part, paragraph X provided:

WAIVER AND RELEASE OF MARITAL RIGHTS

. . . .

(b) In consideration of the provisions of this agreement, [Brenda] waives and relinquishes any and all interest or rights of any kind, character, or nature whatsoever, including but not limited to all rights to elective share, homestead allowance, exempt property, and family

> allowance in the property of [Dale], and renounces all benefits which would otherwise pass to [Brenda] from [Dale] by intestate succession or by virtue of the provisions of any Will executed before this Settlement Agreement which she, as wife, or as widow, or otherwise, has had, now has, or might hereafter have against [Dale], or, in the event of his death, as an heir at law, surviving spouse, or otherwise. [Brenda] also waives and relinquishes any and all interest, present and future, in any and all property, real, personal, or otherwise, now owned by [Dale] or hereafter acquired, and including all property set aside for him in this agreement, it being the intention of the parties that this agreement shall be a full, final, and complete settlement of all matters in dispute between the parties hereto.

Brenda reviewed the agreement drafted by Poppe, but, in her judgment, "[a]t no time did it ever mention anything about beneficiary designation and at no time did I ever believe that that language took away beneficiary designation." She testified that Poppe did not tell her that the agreement could affect beneficiary designations on life insurance policies. She did not raise any concerns herself because "[t]here was nothing in [the agreement] about beneficiary designation. We did retain our own policies."

In August 2011, the district court dissolved Brenda and Dale's marriage. The court approved the property settlement agreement and incorporated it into the decree.

Dale died a week later. Brenda tried to claim the death benefit for two term life insurance policies owned by Dale, only one of which, with a death benefit of $250,000, concerns this appeal. The personal representative of Dale's estate argued that Brenda had waived her right to the death benefits in the property settlement agreement. The trial court agreed and ordered Brenda to withdraw her claim. Brenda appealed.

We affirmed the determination that Brenda had waived her interest as a beneficiary of Dale's life insurance policies

in *Rice v. Webb*.[1] There, we explained that divorce does not affect a beneficiary designation in a life insurance policy. But a spouse may waive a beneficiary interest in the divorce decree. Synthesizing paragraphs VI, IX, and X of the property settlement agreement, we concluded that Brenda unambiguously gave up her right to claim the death benefits:

> We find no ambiguity in the decree. Under paragraph VI, the life insurance policies in Dale's name were awarded to Dale, and under paragraphs IX and X(b), Brenda waived and relinquished all interest in property set aside to Dale. . . . Upon our independent review, we conclude as a matter of law that under the terms of the decree, Brenda unambiguously waived her beneficiary interest in Dale's life insurance policies.[2]

In 2014, Brenda filed this legal malpractice action against Poppe. She alleged that Poppe negligently failed to "advise [her] that the Agreement removed her as primary beneficiary on Dale's life insurance policy."

Poppe moved to dismiss, arguing that the complaint did not state a claim upon which relief could be granted and that he was entitled to judgment as a matter of law. Poppe submitted evidence in support of his motion, so the court converted the motion to dismiss into a motion for summary judgment. It informed the parties of this conversion and gave Brenda the opportunity to offer evidence.

The court entered a summary judgment for Poppe, stating that "an attorney owes no duty to tell clients something that is readily apparent to that client." It reasoned that Brenda did not need Poppe's help to interpret the property settlement agreement, because we determined in *Rice v. Webb* that the agreement was unambiguous.

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[1] *Rice v. Webb*, 287 Neb. 712, 844 N.W.2d 290 (2014).

[2] *Id.* at 726-27, 844 N.W.2d at 301.

ASSIGNMENT OF ERROR

Brenda assigns, consolidated, that the court erred by sustaining Poppe's motion for summary judgment.

STANDARD OF REVIEW

[1,2] We affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[3] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and give that party the benefit of all reasonable inferences deducible from the evidence.[4]

[3,4] The applicability of claim and issue preclusion is a question of law.[5] When reviewing questions of law, we resolve the questions independently of the conclusion reached by the trial court.[6]

ANALYSIS

Legal Malpractice

Brenda argues that Poppe committed malpractice by not asking what her and Dale's intentions were concerning their life insurance beneficiary designations and failing to explain the effect that the property settlement agreement would have on those designations. She contends that the "intricate rules of construction which may render a written settlement agreement that has been incorporated into a decree 'unambiguous' to members of the Nebraska Supreme Court do not apply equally to the uninitiated layperson."[7] Poppe responds that he had no

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[3] *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015).

[4] *Id.*

[5] *McGill v. Lion Place Condo. Assn.*, 291 Neb. 70, 864 N.W.2d 642 (2015).

[6] *Id.*

[7] Brief for appellant at 7.

duty to inform Brenda that she was waiving her beneficiary status, because the "fact she was doing so was readily apparent from the clear language of the Agreement."[8]

[5,6] The main purpose of the summary judgment procedure is to pierce the allegations in the pleadings and show conclusively that the controlling facts are other than as pled.[9] The party moving for summary judgment must make a prima facie case by producing enough evidence to show that the movant is entitled to judgment if the evidence were uncontroverted at trial.[10] If the moving party makes a prima facie case, the burden shifts to the nonmovant to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.[11]

[7] To succeed in a legal malpractice claim, a plaintiff must ultimately prove three elements: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the plaintiff.[12] Poppe does not dispute that Brenda employed him. So we turn to whether he neglected a reasonable duty.

[8,9] Attorneys owe their clients the duty to exercise such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances.[13] We insist that lawyers advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks.[14] In order to meaningfully decide whether to settle a controversy, a client must have the information

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[8] Brief for appellees at 13.

[9] *Hughes v. School Dist. of Aurora, supra* note 3.

[10] *Id.*

[11] *Id.*

[12] *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

[13] See *Guinn v. Murray*, 286 Neb. 584, 837 N.W.2d 805 (2013).

[14] *Wood v. McGrath, North*, 256 Neb. 109, 589 N.W.2d 103 (1999).

necessary to assess the risks and benefits of settling or proceeding to trial.[15] And lawyers should make their best efforts to ensure that the client does not make a decision until the client has been informed of the relevant considerations.[16]

[10,11] So Poppe owed Brenda a duty to reasonably advise her about the property settlement agreement's effect on her interests.[17] And, as the summary judgment movant, he had the burden to produce evidence that he did not breach that duty. The general standard of an attorney's conduct is established by law, but whether an attorney's conduct fell below the standard in a particular case is a question of fact.[18] Expert testimony is generally required to show whether an attorney's performance conformed to the standard of conduct.[19] An attorney moving for summary judgment must generally make a prima facie case by producing expert testimony that his or her conduct did not fall below the standard of care.[20]

[12] Poppe did not offer any expert testimony. We note that Poppe could have offered his own affidavit stating that he met the standard of care.[21] His failure to do so means that he did not make a prima facie case unless the common-knowledge exception applies. Under the common-knowledge exception, expert testimony is not needed if the alleged negligence is within the comprehension of laypersons.[22] But we do not believe that whether a lawyer ought to discuss the effect of

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[15] *Wolski v. Wandel*, 275 Neb. 266, 746 N.W.2d 143 (2008).

[16] *Id.* See 7A C.J.S. *Attorney & Client* § 378 (2015).

[17] See *Balames v. Ginn, supra* note 12.

[18] *Guinn v. Murray, supra* note 13.

[19] *Id.*

[20] See, *Wolski v. Wandel, supra* note 15; *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999).

[21] See *Boyle v. Welsh, supra* note 20.

[22] See, *Wolski v. Wandel, supra* note 15; *Boyle v. Welsh, supra* note 20; 4 Ronald E. Mallen, Legal Malpractice § 37:127 (2016).

a property settlement agreement on life insurance beneficiary designations is so obvious that it is within the comprehension of laypersons. Poppe therefore did not produce evidence which, if uncontroverted at trial, would show that he did not neglect a reasonable duty.

[13] Because Poppe has failed to make a prima facie as to neglect of a reasonable duty, we turn to whether the court could find as a matter of law that Poppe's alleged negligence was not the proximate cause of Brenda's loss. A client cannot recover in a legal malpractice case if the client's own conduct caused his or her injury.[23] In cases revolving around documents which the client read or could have read, courts have discussed the client's failure to discover the error both in terms of causation and contributory negligence.[24] We have noted that a client's negligence in a legal malpractice case is often more relevant to negating the proximate cause element of the claim than to showing that the client's negligence was a contributing cause of the client's injury.[25]

A line of cases decided by the Georgia Court of Appeals illustrates when a client's failure to read or understand a document is the proximate cause of his or her injury arising from the same document. In *Berman v. Rubin*,[26] an attorney drafted a property settlement agreement for a client. The agreement stated that his client had a certain income and, should the client

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[23] *Balames v. Ginn, supra* note 12.

[24] Compare *Marion Partners v. Weatherspoon & Voltz*, 215 N.C. App. 357, 716 S.E.2d 29 (2011); *Hackers Inc. v. Palmer*, 79 Pa. D. & C.4th 485 (Pa. Com. Pl. 2006); *Gorski v. Smith*, 812 A.2d 683 (Pa. Super. 2002); *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325 (Fla. App. 1998); and *Becker v. Port Dock Four, Inc.*, 90 Or. App. 384, 752 P.2d 1235 (1988), with *Little v. Middleton*, 198 Ga. App. 393, 401 S.E.2d 751 (1991); *Kushner v. McLarty*, 165 Ga. App. 400, 300 S.E.2d 531 (1983); and *Berman v. Rubin*, 138 Ga. App. 849, 227 S.E.2d 802 (1976).

[25] *Balames v. Ginn, supra* note 12, citing 3 Ronald E. Mallen & Allison Martin Rhodes, Legal Malpractice § 22:2 (2015).

[26] *Berman v. Rubin, supra* note 24.

"'earn in excess of this said sum, the amount of child support per child for that year and alimony for the wife for that year shall be increased by 15% of such increase.'"[27] Later, the dissolution court construed the agreement to require the client to pay 15 percent of the excess earnings to each of his three children and to his wife, for a total of 60 percent of the excess earnings. The client apparently thought that his children and wife would share 15 percent of the excess. He sued his attorney for malpractice, and the trial court sustained the attorney's motion for summary judgment.

The Georgia Court of Appeals held that the client's "ability to read and comprehend, together with his failure to do so" broke the chain of causation.[28] The court emphasized that the settlement agreement was not ambiguous, not "technical," and not "laced with 'legal jargon.'"[29] But it cautioned that its conclusion was fact dependent:

> Our decision should not be read to state or imply that an attorney may not be held responsible for his negligent draftsmanship whenever the client can or does read the document. Indeed, where the document requires substantive or procedural knowledge, is ambiguous, or is of uncertain application, the attorney may well be liable for negligence, notwithstanding the fact that his client read what was drafted. This holding is simply that when the document's meaning is plain, obvious, and requires no legal explanation, and the client is well educated, laboring under no disability, and has had the opportunity to read what he signed, no action for professional malpractice based on counsel's alleged misrepresentation of the document will lie.[30]

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[27] *Id.* at 850, 227 S.E.2d at 804 (emphasis omitted).

[28] *Id.* at 855, 227 S.E.2d at 807.

[29] *Id.* at 854, 227 S.E.2d at 806.

[30] *Id.* at 854-55, 227 S.E.2d at 806.

The client admitted that he read the first draft of the agreement, asked for certain changes, read the changes, initialed each page, and signed the final page.

The court distinguished *Berman* in *Kushner v. McLarty*.[31] There, the client, a radiologist, retained an attorney to draft an employment contract between himself and a hospital. The client instructed the attorney to "ensure his retention as the hospital's radiologist."[32] The critical language in the contract was:

> "The term of this Agreement shall be for three years and shall automatically be renewed for three years unless either party gives the other party at least 120 days written notice prior to the expiration of the three-year period. . . .
>
> "During the initial term of this Agreement or any renewal term thereof, the services of the Radiologist as set forth herein, shall not be terminated by the Hospital except after 120 days written notice and after a determination has been made that the Radiologist is not providing adequate radiological services . . . . Further, no termination shall take effect . . . without the Radiologist being afforded a hearing . . . ."[33]

The client testified that he did not understand the contract. But he did "understand what [his attorney] told him it meant," which was that "the agreement said what he had intended."[34] Later, a court interpreted the contract to unambiguously allow the hospital to not renew the client's employment at the end of a 3-year term solely by giving the client notice. A determination of inadequate services and a hearing were necessary only if the hospital terminated the client's employment *during* a

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[31] *Kushner v. McLarty, supra* note 24.

[32] *Id.* at 400, 300 S.E.2d at 532.

[33] *Kushner v. Sou. Adventist &c. System*, 151 Ga. App. 425, 425-26, 260 S.E.2d 381, 382 (1979).

[34] *Kushner v. McLarty, supra* note 24, 165 Ga. App. at 403, 300 S.E.2d at 533.

3-year term. The client sued his attorney for malpractice, and the trial court, citing *Berman*, sustained the attorney's motion for a directed verdict.

The Georgia Court of Appeals reversed, stating that a prior judicial determination that the contract was unambiguous did not justify a directed verdict for the attorney. The *Kushner* court stated that the meaning of the employment contract was less obvious than the meaning of the property settlement agreement in *Berman*:

> What was alleged to be negligent draftsmanship in *Berman* was the clear and unambiguous employment of non-technical semantics to effectuate an excessive financial consequence which should have been obvious to a well educated layman upon reading. In contrast, the professional decision in the instant case to separate the contractual terms relating to renewal/nonrenewal and termination into distinct subparagraphs was ultimately one having entirely legal, rather than purely financial, significance and consequences, which were not merely in excess of but directly contrary to [the client's] expressed intent.[35]

Because reasonable minds could disagree about whether the contract needed "legal knowledge or explanation to become clear to a layman," a question of fact existed concerning whether the client's own conduct was the proximate cause of his injury.[36]

The Georgia Court of Appeals similarly found that an issue of fact existed in *Little v. Middleton*.[37] There, the client retained an attorney to represent her in a suit for damages resulting from an automobile collision. The client agreed to settle the suit for the limit of the other driver's insurance coverage. She signed a written release of the other driver, and also released

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[35] *Id.* at 402, 300 S.E.2d at 533.

[36] *Id.* at 403, 300 S.E.2d at 534.

[37] *Little v. Middleton, supra* note 24.

> "[the other driver's] heirs, executors, administrators, agents and assigns, *and all other persons, firms or corporations liable or who might be claimed to be liable*, . . . from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever . . . . [The client] hereby declares that the terms of this settlement and the foregoing notice have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims . . . ."[38]

The client later presented a claim to her own insurer for uninsured motorist benefits. Her insurer cited the release and denied the claim. The client sued her attorney for malpractice, and the attorney, citing *Berman*, moved for summary judgment. The trial court sustained the attorney's motion.

The appellate court reversed, reasoning that there was a question of fact whether the client should have understood that the general language in the release would bar her uninsured motorist claim:

> Unlike the agreement in *Berman,* the document that was signed by [the client] did not *specify* the release of her [uninsured motorist] carrier and, if it does serve to release that otherwise unnamed carrier, it is solely because of the legal effect of the *general* wording that was employed therein.[39]

So it was for the jury to decide whether the release "'require[d] a legal knowledge or explanation to become clear to a layman.'"[40]

[14] As these cases show, whether a client's failure to read or understand the disputed document is a superseding cause

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[38] *Id.* at 393-94, 401 S.E.2d at 752 (emphasis in original).

[39] *Id.* at 395, 401 S.E.2d at 753 (emphasis in original).

[40] *Id.* at 395, 401 S.E.2d at 754.

depends on the facts.[41] It is true, as Poppe notes, that it is no defense to the formation of a contract that a person did not read or understand the document which he or she signed.[42] But Brenda is not arguing that the agreement, incorporated by the dissolution court as part of the decree itself, is not enforceable. Her signature does not estop her from pursuing Poppe for malpractice.[43]

Poppe notes that we have held that the statute of limitations for legal malpractice claims sometimes runs from the date that the client signs a document. Under Neb. Rev. Stat. § 25-222 (Reissue 2008), a claim for legal malpractice accrues upon the attorney's negligent act or omission. But, under § 25-222, if the plaintiff could not discover the act or omission within the limitations period, he or she may bring suit within 1 year from the earlier of "the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery." In *Interholzinger v. Estate of Dent*,[44] the clients sued their attorney for malpractice related to a listing agreement. We held that the limitations period began to run against one of the clients when he signed the listing agreement. But the limitations period on the other client's claim did not run when

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[41] See, *Winston v. Brogan*, 844 F. Supp. 753 (S.D. Fla. 1994); *De La Maria v. Powell, Goldstein, Frazer & Murphy*, 612 F. Supp. 1507 (N.D. Ga. 1985); *Paul v. Smith, Gambrell & Russell*, 283 Ga. App. 584, 642 S.E.2d 217 (2007); *Sutton v. Mytich*, 197 Ill. App. 3d 672, 555 N.E.2d 93, 144 Ill. Dec. 196 (1990); 3 Ronald E. Mallen, Legal Malpractice § 22:3 (2016). But see, *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325 (Fla. App. 1998); *Beattie v. Brown & Wood*, 243 A.D.2d 395, 663 N.Y.S.2d 199 (1997).

[42] See, e.g., *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015).

[43] See, *Winston v. Brogan, supra* note 41; *McWhorter, Ltd. v. Irvin*, 154 Ga. App. 89, 267 S.E.2d 630 (1980); *Arnav Retirement Trust v. Brown*, 96 N.Y.2d 300, 751 N.E.2d 936, 727 N.Y.S.2d 688 (2001), *overruled in part on other grounds, Oakes v. Patel*, 20 N.Y.3d 633, 988 N.E.2d 488, 965 N.Y.S.2d 752 (2013).

[44] *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983).

he signed the agreement, because he was unable to read it and no one explained it to him. In *Nichols v. Ach*,[45] we held that the statute of limitations began to run on the plaintiffs' malpractice claims on the day they signed a stock purchase agreement. We rejected their argument that they did not understand the import of the document, because the evidence showed that they were experienced in business matters and in fact understood what the agreement meant.

These cases show that attorneys are not always insulated from malpractice liability because their clients read or ought to have read the documents themselves. Instead, they "stand only for the proposition that for purposes of determining when an action for alleged legal malpractice begins to run, a client must know what lay persons of ordinary intelligence are deemed to know."[46] We would not have discussed the statute of limitations at all in *Interholzinger* and *Nichols* if the fact that the plaintiffs signed the documents was an absolute bar to recovery. A rule that insulates attorneys from liability as a matter of law on the theory that clients ought to know what they are signing ignores the fact that laypersons often hire attorneys *because* they lack the knowledge and skills needed to understand the transaction.[47]

We conclude that reasonable minds could disagree concerning whether Poppe's failure to advise Brenda about the effect of the property settlement agreement on beneficiary designations was the proximate cause of Brenda's loss. The property settlement agreement here is more akin to the release in *Little*

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[45] *Nichols v. Ach*, 233 Neb. 634, 447 N.W.2d 220 (1989), *disapproved in part on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992). See, also, *Smith v. Ganz*, 219 Neb. 432, 363 N.W.2d 526 (1985).

[46] *Nichols v. Ach, supra* note 45, 233 Neb. at 643, 447 N.W.2d at 227 (Caporale, J., concurring). See *In-Line Suspension v. Weinberg & Weinberg*, 12 Neb. App. 908, 687 N.W.2d 418 (2004).

[47] See *Winston v. Brogan, supra* note 41.

than the agreement in *Berman*. It does not speak specifically about beneficiary designations in life insurance policies. Instead, it speaks generally about "rights," "claims," "interests," "obligations," "benefits," and "property." The agreement leaves it to the reader to span multiple pages and determine that "the legal effect of the *general* wording" is that the parties waive their inchoate entitlement to the death benefits under the other party's life insurance policies.[48] Our holding that the agreement, which the court incorporated into its decree, was unambiguous does not entitle Poppe to a summary judgment. As we stated in *Rice v. Webb*, an agreement is ambiguous if it is susceptible of at least two reasonable but conflicting meanings.[49] That an agreement is susceptible of only one reasonable meaning does not mean that this meaning would be apparent to a layperson. Indeed, the sole reasonable meaning might not always be immediately apparent to a judge. Poppe did not offer any evidence about Brenda's level of sophistication. Because reasonable minds could disagree over whether the meaning of the agreement was clear without the need for legal skill and knowledge, the court could not say as a matter of law that Brenda's own conduct was the proximate cause of her loss.[50]

Issue Preclusion

Alternatively, Poppe argues that the doctrine of issue preclusion entitles him to judgment as matter of law. He reasons that "Brenda is precluded from arguing that she needed [Poppe's] legal advice to understand the Agreement" because we held in *Rice v. Webb* that the agreement was unambiguous.[51]

[15] Issue preclusion bars the relitigation of a finally determined issue that a party had a prior opportunity to fully and

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[48] *Little v. Middleton, supra* note 24, 198 Ga. App. at 395, 401 S.E.2d at 753.

[49] *Rice v. Webb, supra* note 1.

[50] See 3 Mallen, *supra* note 41.

[51] Brief for appellees at 15.

fairly litigate.[52] Issue preclusion applies if (1) an identical issue was decided in a prior action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom the doctrine is to be applied was a party or was in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.[53]

Here, issue preclusion does not bar Brenda's malpractice claim against Poppe, because we did not decide an identical issue in *Rice v. Webb*. The issue in that case—whether Brenda waived her beneficiary interest under Dale's life insurance policies—is not the same as any of the dispositive issues in this case. Brenda must prove three elements to succeed in her legal malpractice claim: (1) She employed Poppe, (2) Poppe neglected a reasonable duty, and (3) Poppe's negligence resulted in and was the proximate cause of loss to Brenda.[54] Our decision in *Rice v. Webb* established that Brenda unambiguously waived her beneficiary interest in the decree. We did not decide whether Poppe neglected a reasonable duty. As explained above, the determination that the decree is unambiguous is not fatal to any element of Brenda's malpractice claim.

CONCLUSION

We conclude that Poppe, the summary judgment movant, failed to produce evidence which would entitle him to a judgment if unopposed at trial. We therefore reverse the summary judgment and remand for further proceedings.

Reversed and remanded for
further proceedings.

Stacy and Kelch, JJ., not participating.

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[52] *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014).

[53] *Id.*

[54] See *Balames v. Ginn, supra* note 12.

Nebraska Supreme Court
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In re Application No. B-1829. Golden Plains Services Transportation, Inc., doing business as GPS Transportation, appellee, v. Happy Cab Company, doing business as Happy Cab Company, Checker Cab Company, and Yellow Cab Company, et al., appellants.

880 N.W.2d 51

Filed April 28, 2016. No. S-15-601.

1. **Public Service Commission: Appeal and Error.** Under Neb. Rev. Stat. § 75-136(2) (Cum. Supp. 2014), an appellate court reviews an order of the Nebraska Public Service Commission de novo on the record.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.
3. **Evidence: Proof.** It is the burden of the proponent of the evidence to establish the relevancy of the evidence it seeks to introduce.

Appeal from the Public Service Commission. Affirmed.

Andrew S. Pollock, Tara Tesmer Paulson, and Halley A. Kruse, of Rembolt Ludtke, L.L.P., for appellants.

Jack L. Shultz and Adam J. Prochaska, of O'Neill, Heinrich, Damkroger, Bergmeyer & Shultz, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Heavican, C.J.

INTRODUCTION

Golden Plains Services Transportation, Inc. (GPS), operated as a common carrier under an open class "Certificate of Public Convenience and Necessity" granted by the Nebraska Public Service Commission (PSC). GPS sought to amend its certificate so that it could transport passengers from one point in Lancaster County to another point in Lancaster County. Happy Cab Company; DonMark, Inc.; and Valor Transportation Company (collectively the Omaha cab companies) objected. Following a hearing, the PSC granted GPS' application. The Omaha cab companies appeal.

At issue before the PSC and now on appeal is whether GPS was fit, willing, and able to properly perform the service proposed in its application. We affirm.

BACKGROUND

GPS filed an application with the PSC on July 23, 2014, seeking to modify its authority by (1) removing the restriction for point-to-point service within Lancaster County and (2) amending the restriction relating to operation in areas where other cab companies hold a certificate or permit.

On August 13, 2014, the Omaha cab companies filed a protest to GPS' application. In that protest, the Omaha cab companies argued both that there was no need for the service which GPS intended to offer and that GPS was not able to adequately provide that service. On August 28, another provider, Transport Plus of Lincoln, Inc., also filed a protest. Transport Plus of Lincoln is not a party to this appeal.

A hearing was held on March 4 and 5, 2015. At the hearing, evidence was adduced regarding GPS. GPS is a corporation; Kirby Young is its sole owner, stockholder, officer, and director. Young also manages all day-to-day operations for GPS. GPS has provided open class service for approximately 2½ years. Open class service, as defined by regulation,

> shall consist of all of the following elements: (i) the business of carrying passengers for hire by a vehicle, (ii) along the most direct route between the points of origin and destination or along a route under the control of the person who hired the vehicle and not over a defined regular route, (iii) at a mileage based or per trip fare.[1]

GPS provides service to both the general public and to the Nebraska Department of Health and Human Services (DHHS) through its broker, "IntelliRide." As of the time of the hearing, GPS had the authority to transport DHHS clients in open class service, except that it was not allowed to transport a passenger from one point in Lancaster County to another point in Lancaster County.

GPS is the largest open class transporter by number of trips in the Omaha, Nebraska, market for clients transported for DHHS. A representative testified that IntelliRide would continue to use GPS' services if GPS were authorized as an open class provider within Lancaster County.

Young is also a coowner and involved in the management of Servant Cab Company, L.L.C. (Servant). Servant holds cab authority and is operated on a day-to-day basis by Young's brother. Regulations provide:

> Taxi service shall consist of all of the following elements: (i) the business of carrying passengers for hire by a vehicle, subject to the provisions of Rule 011.01D, (ii) along the most direct route between the points of origin and destination or a route under the control of the person who hired the vehicle and not over a defined regular route, (iii) on a prearranged or demand basis, (iv) at a metered, mileage based or per trip fare according to the provisions of 011.01F, (v) commencing within, and/or restricted to, a defined geographic area.[2]

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[1] 291 Neb. Admin. Code, ch. 3, § 010.01C (2003).

[2] *Id.*, § 010.01A.

GPS and Servant share space in the same building, but have different offices within that building.

At the hearing on GPS' application, the Omaha cab companies offered exhibit 10, which was entitled "Summary of DHHS Complaints Against Servant Cab." GPS objected on the basis of relevancy, because Servant was not an applicant. The PSC agreed and refused to admit exhibit 10.

In addition to exhibit 10, the Omaha cab companies offered the testimony of Mike Davis, a transportation manager with StarTran, the bus service for the city of Lincoln, Nebraska, regarding complaints made against Servant by patrons of "Handi-Van." Handi-Van is Lincoln's fixed-route transportation service and contracts with Servant to provide transportation for some of that service. The Omaha cab companies also offered exhibits 17 to 21, which are copies of StarTran minutes which contain complaints against Servant. The PSC did not admit those minutes or Davis' testimony, concluding neither was relevant.

On June 2, 2015, the PSC granted GPS' application to extend its authority, finding both that there was a need for the proposed service and that GPS was fit, willing, and able to provide the proposed service. The Omaha cab companies appeal.

ASSIGNMENTS OF ERROR

The Omaha cab companies assign that the PSC erred in (1) excluding evidence relevant to GPS' fitness and ability to provide the proposed service and (2) finding that GPS was fit, willing, and able to provide the proposed service.

STANDARD OF REVIEW

[1,2] Under Neb. Rev. Stat. § 75-136(2) (Cum. Supp. 2014), an appellate court reviews an order of the PSC de novo on the record.[3] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and

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[3] *Telrite Corp. v. Nebraska Pub. Serv. Comm.*, 288 Neb. 866, 852 N.W.2d 910 (2014).

reaches its own independent conclusions concerning the matters at issue.[4]

ANALYSIS

Admission of Evidence

In its first assignment of error, the Omaha cab companies argue that the PSC erred in not admitting evidence relating to complaints against Servant. The parties disagree on the appropriate standard of review that this court should employ when determining whether the PSC erred in not admitting this evidence. The Omaha cab companies direct us to § 75-136(2), which requires an appellate court to review an order of the PSC de novo on the record. GPS argues that as an evidentiary ruling, the admission of evidence is subject to a review for an abuse of discretion, and that the de novo review required by § 75-136(2) applies only to substantive rulings. But we need not decide this issue today, because we conclude, for the reasons explained below, that under either standard of review, the Omaha cab companies did not establish the relevancy of the evidence at issue.

On appeal, the Omaha cab companies argue that this evidence was relevant to GPS' fitness, because Young testified that he was involved in the management of Servant. The Omaha cab companies also direct this court to Young's testimony in prior PSC cases, which are not part of our record, where Young made similar statements regarding his involvement in the management of Servant. But GPS argues that there is no common management or enterprise, that Servant and GPS are separate entities, and that Servant's records are not relevant to GPS' fitness.

A review of the challenged evidence is helpful. Exhibit 10 is a summary of DHHS complaints against Servant for the period beginning December 20, 2012, and ending February 26, 2014. During that time period, there were 51 complaints deemed

[4] *Id.*

valid or still under advisement. Most dealt with late pickup of clients or failure to pick up the client at all.

Exhibits 17 to 21 are minutes from the StarTran advisory board meetings held in September, October, and December 2014, and in January 2015. Those minutes detail meetings between StarTran and Servant to deal with the issue of late pickups. In addition, the Omaha cab companies presented an offer of proof with respect to the testimony of Davis. If allowed, Davis would have testified regarding complaints made to StarTran about Servant's performance under its contract with Handi-Van.

[3] As the proponent of the evidence, it was the burden of the Omaha cab companies to establish the relevancy of the evidence they sought to introduce.[5] In order to do so, the Omaha cab companies attempted to show that Young was involved in the day-to-day operation of both GPS and Servant.

To show this, the Omaha cab companies point to Young's testimony that he and his brother owned Servant and that Young was the president of Servant. The Omaha cab companies also note that Young indicated he considered "both Servant . . . and GPS to be names of [his] businesses," that he was involved in the management of Servant "to a certain degree," and that he was "involved in the oversight of [Servant]." Young also testified that if GPS' certificate was amended, certain "traffic" from the Servant side would be moved for business reasons, suggesting that Young did, in fact, have management authority over Servant. Young testified that his brother was Servant's day-to-day operations manager.

We conclude that this evidence, while sufficient to show that Young had an interest in Servant, was insufficient to meet the

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[5] See, e.g., *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010) (scientific evidence); *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009) (hearsay evidence); *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006) (similar occurrence in products liability action).

Omaha cab companies' burden. The evidence did not establish that Young was involved in the day-to-day operations of Servant such that the complaints against Servant were relevant to GPS' application. It appears from the record that there might be documentation from other proceedings before the PSC that speak to Young's management and oversight of Servant. But that documentation is not in our record, and as such, we cannot review it.

Moreover, we do not have enough information to determine the timeframe of these complaints as compared to Young's alleged management responsibilities. At the time of the hearing, GPS had been operating for less than 3 years—while it appears from the record that Servant had been operating longer and that Young had been involved with Servant prior to GPS' beginning operations. Thus, it is possible that Young was, at one point in time, involved in the day-to-day operations of Servant, but at a time not relevant to this inquiry.

Even considered under a de novo review, the Omaha cab companies did not meet their burden to show that the Servant records were relevant. The PSC did not err in failing to admit that evidence.

Finding GPS Fit, Willing, and Able

In its second assignment of error, the Omaha cab companies argue that the PSC erred in finding that GPS was fit to provide the proposed service. The Omaha cab companies did not contest the need for the proposed service and agreed that GPS was financially fit. It argued only that GPS was not managerially fit.

Given that the Omaha cab companies' evidence regarding Servant was found inadmissible, its primary evidence in support of that position was exhibit 13. Exhibit 13 is a list of complaints filed against GPS, as well as the testimony of a GPS passenger who testified that she had been driven by a GPS driver who was driving recklessly, and another driver who

made comments of a sexual nature which, while not directed at her, the passenger nevertheless found inappropriate.

Exhibit 13 detailed a list of complaints against GPS by DHHS clients between May 2014 and March 2015. Ultimately, 28 out of a total of 52 incidents were found to be valid. The record shows that in that same period of time—May 2014 to March 2015—GPS had a total of 48,020 completed trips. Valid complaints, then, composed a small percentage of GPS' total trips.

In its order, the PSC did express some concern about the complaints and indicated that they would be investigated further. But the PSC did not find that these complaints were sufficient to conclude that GPS was not fit.

We note that many of the complaints from exhibit 13 were that the driver was late. There was evidence at the hearing that part of this was a function of the IntelliRide system, which dispatched calls to drivers. There was testimony that calls were sometimes canceled as the driver was en route and the driver was then rerouted elsewhere. In addition, there are fewer providers in the Lincoln area, which could have caused the remaining providers' capacity to be taxed, resulting in tardiness.

Finally, a representative for IntelliRide testified that it would utilize GPS' services for point-to-point transportation within Lancaster County should GPS' certificate be amended.

Upon our de novo review, we conclude there was evidence to support the PSC's decision that GPS was fit, willing, and able to properly perform the service proposed in its application, and therefore, the PSC did not err in amending GPS' certificate. There is no merit to the Omaha cab companies' arguments on appeal.

CONCLUSION

The decision of the PSC is affirmed.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Bao Minh Nguyen, appellant.

881 N.W.2d 566

Filed May 6, 2016. No. S-15-142.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
2. **Criminal Law: Weapons: Intent.** When a weapon has been classified as a deadly weapon per se for purposes of Neb. Rev. Stat. § 28-1202 (Cum. Supp. 2014), the manner or intended use of such deadly weapon is immaterial.
3. ____: ____: ____. Any knife with a blade over 3½ inches in length is a deadly weapon per se, and the manner or intended use of such deadly weapon is not an element of the crime charged.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Irwin and Inbody, Judges, on appeal thereto from the District Court for Lancaster County, John A. Colborn, Judge. Judgment of Court of Appeals affirmed.

Gerald L. Soucie for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Wright, J.

NATURE OF CASE

This case comes to us on Bao Minh Nguyen's petition for further review of the Nebraska Court of Appeals' unpublished

memorandum opinion, filed on October 14, 2015, which affirmed his conviction of carrying a concealed weapon in violation of Neb. Rev. Stat. § 28-1202 (Cum. Supp. 2014). Nguyen argues that the knife which he had in his possession was not a deadly weapon per se and that the State was required to show that he intended to use the knife as a deadly weapon. For the reasons set forth below, we affirm.

BACKGROUND

On June 30, 2014, Nguyen was stopped by law enforcement for failing to use a turn signal, which ultimately led to a search of his vehicle and the discovery of methamphetamine and a "Stiletto" knife with a blade measuring 3¾ inches long. Nguyen was arrested and charged with one count of possession of methamphetamine and one count of carrying a concealed weapon, second offense. The parties agreed to bifurcate the proceedings. Nguyen pled guilty to possession of methamphetamine and was sentenced to 1 to 3 years' imprisonment. He does not appeal from that conviction.

A stipulated bench trial was held on the charge of carrying a concealed weapon. The parties submitted a written trial stipulation, a copy of the police report describing the incident, and photographs of the knife alongside a ruler. The stipulation set forth that Nguyen carried the knife concealed in the visor of his vehicle and that the photographs submitted were true and accurate photographs of the knife and the ruler measuring the knife.

The issue before the district court was whether the knife constituted a deadly weapon under § 28-1202. Based upon our decisions in *State v. Williams*[1] and *State v. Valencia*,[2] Nguyen argued that the State was required to prove that the manner in which the knife was used or intended to be used was capable of producing death or serious bodily injury.

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[1] *State v. Williams*, 218 Neb. 57, 352 N.W.2d 576 (1984).

[2] *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980).

The district court noted that § 28-1202 had been amended since the publication of *Williams* and *Valencia*. The 2009 amendment deleted references to specific types of knives and instead added the general term "knife" as a deadly weapon per se. The court concluded that the Legislature amended the statute to prohibit a person from carrying *any knife* concealed on or about his or her person, if it came within the definition of knife set forth in Neb. Rev. Stat. § 28-1201(5) (Cum. Supp. 2014). Section 28-1201(5) defines knife as "any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds." The court concluded that the knife found in Nguyen's vehicle was a knife as defined in § 28-1201 and was a deadly weapon per se under § 28-1202. The district court found Nguyen guilty of carrying a concealed weapon and sentenced him to 1 to 3 years' imprisonment.

In his appeal to the Court of Appeals, Nguyen assigned that the district court erred by rejecting the precedent set forth in *Williams* and *Valencia* that regardless of the length of the knife's blade, the State must present evidence that the accused intended to use the knife as a deadly weapon. He argued that the phrase "such as a handgun, a knife, brass or iron knuckles, or any other deadly weapon" in § 28-1202 indicated the legislative intent to give examples of deadly weapons but that those examples were not intended to make such instruments deadly weapons per se. Nguyen asserted that an exclusion of shotguns from the list would indicate that shotguns were not deadly weapons per se and that therefore, a showing of the intended use of the shotgun was required for conviction.

The Court of Appeals rejected Nguyen's argument and adopted the district court's reasoning that proof of intent to use the knife as a deadly weapon was not required, because the 2009 statutory amendment made any knife with a blade longer than 3½ inches a per se deadly weapon. The Court of Appeals therefore affirmed Nguyen's conviction.

ASSIGNMENTS OF ERROR

Nguyen alleges, summarized and restated, that the Court of Appeals erred in affirming his conviction of unlawfully carrying a concealed weapon, second offense. He asserts that pursuant to *Valencia* and *Williams*, regardless of the length of the knife's blade, the State must prove that the accused intended to use the concealed knife as a deadly weapon.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[3]

ANALYSIS

Nguyen asserts that the Court of Appeals erred in not requiring the State to prove that Nguyen intended to use the knife as a deadly weapon and in concluding that the knife in question was per se a deadly weapon.

The question is whether, following the legislative amendment to § 28-1202 in 2009, the State must still prove the accused intended to use a knife as a deadly weapon if the knife concealed by the accused has a blade longer than 3½ inches. The answer lies in the determination whether such amendment was intended by the Legislature to change this requirement of proof which this court espoused in *Williams*[4] and *Valencia*.[5] We examine each case.

State v. Valencia

The defendant in *State v. Valencia*, Modesto C. Valencia, was arrested at his place of employment on a charge not relevant to this appeal. As part of the arrest procedure, one of the arresting officers frisked Valencia and found a spring-operating

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[3] *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015).

[4] *State v. Williams, supra* note 1.

[5] *State v. Valencia, supra* note 2.

switchblade knife in his pants' pocket. He was charged with carrying a weapon concealed on or about his person in violation of § 28-1202 (Supp. 1978), which, at that time, stated in part as follows:

> (1) Except as provided in subsection (2) of this section, any person who carries a weapon or weapons concealed on or about his person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, or any other deadly weapon, commits the offense of carrying concealed weapons.
>
> (2) It shall be an affirmative defense that the defendant was engaged in any lawful business, calling or employment at the time he was carrying any weapon or weapons, and the circumstances in which such person was placed at the time were such as to justify a prudent person in carrying the weapon or weapons, for the defense of his person, property or family.

Valencia subsequently moved to dismiss the information based upon his allegation that § 28-1202 was unconstitutional and void, because it was vague and indefinite on its face and as applied and violated article I, § 3, of the Nebraska Constitution, and the Fifth and Sixth Amendments to the U.S. Constitution.

The district court in *Valencia* found that § 28-1202(1) was unconstitutional as applied for the reason that the weapon as disclosed by the evidence at the preliminary hearing did not fall within the specific types of weapons prohibited, but, rather, fell within the category of "'other deadly weapons'" and that such category was unconstitutionally vague and overbroad.[6]

The State appealed from that order to this court. We concluded that the statute in question was constitutional. We reversed the order of the district court which had quashed that part of the information and remanded the cause for further

[6] *Id.* at 722, 290 N.W.2d at 183.

proceedings. In discussing Valencia's contention that the words "'other deadly weapon'" as used in § 28-1202(1) were so vague and overbroad as to render the statute unconstitutional, we noted that the term "'deadly weapon'" had been statutorily defined in another section of the new criminal code, Neb. Rev. Stat. § 28-109 (Supp. 1978), and provided in part:

> "As used in this code, unless the context otherwise requires: . . . (7) Deadly weapon shall mean any firearm, knife, bludgeon, or other device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury . . . ."[7]

By applying this definition to § 28-1202(1), we determined that it was clear the Legislature, in enacting that statute, had designated certain weapons as deadly weapons per se and that the manner of actual or intended use of such designated weapons was immaterial under the statute in question. We found that the reference to the catchall phrase "'or any other deadly weapon'" contained in § 28-1202(1) was the element of actual or intended use which rendered the words "'other deadly weapons'" sufficiently definite to provide citizens an opportunity to conform their conduct to the statute and distinguish between situations involving culpable concealment and those involving innocent concealment.[8] And it was this element of intended use which saved the term "'deadly weapon'" from being vague or overbroad.[9]

We went on to say in *Valencia* that because the weapon, a switchblade knife, was not of the type enumerated in § 28-1202(1), we had serious doubts as to whether the switchblade knife was a deadly weapon per se. We noted that the decision was one for the Legislature to determine if it chose to amend the statute in question. We stated that whether an

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[7] *Id*. at 724, 290 N.W.2d at 184.

[8] *Id.*

[9] *Id*. at 725, 290 N.W.2d at 184.

object or weapon not specifically mentioned in the statute was in fact a "'deadly weapon'" was clearly a question of fact to be decided by the trier of fact in prosecutions under this statute.[10] We further stated the resolution of this question would depend upon the evidence adduced as to the use or intended use of the object in question.

State v. Williams

The defendant in *State v. Williams*, Timothy R. Williams, was arrested in Omaha, Nebraska, while driving a 1983 Lincoln Continental reported to have been stolen from a Lincoln, Nebraska, new car dealer. The police searched the car for contraband and discovered a pellet gun which looked like a .357-magnum firearm in the glove compartment and an 8½ inch long "'serrated steak knife'" with a blade 4¾ inches long, beneath the driver's seat.[11] It was described as a "table steak knife as used in dining."[12] Williams was charged with receiving stolen property and carrying a concealed weapon.

At trial, Williams testified that he had no knowledge of the knife underneath the seat and that he had never seen it before. Following his conviction for carrying a concealed weapon, Williams appealed, arguing that the jury should have been specifically instructed that the concealment of a weapon may be innocent as opposed to culpable.

The State asserted that the jury was so instructed and that in any event, the knife in question was a deadly weapon as specifically enumerated by § 28-1202(1) (Reissue 1979). It argued that the use or intended use of such weapon was immaterial and that there could not be any innocent concealment. During its argument, the State requested the court to expand the list of weapons specifically enumerated in § 28-1202(1) to include all knives with a blade in excess of

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[10] *Id.*

[11] *State v. Williams, supra* note 1, 218 Neb. at 58, 352 N.W.2d at 578.

[12] *Id.*

3½ inches in length. It asked the court to expand the specific list of per se deadly weapons to include the table knife at issue by considering the definition of a "'deadly weapon'" in § 28-109(7) (Reissue 1979) which included the word "'knife'" and the definition of a knife as having a blade over 3½ inches in length.[13]

We rejected the State's argument and refused to expand our holding in *Valencia* or to construe § 28-1202(1) in the manner requested by the State. We reasoned that the context of chapter 28, article 12, of the Nebraska Revised Statutes required that the concept of per se deadly weapons be limited to the specific weapons enumerated in § 28-1202(1). We concluded that to hold otherwise would mean that every citizen carrying a kitchen paring knife with a 4-inch blade in a picnic basket with other appropriate picnic items would be concealing a per se deadly weapon and would be guilty of a Class IV felony, without being able to explain his or her innocent intent. And we reasoned that such a result was not contemplated by the Legislature in enacting § 28-1202(1).

We then proceeded to determine if the steak knife was a weapon specifically enumerated in the statute. With regard to this knife, we noted that the specifically named weapons were bowie knife, dirk, or knife with a dirk blade attachment.

We found in *Williams* that as a matter of law, the steak knife was not a deadly weapon per se. We concluded that for the jury to make a proper finding of fact, it was necessary that the jury be properly instructed. We concluded the jury had not been instructed that neither the knife nor the pellet gun were per se deadly weapons. The jury should have been instructed that before Williams could be convicted of the crime charged, the jury would have to determine that the weapon was a deadly weapon and that the defendant carried the weapon with the intent to use it to produce death or serious bodily injury. Because the instructions given to the jury were incomplete

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[13] *Id.* at 60, 352 N.W.2d at 579.

and misleading, we reversed the judgment and remanded the cause for a new trial.

Resolution

Having examined our opinions in *Williams*[14] and *Valencia*,[15] we can proceed with our examination of § 28-1202(1) as amended in 2009.[16] The amended version of the statute provides in relevant part: "Except as otherwise provided in this section, any person who carries a weapon or weapons concealed on or about his or her person, such as a handgun, a knife, brass or iron knuckles, or any other deadly weapon, commits the offense of carrying a concealed weapon." The term "knife" is defined in § 28-1201(5) as "any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length or any other dangerous instrument capable of inflicting cutting, stabbing, or tearing wounds."

The Court of Appeals reasoned, and we agree, that from the clear statutory language of § 28-1201(5), the definition of a knife is to be applied to § 28-1202 and, consequently, the knife found and being carried and concealed by Nguyen, a stiletto with a blade over 3½ inches in length, was a deadly weapon per se for purposes of § 28-1202. Therefore, the State was not required to provide additional evidence of intent that Nguyen used or intended to use the knife to produce death or serious bodily injury.

[2] In *State v. Bottolfson*,[17] we addressed the defendant's conviction for use of a weapon to commit a felony. At that time, § 28-1201(4) (Reissue 1995) defined knife as "'any dagger, dirk, knife, or stiletto with a blade over three and one-half inches in length.'"[18] We noted that it was obvious that

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[14] *State v. Williams, supra* note 1.

[15] *State v. Valencia, supra* note 2.

[16] § 28-1202(1) (Cum. Supp. 2014).

[17] *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000).

[18] *Id.* at 476, 610 N.W.2d at 384.

the Legislature, by enacting § 28-1201(4), did not intend that any knife be a per se deadly weapon under Neb. Rev. Stat. § 28-1205 (Reissue 1995). We determined that the Legislature intended the words "'with a blade over three and one-half inches'" to apply to daggers, dirks, knives, and stilettos such that any of these items having blades over 3½ inches were knives under § 28-1201(4) and that thus, any knife with a blade over 3½ inches was a deadly weapon per se.[19] When a weapon has been classified as a deadly weapon per se for purposes of § 28-1202, the manner or intended use of such deadly weapon is immaterial.[20]

[3] We therefore conclude that given the amendment to § 28-1202 and the amendment to the term "knife" as defined in § 28-1201(5), any knife with a blade over 3½ inches in length is a deadly weapon per se, and the manner or intended use of such deadly weapon is not an element of the crime charged. To the extent that our opinions in *State v. Williams*[21] and *State v. Valencia*,[22] can be construed to require proof of the intended use of any knife with a blade over 3½ inches, that interpretation has been superseded by the 2009 statutory amendment.

CONCLUSION

We decline to comment on the rationale for the legislative amendment that defines all knives with blades longer than 3½ inches as a deadly weapon per se for purposes of the offense of carrying a concealed weapon under § 28-1202. That is the province of the Legislature.

For the reasons set forth above, we affirm the judgment of the Court of Appeals which affirmed the district court's conviction and sentence of Nguyen for carrying a concealed weapon.

Affirmed.

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[19] *Id*. at 476-77, 610 N.W.2d at 384.

[20] See *State v. Kanger*, 215 Neb. 128, 337 N.W.2d 422 (1983).

[21] *State v. Williams, supra* note 1.

[22] *State v. Valencia, supra* note 2.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Karry R. Neisius, appellant.

881 N.W.2d 572

Filed May 6, 2016. No. S-15-816.

1. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for error appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Statutes: Judgments: Appeal and Error.** The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.
4. **Motor Vehicles: Licenses and Permits.** In order to operate a commercial motor vehicle on a Nebraska highway, a Nebraska resident must possess a commercial driver's license or an LPC-learner's permit.
5. **Motor Vehicles: Licenses and Permits: Words and Phrases.** For purposes of the Motor Vehicle Operator's License Act, the definitions found in Neb. Rev. Stat. §§ 60-463.01 to 60-478 (Reissue 2010 & Cum. Supp. 2012) shall be used.
6. **Statutes: Appeal and Error.** An appellate court gives effect to all parts of a statute and avoids rejecting as superfluous or meaningless any word, clause, or sentence.

Appeal from the District Court for Dixon County, Paul J. Vaughan, Judge, on appeal thereto from the County Court for Dixon County, Douglas L. Luebe, Judge. Judgment of District Court affirmed.

David E. Copple and Michelle M. Schlecht, of Copple, Rockey, McKeever & Schlecht, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Cassel, J.

INTRODUCTION

Karry R. Neisius appeals from his conviction and sentence, upon stipulated facts, for driving a commercial motor vehicle without obtaining a commercial driver's license (CDL). The issue is whether the power unit and hay grinder that he was driving was a commercial motor vehicle. Based upon definitions in the Motor Vehicle Operator's License Act (Act), we conclude that it was. Accordingly, we affirm.

BACKGROUND

Neisius' employer provided custom hay grinding services. Its customers were farmers in the region surrounding its principal place of business in Beemer, Nebraska. Neisius was a hay grinder operator. His duties included transporting the hay grinder and its power unit between jobsites and back to one of his employer's offices located in Wakefield, Nebraska.

The hay grinder used by Neisius was designed to operate with a power unit. The parties stipulated as follows:

> The power unit is a truck that is used to haul the hay grinder from site to site. They connect via a fifth wheel attachment mechanism and move as one unit. In addition to being dependent on the power unit for transportation, the hay grinder is dependent on the power unit to stabilize it while in operation. The hay grinder can not [sic] be operated properly without the power unit being attached or connected to it. The State disputes the characterization of the power unit.

The trial record does not illuminate the precise nature of the State's dispute regarding the "characterization" of the power

unit. According to a brochure in evidence, the hay grinder is built upon a semitrailer truck. Based on a photograph of the power unit and hay grinder in the record, it appears that the hay grinder/semitrailer truck is connected to a tractor unit. The unit could also be described in common parlance as a truck-tractor or semitractor.

In September 2013, law enforcement stopped Neisius as he was driving the power unit and hay grinder to Wakefield. Neisius possessed a valid Class O driver's license, but he did not have a CDL or an LPC-learner's permit. Law enforcement issued Neisius a citation for driving a commercial motor vehicle without obtaining a CDL.

The State filed a complaint in the county court for Dixon County charging Neisius with operating a commercial motor vehicle without obtaining a CDL in violation of Neb. Rev. Stat. § 60-4,141(1)(a) (Reissue 2010). Neisius pled not guilty, and the parties tried the matter to the bench on stipulated facts.

The county court found Neisius guilty. The court concluded that the subject vehicle was a commercial motor vehicle defined within the Act. The court reasoned that the vehicle was used in commerce to transport passengers or property—Neisius as an employee of the vehicle's owner and the hay grinder which was owned by Neisius' employer—and that the power unit combined with the hay grinder had a "total weight combination" of 63,100 pounds. The county court imposed a $100 fine and ordered Neisius to pay costs of $49.

Neisius appealed to the district court. He alleged that the evidence was insufficient to support the conviction and that the conviction was contrary to law. The district court affirmed the conviction and sentence.

Upon Neisius' further appeal, we moved the case to our docket.[1]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

ASSIGNMENT OF ERROR

Neisius alleges that the district court erred in affirming the county court's decision for three reasons. But all three are variations of his assertion that the vehicle—the combination of the power unit and hay grinder—was not a commercial motor vehicle requiring a CDL.

STANDARD OF REVIEW

[1,2] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.[2] When reviewing a judgment for error appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3]

[3] The meaning and interpretation of a statute are questions of law. An appellate court independently reviews questions of law decided by a lower court.[4]

ANALYSIS

[4] The central issue is whether Neisius needed a CDL in order to lawfully drive the power unit and hay grinder. His Class O driver's license authorized him to "operate on highways any motor vehicle except a commercial motor vehicle or motorcycle."[5] In order to operate a commercial motor vehicle on a Nebraska highway, a Nebraska resident must possess a CDL or an LPC-learner's permit.[6] The issue turns on whether the power unit and hay grinder constituted a commercial motor vehicle.

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[2] *State v. Kleckner*, 291 Neb. 539, 867 N.W.2d 273 (2015).

[3] *Id.*

[4] *Adair Asset Mgmt. v. Terry's Legacy, ante* p. 32, 875 N.W.2d 421 (2016).

[5] See Neb. Rev. Stat. § 60-480(1) (Reissue 2010).

[6] See Neb. Rev. Stat. § 60-4,137 (Cum. Supp. 2014).

Definitions of Motor Vehicle

One of Neisius' principal arguments relies upon the existence of various definitions of "motor vehicle" in chapter 60 of the Nebraska Revised Statutes, governing "Motor Vehicles." He urges that these definitions be "reviewed as a collection of statutes."[7]

It is certainly true that differing definitions of "motor vehicle" are employed within chapter 60. Several define a motor vehicle as a vehicle "propelled by any power other than muscular power"[8] and then itemize vehicles excluded from the definition. In the Nebraska Rules of the Road, a motor vehicle is defined as "every self-propelled land vehicle, not operated upon rails, except mopeds, self-propelled chairs used by persons who are disabled, and electric personal assistive mobility devices."[9] The definition contained in the Motor Vehicle Industry Regulation Act varies considerably and focuses on whether "evidence of title is required as a condition precedent to registration under the laws of this state."[10]

As Neisius points out, two statutes exclude a power unit and hay grinder from the definition of a motor vehicle. Statutes within the Motor Vehicle Certificate of Title Act[11] and the Motor Vehicle Registration Act[12] provide that "[m]otor vehicle does not include . . . power unit hay grinders or a combination which includes a power unit and a hay grinder when operated without cargo." The first act generally governs which types of vehicles are required to have certificates of title.[13] The second

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[7] Brief for appellant at 4.

[8] See Neb. Rev. Stat. §§ 60-123, 60-339, and 60-471 (Cum. Supp. 2014).

[9] Neb. Rev. Stat. § 60-638 (Reissue 2010).

[10] Neb. Rev. Stat. § 60-1401.25 (Reissue 2010).

[11] § 60-123.

[12] § 60-339.

[13] See, generally, Neb. Rev. Stat. §§ 60-137 to 60-149 (Reissue 2010, Cum. Supp. 2014 & Supp. 2015).

act generally pertains to requirements for registration of vehicles for operation on Nebraska roads and highways.[14]

But Neisius was charged under the Act, and its definition of "[m]otor vehicle"[15] does not contain a similar exclusion of a power unit and hay grinder. Rather, § 60-471 states:

> Motor vehicle means all vehicles propelled by any power other than muscular power. Motor vehicle does not include (1) self-propelled chairs used by persons who are disabled, (2) farm tractors, (3) farm tractors used occasionally outside general farm usage, (4) road rollers, (5) vehicles which run only on rails or tracks, (6) electric personal assistive mobility devices as defined in section 60-618.02, and (7) off-road designed vehicles not authorized by law for use on a highway, including, but not limited to, go-carts, riding lawn mowers, garden tractors, all-terrain vehicles and utility-type vehicles as defined in section 60-6,355, minibikes as defined in section 60-636, and snowmobiles as defined in section 60-663.

Both the power unit and hay grinder are motor vehicles under this definition. Each constitutes a vehicle as a "device in, upon, or by which any person or property is or may be transported or drawn upon a highway."[16] And because the power unit and hay grinder are propelled by power other than muscular power and are not excluded as a motor vehicle under § 60-471, they fall within the definition.

Neisius argues that we must view collectively all of the definitions of a motor vehicle contained in chapter 60. He cites a case stating that under principles of statutory construction, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so

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[14] See, generally, Neb. Rev. Stat. §§ 60-362 to 60-369 and 60-373 to 60-385 (Reissue 2010, Cum. Supp. 2014 & Supp. 2015).

[15] § 60-471.

[16] See Neb. Rev. Stat. § 60-676 (Reissue 2010).

that different provisions of an act are consistent, harmonious, and sensible.[17]

[5,6] This argument, however, ignores the statutory mandate that "[f]or purposes of the . . . Act, the definitions found in sections 60-463.01 to 60-478 shall be used."[18] An appellate court gives effect to all parts of a statute and avoids rejecting as superfluous or meaningless any word, clause, or sentence.[19] In order to give effect to the statutory mandate of § 60-463, we must use the definition of a motor vehicle found in § 60-471 and not the definitions contained within other acts and articles of chapter 60.

Moreover, to do as Neisius suggests would violate the command of each act. In each instance, the Legislature has prescribed the definitions to be used. The Motor Vehicle Certificate of Title Act contains a statute mandating that specified definitions within that act be used for its "purposes."[20] A statute in the Motor Vehicle Registration Act does likewise.[21] So does the Act before us. Each legislative act provides its own definitions. With respect to these definitions, these acts are not, as Neisius contends, components of a series or collection of statutes pertaining to a certain subject matter. Each act is separate and independent. Neisius' first principal argument lacks merit.

Definition of Commercial Motor Vehicle

Just as § 60-463 requires us to use the Act's definition of "motor vehicle," it also mandates that we use the Act's

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[17] See *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009).

[18] Neb. Rev. Stat. § 60-463 (Reissue 2010).

[19] *Hoppens v. Nebraska Dept. of Motor Vehicles*, 288 Neb. 857, 852 N.W.2d 331 (2014).

[20] Neb. Rev. Stat. § 60-102 (Cum. Supp. 2014).

[21] Neb. Rev. Stat. § 60-302 (Cum. Supp. 2014).

definition of "commercial motor vehicle."[22] Neisius' second principal argument addresses a specific phrase within this definition. Although this definitional statute has two subsections—one generally defining the term and another excluding certain types of vehicles from the general definition—Neisius addresses only the first subsection. Therefore, we examine the disputed language.

This disputed language defines "[c]ommercial motor vehicle" to mean a "motor vehicle or combination of motor vehicles *used in commerce to transport passengers or property*" if it meets any one of four characteristics regarding weight, design, or use.[23] Neisius does not dispute that one of the weight characteristics applies to the power unit and hay grinder. Thus, we focus specifically on the italicized phrase.

To fit within the definition of a commercial motor vehicle, the power unit and hay grinder—a combination of motor vehicles—must be "used in commerce to transport passengers or property."[24] Neisius does not dispute that the combination is used in commerce, but he challenges both of the other components—transportation of passengers or transportation of property. Because the statute is phrased in the disjunctive, either usage will suffice.

We assume, without deciding, that the county court erred in characterizing Neisius as a "passenger" in the power unit and hay grinder combination. The county court stated that the vehicle was used to transport Neisius as a passenger. However, Neisius contends that he was the driver and not a passenger. The Act does not define "passenger." It could be argued that the statutory definition of "[c]ommercial motor vehicle" includes a driver as a passenger by language encompassing vehicles "designed to transport sixteen or more passengers,

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[22] See Neb. Rev. Stat. § 60-465 (Reissue 2010).

[23] § 60-465(1) (emphasis supplied).

[24] *Id.*

including the driver."[25] But the Act defines "[o]perator or driver" to mean "any person who drives a motor vehicle."[26] Other provisions of the Act use "passenger" in a context which would clearly exclude the driver.[27] In this appeal, we need not decide whether Neisius was a "passenger" when he operated the power unit and hay grinder.

Regardless of whether the combination was "used in commerce" to "transport passengers," it clearly was "used in commerce" to "transport . . . property."[28] The parties stipulated that the power unit was a truck or tractor used to haul the hay grinder from site to site. In that sense, the power unit was used to transport property—the hay grinder—which happened to be built on a semitrailer. And there can be no doubt that the combination of vehicles was used in "commerce," that is, as part of "[t]he exchange of goods and services, esp. on a large scale involving transportation between cities, states, and countries."[29] The county court correctly determined that the power unit and hay grinder combination was used in commerce to transport property.

Neisius does not contest that the combination of the power unit and hay grinder otherwise falls within the definition of a commercial motor vehicle. Indeed, the parties stipulated regarding the weights of the components. And Neisius does not assert that any of the exclusions of § 60-465(2) applies.

Sufficiency of Evidence

Although Neisius assigned that the evidence was insufficient to support his conviction, this argument depended upon his statutory arguments. Because they fail, his sufficiency argument also lacks merit.

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[25] § 60-465(1)(c).

[26] Neb. Rev. Stat. § 60-473 (Reissue 2010).

[27] See, e.g., Neb. Rev. Stat. § 60-4,120.01(3)(b) (Reissue 2010).

[28] See § 60-465(1).

[29] Black's Law Dictionary 325 (10th ed. 2014).

Purpose of Act

Before concluding, we address Neisius' argument that interpreting the power unit and hay grinder to be a commercial motor vehicle "does nothing to further the stated purpose of the . . . Act."[30] He directs us to a statute stating:

> It is the intent of the Legislature that the department develop, implement, and maintain processes for the issuance of operators' licenses and state identification cards designed to protect the identity of applicants for and holders of such licenses and cards and reduce identity theft, fraud, forgery, and counterfeiting to the maximum extent possible with respect to such licenses and cards. The department shall adopt security and technology practices to enhance the enrollment, production, data storage, and credentialing system of such licenses and cards in order to maximize the integrity of the process.[31]

Neisius argues that requiring the operator of a power unit and hay grinder to obtain a CDL does not further the intent of the act "to prevent identity theft and streamline the process of credentialing drivers."[32]

But Neisius overlooks the stated purposes of the section under which he was charged. Aside from implementing requirements mandated by federal laws and regulations, the purposes of certain statutes, including § 60-4,141, are "to reduce or prevent commercial motor vehicle accidents, fatalities, and injuries by: (1) Permitting drivers to hold only one operator's license; (2) disqualifying drivers for specified offenses and serious traffic violations; and (3) strengthening licensing and testing standards."[33] The Legislature focused on the enhanced risk of harm associated with the operation of large, heavy commercial vehicles.

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[30] Brief for appellant at 23.

[31] Neb. Rev. Stat. § 60-462.02 (Cum. Supp. 2014).

[32] Brief for appellant at 24.

[33] Neb. Rev. Stat. § 60-4,132 (Cum. Supp. 2012).

The contested requirement furthers the legislative purpose. A combination of vehicles with a gross vehicle weight rating in excess of 63,000 pounds certainly poses a greater risk of harm in the event of an accident. Requiring the operator of such a vehicle to pass the necessary testing in order to obtain a CDL furthers the purpose of reducing or preventing commercial motor vehicle accidents, fatalities, and injuries.

If the Legislature believes that a power unit and hay grinder combination does not pose the type of risk it was intending to prevent and that excluding the combination from the CDL requirement would not violate the conditions for federal funding it desires to obtain, it could amend the Act's definition of "motor vehicle"[34] in a fashion similar to the comparable definitions of the Motor Vehicle Certificate of Title Act[35] and the Motor Vehicle Registration Act.[36] It is not a proper function of this court to do so in the guise of statutory construction.

CONCLUSION

We conclude that the power unit and hay grinder operated by Neisius was a commercial motor vehicle under the Act. Because Neisius did not possess a CDL, his conviction for operating a commercial motor vehicle without obtaining a CDL conforms to the law and is supported by competent evidence. We affirm the judgment of the district court, which affirmed Neisius' conviction and sentence.

Affirmed.

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[34] § 60-471.

[35] § 60-123.

[36] § 60-339.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Milton B. Dortch, Jr., appellant.

880 N.W.2d 57

Filed May 6, 2016. No. S-15-841.

1. **Convictions: Evidence: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

Glenn A. Shapiro, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Miller-Lerman, J.

NATURE OF CASE

Milton B. Dortch, Jr., was convicted in the district court for Douglas County of first degree murder and use of a firearm to commit a felony. The court sentenced Dortch to imprisonment for life for first degree murder and to imprisonment for 5 to 10

years for use of a firearm to commit a felony. Dortch appeals, and his sole assignment of error is that there was insufficient evidence to support his convictions. We affirm Dortch's convictions and sentences.

STATEMENT OF FACTS

On the morning of September 17, 2014, Dortch walked into a jewelry store in Omaha, Nebraska, carrying a gun. Several employees, including the store owner, James Minshall, Sr., were working inside. Dortch pointed the gun at employees as he threw a bag over the counter and told them to "'[p]ick it up and fill it up.'" When another employee went to open a display case, Minshall walked from a workstation at the counter to the back room of the store. Dortch noticed that Minshall had gone to the back room; Dortch took a few steps to get a better view of Minshall. Dortch asked what Minshall was doing, and he then fired three shots in rapid succession at Minshall. Dortch ran out of the store and fled the area on foot. One of the bullets struck Minshall in the chest, and, despite the efforts of other employees to revive him, Minshall died soon after being shot.

Dortch was arrested the next day on a warrant related to a different robbery, and during a police interview, he admitted that he had committed the shooting at Minshall's jewelry store. On October 21, 2014, Dortch was charged by information with first degree murder under a felony murder theory which set forth "the perpetration of or attempt to perpetrate a Robbery" as the underlying felony. The State also charged Dortch with use of a firearm to commit a felony.

In a bench trial of the charges, the State presented testimony of three employees who witnessed the events in the store on September 17, 2014. During the testimony of one of the employees, the court allowed into evidence a video from the store depicting the events surrounding the alleged attempted robbery and the shooting. The video was played for the court, and various stills from the video were also allowed

into evidence. The State presented evidence that Minshall died from a single gunshot wound to the chest. The State also presented evidence indicating that Dortch's DNA was found on gloves, a gun, and a bag that were found near the scene of the shooting.

The State presented the testimony of a police officer who had interviewed Dortch after he was arrested on a warrant relating to another robbery. The officer testified that Dortch admitted that he had entered Minshall's jewelry store with the intention of robbing the store. According to the officer, Dortch indicated that after Minshall retrieved a gun, Dortch shot at Minshall.

When cross-examining the State's witnesses, Dortch elicited testimony to the effect that no merchandise or money was actually taken from the store and that there was a handgun located on the floor near Minshall's body after he was shot.

Dortch testified in his own defense. Dortch admitted that on September 17, 2014, he had walked into the jewelry store and that he threw a bag over the counter and told the employees to fill it up with merchandise. He testified that he saw Minshall walk to the back room and "grab a gun." Dortch testified that when he saw Minshall try to cock the gun, he became scared and decided he did not "want to do this no more," and that he was "just ready to get up out of there." Dortch testified that when he went into the store, he had no intention to harm anyone, and that when he saw Minshall had a gun, he abandoned his plans to commit a robbery.

On cross-examination, Dortch admitted that the day before the shooting, he and an associate had "cased" the jewelry store for a robbery, and that when he entered the store, he knew his gun was loaded and his intent was to "point a gun in somebody's face and take property from them." He also admitted that he fired the gun at Minshall and that he did not pull the trigger accidentally. However, he refused to admit that he "intentionally" pulled the trigger, because he testified that while he shot the gun, he "didn't want to."

At the conclusion of the bench trial, the court found Dortch guilty of first degree felony murder and use of a weapon to commit a felony. The court specifically found that Minshall's "death occurred in connection with the perpetration of the crime of attempted robbery." The court thereafter sentenced Dortch to imprisonment for life for first degree murder and to imprisonment for 5 to 10 years for use of a firearm to commit a felony and ordered the sentences to run consecutively.

Dortch appeals his convictions.

ASSIGNMENT OF ERROR

Dortch claims that there was insufficient evidence to support his convictions.

STANDARD OF REVIEW

[1] When reviewing the sufficiency of the evidence to sustain a criminal 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 reweigh the evidence; such matters are for the finder of fact. *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id*.

ANALYSIS

Dortch's sole assignment of error is that there was not sufficient evidence to support his convictions. We conclude that viewed in the light most favorable to the State, there was sufficient evidence to support the convictions.

Dortch was convicted of first degree murder under a felony murder theory and of use of a firearm to commit a felony. In order to prove felony murder under Neb. Rev. Stat. § 28-303 (Reissue 2008), the State must prove that the defendant "kill[ed] another person . . . in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson,

robbery, kidnapping, hijacking of any public or private means of transportation." In order to prove use of a firearm to commit a felony under Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2014), the State must prove that the defendant "use[d] a firearm . . . to commit a felony."

When the State charged Dortch with first degree murder under a felony murder theory, it alleged that the underlying felony was an attempted robbery. At trial, the State presented evidence, including witness testimony and physical evidence, which showed that Dortch entered the jewelry store with a gun, pointed the gun at employees of the store, threw a bag over the counter, and told the employees to fill it with merchandise. The State presented evidence that Dortch fired a gun at Minshall and that Minshall died from the gunshot wound. The State also presented evidence of statements Dortch made to police in which he admitted that he entered the store with the intent of robbing it and that he shot Minshall. Finally, Dortch's testimony in his own defense, both on direct and on cross-examination, established that he intended to rob the jewelry store and that he shot Minshall. Such evidence was sufficient for the district court to find that Dortch killed Minshall in the attempt to perpetrate a robbery and that he used a firearm to kill Minshall. These findings support convictions for felony murder under § 28-303 and for use of a firearm to commit a felony under § 28-1205.

Dortch makes two main arguments to support his contention that the evidence did not support his convictions. We find both arguments to be without merit.

For his first argument, Dortch points to evidence that he did not actually take anything from the store; he contends that because he did not actually commit a robbery, he did not kill Minshall in the perpetration of a robbery. This argument fails, because § 28-303 by its terms applies to a killing that occurs "in the perpetration of *or attempt to perpetrate*" one of the listed felonies. (Emphasis supplied). The State alleged that the underlying felony in this case was an attempted robbery.

Nebraska's criminal attempt statute, Neb. Rev. Stat. § 28-201 (Cum. Supp. 2014), defines "attempt" in part as intentionally engaging in conduct which constitutes a substantial step in a course of conduct intended to culminate in the commission of the crime. The evidence in this case showed that Dortch's intent was to commit a robbery and that he took substantial steps intended to culminate in the commission of a robbery. The fact that Dortch did not actually complete the robbery does not negate a finding, for purposes of § 28-303, that he attempted to perpetrate a robbery.

For his second argument, Dortch directs our attention to his testimony to the effect that when he saw that Minshall had a gun, he abandoned his plan to commit a robbery. He contends that because he had abandoned the plan at the time he shot Minshall, the killing did not occur in the perpetration of a robbery. However, as noted above, the State alleged that the underlying felony in this case was an attempted robbery. In response to Dortch's assertion that he abandoned his plan to commit a robbery, the State cites *State v. Schmidt*, 213 Neb. 126, 327 N.W.2d 624 (1982), for the proposition that abandonment is not a defense to attempt under Nebraska law. See, also, *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009) (stating that evidence did not support instruction on abandonment defense to felony murder charge where killing occurred while defendant was escaping scene of completed robbery).

With regard to the elements of felony murder, in *State v. Perkins*, 219 Neb. 491, 500, 364 N.W.2d 20, 27 (1985), we approved a felony murder jury instruction which stated in part that "'a homicide is committed in the perpetration of or attempt to perpetrate a robbery . . . if the initial crime of perpetration or of attempt to perpetrate a robbery and the homicide were closely connected in point of time, place and causal relation, and were parts of one continuous transaction.'" (Emphasis omitted.) We determined in *Perkins* that the instruction fairly stated the elements of felony murder. See, also, *State*

v. Quintana, 261 Neb. 38, 621 N.W.2d 121 (2001) (approving similar jury instruction).

Even if Dortch abandoned his plan to commit the robbery when he saw that Minshall had a gun, the evidence indicates that Dortch shot Minshall very soon thereafter. Whether the shooting occurred while Dortch was still attempting to perpetrate a robbery or whether it occurred soon after he had abandoned his plan and was escaping from an attempted robbery, based on the evidence, the district court could have found that the killing and the attempted robbery "'were closely connected in point of time, place and causal relation, and were parts of one continuous transaction.'" See *Perkins*, 219 Neb. at 500, 364 N.W.2d at 27. Such determination would support a finding that the killing occurred in the attempt to perpetrate a robbery.

Dortch's arguments that he did not complete the robbery and that he abandoned his plan to commit the robbery before he shot Minshall do not negate the evidence noted above that supports convictions for felony murder under § 28-303 and for use of a firearm to commit a felony under § 28-1205. We reject Dortch's claim that there was not sufficient evidence to support his convictions.

CONCLUSION

The State presented sufficient evidence for the district court to find that Dortch killed Minshall in an attempt to perpetrate a robbery and that he used a firearm to do so. Therefore there was sufficient evidence to support convictions for first degree murder and use of a firearm to commit a felony. We affirm Dortch's convictions and sentences.

Affirmed.

Nebraska Supreme Court
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Madeline Loretta Sickler, now known as Madeline Loretta Schmitz, appellee, v. Steven Dale Sickler, appellant.

878 N.W.2d 549

Filed May 13, 2016. No. S-15-594.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which the trial court's (1) resolution of issues of law is reviewed de novo, (2) factual findings are reviewed for clear error, and (3) determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
2. **Contempt.** Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party fails to comply with a court order made for the benefit of the opposing party.
3. **Contempt: Words and Phrases.** Willful disobedience is an essential element of contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
4. **Contempt: Proof: Presumptions.** Outside of statutory procedures imposing a different standard or an evidentiary presumption, the complainant must prove all elements of contempt by clear and convincing evidence.
5. **Contempt.** Contempt proceedings may both compel obedience to orders and administer the remedies to which a court has found the parties to be entitled.
6. **Courts: Restitution: Contempt.** Through its inherent powers of contempt, a court may order restitution for damages incurred as a result of failure to comply with a past order.
7. **Courts: Jurisdiction: Divorce: Contempt.** A court's continuing jurisdiction over a dissolution decree includes the power to provide equitable relief in a contempt proceeding.
8. **Courts: Equity.** Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope

of judicial action, a court of equity will devise a remedy to meet the situation.

9. **Constitutional Law: Debtors and Creditors.** With the passage of Neb. Const. art. I, § 20, Nebraska put an end to the ancient practice of seizing the person of a debtor as a means of coercing payment of a debt.
10. **Debtors and Creditors: Words and Phrases.** Whether an obligation is a "debt" depends on the origin and nature of the obligation and not on the manner of its enforcement.
11. ____: ____. "Debt," as stated in state constitutional prohibitions of imprisonment for debt, is generally viewed as an obligation to pay money from the debtor's own resources, which arose out of a consensual transaction between the creditor and the debtor.
12. **Divorce: Property Division: Constitutional Law: Contempt: Debtors and Creditors.** Contempt for noncompliance with a property division award in a dissolution decree does not originate in an action for the collection of debt, or from an obligation, through a consensual transaction between the creditor and the debtor, to pay money from the debtor's own resources. Therefore, enforcement, through contempt, of a property division does not violate Neb. Const. art. I, § 20.
13. **Courts: Criminal Law.** A court can impose criminal, or punitive, sanctions only if the proceedings afford the protections offered in a criminal proceeding.
14. **Contempt: Sentences.** A civil sanction is coercive and remedial; the contemnors carry the keys of their jail cells in their own pockets, because the sentence is conditioned upon continued noncompliance and is subject to mitigation through compliance.
15. **Criminal Law: Contempt: Sentences.** A criminal sanction is punitive; the sentence is determinate and unconditional, and the contemnors do not carry the keys to their jail cells in their own pockets.
16. **Contempt.** The ability to comply with a contempt order marks a dividing line between civil and criminal contempt.
17. ____. In order for the punishment to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge the contempt by compliance and either avert punishment or, at any time, bring it to an end.
18. **Contempt: Sentences.** A present inability to comply with a contempt order is a defense, not necessarily to contempt, but to incarceration.
19. **Constitutional Law: Criminal Law: Contempt: Sentences.** An incorrect decision on the ability to comply with a contempt order—the critical factor dividing civil from criminal contempt—increases the risk of wrongful incarceration by depriving the defendant of the procedural protections that the Constitution would demand in a criminal proceeding.

20. **Contempt: Sentences: Due Process.** Prospectively, a court that imposes incarceration as part of civil contempt proceedings shall make express findings regarding the contemnor's ability to comply with the purge order, in order to avoid inadvertent violations of due process rights and for consistency of procedure for both represented and nonrepresented indigent contemnors.
21. **Contempt: Sentences: Proof.** It is the contemnor who has the burden to assert and prove the inability to comply with the contempt order to avoid incarceration or to purge himself or herself of contempt.
22. **Contempt: Sentences: Evidence.** A contemnor may defend against incarceration under a civil contempt order, but only upon a showing of such inability by a preponderance of the evidence; that showing entails attempts to exhaust all resources and assets or borrow sufficient funds and the inability to thereby secure the funds to comply with the purge order.
23. **Contempt: Evidence.** The contemnor is in the best position to know whether the ability to pay is a consideration, and he or she has the best access to the evidence on the issue.
24. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
25. **Criminal Law: Contempt: Sentences: Time.** When a contemnor is required to serve a determinate sentence after a specified date if compliance has not occurred by that date, and there is no provision for discharge thereafter by doing what the contemnor had previously refused to do, then the sentence is punitive as of that date.
26. **Contempt: Sentences: Time.** In the case of civil contempt involving the use of incarceration as a coercive measure, a court may impose a determinate sentence only if it includes a purge clause that continues so long as the contemnor is imprisoned.

Appeal from the District Court for Buffalo County: Mark J. Young, Judge. Affirmed as modified.

Kent A. Schroeder, of Ross, Schroeder & George, L.L.C., for appellant.

Marsha E. Fangmeyer, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Wright, J.

I. NATURE OF CASE

Steven Dale Sickler appeals from an order of contempt sanctioning him with a determinate period of 90 days' incarceration if, within 17 days, he did not pay $37,234.84 to his ex-wife, Madeline Loretta Sickler, now known as Madeline Loretta Schmitz. The sum in question stems from the property division awarding a percentage of Steven's individual retirement account (IRA) to Madeline. Madeline's percentage had not been transferred to her in the 14 years since the decree. Due to withdrawals by Steven, of which Madeline was unaware, the account no longer contains sufficient funds to satisfy the award.

Steven argues that the order of contempt is an imprisonment for debt in violation of article I, § 20, of the Nebraska Constitution. He also argues that the period of 17 days to purge the contempt was unreasonable. The contempt and sanctions order was stayed on condition that Steven file an appearance bond, and Steven argues the requirement of an appearance bond also violates article I, § 20, of the Nebraska Constitution.

II. BACKGROUND

1. Dissolution Decree

Madeline and Steven were divorced in April 2001. As part of the property division, the court awarded to Madeline 18.6 percent of an IRA held under Steven's name. The dissolution decree listed the amount of the award to Madeline as $45,786. The court denied the "request to reduce retirement benefits for either party by anticipated but nevertheless speculative tax consequences."

The total balance for the IRA account in April 2001 was $305,587.44. The court's order made no reference to the need for a qualified domestic relations order (QDRO) with respect to the IRA.

Steven moved for a new trial. As a result of the motion, the court adjusted the award of the IRA by decreasing Madeline's

award by $3,100 and increasing Steven's award by $3,100. Steven appealed the order but later dismissed his appeal.

2. October 2004 Negotiations

Nothing occurred until October 2004, when Madeline called Steven about the fact that her percentage of the IRA still needed to be transferred to her. Madeline had apparently been confused about how to proceed with the transfer. Steven sent a letter to Madeline stating that the reason she had not received her share of the retirement account is that her attorney failed to file a QDRO. Steven recognized Madeline's share of the retirement account was $45,786 and offered several options for payment that were amenable to him. He wished to avoid attorney fees. He mentioned opening and reassessing all life insurance and retirement plans listed on the property statement attached to the dissolution decree. He wanted credit for student loans he had incurred on behalf of their children since the decree.

3. October 2005 QDRO

Madeline did not accept any of Steven's proposals for payment. A QDRO was filed in October 2005. It stated that the dollar amount of benefits to be paid to Madeline was 18.6 percent of Steven's share of the IRA as of April 25, 2001, the date of the decree of dissolution.

4. Motion to Set Aside QDRO

Steven moved to set aside the QDRO on the ground that the amount stated in the QDRO was inconsistent with the dissolution decree as revised after the motion for new trial. At the hearing on the motion, Steven's counsel complained that the QDRO should have been sought sooner.

5. April 2006 Order Regarding Need for New QDRO

On April 18, 2006, the court vacated the QDRO filed in October 2005. It explained that the matter was before the

court "because of the failure of one or both parties to submit a [QDRO] at the time the Court entered its amended decree" of dissolution. The court found that a new QDRO should be drafted and submitted by Madeline's counsel, subject to Steven's approval as to form and content.

The court then made the following findings:

> First the final decree entered by the Court awarding a percentage of an IRA to each party means exactly what is set forth in the Court's order. Each party being awarded a percentage of a particular asset then shares in the potential for gain or loss associated with that asset from the date of division. The Court's quantifying the value of the percentage of the asset is solely for the purpose of insuring that an equitable division of the property occurred and is not intended to be an award of a dollar value to a particular party.
>
> As such, the Court finds that [Madeline's] current share of the IRA, upon division, is the original market value of the asset plus or minus the performance of that portion of the asset since the order of division, the final journal entry.

6. Motion for Order to Show Cause

On June 6, 2006, Madeline moved for an order to show cause why Steven should not be held in contempt for violating the terms of the September 2001 dissolution decree by withdrawing a total of $209,980 from the IRA.

7. June 2006 Hearing

A hearing was held on June 28, 2006, for the purposes of conducting an evidentiary hearing with regard to the proposed revised QDRO and the current value of the IRA, and to determine facts relevant to Madeline's motion to show cause.

At the hearing, it was discovered that Steven had made the following withdrawals from the IRA since the dissolution decree, leaving the IRA with inadequate funds to cover the property division award: $30,000 in August 2001, $10,000 in

March 2002, $40,000 in April 2002, $20,000 in July 2002, $30,000 in August 2002, and $79,980 in January 2005. After the January 2005 withdrawal, the IRA account was left with a balance of $13,115.25. By September 2005, the balance was $4,748.18. Steven testified that that was the approximate balance as of the date of the hearing. The difference between the balance after the withdrawal in January and the balance in September is apparently due to fluctuations within the investments making up the IRA. The IRA had depreciated due to market fluctuations by about $90,000 since the time of the dissolution decree.

Steven admitted that he made these withdrawals with the knowledge that Madeline was awarded a percentage of the IRA. Steven testified that he made no attempts to discern whether Madeline had transferred her portion of the IRA out of his accounts prior to making the withdrawals.

Madeline testified that she did not attempt to obtain her share of the IRA directly from the bank, noting that the account was in Steven's name. She did not know that Steven was making withdrawals from the IRA account.

8. July 2006 Contempt Order

The court found that Steven knew in October 2004, before withdrawing approximately $80,000 from the IRA account, that Madeline had not received her moneys from the account, as required by the dissolution decree. The court reasoned that such knowledge was clearly indicated in Steven's letter to Madeline in October 2004.

In an order dated July 10, 2006, the court found that "depletion of the account by [Steven] with knowledge of the nonpayment to [Madeline] clearly places [Steven] in contempt of court for willfully violating the court's order requiring that [Madeline] receive her proceeds from the account." Steven was ordered to pay Madeline $37,234.84. The court explained that this amount represented 17.34 percent of all moneys taken by Steven from the account and 17.34 percent of the account balance.

9. August 2006 Motion for Further Sanctions

On August 24, 2006, Madeline filed a motion for an order imposing further contempt sanctions for the reason that Steven had failed to comply with the July 2006 order to pay Madeline $37,234.84.

10. May 2007 Assignment of Expected Lawsuit Proceeds

On May 15, 2007, Steven assigned to Madeline a pro rata share, not to exceed $37,234.84, of whatever proceeds Steven received as a result of litigation he had filed. In exchange, Madeline agreed to forbear from pursuing her motion for further sanctions against Steven. Steven's litigation involved claims of malpractice against a law firm and an attorney from another law firm, arising out of alleged negligence in performing the "legal background for the franchises" Steven owned. As a result of the alleged negligence, 15 lawsuits had been filed against Steven for 15 out of the 21 franchises he had sold.

11. Lawsuits End With No Payment to Madeline

The lawsuit against the law firm eventually settled for $2.2 million. The lawsuit against the attorney went to trial and resulted in a verdict in the attorney's favor. However, according to Steven, $1.2 million of the settlement with the law firm went to attorney fees and all remaining funds from the settlement were consumed by the liens against him as a result of the underlying suits relating to the 15 franchises. Steven claimed that he still had outstanding judgments against him. No payment was made to Madeline pursuant to the assignment.

12. April 2014 Stipulation for Repayment Plan

In April 2014, Madeline and Steven jointly filed a stipulation for a repayment plan whereby Steven would fulfill his

obligation to pay $37,234.84 by paying $6,000 "at the end of each sixth month period" over a 4-year period, with an interest rate of 2 percent on the outstanding balance.

In an order entered April 3, 2014, the court approved the stipulation and ordered the parties to comply with the terms thereof. The court explained that the matter was before it due to Steven's failure to comply with a court order that he pay Madeline $37,234.84. Pursuant to the stipulation, Madeline's motion for further sanctions was dismissed without prejudice.

13. February 2015 Motion for Further Sanctions and Hearing

In February 2015, Madeline filed a new motion for further sanctions due to the failure to make any payments under the stipulation for repayment plan. A hearing was held on the motion.

At the hearing on the motion, Steven's attorney argued that the IRA was not subject to the federal Employee Retirement Income Security Act of 1974 and that thus, a QDRO was never required in order for Madeline to transfer her share out of the account. The implication was that Madeline wasted a lot of time obtaining a QDRO that was never required.

Steven's attorney also asserted that the July 2006 order directing Steven to pay $37,234.84 to Madeline is "clearly contrary" to the court's April 2006 order pertaining to drafting a new QDRO. This argument was apparently based on the assertion that the April 2006 order was "quantifying the value of the percentage of the asset" "solely for the purpose of ensuring that an equitable division of the property occurred" and was "not intended to be an award of a dollar value to a particular party."

Steven testified that he did not make any payments under the 2014 stipulation because a contract to work in Newfoundland, Canada, earning $370,000 per year, fell through. Steven also explained that he believed the stipulation "sidesteps the laws

of the IRS," because direct payments to Madeline allowed her to avoid early withdrawal penalties. Lastly, Steven explained that he did not pay under the stipulation because Madeline's attorney allegedly "lied to the Judge" about Steven's depleting the IRA account, insofar as he had originally "never touched that account that made up 25 percent of the value of it."

Madeline adduced testimony concerning Steven's income in the years since the 2006 contempt order. Steven testified that he was employed in 2006, running his own franchise business. After that, he was unemployed for about a year. He then obtained a job as a sales manager for an electric company, earning $79,000 a year. He worked for that company for about 1½ years before obtaining employment as a project manager for another electric company. He worked there for about 2 years, earning $125,000 per year. In 2013, Steven obtained a 1-year contract with an engineering and construction company as a construction manager, under which contract he earned $287,000. After the contract in Newfoundland fell through, he was unemployed for 2 months. He then worked as a project manager for an engineering company, earning $150,000 per year.

There was a 6-week gap between the 1-year contract with the engineering and construction company and his employment at the time of the hearing. He was working as a contractor and was being paid $60 per hour. He was anticipating employment with another company, to begin in 2 weeks. He expected to work as a construction manager earning $145,000 per year. His expectation was that he would be working there long term.

Steven owned his home, but it was mortgaged. It was unclear whether there was any equity in the home. He owned a car, but it was unclear what liens were on the car. Steven admitted that he had made no payments to comply with the July 2006 order. Nor had he made any payments under the stipulated payment plan.

14. June 2015 Order of Contempt and Sanctions

In an order dated June 8, 2015, the court found that Steven was still in contempt. The court ordered that, as further sanctions, he must report on June 15 to serve a sentence of 90 days' incarceration.

The sentence could be purged by payment in full of the sum of $37,234.84 to Madeline on or before June 15, 2015. If Steven failed to report on June 15, or failed to pay the sum owed Madeline before that date, a bench warrant would be issued for his arrest.

The order stated:

> [T]he Court . . . finds that [Steven] is still in contempt and as further sanctions, he shall report to the Buffalo County Detention Center on June 15, 2015 at 9:00 a.m. to serve a sentence of ninety (90) days incarceration. Said sentence may be purged by payment in full of the monies owed to [Madeline], the sum of $37,234.84, *on or before June 15, 2015.*
>
> If [Steven] fails to report to the Buffalo County Detention Center on June 15, 2015 or fails to pay the sum owed to [Madeline] on or before that date, a bench warrant will be issued for his arrest.

(Emphasis supplied.)

At the hearing, the court had reasoned, "[Steven] may have had some setbacks, and it certainly sounds like a course of setbacks during the last eight years, but it's not like he wasn't given an opportunity to purge by simply paying the money." The court also noted that it did not find particularly relevant what Madeline may or may not have known or done about transferring out her share of the IRA account before Steven depleted the funds. The court did not make any specific findings regarding Steven's ability to pay a lump sum of $37,234.84 within the timeframe specified by the order.

15. Motion to Stay Granted

On June 15, 2015, the court granted Steven's motion to stay the contempt and sanctions order. The stay was subject to Steven's posting a surety bond in the amount of $25,000 within 30 days of June 8, 2015, or his appearance to the jail on further order of the court. Steven filed the appearance bond on June 19.

16. Appeal Filed

On July 2, 2015, Steven filed his notice of appeal of the June 8 order imposing further sanctions.

III. ASSIGNMENTS OF ERROR

Steven assigns that the district court abused its discretion in (1) finding Steven to be in civil contempt; (2) imposing an unreasonable, arbitrary, capricious, and punitive sentence; (3) setting parameters for Steven to purge himself that were impossible to perform; and (4) requiring Steven to post an appearance bond.

IV. STANDARD OF REVIEW

[1] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which the trial court's (1) resolution of issues of law is reviewed de novo, (2) factual findings are reviewed for clear error, and (3) determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.[1]

V. ANALYSIS

[2-4] This is an appeal from an order imposing further sanctions for civil contempt in relation to a dissolution decree. Civil contempt proceedings are instituted to preserve and enforce the rights of private parties to a suit when a party

[1] See *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

fails to comply with a court order made for the benefit of the opposing party.[2] Willful disobedience is an essential element of contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order.[3] Outside of statutory procedures imposing a different standard or an evidentiary presumption, the complainant must prove all elements of contempt by clear and convincing evidence.[4]

[5-8] Contempt proceedings may both compel obedience to orders and administer the remedies to which a court has found the parties to be entitled.[5] Through its inherent powers of contempt, a court may order restitution for damages incurred as a result of failure to comply with a past order.[6] And a court's continuing jurisdiction over a dissolution decree includes the power to provide equitable relief in a contempt proceeding.[7] Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.[8]

In its 2006 order of contempt, the court found that Steven willfully violated the dissolution decree when he depleted the funds of the IRA within 3 months of being informed by Madeline that she had not yet received her share of the IRA that was awarded to her. Recognizing that a rollover of funds directly from Steven's IRA into Madeline's IRA was no longer possible, the court devised that appropriate restitution for the

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[2] See, *id.*; *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh, supra* note 1.

[3] See *Hossaini v. Vaelizadeh, supra* note 1.

[4] See, *id.*; *Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 2.

[5] See *Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 2.

[6] See *id.*

[7] See *id.*

[8] *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

dissipation of the IRA account was payment to Madeline of the sum of $37,234.84. Steven has delayed the imposition of any further sanctions for contempt by assignment of the proceeds from a lawsuit and a stipulation for payments. No payments have been made to Madeline in the 9 years since the 2006 contempt order. In 2015, the court ordered imprisonment as a further sanction for Steven's continuing civil contempt. Steven makes several arguments attacking the validity of that order.

1. Prohibition of Imprisonment for Debt

[9] Steven's principal contention is that imprisonment for failing to pay restitution of funds that were awarded to an ex-spouse in a dissolution decree is imprisonment for debt in violation of article I, § 20, of the Nebraska Constitution. Article I, § 20, states, "No person shall be imprisoned for debt in any civil action on mesne or final process." With the passage of article I, § 20, Nebraska put an end to the "ancient practice of seizing the person of a debtor as a means of coercing payment of a debt."[9]

[10] Most courts do not allow "nonpayment contempt," which is the use of the court's contempt power to threaten a debtor with imprisonment for failure to comply with a court order to turn money or property over to creditors.[10] The courts find such contempt orders violate constitutional prohibitions of imprisonment for debt. Whether an obligation is a "debt" depends on the origin and nature of the obligation and not on the manner of its enforcement.[11]

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[9] *Rosenbloom v. State*, 64 Neb. 342, 346, 89 N.W. 1053, 1054 (1902).

[10] Lea Shepard, *Creditors' Contempt*, 2011 BYU L. Rev. 1509, 1543 (2011). See, 16B Am. Jur. 2d *Constitutional Law* § 680 (2009); 17 C.J.S. *Contempt* § 185 (2011). See, also, e.g., *Carter v. Grace Whitney Properties*, 939 N.E.2d 630 (Ind. App. 2010); *In re Byrom*, 316 S.W.3d 787 (Tex. App. 2010).

[11] 16A C.J.S. *Constitutional Law* § 813 (2015).

[11] The definition of "debt," for the purposes of constitutional prohibitions of imprisonment for debt, means more than just a specific sum of money due or owing from one to another.[12] "Debt," as stated in state constitutional prohibitions of imprisonment for debt, is generally viewed as an obligation to pay money from the debtor's own resources, which arose out of a consensual transaction between the creditor and the debtor.[13] Thus, the prohibition applies to money directly due under a contract, to judgment debt arising from contractual debts, to attempts to specifically enforce creditor-debtor agreements, and to damages for breach of any form of contractual obligation.[14]

[12] In *Rosenbloom v. State*,[15] we said that Neb. Const. art. I, § 20, "means just what it says, and, when considered in the light of familiar history, it seems hardly possible to misunderstand it. It deals only with procedure in civil actions,—actions having for their object the collection of debts." As we will explain in more detail, we agree with Madeline that contempt for noncompliance with a property division award in a dissolution decree does not originate in an action for the collection of debt, or from an obligation, through a consensual transaction between the creditor and the debtor, to pay money from the debtor's own resources. Therefore, enforcement through contempt of such property division does not violate Neb. Const. art. I, § 20.

It has been said that "debt," as specified in state constitutional prohibitions of imprisonment for debt, does not generally include enforcement of equitable orders.[16] We have held that child support obligations bear no "resemblance whatever

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[12] *Id.*

[13] *Id.*

[14] 16A C.J.S., *supra* note 11, § 814.

[15] *Rosenbloom v. State, supra* note 9, 64 Neb. at 346, 89 N.W. at 1054.

[16] See 17 Am. Jur. 2d *Contempt* § 205 (2014).

to a debt, and therefore the Constitution does not forbid imprisonment for the defendant's refusal to obey the order of the court" to pay child support.[17] Likewise, we have held that an order of temporary alimony is not debt under article I, § 20, but is instead an order designed to secure the performance of a legal duty in which the public has an interest.[18] We further reasoned that such powers are part of the inherent equity powers of the dissolution court.[19] We have said that attorney fees and costs arising out of a dissolution action are not debt under article I, § 20, on similar grounds.[20]

The courts may, through the exercise of their equitable powers, enforce orders made in dissolution proceedings. We have held that a party may use contempt proceedings to enforce a property settlement agreement incorporated into a dissolution decree. But we have never directly addressed whether a contempt order for failure to abide by a property division runs afoul of the constitutional prohibition against imprisonment for debt, when the court has ordered imprisonment as a sanction.[21] In *Grady v. Grady*,[22] we affirmed a contempt order sentencing the ex-husband to 90 days in jail for diverting funds from stocks awarded to his ex-wife in a dissolution decree. We could have, but did not, notice any plain error with regard to the order of incarceration. *Grady* implicitly stands for the proposition that obligations arising out of the property division in a dissolution action are not debt under article I, § 20, of the Nebraska Constitution.

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[17] *Fussell v. State*, 102 Neb. 117, 166 N.W. 197, 199 (1918).

[18] *Cain v. Miller*, 109 Neb. 441, 191 N.W.2d 704 (1922).

[19] See *id.*

[20] *Jensen v. Jensen*, 119 Neb. 469, 229 N.W. 770 (1930).

[21] See, *Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 2; *Novak v. Novak*, 245 Neb. 366, 513 N.W.2d 303 (1994), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 2; *Grady v. Grady*, 209 Neb. 311, 307 N.W.2d 780 (1981).

[22] *Grady v. Grady, supra* note 21.

We now expressly hold what we implied in *Grady*—that imprisonment for contempt for the failure to comply with the order of property division in a dissolution decree does not violate article I, § 20, of the Nebraska Constitution.

Many other jurisdictions similarly hold that imprisonment under contempt proceedings relating to a property division award does not violate state constitutional prohibitions of imprisonment for debt.[23]

We agree with the reasoning of these courts that property divisions in dissolution decrees arise from the existence of the marital status, and not from a business transaction; thus, property divisions are "state concerns."[24] The public interest treats property divisions in dissolution decrees as equitable determinations of the rights and obligations of the marital couple to

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[23] See, *White v. Taylor*, 19 Ark. App. 104, 717 S.W.2d 497 (1986); *Harvey v. Harvey*, 153 Colo. 15, 384 P.2d 265 (1963); *Froehlich v. Froehlich*, 297 Ga. 551, 775 S.E.2d 534 (2015); *Phillips v. District Court of Fifth Judicial District*, 95 Idaho 404, 509 P.2d 1325 (1973); *In re Marriage of Lenger*, 336 N.W.2d 191 (Iowa 1983); *Switzer v. Switzer*, 460 So. 2d 843 (Miss. 1984); *Cobb v. Cobb*, 54 N.C. App. 230, 282 S.E.2d 591 (1981); *Harris v. Harris*, 58 Ohio St. 2d 303, 390 N.E.2d 789 (1979); *Sinaiko v. Sinaiko*, 445 Pa. Super. 56, 664 A.2d 1005 (1995); *Hanks v. Hanks*, 334 N.W.2d 856 (S.D. 1983); *Kanzee v. Kanzee*, 668 P.2d 495 (Utah 1983); *Decker v. Decker*, 52 Wash. 2d 456, 326 P.2d 332 (1958); *Schroeder v. Schroeder*, 100 Wis. 2d 625, 302 N.W.2d 475 (1981). See, also, *Dowd v. Dowd*, 96 Conn. App. 75, 899 A.2d 76 (2006); *In re Marriage of Wiley*, 199 Ill. App. 3d 223, 556 N.E.2d 788, 145 Ill. Dec. 170 (1990); *Wisdom v. Wisdom*, 689 S.W.2d 82 (Mo. App. 1985); *Lamb v. Lamb*, 848 P.2d 582 (Okla. App. 1992); *Brooks v. Brooks*, 277 S.C. 322, 286 S.E.2d 669 (1982). But see, *Johnson v. Johnson*, 22 Ariz. App. 69, 523 P.2d 515 (1974); *Kadanec v. Kadanec*, 765 So. 2d 884 (Fla. App. 2000); *Kimbrell v. Secrist*, 613 N.E.2d 451 (Ind. App. 1993); *Haughton v. Haughton*, 319 Md. 460, 573 A.2d 42 (1990); *Guynn v Guynn*, 194 Mich. App. 1, 486 N.W.2d 81 (1992); *Burgardt v. Burgardt*, 474 N.W.2d 235 (Minn. App. 1991); *Hall v. Hall*, 114 N.M. 378, 838 P.2d 995 (N.M. App. 1992); *Dvorak v. Dvorak*, 329 N.W.2d 868 (N.D. 1983).

[24] See, e.g., *Phillips v. District Court of Fifth Judicial District, supra* note 23; *Haley v. Haley*, 648 S.W.2d 890 (Mo. App. 1982); *Oedekoven v. Oedekoven*, 538 P.2d 1292 (Wyo. 1975).

one another. The division of marital accumulations as a result of joint efforts and economies is treated no differently than alimony.[25] The obligations are not money owed as a debt, but are instead "status obligations"—what we consider to be the equitable division of property acquired during the marriage.[26]

We also find persuasive the reasoning that orders enforcing the division of property under a dissolution action are merely requiring the contemnor to surrender property that already belongs to the ex-spouse, likening the contemnor to a constructive trustee rather than a debtor.[27] The court is not ordering the contemnor to pay money out of his or her own resources, but is merely mandating that the person return the other person's resources that resided in the marital estate.[28]

We find no merit to Steven's contention that, because the contempt stems from a property division in a dissolution decree, incarceration as a sanction for the contempt runs afoul of our constitutional prohibition of imprisonment for debt. We similarly find no merit to Steven's contention that the appearance bond violated article I, § 20.

2. Willfulness

Steven's next argument appears to be that the court erred in finding his conduct to be willful. Steven argues that through the contempt order, he was being "blamed for the failure of [Madeline] to segregate the IRA into two different accounts."[29] Steven points out that it took Madeline over 4 years to obtain a QDRO and that, because the IRA is not a financial account governed by the Employee Retirement Income Security Act, division of an IRA can be accomplished simply by presenting

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[25] See *Harris v. Harris, supra* note 23.

[26] See, *id.*; Richard E. James, *Putting Fear Back Into the Law and Debtors Back Into Prison: Reforming the Debtors' Prison System*, 42 Washburn L.J. 143 (2002).

[27] See *Ex parte Gorena*, 595 S.W.2d 841 (Tex. 1979).

[28] See *In re Estate of Downs*, 300 S.W.3d 242 (Mo. App. 2009).

[29] Brief for appellant at 5.

the dissolution decree to the issuer of the IRA. This argument equates with a claim that leaving the money in Steven's control caused him to take the money that belonged to Madeline. This argument has no equitable basis and is clearly without merit.

We find no error in the court's finding that Steven willfully violated the dissolution decree. Without Madeline's or the dissolution court's knowledge, Steven made numerous withdrawals from the IRA. He made one withdrawal in 2001 of $30,000. In 2002, he made four withdrawals in increments of $10,000, $20,000, $30,000, and $40,000. The sum total of the withdrawals in 2002 and 2003 left the IRA with insufficient funds to satisfy the dissolution decree.

But within 3 months of Madeline's 2005 inquiries about finally transferring her share of the IRA to an account in her name, Steven made his largest single withdrawal, $79,980, which reduced the amount of the IRA to a level grossly insufficient to satisfy the property division award. The court did not err in finding that at the time of this withdrawal, Steven was aware that Madeline's share of the IRA account had not yet been transferred to her possession. The court did not err in finding that in 2005, Steven acted willfully when he withdrew moneys from the IRA account, which by virtue of the dissolution decree belonged to Madeline.[30]

We note that the issue of Steven's willfulness would ordinarily be considered the law of the case from the time of the June 2006 order, which was not appealed. The law of the case doctrine reflects the principle that an issue that has been litigated and decided in one stage of a case should not be relitigated at a later stage.[31] As we stated in *Smeal Fire Apparatus Co. v. Kreikemeier*,[32] an order of contempt in a postjudgment proceeding to enforce a previous final judgment is a final order, because it affects substantial rights and is made upon

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[30] See *Hossaini v. Vaelizadeh, supra* note 1.

[31] *Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 2.

[32] *Id.*

a summary application after judgment. But the 2006 order was issued before our decision in *Smeal Fire Apparatus Co*. And, before that opinion, our case law held that civil contempt orders were not final orders and could be challenged only in habeas corpus proceedings.[33] We conclude the court did not err in finding Steven acted willfully.

Steven's allegations that Madeline should have withdrawn the funds earlier do not negate his willful disobedience of a decree that clearly awarded these funds to Madeline. Any inference of laches or any other equitable defense to his dissipation lacks any merit, and Steven could not be said to have come to the court with clean hands.[34]

3. Criminal Versus Civil Contempt

Lastly, Steven argues that the 17-day period, in which he must raise the $37,234.84 or else suffer 90 days' incarceration as further sanction for his continuing contempt, is unreasonable. Steven argues there was insufficient evidence that he would be able to pay that lump sum within the time period provided in the order and, thus, that he did not have the keys to his own jail cell.[35]

While we agree that the present ability to comply with the purge provision was essential for the order to retain its civil character in these civil proceedings, it was Steven's burden to raise and prove his inability to comply. Steven did not meet that burden.

[13-15] A court can impose criminal, or punitive, sanctions only if the proceedings afford the protections offered in a criminal proceeding.[36] A criminal or punitive sanction is invalid

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[33] See, e.g., *Allen v. Sheriff of Lancaster Cty.*, 245 Neb. 149, 511 N.W.2d 125 (1994); *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993); and *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991) (cases overruled by *Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 2).

[34] See *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003).

[35] See *Allen v. Sheriff of Lancaster Cty., supra* note 33.

[36] *Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 2.

if imposed in a proceeding that is instituted and tried as civil contempt, because it lacks the procedural protections that the Constitution would demand in a criminal proceeding.[37] A civil sanction is coercive and remedial; the contemnors "'"carry the keys of their [jail cells] in their own pockets,"'"[38] because the sentence is conditioned upon continued noncompliance and is subject to mitigation through compliance.[39] In contrast, a criminal sanction is punitive; the sentence is determinate and unconditional, and the contemnors do not carry the keys to their jail cells in their own pockets.

(a) Present Ability to Comply

[16-18] We have recognized that when a purge order involves payment of money, the sum required to purge oneself of contempt must be within the contemnor's *present* ability to pay, taking into consideration the assets and financial condition of the contemnor and his or her ability to raise money.[40] Otherwise, the contempt becomes punitive rather

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[37] See, *Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011); *In re Contempt of Sileven*, 219 Neb. 34, 361 N.W.2d 189 (1985), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 2. See, also, e.g., *Hicks v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988); *Shillitani v. United States*, 384 U.S. 364, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966).

[38] *Hicks v. Feiock, supra* note 37, 485 U.S. at 633.

[39] See, *Hicks v. Feiock, supra* note 37; *Maddux v. Maddux, supra* note 33.

[40] See, *Allen v. Sheriff of Lancaster Cty., supra* note 33; *Maddux v. Maddux, supra* note 33. See, also, *In re Lawrence*, 279 F.3d 1294 (11th Cir. 2002); *In re Falck*, 513 B.R. 617 (S.D. Fla. 2014); *Taylor v. Johnson*, 764 So. 2d 1281 (Ala. Civ. App. 2000); *McVay v. Johnson*, 727 P.2d 416 (Colo. App. 1986); *Ponder v. Ponder*, 438 So. 2d 541 (Fla. App. 1983); *Jones v. State*, 351 Md. 264, 718 A.2d 222 (1998); *Gonzalez v Gonzalez*, 121 Mich. App. 289, 328 N.W.2d 365 (1982); *Newell v. Hinton*, 556 So. 2d 1037 (Miss. 1990); *Calloway v. Calloway*, 406 Pa. Super. 454, 594 A.2d 708 (1991); *In re Gawerc*, 165 S.W.3d 314 (Tex. 2005); *Krochmalny v. Mills*, 186 Vt. 645, 987 A.2d 318 (2009); *In re King*, 110 Wash. 2d 793, 756 P.2d 1303 (1988); *State, Dept. of Family Services v. Currier*, 295 P.3d 837 (Wyo. 2013); 27C C.J.S. *Divorce* § 1132 (2005).

than coercive.[41] As the U.S. Supreme Court said in *Turner v. Rogers*,[42] it is the ability to comply with a contempt order that marks a dividing line between civil and criminal contempt. In order for the punishment to retain its civil character, the contemnor must, *at the time the sanction is imposed*, have the ability to purge the contempt by compliance and either avert punishment or, at any time, bring it to an end.[43] A present inability to comply with a contempt order is a defense, not necessarily to contempt, but to incarceration.[44]

A past ability to comply with an order does not show a present ability to purge the contempt.[45] Accordingly, while deliberate disposal of financial resources to avoid compliance with an order may be willful behavior justifying a finding of contempt and incarceration under *criminal* contempt proceedings, such a person cannot be incarcerated under a *civil* contempt proceeding unless he or she has the present ability to pay the purge amount when incarcerated.[46] Otherwise, that

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[41] See *Gonzalez v Gonzalez, supra* note 40.

[42] *Turner v. Rogers, supra* note 37. See, also, e.g., *Hicks v. Feiock, supra* note 37.

[43] See, *Allen v. Sheriff of Lancaster Cty., supra* note 33; *Com. v. Ivy*, 353 S.W.3d 324 (Ky. 2011) (citing *Shillitani v. United States, supra* note 37). See, also, *Turner v. Rogers, supra* note 37; *Hicks v. Feiock, supra* note 37.

[44] *Riser v. Peterson*, 566 So. 2d 210 (Miss. 1990). See, also, *Allen v. Sheriff of Lancaster Cty., supra* note 33; *Com. v. Ivy, supra* note 43; *Turner v. Rogers, supra* note 37; *Hicks v. Feiock, supra* note 37.

[45] See, *Rawlings v. Rawlings*, 362 Md. 535, 766 A.2d 98 (2001); *Howard v. Howard*, 913 So. 2d 1030 (Miss. App. 2005). See, also, *Turner v. Rogers, supra* note 37; *Hicks v. Feiock, supra* note 37; *Allen v. Sheriff of Lancaster Cty., supra* note 33; *Com. v. Ivy, supra* note 43; *Riser v. Peterson, supra* note 44.

[46] See, *Ponder v. Ponder, supra* note 40; *Wells v. State*, 474 A.2d 846 (Me. 1984); *Howard v. Howard, supra* note 45; 27C C.J.S., *supra* note 40. See, also, *United States v. Rylander*, 460 U.S. 752, 103 S. Ct. 1548, 75 L. Ed. 2d 521 (1983).

person does not have the keys to his or her jail cell.[47] Civil contempt is by its very nature inapplicable to one who is powerless to comply with the court order.[48] Only criminal contempt can rely solely on a past ability to comply accompanied by a past refusal to do so.[49]

(b) Need for Explicit Findings on Present Ability to Comply

[19] In *Turner v. Rogers*, the U.S. Supreme Court held that an indigent defendant in civil contempt proceedings must be appointed counsel or benefit from alternative procedures such as notice, hearing, and use of a form to elicit relevant financial information and that there must be an express finding by the court that the defendant has the ability to pay.[50] The court explained that such procedures are required, because an incorrect decision on the ability to comply with a contempt order—the critical factor dividing civil from criminal contempt—increases the risk of wrongful incarceration by depriving the defendant of the procedural protections that the Constitution would demand in a criminal proceeding.[51]

[20] Given the importance of the ability to comply in distinguishing between civil and criminal contempt and its due process implications, several jurisdictions hold that a court that imposes incarceration as part of civil contempt proceedings

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[47] See *id.*

[48] *Mayo v. Mayo*, 173 Vt. 459, 786 A.2d 401 (2001). See, also, *Ponder v. Ponder, supra* note 40; *Wells v. State, supra* note 46; *Howard v. Howard, supra* note 45; 27C C.J.S., *supra* note 40. See, also, *United States v. Rylander, supra* note 46.

[49] *Wells v. State, supra* note 46. See, also, *United States v. Rylander, supra* note 46; *Ponder v. Ponder, supra* note 40; *Howard v. Howard, supra* note 45; *Mayo v. Mayo, supra* note 48; 27C C.J.S., *supra* note 40.

[50] *Turner v. Rogers, supra* note 37.

[51] *Id*. See, also, e.g., *Hicks v. Feiock, supra* note 37.

must make express findings regarding the contemnor's ability to comply with the purge order, regardless of whether the contemnor is indigent.[52] We agree that, prospectively, this is the best approach in order to avoid inadvertent violations of due process rights and for consistency of procedure for both represented and nonrepresented indigent contemnors.

(c) Burden of Production and Persuasion on Contemnor

Steven was represented, and he did not claim to be indigent. This case is somewhat atypical insofar as the finding of contempt came years before the order imposing incarceration as further sanctions for such continuing contempt. More often, an order of incarceration for civil contempt will be contemporaneous with a finding of willfulness, which is at that moment often commensurate to the ability to comply. Given the uniqueness of the facts presented and the fact that our ruling regarding explicit findings on the present ability to comply is prospective only, the court did not commit plain error in failing to sua sponte make findings on Steven's ability to comply at the time of the 2015 order.

[21,22] And Steven did not sufficiently raise and prove the inability to comply as a defense to the order. In *Maddux v. Maddux*,[53] we said it is the contemnor who has the burden to assert and prove the inability to comply with the contempt order to avoid incarceration or to purge himself or herself of contempt. We agree with other courts that have found that a contemnor may defend against incarceration under a civil

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[52] See, *Wagley v. Evans*, 971 A.2d 205 (D.C. App. 2009); *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985); *In re Adam*, 105 Haw. 507, 100 P.3d 77 (Haw. App. 2004); *Poras v. Pauling*, 70 Mass. App. 535, 874 N.E.2d 1127 (2007); *In re Brown*, 12 S.W.3d 398 (Mo. App. 2000); *Clark v. Gragg*, 171 N.C. App. 120, 614 S.E.2d 356 (2005); *Mundlein v. Mundlein*, 676 N.W.2d 819 (S.D. 2004); *Russell v. Armitage*, 166 Vt. 392, 697 A.2d 630 (1997).

[53] See *Maddux v. Maddux, supra* note 33. See, also, *Liming v. Damos*, 2012 Ohio 4783, 133 Ohio St. 3d 509, 979 N.E.2d 297 (2012).

contempt order, but only upon a showing of such inability by a preponderance of the evidence; that showing entails attempts to exhaust all resources and assets or borrow sufficient funds and the inability to thereby secure the funds to comply with the purge order.[54] The burden of both production and persuasion is on the contemnor. The contemnor must be afforded only the opportunity, before being incarcerated, to demonstrate the inability to comply.

[23] Unlike a showing of willful noncompliance with a prior order at a specific date, it would be particularly difficult for a complainant to bear the burden of establishing the contemnor's financial status on the particular day of an order for incarceration as further sanctions for contempt.[55] And it would be impractical for the court or the complainant to bear the burden of raising and proving the ability to comply during a period of incarceration. The contemnor is in the best position to know whether the ability to pay is a consideration, and he or she has the best access to the evidence on the issue.[56]

Furthermore, a finding of willfulness with regard to the underlying contempt, proved by the complainant by clear and convincing evidence, is sufficient to shift the burden to the

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[54] See, *Cross v. Ivester*, 315 Ga. App. 760, 728 S.E.2d 299 (2012); *Hughes v. Dept. of Human Resources*, 269 Ga. 587, 502 S.E.2d 233 (1998). See, also, *U.S. v. Butler*, 211 F.3d 826 (4th Cir. 2000); *Huber v. Marine Midland Bank*, 51 F.3d 5 (2d Cir. 1995); *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525 (11th Cir. 1992); *McMorrough v. McMorrough*, 930 So. 2d 511 (Ala. Civ. App. 2005); *Wagley v. Evans, supra* note 52; *Nab v. Nab*, 114 Idaho 512, 757 P.2d 1231 (Idaho App. 1988); *Com. v. Ivy, supra* note 43; *Jones v. State, supra* note 40; *Newell v. Hinton, supra* note 40; *James Talcott Factors v Larfred, Inc.*, 115 A.D.2d 397, 496 N.Y.S.2d 27 (1985); *In re Mott*, 137 S.W.3d 870 (Tex. App. 2004); *In re King, supra* note 40; *Deitz v. Deitz*, 222 W. Va. 46, 659 S.E.2d 331 (2008). But see, *Bresch v. Henderson*, 761 So. 2d 449 (Fla. App. 2000); *Wells v. State, supra* note 46; *Lambert ex rel. Estate of Lambert v. Beede*, 175 Vt. 610, 830 A.2d 133 (2003).

[55] *Arrington v. Human Resources*, 402 Md. 79, 935 A.2d 432 (2007).

[56] See, *id.*; *State ex rel Mikkelsen v. Hill*, 315 Or. 452, 847 P.2d 402 (1993).

contemnor to show by a preponderance of the evidence an inability to comply, in the event the sanctions for contempt include incarceration.[57]

The contemnor must be given an opportunity to raise the issue of the inability to comply. And, as stated, the court shall in the future also make findings relating to the issue of the ability to comply before the contemnor is incarcerated. But such findings will take into account the fact that the contemnor has the burden to raise and prove this defense.

Given the evidence demonstrating Steven's substantial financial resources and Steven's failure to object on due process grounds below, we find no reversible error based on the argument that the 17-day period in which to garner the funds required to purge the contempt was unreasonable. We find unavailing Steven's assertion that "[n]o reasonable or fair minded person would conclude that [$37,234.84] could be raised in that amount of time unless there was specific evidence that the contemnor had sufficient funds on deposit that could be immediately withdrawn and paid to the court."[58] No such presumption exists isolated from the evidence. He has had over a decade to secure and pay his obligation and, on numerous occasions, has promised payment, including a promise to pay $6,000 in semiannual installments. The time for honoring that promise has come and gone without payment. Steven neither raised nor proved his inability to pay; therefore, the order of incarceration in these civil contempt proceedings did not violate due process on the ground that Steven lacked the ability to obtain $37,234.84 within 17 days. And, because further sanctions were stayed pending this appeal, Steven has been given additional time to acquire the purge amount set forth in the 2006 contempt order and reiterated in the 2015 order for further sanctions.

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[57] See *Kanzee v. Kanzee, supra* note 23.

[58] Brief for appellant at 10-11.

(d) Determinate Sentence Without Purge Clause Was Plain Error

[24] We find plain error in one important aspect of the district court's 2015 order for further sanctions. The order of incarceration, insofar as it provides no means to purge the contempt after the 90-day period of incarceration goes into effect, is an error plainly evident from the record. By unmistakably imposing a criminal sanction in civil proceedings, such order damages the fairness of the judicial process. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[59]

[25,26] We have specifically held in reviewing a similar order that when a contemnor is required to serve a determinate sentence after a specified date if compliance has not occurred by that date, and there is no provision for discharge thereafter by doing what the contemnor had previously refused to do, then the sentence is punitive as of that date.[60] In circumstances where there is no provision for purging the contempt after a certain date, the contemnor no longer holds the keys to his or her jail cell as of that date.[61] The order ceases to be coercive, because the jail sentence is no longer subject to mitigation.[62] In the case of civil contempt involving the use of incarceration as a coercive measure, a court may impose a determinate sentence only if it includes a purge clause that continues so long as the contemnor is imprisoned.[63]

Here, the court failed to include the ability to purge after June 15, 2015. The court provided that Steven could avoid

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[59] *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015); *State v. Kays*, 289 Neb. 260, 854 N.W.2d 783 (2014).

[60] *Maddux v. Maddux, supra* note 33. See, also, *Hicks v. Feiock, supra* note 37. But see *Peters-Riemers v. Riemers*, 674 N.W.2d 287 (N.D. 2004).

[61] See *Hicks v. Feiock, supra* note 37.

[62] *Id.*

[63] See, *Hicks v. Feiock, supra* note 37; *Maddux v. Maddux, supra* note 33.

the 90-day determinate sentence only "by payment in full of the monies owed to [Madeline], the sum of $37,234.84, on or before June 15, 2015." Taken literally, the order provides that after June 15, Steven would no longer hold the keys to his jail cell, as is required in civil contempt. We conclude this simply was not the court's intention. We modify the 2015 order by adding to the end of the order the following: "Said sentence may be purged at any time by payment in full of the monies owed to Madeline, in the sum of $37,234.84."

VI. CONCLUSION

We find no merit to Steven's assignments of error. But because these were civil proceedings, we modify the 2015 order so as to permit Steven to purge the contempt at any time during his period of incarceration. As so modified, we affirm the order of the district court.

Affirmed as modified.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Michael Unger, sheriff of the County of Stanton, Nebraska, appellant, v. State of Nebraska et al., appellees.

878 N.W.2d 540

Filed May 13, 2016. No. S-15-808.

1. **Mandamus: Words and Phrases.** Mandamus is a law action, and it is an extraordinary remedy, not a writ of right.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict. An appellate court will not disturb them unless they are clearly erroneous.
3. **Mandamus.** Whether to grant a writ of mandamus is within the trial court's discretion.
4. **Mandamus: Proof.** A party seeking a writ of mandamus under Neb. Rev. Stat. § 84-712.03 (Reissue 2014) has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records; (2) the document sought is a public record as defined by Neb. Rev. Stat. § 84-712.01 (Reissue 2014); and (3) the requesting party has been denied access to the public record as guaranteed by Neb. Rev. Stat. § 84-712 (Reissue 2014).
5. ____: ____. If the requesting party satisfies its prima facie claim for release of public records, the public body opposing disclosure must show by clear and convincing evidence that Neb. Rev. Stat. § 84-712.05 (Reissue 2014) or Neb. Rev. Stat. § 84-712.08 (Reissue 2014) exempts the record from disclosure.
6. **Presentence Reports.** A presentence report is not a public record.
7. **Mandamus.** A court may issue a writ of mandamus only to an inferior tribunal, corporation, board, or person.

8. **Mandamus: Default Judgments.** The issuance of a peremptory writ of mandamus because of a respondent's failure to answer the alternative writ is the equivalent of a default judgment.
9. **Default Judgments: Waiver.** A plaintiff waives the right to seek a default judgment by failing to timely exercise that right and proceeding to the merits.
10. **Appeal and Error: Words and Phrases.** Plain error is error uncomplained of at trial, plainly evident from the record, and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Vincent Valentino and Brandy Johnson for appellant.

Douglas J. Peterson, Attorney General, and Elizabeth A. Gregory for appellees.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Kelch, JJ.

Connolly, J.

SUMMARY

This appeal presents the issue of whether a presentence report is a public record. Michael Unger, the Stanton County Sheriff, petitioned for a public records writ of mandamus compelling the partial disclosure of an offender's presentence report containing any statements made by Dillon Fales, a victim of the offender's crime. Fales had sued Stanton County, Nebraska, for damages arising from injuries associated with the crime. Unger argued that the presentence report was a public record and that Fales' statement might be relevant to a contested issue in his civil suit. The court dismissed Unger's petition because it determined that presentence reports are privileged.[1] We likewise conclude that presentence reports are not public records because they are privileged by statute. We therefore affirm.

[1] See Neb. Rev. Stat. § 29-2261(6) (Cum. Supp. 2014).

BACKGROUND

Bryant Irish's Criminal Case in Madison County District Court

In 2014, the State charged Bryant L. Irish with driving under the influence of alcohol and causing serious bodily injury under Neb. Rev. Stat. § 60-6,198 (Cum. Supp. 2014). Section 60-6,198(1) provides: "Any person who, while operating a motor vehicle in violation of section 60-6,196 or 60-6,197, proximately causes serious bodily injury to another person or an unborn child of a pregnant woman shall be guilty of a Class IIIA felony . . . ."

The court, with District Judge Mark A. Johnson presiding, convicted Irish after a bench trial. It found that Fales left a party in a pickup truck driven by Irish. A Stanton County deputy sheriff followed the pickup truck and activated the overhead lights on the deputy's cruiser. Irish missed a curve in the road and struck a culvert. Emergency responders transported Fales to a hospital because he was unable to move and had a head injury. The court determined that Irish operated a motor vehicle while under the influence of alcohol and that "such impairment by alcohol caused the motor vehicle accident which, in turn, proximately caused the serious bodily injury to his passenger . . . Fales." It ordered the probation office to prepare a presentence report for Irish's sentencing.

At Irish's sentencing hearing, his attorney told the court that he had talked with Fales and that Fales "indicated to me that [he] could have been the one driving just as well," that Fales and Irish "were both in the wrong," and that they "s[aw] each other as interchangeable in this case." Irish's attorney said that Irish and Fales were "lifelong friends and remain so through this." The court noted the comments by Irish's attorney and said, "I will also take into account that the victim in this case has indicated he does not want [Irish] to go to jail but wants [him] to get probation." The court sentenced Irish to 180 days in jail and 60 months' probation.

Tort Action in Madison County District Court

Before the court sentenced Irish, Fales sued Stanton County under the Political Subdivisions Tort Claims Act.[2] Fales alleged that he was an innocent third party injured by the vehicular pursuit of Irish by the Stanton County Sheriff.

In an answer to an interrogatory, Fales said that he completed a "Victim Questionnaire" for use in Irish's sentencing. In response to a request to produce any documents he authored for Irish's criminal case, Fales answered: "Do not have."

Stanton County sent a "Subpoena Duces Tecum and Public Records Request" to Judge Johnson and the district probation office. The subpoenas asked Judge Johnson and the probation office to produce any victim questionnaire "included within the presentence investigation report prepared in the criminal matter of *State v. Bryant Irish*."

Judge Johnson and the probation office moved to quash the subpoenas. The record does not show the outcome of their motion to quash. But Unger states in his brief that Stanton County "withdrew" the subpoenas.[3]

Mandamus Action in Lancaster County District Court

In 2015, Unger filed a "Complaint/Petition for Public Records Writ of Mandamus" in the Lancaster County District Court. The respondents are the State of Nebraska, Judge Johnson, the State of Nebraska's "District 7 Probation Office," and the State of Nebraska Office of Probation Administration. Unger alleged that Fales submitted a statement or questionnaire for use in Irish's sentencing. Unger claimed that Fales' submission might be relevant to whether Stanton County was liable to Fales in the tort action pending in the Madison County District Court.

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[2] See Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012).

[3] Brief for appellant at 9.

Unger claimed that he was entitled to a writ of mandamus under the public records statutes.[4] The court issued an alternative writ of mandamus which directed the respondents to produce the questionnaire for the court's in camera inspection. The court further ordered the respondents to show cause why the questionnaire was not a public record. The respondents did not file a responsive pleading.

At the show cause hearing, the court received several exhibits, including the portion of Irish's presentence report consisting of Fales' questionnaire. The court held the questionnaire under seal. The respondents argued that Irish's presentence report was not a public record because a statute provides that presentence reports "shall be privileged."[5]

The court dismissed Unger's petition. It reasoned that Fales' questionnaire was part of Irish's presentence report and that presentence reports are not subject to the public records statutes.

Unger appeals from the order of the Lancaster County District Court dismissing his petition for a writ of mandamus.

ASSIGNMENTS OF ERROR

Unger assigns, restated, that the court erred by (1) determining that Irish's presentence report was not a public record, (2) failing to determine that Fales waived any privilege that attached to the presentence report, and (3) failing to enter a peremptory writ of mandamus because the respondents did not file an answer to the alternative writ of mandamus.

STANDARD OF REVIEW

[1-3] Mandamus is a law action, and we have defined it as an extraordinary remedy, not a writ of right.[6] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict.[7] We will not disturb those findings unless they

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[4] See Neb. Rev. Stat. § 84-712.03(1)(a) (Reissue 2014).

[5] § 29-2261(6).

[6] *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

[7] *Id.*

are clearly erroneous.[8] Whether to grant a writ of mandamus is within the trial court's discretion.[9]

ANALYSIS

Irish's Presentence Report Is Not a Public Record

Unger argues that he is entitled to the portion of Irish's presentence report containing Fales' questionnaire. Neb. Rev. Stat. § 84-712(1) (Reissue 2014) empowers any citizen of this state or other interested person to examine and obtain copies of public records, "[e]xcept as otherwise expressly provided by statute . . . ." The phrase "public records" is defined by Neb. Rev. Stat. § 84-712.01(1) (Reissue 2014):

> Except when any other statute expressly provides that particular information or records shall not be made public, public records shall include all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing.

A person denied access to a public record may file for speedy relief by a writ of mandamus under § 84-712.03.

[4,5] A party seeking a writ of mandamus under § 84-712.03 has the burden to satisfy three elements: (1) The requesting party is a citizen of the state or other person interested in the examination of the public records; (2) the document sought is a public record as defined by § 84-712.01; and (3) the requesting party has been denied access to the public record as guaranteed by § 84-712.[10] If the requesting party satisfies its prima facie claim for release of public records, the public body opposing disclosure must show by clear and convincing

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[8] *Id.*

[9] *Id.*

[10] *Id.*

evidence that Neb. Rev. Stat. § 84-712.05 (Reissue 2014) or Neb. Rev. Stat. § 84-712.08 (Reissue 2014) exempts the record from disclosure.[11]

The respondents argue that Irish's presentence report is not a public record because it is privileged. Section 29-2261 generally requires the preparation of a presentence report for an offender convicted of a felony other than murder in the first degree. The report may include the written statement of a victim.[12] Section 29-2261(6) provides that the resulting report is privileged:

> Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, the probation administrator or his or her designee, or others entitled by law to receive such information . . . . The court may permit inspection of the report or examination of parts thereof by the offender or his or her attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration.

We have stated that the first sentence in § 29-2261(6) sets forth the general rule that information in a presentence report is privileged and cannot be disclosed to anyone outside of the persons listed.[13] Even the offender has only a qualified right to review his or her own report.[14] Section 29-2261(7) and (8) then in effect states that the Department of Correctional Services, Board of Parole, Office of Parole Administration, and Supreme Court or an agent of the Supreme Court acting under the

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[11] *Id.*

[12] § 29-2261(3).

[13] *State v. Albers*, 276 Neb. 942, 758 N.W.2d 411 (2008).

[14] *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

direction and supervision of the Chief Justice may access the report in some circumstances.

[6] We conclude that Irish's presentence report is not a public record. Section 84-712.01(1) states that a document is not a public record if "any other statute expressly provides that particular information or records shall not be made public . . . ." Similarly, § 84-712(1) states that persons have a right to examine public records "[e]xcept as otherwise expressly provided by statute . . . ." And § 29-2261 is a statute which expressly provides otherwise—it says presentence reports are privileged. We do not believe that the "others entitled by law to receive" a presentence report under § 29-2261(6) include anyone entitled to make a public records request, i.e., "all citizens of this state and all other persons interested in the examination of the public records."[15] If presentence reports were public records, the privilege in § 29-2261(6) would be a mirage.

Nor does Unger have an equitable entitlement to Irish's presentence report under the public records statutes. He cites § 84-712.03(2), which provides in part: "In any suit filed under this section, the court has jurisdiction to enjoin the public body from withholding records, to order the disclosure, and to grant such other equitable relief as may be proper." Similarly, Neb. Rev. Stat. § 84-712.07 (Reissue 2014) states that the statutes "pertaining to the rights of citizens to access to public records may be enforced by equitable relief." Unger seems to argue that the public records statutes give him an equitable right to nonpublic records. He cites no authority for such a rule, and we believe that equitable relief under §§ 84-712.03 and 84-712.07 must relate to a public record.

Unger also argues that he is entitled to Irish's presentence report because it was publicly disclosed in open court during the sentencing hearing in Irish's criminal case. He cites § 84-712.05, which lists exceptions to the general rule of disclosure. Section 84-712.05 begins by stating an exception

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[15] § 84-712(1).

to the exceptions: "The following records, *unless publicly disclosed in an open court*, . . . may be withheld from the public by the lawful custodian of the records . . . ." (Emphasis supplied.) But § 84-712.05 applies only to materials which we would otherwise consider public records. Presentence reports are not, as a matter of first principles, public records.

Moreover, Irish's presentence report was not "publicly disclosed in an open court." Unger emphasizes that Irish's attorney told the court that Fales said he "could have been the one driving" and that Fales and Irish saw themselves as "interchangeable." But Irish's attorney said that he obtained this information by speaking with Fales directly. The sentencing court's comment that "the victim in this case had indicated he does not want [Irish] to go to jail" does not amount to a public disclosure of the presentence report.

Unger also contends that the privilege in § 29-2261(6) does not apply because Fales was not a "victim." First, we note that the privilege in § 29-2261(6) attaches to the presentence report, not the victim statement. Second, in convicting Irish under § 60-6,198 after a bench trial, the Madison County District Court found beyond a reasonable doubt that Fales was a "victim" as that term is defined with reference to presentence reports.[16] Unger argues that Fales was not a victim because he "expressed genuine concern for his friend . . . Irish."[17] But victims of crime do not stop being victims when they forgive the offender.

Finally, Unger argues that Fales waived the privilege in § 29-2261(6) when he purportedly tried to produce his questionnaire during discovery in the pending litigation in the Madison County District Court. In this appeal, we are tasked with deciding whether a presentence report is definitionally a

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[16] Compare § 29-2261(4), Neb. Rev. Stat. § 29-119(2)(a) (Cum. Supp. 2014), and Neb. Rev. Stat. § 28-109(20) (Reissue 2008), with § 60-6,198(1) and (2).

[17] Brief for appellant at 13.

"public record" so as to be the subject of a public records writ of mandamus. Fales' responses to discovery requests are not germane to our inquiry.

Judge Johnson Is Not an Inferior Officer

[7] Issuing a writ of mandamus to one of the respondents, Judge Johnson, is inappropriate for another reason: Judge Johnson is not an inferior officer. A court may issue a writ of mandamus only to an inferior tribunal, corporation, board, or person.[18] Here, Unger asked a judge of the Lancaster County District Court to issue a writ of mandamus to a judge of the Madison County District Court in the latter's capacity as "District Judge." One district court judge is not inferior to another. So even if Irish's presentence report was a public record, mandamus would not lie against Judge Johnson.

Unger Waived the Respondents' Failure to Answer

[8] Finally, Unger argues that the court should have issued a peremptory writ of mandamus because the respondents did not file an answer. Under Neb. Rev. Stat. § 25-2162 (Reissue 2008), the parties on whom the alternative writ is served "may show cause, by answer made, in the same manner as an answer to a complaint in a civil action." The writ and the answer are the pleadings in the case and have the same effect and are subject to the same construction as the pleadings in a civil action.[19] Neb. Rev. Stat. § 25-2163 (Reissue 2008) provides in part: "If no answer be made, a peremptory mandamus must be allowed against the defendant." Issuing a peremptory writ of mandamus because of a respondent's failure to answer the alternative writ is the equivalent of a default judgment.[20]

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[18] See, *Mid America Agri Products v. Rowlands*, 286 Neb. 305, 835 N.W.2d 720 (2013); 52 Am. Jur. 2d *Mandamus* § 301 (2011).

[19] Neb. Rev. Stat. § 25-2164 (Reissue 2008).

[20] John P. Lenich, Nebraska Civil Procedure § 20:11 (2008).

[9] But Unger failed to seek a peremptory writ because of the respondents' default. A plaintiff waives the right to seek a default judgment by failing to timely exercise that right and proceeding to the merits.[21] Unger chose to present evidence and proceed to the merits of the mandamus action. The time for him to raise the respondents' default has passed.

[10] Unger asks us to notice the respondents' failure to file an answer as plain error. Plain error is error uncomplained of at trial, plainly evident from the record, and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.[22] We conclude that the court's failure to enter a peremptory writ because of the respondents' failure to file an answer was not plain error. The respondents did not file an answer, but they did submit a brief and made arguments at the hearing on Unger's mandamus action to which Unger was able to respond. Unger does not explain how he was prejudiced by the lack of answer, much less how leaving the error uncorrected would harm the integrity, reputation, or fairness of the judicial process.

CONCLUSION

Irish's presentence report is not a public record. The court therefore did not abuse its discretion by dismissing Unger's petition for a public records writ of mandamus. We affirm.

Affirmed.

Stacy, J., not participating.

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[21] See, *Laurel Baye Healthcare of Macon v. Neubauer*, 315 Ga. App. 474, 726 S.E.2d 670 (2012); *Shows v. Man Engines & Components, Inc.*, 364 S.W.3d 348 (Tex. App. 2012); *Schwan v. Folden*, 708 N.W.2d 863 (N.D. 2006); *Kuykendall v. Circle, Inc.*, 539 So. 2d 1252 (La. App. 1989); *Demoski v. New*, 737 P.2d 780 (Alaska 1987); *Barber & McMurry v. Top-Flite Develop.*, 720 S.W.2d 469 (Tenn. App. 1986); *Whitehall Packing Co. v. Safeway Truck Lines*, 68 Wis. 2d 369, 228 N.W.2d 365 (1975); *Lanning v. Landgraf*, 259 Iowa 397, 143 N.W.2d 644 (1966); 49 C.J.S. *Judgments* § 276 (2009).

[22] *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013).

Nebraska Supreme Court
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State of Nebraska, appellee, v. Mohamed Abdulkadir, appellant.

878 N.W.2d 390

Filed May 13, 2016. No. S-15-951.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Constitutional Law: Judgments: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
3. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
4. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a defendant was represented both at trial and on direct appeal by the same lawyers, generally speaking, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.
5. **Self-Defense.** Self-defense is a legal conclusion.
6. ____. To successfully claim one was acting in self-defense, the force used in defense must be immediately necessary and must be justified under the circumstances.
7. ____. A defendant's use of deadly force in self-defense is justified if a reasonable ground existed under the circumstances for the defendant's belief that he or she was threatened with death or serious bodily

harm, even if the defendant was actually mistaken about the extent of the danger.

8. ____. Once the basis for an accused's reasonable belief that he or she is in danger of serious bodily harm has been dispelled, the accused's continued use of deadly force is not justified by self-defense.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

Stuart J. Dornan, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Heavican, C.J.

INTRODUCTION

Mohamed Abdulkadir appeals from the district court's order denying his postconviction motion to vacate and set aside his convictions without an evidentiary hearing. Abdulkadir alleged that his convictions for the second degree murder of Michael Grandon and for use of a deadly weapon to commit a felony should be vacated because his trial counsel failed to call two witnesses Abdulkadir claimed would have testified in his favor. We affirm.

BACKGROUND

This is the second time Abdulkadir has appealed to this court. In 2013, we affirmed his convictions on direct appeal.[1] Abdulkadir then filed a postconviction motion to vacate and set aside his convictions in the district court because his trial counsel (who also served as counsel on direct appeal) did not call two potential witnesses: Eltio Plater and a corrections officer named "Vidal."

[1] *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

In June 2011, Abdulkadir was an inmate at the Nebraska State Penitentiary. During the afternoon of June 30, Abdulkadir reported to a caseworker, Cody Eastman, that some items from his cell were missing. Eastman told Abdulkadir to fill out a report to assist in the investigation. Instead, Abdulkadir began asking fellow inmates if they knew anything about the theft. Abdulkadir approached Grandon in the prison gymnasium to discuss the stolen items, but Grandon apparently denied any involvement.

According to Abdulkadir's testimony and corroborating testimony by another inmate, Danny Robinson, later that afternoon, Grandon punched Abdulkadir without warning and a struggle ensued. Abdulkadir and Robinson testified that Grandon then took an object, later discovered to be a knife, into his hand and that Abdulkadir wrestled the knife from Grandon. Witnesses saw Abdulkadir stab Grandon multiple times. After the altercation, Grandon died from his injuries.

Henry McFarland was an officer on duty in Abdulkadir's housing unit on the day Grandon died. McFarland testified at trial that while working in the control center, four inmates, including Plater and Robinson, stood shoulder-to-shoulder, blocking his view of the unit. McFarland told the inmates to move and then heard the struggle between Grandon and Abdulkadir from the direction the inmates had been obstructing. He witnessed Grandon falling to the floor. Abdulkadir then stood over Grandon, making stabbing motions while Grandon rolled around in a fetal position.

Three of the four inmates who had allegedly blocked McFarland's view testified at trial that they were merely cutting each other's hair. They claimed not to be intentionally obstructing the control center window. Plater was not called to testify.

McFarland called for help, and Eastman was the first to respond. When Eastman entered the area, he witnessed Grandon already on the floor in a fetal position and Abdulkadir standing over Grandon, stabbing him twice. Eastman then

entered the area and told Abdulkadir to drop the knife; Abdulkadir complied.

McFarland testified that he saw Abdulkadir stab Grandon between 10 to 15 times while Grandon was on the floor. McFarland also said that he heard Abdulkadir yelling, "'You think you can steal from me?'"[2] Another officer who was also in the unit at the time testified at trial that Abdulkadir stabbed Grandon only three or four times after Grandon fell. Abdulkadir testified that during the struggle, he became hysterical and apparently could not remember what happened after he began stabbing Grandon. None of Abdulkadir's trial witnesses claimed to have seen the entire incident.

Grandon suffered a total of 25 stab wounds. He was still alive briefly after Abdulkadir was escorted away. But Grandon's heart stopped beating before he arrived at the hospital.

After the stabbing, Abdulkadir was taken to a segregation unit. There, an officer overheard Abdulkadir responding to inmates' questions about why he was in segregation. According to that officer's testimony, Abdulkadir told them that "'somebody was stealing his shit and he couldn't let that happen and that he'd do it again.'"[3]

A jury convicted Abdulkadir, and the district court sentenced him to a term of life-to-life imprisonment for second degree murder and 15 to 25 years' imprisonment for use of a deadly weapon. We affirmed the convictions on direct appeal. Abdulkadir then filed the motion for postconviction relief at issue here on the ground of ineffective assistance of counsel. Abdulkadir alleged, in part:

> 1. That defense counsel failed to produce, as requested by [Abdulkadir], two witnesses who would have provided testimony that would have been favorable to [Abdulkadir];
>
> 2. That one of the witnesses, . . . Plater, a recent parolee who had witnessed the altercation that led to the

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[2] *Id.* at 420, 837 N.W.2d at 514.

[3] *Id.* at 420, 837 N.W.2d at 515.

> charges against [Abdulkadir], would have testified that he observed a fist fight between [Abdulkadir] and another inmate and he observed [Abdulkadir] take from the other party in the fist fight a knife or some other object which he saw [Abdulkadir] use while defending himself[.]

The State moved to deny an evidentiary hearing on Abdulkadir's motion.

At a June 2, 2015, hearing, the district court granted Abdulkadir additional time to locate his potential witnesses, Plater and Vidal. On September 4, there was a second hearing on the State's motion to deny an evidentiary hearing. Abdulkadir stated that Vidal's "affidavit would not add anything to the petition." Abdulkadir also stated that Plater was proving difficult to track down because he was evading a warrant for child support. Although he could not say with certainty what Plater may have testified to at trial if called, Abdulkadir claimed that Plater's testimony "would have corroborated . . . Abdulkadir's testimony and would have lended [sic] credence to his argument that he was acting in self-defense."

The district court granted the State's motion to deny an evidentiary hearing. The district court discounted the assertion that Plater would testify that Abdulkadir was "defending himself," because self-defense is a legal conclusion, not a factual allegation. Further, it reasoned that Abdulkadir had failed to allege facts warranting postconviction relief because Abdulkadir suffered no prejudice by Plater's absence at trial.

ASSIGNMENTS OF ERROR

Abdulkadir assigns that the district court erred by (1) denying an evidentiary hearing and (2) denying postconviction relief.

STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her

constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[4]

ANALYSIS

In his first assignment of error, Abdulkadir argues that the district court erred by granting the State's motion to deny an evidentiary hearing. We find no error, because Abdulkadir's motion did not allege any facts showing his defense was prejudiced by the absence of Plater and Vidal at his trial.

[2] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.[5] However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.[6]

[3,4] In this case, Abdulkadir claims that he received ineffective assistance of counsel, in violation of his constitutional rights. To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[7] When a defendant was represented both at trial and on direct appeal by the same lawyers, generally speaking, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.[8] Here, Abdulkadir was represented by the same counsel at trial and upon direct appeal, so his ineffective assistance of counsel claim has not been waived.

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[4] *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

[5] *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015).

[6] *State v. Ware*, 292 Neb. 24, 870 N.W.2d 637 (2015).

[7] *State v. Jones*, 274 Neb. 271, 739 N.W.2d 193 (2007).

[8] *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

Abdulkadir's motion alleged that his trial counsel failed to produce Plater and Vidal—which we presume Abdulkadir claims was deficient performance. But nothing in Abdulkadir's motion specifically alleges any prejudice to his defense. Instead, Abdulkadir states that Plater's and Vidal's testimony "would have been favorable" to him. We question whether this allegation is sufficient to raise the issue of prejudice in a post-conviction motion.

However, even assuming that Abdulkadir's motion might have properly alleged prejudice, the motion clearly failed to state facts actually *amounting to* prejudice. Because Abdulkadir withdrew his allegations concerning Vidal during the second hearing on the State's motion, we will not address the allegations about Vidal's possible testimony. As to Plater, Abdulkadir alleged that Plater "would have testified that he observed a fist fight between [Abdulkadir] and another inmate and he observed [Abdulkadir] take from the other party in the fist fight a knife or some other object which he saw [Abdulkadir] use while defending himself."

In *State v. Banks*,[9] we held that a defendant was not entitled to an evidentiary hearing because he had only alleged conclusions of law or fact. The defendant claimed ineffective assistance of counsel because his attorney allegedly failed to investigate potential witnesses who "would have supported a defense that [the defendant] acted in self-defense."[10] The defendant never explained what facts the potential witnesses could have testified to in support of the self-defense claim.

[5] Just as in *Banks*, the district court in the case at bar was correct to discount Abdulkadir's contention that Plater would testify that Abdulkadir used the knife "while defending himself." Self-defense is a legal conclusion, and the district court could not consider this phrase in determining whether an evidentiary hearing was warranted. The district court was

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[9] *State v. Banks*, 289 Neb. 600, 856 N.W.2d 305 (2014).

[10] *Id.* at 605, 856 N.W.2d at 310.

constrained to reviewing only the factual allegations in the motion—that Plater "observed a fist fight between [Abdulkadir] and another inmate and he observed [Abdulkadir] take from the other party in the fist fight a knife or some other object which he saw [Abdulkadir] use."

At trial, both Abdulkadir and Robinson testified to the same facts alleged in Abdulkadir's motion. Abdulkadir does not allege that Plater would have introduced any additional facts at trial. Nor would it contradict any facts presented by the State about what occurred after Grandon fell. Instead, Abdulkadir, apparently overlooking Robinson's testimony in his review of the record, argues that he suffered prejudice because Plater would have been the only witness to corroborate Abdulkadir's own testimony.

[6-8] But even if we were to make every credibility determination in favor of Abdulkadir, all of the testimony at trial, as well as the alleged facts in Abdulkadir's motion for postconviction relief, cannot prove he acted in self-defense. To successfully claim one was acting in self-defense, the force used in defense must be immediately necessary and must be justified under the circumstances.[11] A defendant's use of deadly force in self-defense is justified if a reasonable ground existed under the circumstances for the defendant's belief that he or she was threatened with death or serious bodily harm, even if the defendant was actually mistaken about the extent of the danger.[12] Once the basis for an accused's reasonable belief that he or she is in danger of serious bodily harm has been dispelled, the accused's continued use of deadly force is not justified by self-defense.[13]

Abdulkadir and Robinson testified only that Grandon was the initial aggressor and that Grandon produced the knife from

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[11] See *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

[12] *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

[13] See *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012) (finding that no self-defense instruction was required, because fight had ended and defendant shot and killed victim as victim ran away).

his pocket. Abdulkadir was then able to wrestle the knife from Grandon. At trial, Abdulkadir apparently could not recall what occurred next. Robinson claimed to have walked away at this point in the struggle.

The only other eyewitness evidence of the incident, from the various prison officials who testified at trial, establishes that Grandon fell to the floor and curled into a fetal position and that Abdulkadir continued stabbing Grandon anywhere between 3 and 15 more times. By the time the struggle ended, Grandon had suffered 25 stab wounds. While Abdulkadir stood over Grandon, he yelled, "'You think you can steal from me?'"[14] Finally, Abdulkadir later told other inmates that he had been acting in retaliation.

Under these circumstances, Abdulkadir did not have a good faith reasonable belief that he was still in imminent danger of serious bodily harm. Once Grandon fell helplessly to the floor, the threat to Abdulkadir was neutralized and he was no longer justified in using deadly force in self-defense. Nothing in Plater's alleged testimony, or any of Abdulkadir's evidence at trial, would contradict this finding. Thus, even assuming that counsel's choice not to call Plater would have been deficient—which we do not decide—it did not prejudice Abdulkadir's defense.

Abdulkadir's first assignment of error is, therefore, without merit.

In Abdulkadir's second assignment of error, he argues that the district court erred by denying postconviction relief. Because Abdulkadir's first assignment of error has no merit, his second assignment of error also fails.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

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[14] See *Abdulkadir, supra* note 1, 286 Neb. at 420, 837 N.W.2d at 514.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

Joseph Pittman, appellant and cross-appellee, v. Matthew Rivera and Teresa Erpelding, appellees, and 2nd Street Slammer, Inc., et al., appellees and cross-appellants.

879 N.W.2d 12

Filed May 20, 2016. No. S-15-159.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
4. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
5. **Innkeepers: Alcoholic Liquors: Liability.** Businesses that are open to the public are subject to a duty of reasonable care, regardless of whether they serve alcoholic liquor.
6. **Negligence.** In a negligence action, in order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence.
7. ____. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.

8. ____. In order to make a risk of attack foreseeable, the circumstances to be considered must have a direct relationship to the harm incurred.

Appeal from the District Court for Adams County: Terri S. Harder, Judge. Affirmed.

Siegfried H. Brauer, of Brauer Law Office, for appellant.

Stephen G. Olson and Kristina J. Kamler, of Engles, Ketcham, Olson & Keith, P.C., for appellees 2nd Street Slammer, Inc., et al.

Heavican, C.J., Wright, Connolly, Cassel, and Stacy, JJ.

Wright, J.

NATURE OF CASE

Joseph Pittman filed a negligence action against 2nd Street Slammer, Inc. (2nd Street), and its owners, Walter C. Bienkowski and Diana C. Bienkowski (collectively the appellees); Matthew Rivera; Nellie Snyder; and Teresa Erpelding for injuries he sustained when he was struck by a vehicle while standing in or near a parking lot owned and maintained by 2nd Street. The driver of the vehicle was Rivera, another patron who had been forcibly removed from 2nd Street earlier that evening by an employee of 2nd Street. The district court granted summary judgment in favor of the appellees, finding that Rivera's conduct in striking Pittman with his vehicle was not reasonably foreseeable and that therefore, 2nd Street did not breach its duty of reasonable care. Pittman appeals, and the appellees cross-appeal.

BACKGROUND

The Bienkowskis own 2nd Street, a drinking establishment in Hastings, Nebraska, that serves alcohol. In the early morning hours of December 2, 2007, while at 2nd Street, Rivera got into a physical altercation with his girlfriend, Snyder. An employee of 2nd Street, Craig Hubbard, intervened in the

altercation and forcibly removed Rivera from the premises. As he was being escorted out, Rivera was aggressive and assaultive toward Hubbard, but ultimately got into a vehicle with friends and was driven away by a designated driver. Hubbard considered the incident "'handled'" and did not contact police.

About an hour later and just as the bar was closing, Rivera returned to 2nd Street looking for Snyder. Hubbard confronted Rivera at the door and told him he was not allowed to come inside. Rivera became aggressive, and Hubbard escorted him outside to the parking lot once again. Rivera got into his vehicle and sped out of the parking lot, away from 2nd Street. He abruptly performed a U-turn and traveled toward and then past 2nd Street. He abruptly performed another U-turn, revved his engine, and raced toward a crowd of patrons who were standing on or near the property line between 2nd Street's parking lot and an adjacent roadway. At this moment, Pittman and some of his friends had recently left 2nd Street and were standing outside talking.

An employee of 2nd Street saw the vehicle approaching and yelled for Pittman to get out of the way. Pittman did not react in time and was struck by Rivera's vehicle. Rivera's assault with his vehicle happened quite rapidly. Approximately 60 seconds lapsed from the time Rivera entered his vehicle to the time Pittman was struck. Pittman sustained serious injuries as a result of the impact. Hubbard immediately called the 911 emergency dispatch service after Pittman was struck. Rivera was later convicted of and sentenced to prison for first degree assault and leaving the scene of an accident.

Pittman filed this action in the district court for Adams County, Nebraska, alleging that 2nd Street breached its duty to protect him from Rivera's actions. The appellees moved for summary judgment, asserting that they did not owe Pittman a duty of care and that even if they did, there was no breach of any duty because Rivera's conduct in running down Pittman with his vehicle was not reasonably foreseeable. The district

court found that 2nd Street owed Pittman a duty of reasonable care but held that the material and undisputed evidence confirmed that Rivera's conduct in striking Pittman with his vehicle was not a foreseeable risk. It therefore concluded as a matter of law that 2nd Street did not breach its duty to Pittman. It granted summary judgment in favor of the appellees. Pittman appeals, and the appellees cross-appeal. In previous proceedings, Snyder had been dismissed from the action. In a separate court order, Rivera and Erpelding, Rivera's mother and cosigner of the loan for the vehicle which struck Pittman, were found liable for negligence and assessed damages. They are not involved in this appeal.

ASSIGNMENTS OF ERROR

On appeal, Pittman assigns seven errors, which we combine and restate as follows: The district court erred in granting summary judgment in favor of the appellees, because foreseeability was a factual question upon which reasonable minds could differ and, therefore, such determination should have been left to the jury.

On cross-appeal, the appellees assign that the district court erred in finding that 2nd Street owed a duty of reasonable care to Pittman, because Nebraska's public policies warrant a no-duty determination in this case.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that

[1] *Sulu v. Magana, ante* p. 148, 879 N.W.2d 674 (2016).

party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

[3] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[3] To warrant summary judgment in their favor, the appellees had to submit evidence showing the absence of at least one of these elements. Here, the appellees moved for summary judgment on the bases that 2nd Street did not owe Pittman a duty of care and that even if it did, no reasonable person would find that it breached such duty, because Rivera's conduct in running down Pittman with his vehicle was not reasonably foreseeable.

On appeal, Pittman argues that 2nd Street had a duty to take reasonable steps to prevent danger or injury to its patrons if it knew or had reason to know of circumstances that presented a threat of injury by a third party. Pittman asserts that 2nd Street had knowledge of Rivera's assaultive and threatening behavior in its place of business and failed to take meaningful action to prevent Rivera from causing harm to other patrons. He argues that 2nd Street should have called law enforcement to remove Rivera, or at least should have warned its patrons that a violent and drunken person had been turned loose on the city streets, especially when Rivera got behind the wheel of a vehicle and 2nd Street knew its patrons were or soon would be leaving the bar. Pittman argues that summary judgment was improper, because foreseeability was a question of fact for the jury unless no reasonable person could differ on the question.

On cross-appeal, the appellees assert that the district court erred in finding 2nd Street owed Pittman a duty of reasonable care. They argue that Nebraska's premises liability is limited,

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[2] *Id.*

[3] *Phillips v. Liberty Mutual Ins. Co., ante* p. 123, 876 N.W.2d 361 (2016).

as a matter of public policy, to the boundaries of the premises and for the protection of individuals on the premises for business purposes. They also assert that the Nebraska Liquor Control Act, adopted in 1935, repealed the former dram shop acts which imposed civil liability upon drinking establishments for the intoxicated acts of its patrons. Thus, they argue that the public policy against imposing dram shop liability overrides any duty based upon premises liability and requires a no-duty determination.

Duty

[4] We begin our analysis by addressing whether 2nd Street owed Pittman a duty of care. The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[4] We have articulated the duty a business proprietor owes to protect its patrons from third parties as follows:

> "The modern general rule, summarized in its simplest terms, is 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."[5]

[5] Businesses that are open to the public are subject to a duty of reasonable care, regardless of whether they serve

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[4] *Peterson v. Kings Gate Partners*, 290 Neb. 658, 861 N.W.2d 444 (2015).

[5] *Schroer v. Synowiecki*, 231 Neb. 168, 173-74, 435 N.W.2d 875, 879 (1989) (emphasis omitted).

alcoholic liquor.[6] Thus, we agree with the district court's finding that 2nd Street owed a general duty based on premises liability, and we find no merit to the appellees' argument on cross-appeal that such duty is overridden by the public policy against dram shop liability.

Breach

Having determined that 2nd Street owed a duty of reasonable care to its patrons, we examine if there was a material issue of fact whether 2nd Street breached its duty of reasonable care.

[6,7] In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence.[7] The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable.[8] Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter.[9] Here, we agree with the district court's determination that Rivera's conduct in running down Pittman with his vehicle was not a foreseeable risk, and we conclude that summary judgment was proper because no reasonable person could differ on this matter.

[8] In order to make a risk of attack foreseeable, the circumstances to be considered must have a direct relationship to the harm incurred.[10] Rivera's prior conduct at the bar that night (i.e., assaultive and threatening behavior toward Snyder and Hubbard) was completely different in nature from his

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[6] See *id.*

[7] *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[8] See *id.*

[9] See *id.*

[10] *Id.*

later actions that harmed Pittman. There was no evidence that Rivera knew Pittman, that he had any reason to assault Pittman, or that he would intentionally try to run over a person outside the bar. Hubbard, as an employee of 2nd Street, had promptly removed Rivera from the premises upon observing his assaultive behavior and had observed him leaving the scene with a designated driver.

When Rivera returned to the premises and Hubbard discovered that he was driving a vehicle, it was not reasonably foreseeable that Rivera would use his vehicle to assault Pittman.

Even when viewed in the light most favorable to Pittman, he has not established there is a genuine issue of material fact whether 2nd Street breached its duty of reasonable care to Pittman. We conclude as a matter of law that no reasonable person would find that 2nd Street breached its duty of reasonable care regarding Pittman. Summary judgment in favor of 2nd Street was proper.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court.

Affirmed.

Miller-Lerman, J., participating on briefs.

Nebraska Supreme Court
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Douglas G. Deines, appellee, v. Essex Corporation, appellant.

879 N.W.2d 30

Filed May 20, 2016. No. S-15-170.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. That is so even where no party has raised the issue.
2. **Judgments.** A judgment is the final determination of the rights of the parties in an action.
3. **Final Orders.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
4. **Final Orders: Motions to Dismiss: Appeal and Error.** Every order vacating an order of dismissal and reinstating a case is not a final and appealable order; rather, each order must be analyzed to see if it comports with the statutory requirements of a final order.
5. **Final Orders: Appeal and Error.** Whether an order affects a substantial right depends on whether it affects with finality the rights of the parties in the subject matter. It also depends on whether the right could otherwise effectively be vindicated. An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.
6. **Final Orders.** An order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to one of the parties.
7. **Final Orders: Trial.** The fact than an order may move the case forward to trial does not mean that the order affects a substantial right of the opposing party. Ordinary burdens of trial do not necessarily affect a substantial right.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Appeal dismissed.

Michaelle L. Baumert, of Kutak Rock, L.L.P., and, on brief, Henry L. Wiedrich, of Husch Blackwell, L.L.P., for appellant.

Timothy S. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Stacy, J.

The plaintiff below, Douglas G. Deines, filed a civil action that was dismissed by the district court for failure to prosecute. Deines then filed a motion to vacate the dismissal and reinstate the case, which the court granted. The defendant below, Essex Corporation (Essex), has appealed, claiming the trial court erred in vacating the order of dismissal and reinstating the case. We conclude Essex has appealed from an order which is neither a judgment nor a final order, and we dismiss the appeal.

BACKGROUND

In May 2013, Deines filed a complaint seeking to recover earned commissions from his former employer under the Nebraska Wage Payment and Collection Act.[1] Essex filed an answer which, among other things, alleged Deines had been paid all commissions he was owed. After the case had been pending for approximately 15 months, the trial court issued a notice of intent to dismiss. The notice required the parties to take certain action within 30 days or the case would be dismissed for want of prosecution. No action was taken within the prescribed time. On November 13, 2014, the court entered an order dismissing the case for want of prosecution. Deines subsequently filed a motion to reinstate the case.

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[1] Neb. Rev. Stat. § 48-1228 et seq. (Reissue 2010).

At the hearing on the motion to reinstate, the parties offered affidavits reflecting their respective version of events. It was acknowledged that the order of dismissal was entered during the 2014 court term and that the motion to reinstate (more properly characterized as a motion to vacate the order of dismissal)[2] was not filed until January 21, 2015—roughly 3 weeks after commencement of the 2015 court term. After receiving evidence and considering the arguments of counsel, the court granted the motion and reinstated the case. Essex filed this appeal.

ASSIGNMENT OF ERROR

Essex assigns, restated, that the district court exceeded its equitable authority when it vacated the order of dismissal after the commencement of a new term.

JURISDICTION

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] That is so even where, as here, no party has raised the issue.[4]

Neb. Rev. Stat. § 25-1911 (Reissue 2008) gives appellate courts jurisdiction to review "[a] judgment rendered or final order made by the district court . . . for errors appearing on the record." In this appeal, whether we have jurisdiction to review the district court's order depends on whether Essex has appealed from either a judgment or a final order.

[2] The term "judgment" has a very specific statutory definition in the context of appellate jurisdiction. Under Neb. Rev.

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[2] See *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013) (court treats motion to reinstate case after order of dismissal as motion to vacate the order).

[3] *Williams v. Baird,* 273 Neb. 977, 735 N.W.2d 383 (2007); *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004).

[4] *Wilczewski v. Charter West Nat. Bank*, 290 Neb. 721, 861 N.W.2d 700 (2015).

Stat. § 25-1301(1) (Reissue 2008), "[a] judgment is the final determination of the rights of the parties in an action."

Here, the order vacating dismissal and reinstating the case is not a judgment. It does not address or decide the merits of the action and makes no final determination of the parties' rights. The order merely returns the case to the court's active docket for eventual resolution on the merits. Nor was the court's earlier order dismissing the case for want of prosecution a judgment under § 25-1301. The order of dismissal was without prejudice to a future action,[5] so it had no impact on the merits of the action. Although the order dismissed the action for failure to comply with the show cause order and thus effectively ended the case, it did so without finally determining the rights of the parties, and was not a judgment.

[3] We next consider whether the order vacating dismissal and reinstating the case is a final order for purposes of interlocutory appeal under Neb. Rev. Stat. § 25-1902 (Reissue 2008). An order is final for purposes of appeal under § 25-1902 if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[6]

[4] In *Jarrett v. Eichler*,[7] we broadly stated that "an order vacating a dismissal made within the same term in which the dismissal was granted is a final and appealable order." Our opinion in *Jarrett*, however, concluded the order was final and appealable only after determining it (1) was made in a special proceeding and (2) affected a substantial right. We therefore do not read *Jarrett* to adopt a blanket rule that every order vacating a dismissal and reinstating a case is final and appealable. Rather, the statutory criteria of § 25-1902 must be applied to determine whether the order appealed from is final.

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[5] See Neb. Rev. Stat. § 25-601 (Reissue 2008).

[6] § 25-1902.

[7] *Jarrett v. Eichler*, 244 Neb. 310, 313, 506 N.W.2d 682, 684 (1993).

We recognize that determining whether an order fits within any of the three categories described in § 25-1902 is often challenging for practitioners and judges.[8] However, in this appeal, it is not necessary to decide whether the order vacating dismissal and reinstating the case fits into any of the three categories, because the dispositive issue here is whether the order affects a substantial right in the action.

[5,6] Numerous factors determine whether an order affects a substantial right for purposes of interlocutory appeal. Broadly, these factors relate to the importance of the right and the importance of the effect on the right by the order at issue.[9] It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[10] Whether the effect of an order is substantial depends on "'whether it affects with finality the rights of the parties in the subject matter.'"[11] It also depends on whether the right could otherwise effectively be vindicated.[12] An order affects a substantial right when the right would be significantly undermined or irrevocably lost by postponing appellate review.[13] Stated another way, an order affects a substantial right if it "'affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.'"[14]

In *Jarrett*,[15] we found the order vacating dismissal and reinstating the case affected a substantial right because it destroyed

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[8] See, generally, John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239 (2001).

[9] See *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015).

[10] See *id.*

[11] *Id.* at 914, 870 N.W.2d at 138.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Jarrett v. Eichler, supra* note 7.

an affirmative defense that was available to the defendants once the action was dismissed for want of prosecution after the applicable statute of limitations had run. Here, unlike *Jarrett*, there is nothing in the record to suggest the order vacating dismissal and reinstating the action affects a substantial right of Essex. To the contrary, during oral argument, counsel for Essex agreed the order here did not diminish any claim or defense that was available before the case was reinstated.

[7] The order vacating dismissal and reinstating the case merely put the parties back in the same posture as before the action was dismissed for want of prosecution—working toward eventual resolution on the merits. "The fact that an order . . . may move the case forward to trial does not mean that the order affects a substantial right of the opposing party. Ordinary burdens of trial do not necessarily affect a substantial right."[16] The order reinstating the case does not affect with finality the parties' rights in this action, and nothing in the record suggests any party's rights will be diminished, undermined, or lost by postponing appellate review.[17]

We conclude on this record that the order vacating dismissal and reinstating the action is not a final order under § 25-1902, because it does not affect a substantial right.

CONCLUSION

The district court's order vacating the judgment of dismissal without prejudice and reinstating the action is not immediately appealable, because it is neither a final judgment under § 25-1301 nor a final order under § 25-1902. We have no jurisdiction over this interlocutory appeal.

Appeal dismissed.

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[16] *Platte Valley Nat. Bank v. Lasen*, 273 Neb. 602, 611, 732 N.W.2d 347, 353 (2007).

[17] See *id.*

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State of Nebraska, appellee, v. Vencil Leo Ash III, appellant.

878 N.W.2d 569

Filed May 20, 2016. No. S-15-327.

1. **Criminal Law: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
3. **Motions for New Trial: Appeal and Error.** A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.
4. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** An ineffective assistance of counsel claim is raised on direct appeal when allegations of deficient performance are made with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.
5. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel raised on direct appeal may be determined on direct appeal is a question of law.
6. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively

determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?

7. **Criminal Law: Motions for Mistrial.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
8. **Motions for Mistrial.** Events that may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters.
9. **Motions for Mistrial: Appeal and Error.** Whether to grant a motion for mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
10. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
11. **Evidence.** Evidence is relevant if it has 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.
12. **Verdicts: Juries: Appeal and Error.** In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial court was surely unattributable to the error.
13. **Motions for Mistrial: Motions to Strike: Appeal and Error.** Generally, error cannot 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.
14. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
15. **Effectiveness of Counsel: Proof: Presumptions: Appeal and Error.** The two prongs of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.

16. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.
17. **Rules of Evidence: Hearsay: Words and Phrases.** Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.
18. **Effectiveness of Counsel: Proof: Appeal and Error.** When making an ineffective assistance of counsel claim on direct appeal, allegations of prejudice are not required. However, a defendant must make specific allegations of the conduct that he or she claims constitutes deficient performance.
19. **Effectiveness of Counsel.** A general allegation that counsel failed to object, without any kind of assertion as to what grounds supported any objection, is insufficient to preserve a claim that trial counsel performed deficiently.

Appeal from the District Court for Kimball County: Derek C. Weimer, Judge. Affirmed.

Leonard G. Tabor for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ.

Stacy, J.

I. INTRODUCTION

This is the second time Vencil Leo Ash III has been before us challenging his conviction for first degree murder. In 2012, Ash was convicted of the first degree murder of Ryan Guitron and was sentenced to life in prison. On direct appeal, we reversed, and remanded for a new trial. We found the trial court erred in denying Ash's request for a continuance after the State disclosed, on the brink of trial, that a codefendant would be testifying pursuant to a plea agreement.[1]

[1] *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013).

Ash was retried in 2015, and again was found guilty of first degree murder and sentenced to life in prison. He timely filed this direct appeal and was appointed different counsel to represent him on appeal. We affirm his conviction and sentence.

II. BACKGROUND

On November 4, 2003, Guitron was reported missing by his girlfriend. Guitron's remains were discovered nearly 7 years later, on April 8, 2010, under a woodpile on an abandoned farm in rural Kimball County, Nebraska. The cause of death was determined to be two gunshot wounds, one through his right eye and the other through the back of his neck. The bullet recovered from Guitron's skull was fired from a .380-caliber pistol purchased by Ash's sister. Guitron's death was found to have occurred on October 15, 2003.

In August 2003, Ash and his 15-year old girlfriend, Kelly Meehan (whom Ash later married), began living with Guitron in Fort Collins, Colorado. Guitron, Ash, and Meehan were methamphetamine users. After living together for several weeks, Ash and Meehan moved out of Guitron's trailer home and began living in a tent near Grover, Colorado. While living in the tent, Ash retrieved the .380-caliber pistol from his sister because Meehan wanted some form of protection. Ash was with his sister when she purchased the pistol on August 1, 2003, in Walsenburg, Colorado.

1. Meehan's Version of Events

Meehan testified that Ash threatened to kill Guitron after finding Meehan's bra and underwear in Guitron's backpack, along with a pornographic magazine. On the day of the murder, Ash asked Guitron to travel with Ash and Meehan to get methamphetamine. Ash drove them in Guitron's car to an abandoned farm. Ash, Guitron, and Meehan smoked methamphetamine during the drive, and again upon arriving at the abandoned farm.

According to Meehan, all three got out of Guitron's car and walked around the farm. They discovered parts of a baby bed,

and Ash instructed Meehan to collect the parts and take them back to the car. On her way back to the car, Meehan heard a gunshot. She looked back and saw Ash standing over Guitron's body, holding the .380-caliber pistol. Meehan testified this was the first time she had seen the pistol that day, because Ash normally tucked the pistol in his pants. Meehan stated she did not hear or see a struggle or see any other weapon during the incident. Ash then walked to the car, got a pair of black gloves, and told Meehan he was going to bury Guitron under a woodpile near the farm. According to Meehan, after Ash covered up the body, they left to get gas and then drove Guitron's car back to Fort Collins. During the drive to Fort Collins, Ash told Meehan that Guitron had come after him with a knife, so Ash shot him.

2. Ash's Version of Events

Ash denied finding Meehan's bra and underwear in Guitron's backpack and claimed he and Guitron were good friends. Ash claimed that on the day of the murder, he, Guitron, and Meehan went in Guitron's car to get some iodine from Guitron's source so that Ash could "'cook'" more methamphetamine.[2] The three of them smoked methamphetamine during the drive. Ash missed a turn, and they ended up at an abandoned farm where some old cars caught his eye. Ash claimed he left his sister's .380-caliber pistol in a cooler in the back seat next to Meehan. According to Ash, they found a baby bed while walking the farm property. Ash went back to the car to retrieve tools so that Meehan could dismantle the baby bed, and at the same time, Guitron returned to the car and got a .22-caliber rifle. While Meehan dismantled the baby bed, Ash and Guitron continued to search the property.

During the search, Guitron wanted to smoke more methamphetamine, but discovered none was left. According to Ash, Guitron said that "'he was going to kill that . . . bitch,'"

[2] *Id.* at 684, 838 N.W.2d at 276.

referring to Meehan, and "'took off running'" with the rifle in hand.[3] Ash claimed he went after Guitron and saw Guitron fire a shot from the .22-caliber rifle at Meehan. Ash then knocked the rifle out of Guitron's hand, which caused another round to go off. The two men struggled, and then Ash saw Meehan and heard a shot. The men fell to the ground, and Ash heard another shot. Ash claimed he then saw Guitron lying on the ground and saw Meehan in the car, banging her head against the dashboard. Ash claimed he and Meehan then left in Guitron's car to get gas. They returned, however, to pick up the rifle and retrieve from Guitron's person the address for Guitron's iodine source.

After the murder, Ash traded Guitron's car for a Cadillac Escalade. Ash and Meehan then drove the Escalade to Guitron's home in Fort Collins and loaded some of Guitron's property into the Escalade.

3. Investigation

On October 18, 2003, 3 days after Guitron's death, Ash was arrested on a warrant for parole violations. The Escalade remained with Meehan after Ash's arrest. The following day, Meehan was arrested on a juvenile warrant, and the .380-caliber pistol was discovered under Meehan's bed at Ash's sister's house, where Meehan had been living. After Meehan's arrest, the Escalade was towed and several of Guitron's possessions were found inside, including his credit card and various personal items. Pieces of the baby bed gathered on the day of the murder were also found in the Escalade. Later, on November 24, law enforcement retrieved the .380-caliber pistol from Ash's sister. It was not disputed that this was the weapon used to shoot Guitron.

After Guitron's disappearance, Ash was questioned by law enforcement on several occasions. On November 4, 2003, Ash indicated he had last seen Guitron on October 17. Ash

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[3] *Id.* at 684, 838 N.W.2d at 277.

claimed Guitron was supposed to pick him up to work at an oil rig the next day, but never showed up. On March 18, 2004, Ash was interviewed by the lead investigator into Guitron's disappearance. At that time, Ash claimed he had seen Guitron alive on October 18, 2003, at Guitron's home. Ash denied killing Guitron, but at the end of the interview, unsolicited, he asked whether they had found Guitron's body. Ash then stated that if Guitron was dead, law enforcement would have found his body because it had been quite some time since Guitron's disappearance.

On April 2, 2010, Meehan was interviewed by law enforcement on a different matter. During the interview, she volunteered that Ash had killed Guitron. Meehan was then escorted by the lead investigator to try to locate the abandoned farm, but she failed to do so. A few days later, on April 7, the lead investigator again interviewed Ash. During this interview, Ash initially denied shooting Guitron, but then admitted shooting Guitron twice to protect Meehan because Guitron was shooting at her. Ash then directed law enforcement to the abandoned farm, where Guitron's remains were later discovered.

Officers also located two .22-caliber rifle casings at the abandoned farm. One casing was found on top of the dirt, and the other on top of some cement; neither casing was rusted. Based on the locations of the two casings, law enforcement determined the casings could not have been ejected to their respective locations from where Guitron had been shot, as shown by physical evidence that still remained at the scene, or from where his remains were located.

Ash was charged with first degree murder in connection with Guitron's death. In a separate information, Meehan was charged with aiding and abetting the first degree murder of Guitron.[4] Meehan eventually reached a plea agreement with the State, and she testified as a central witness against

[4] *State v. Ash, supra* note 1.

Ash at both the first and the second jury trial. After the second jury trial, Ash was found guilty of first degree murder and sentenced to life in prison. He timely filed this direct appeal.

III. ASSIGNMENTS OF ERROR

Ash presents four assignments of error on appeal: (1) There was insufficient evidence to support the jury verdict, (2) the trial court erred in various evidentiary rulings made during trial, (3) the trial court erred in overruling his motion for new trial, and (4) his trial counsel was ineffective.

IV. STANDARD OF REVIEW

[1] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[5]

[2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[6]

[3] A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.[7]

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[5] *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015); *State v. Esch*, 290 Neb. 88, 858 N.W.2d 219 (2015).

[6] *State v. Newman*, 290 Neb. 572, 861 N.W.2d 123 (2015); *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

[7] *State v. Stricklin, supra* note 6; *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

[4] An ineffective assistance of counsel claim is raised on direct appeal when allegations of deficient performance are made with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.[8]

[5,6] Whether a claim of ineffective assistance of trial counsel raised on direct appeal may be determined on direct appeal is a question of law.[9] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?[10]

V. ANALYSIS

1. Sufficiency of Evidence

Ash argues the evidence was insufficient to convict him of first degree murder. His brief highlights several inconsistencies in the evidence—particularly in the testimony of Meehan. Ash suggests that because of these inconsistencies, the evidence presented lacked sufficient probative value. We disagree.

The evidence submitted at the second trial, including Meehan's testimony, was substantially similar to the evidence submitted at the first trial. In Ash's first direct appeal, we specifically analyzed whether the evidence presented was sufficient to convict Ash of first degree murder, and found

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[8] See, *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014); *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[9] See *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

[10] *Id.*

it was.[11] Ash now argues that Meehan's testimony was not credible, but it is not this court's function to assess the credibility of witnesses when determining the sufficiency of the evidence.[12] Viewed in the light most favorable to the prosecution, the evidence presented at the second trial was sufficient for a rational jury to find beyond a reasonable doubt that Ash was guilty of first degree murder. This assignment of error is without merit.

2. Errors in Trial Court Rulings

Ash assigns broadly that there were "[e]rrors in the ruling of the trial court during the trial."[13] In his brief, Ash identifies six rulings relating to this assignment of error. We address each in turn.

(a) State's Opening Statements and Motion for Mistrial

During opening statements, the prosecutor gave a detailed and lengthy summary of the procedural and substantive history of the case. As part of that summary, the prosecutor said detectives had a "big break" in April 2010 when Meehan was interviewed on an unrelated incident. The prosecutor explained that "during that interview," Meehan told investigators she had information about Guitron's disappearance. The prosecutor then went on to describe Meehan's general version of events and, in doing so, referred sometimes to Meehan's anticipated trial testimony using typical phrases like "she will tell you" and "she will testify" and other times referred instead to what Meehan "said." Ash did not object to the prosecutor's remarks during the State's opening statement. Instead, after both parties' opening statements were finished and the jurors were excused for the evening, Ash made a record of his

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[11] *State v. Ash, supra* note 1.

[12] *State v. Dominguez, supra* note 5.

[13] Brief for appellant at 18.

objection that the prosecutor's opening statement referenced inadmissible hearsay, and moved for mistrial. In opposing the motion, the State conceded the prosecutor's remarks had been imprecise, but argued the point was to "get across the fact that this is [Meehan's] story and this is the story [the jury would] hear . . . when she comes up [to] testify." The court overruled the motion for mistrial.

[7-9] Ash contends the overruling of his motion for mistrial was error. A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[14] Events that may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters.[15] Whether to grant a motion for mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.[16]

Assuming without deciding that Ash's objection adequately preserved the issue for appellate review, we conclude the court did not abuse its discretion in overruling the motion for mistrial. Our review of the record demonstrates the prosecutor's description of Meehan's testimony was ambiguous in terms of tense, and the jury could easily have understood the prosecutor's remarks as foretelling Meehan's trial testimony, rather than referencing what she actually said to investigators in 2010. The prosecutor's occasional reference to "she said" rather than "she will testify" in the opening statement is not the type of egregious or prejudicial statement that requires a mistrial, particularly when the jury was specifically admonished

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[14] *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013).

[15] *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[16] *Id.*

that counsel's statements were not evidence. There is no merit to this assignment of error.

(b) Guitron's Oakland Raiders Jacket and Television

At trial, the State presented evidence that Ash had pawned two items belonging to Guitron: an Oakland Raiders jacket and a television. The jacket was pawned 2 days before the murder and the television 2 days after. Ash objected to this evidence based on Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014), arguing it was inadmissible character evidence. The court overruled his objections and admitted the evidence.

[10] Ash asserts in his brief that this evidence was erroneously admitted, but he presents no argument as to how or why the court erred, and we decline to speculate. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[17] This requirement is not designed to impede appellate review, but to facilitate it by preventing parties from shifting to appellate courts the critical tasks of searching the record for relevant facts, identifying possible error, and articulating a legal rationale that supports the assigned error. Because Ash presents no argument regarding the error he assigns to admission of this evidence, the issue is not properly presented for appellate review and we do not address it further.

(c) Meehan's Testimony

In his brief, Ash asserts that Meehan testified she regretted telling investigators about Ash's role in Guitron's murder, because she married Ash in 2010. Ash also notes there was evidence he and Meehan had several conversations about her anticipated testimony. Other than generally referencing this evidence, Ash's brief cites no evidentiary ruling he claims was

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[17] *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015); *State v. Filholm, supra* note 8.

erroneous and presents no argument that the admission of this evidence resulted in any type of error or prejudice. We are left to speculate as to both the source and the nature of any error, and we decline to do so.

An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[18] Because this error was assigned but not argued, we do not address it further.

(d) Guitron's Background

During trial, an investigator was asked by the State whether Guitron was "wanted" for any criminal activity at the time of his disappearance. Ash objected to the question on relevance, but the objection was overruled. The investigator responded that Guitron did not have any outstanding warrants.

[11,12] On appeal, Ash contends his objection should have been sustained because whether Guitron had warrants at the time of his disappearance was not relevant evidence. Evidence is relevant if it has "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."[19] Assuming that overruling the objection was error, we nevertheless conclude it was harmless. In a harmless error review, an appellate court looks at the evidence upon which the jury rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the guilty verdict rendered in the trial was surely unattributable to the error.[20] Here, the guilty verdict was surely unattributable to any error in admitting the evidence regarding Guitron's lack of warrants.

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[18] *Id.*

[19] Neb. Rev. Stat. § 27-401 (Reissue 2008).

[20] *State v. Britt, ante* p. 381, 881 N.W.2d 818 (2016); *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016).

(e) Premeditation Instruction

At the jury instruction conference, Ash asked that the jury be instructed using only the statutory definition of premeditation set forth in Neb. Rev. Stat. § 28-302(3) (Reissue 2008), which provides: "Premeditation shall mean a design formed to do something before it is done." In jury instruction No. 5, the district court instead gave a premeditation definition consistent with NJI2d Crim. 4.0: "Premeditated/Premeditation means to form the intent to do something before it is done. The time needed for premeditation may be so short as to be instantaneous provided that the intent to act is formed before the act and not simultaneously with the act."

Ash's brief contends this was error, but does not argue or explain why. Because the alleged error is not both assigned and argued, it is not preserved for our review.[21]

(f) Hearsay During Investigator's Testimony

During the State's examination of an investigator, the following exchange took place:

> Q. Okay, do you recall what you told Investigator Maul at that time?
>
> A. Something to the effect that —
>
> [Defense counsel]: I'm going to object [on] hearsay.
>
> THE COURT: That's overruled. Go ahead.
>
> . . . .
>
> A. It was something to the effect that we had developed some information about a possible missing person that they were working and . . . Meehan had just told me that . . . Ash had killed . . . Guitron.
>
> [Defense counsel]: Object, move to strike.

The court then sustained defense counsel's objection, struck the investigator's response, and admonished the jury to disregard the investigator's statement about what Meehan had told

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[21] See, *State v. Cook, supra* note 17; *State v. Filholm, supra* note 8.

him. Ash then moved for a mistrial, and the court overruled the motion. Ash now argues the court abused its discretion in overruling the motion for mistrial.

[13] Generally, error cannot 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.[22] Moreover, although the investigator's testimony was hearsay, its admission here was harmless. It was not important at trial that one investigator told another investigator what Meehan had reported, particularly since Meehan herself testified at trial that Ash killed Guitron. Under the circumstances, the court did not abuse its discretion in overruling the motion for mistrial, and this assignment of error has no merit.

3. Denial of Motion for New Trial

Ash argues the district court erred in overruling his motion for new trial, because the evidence was insufficient to show the murder occurred in Nebraska. But there was evidence presented at trial via Meehan, and Ash's own testimony from the first trial, that the murder occurred on a farm located in Kimball County. That evidence was sufficient to support the venue of the murder in Kimball County. There was no abuse of discretion in denying Ash's motion for new trial on this basis.

We note that in his brief, Ash also makes reference to testimony he gave at the hearing on his motion for new trial—testimony to the effect that his earlier statements and testimony regarding the location of the murder were involuntary. However, because Ash presents no argument with respect to these statements, and because no error was assigned regarding these statements, we do not address this issue on appeal.[23]

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[22] *State v. Davis*, 290 Neb. 826, 862 N.W.2d 731 (2015).

[23] See, *State v. Cook, supra* note 17; *State v. Filholm, supra* note 8.

4. Ineffective Assistance of Trial Counsel

[14,15] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[24] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[25] The two prongs of this test may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.[26]

[16] Ash is represented on direct appeal by different counsel than the counsel who represented him at trial. When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.[27] An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court.[28]

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal.[29] The determining factor is whether

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

[25] *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015); *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013).

[26] *State v. Cullen, supra* note 9.

[27] *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

[28] See, *State v. Abdullah, supra* note 8; *State v. Filholm, supra* note 8.

[29] *State v. Cullen, supra* note 9.

the record is sufficient to adequately review the question.[30] An ineffective assistance of counsel claim will not be resolved on direct appeal if it requires an evidentiary hearing.[31]

(a) Stipulations

The parties stipulated that on December 13, 2003, law enforcement conducted a traffic stop of a car owned by Guitron. The driver told officers she received the car from her brother. The brother had received the car from Ash after trading the Escalade. The parties also stipulated that the .380-caliber pistol identified as the murder weapon was submitted for DNA testing, but that no usable DNA profile was discovered. Ash argues his trial counsel performed deficiently by entering into these stipulations, because it "made it easier for the [S]tate to try the case."[32]

Defense counsel does not perform in a deficient manner simply by failing to make the State's job more difficult. And Ash offers no other argument as to why his counsel's performance regarding these stipulations was deficient. Most notably, there is no argument that the State would have been unable to offer the evidence in the absence of the stipulations. This assignment of error is without merit.

(b) Dr. Schilke's Testimony

Dr. Peter Schilke, a pathologist, performed an autopsy on Guitron's remains. He testified on direct that he sent the jawbone and teeth to a forensic dentist for a positive identification of the body. Schilke then testified that he was aware the forensic dentist was able to positively identify the remains as those of Guitron. Ash's counsel did not object to this testimony from Schilke. On appeal, Ash contends this was deficient performance because the testimony was hearsay.

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[30] *Id.*

[31] *Id.*

[32] Brief for appellant at 40.

[17] Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.[33] We need not analyze whether Schilke's testimony was hearsay, because even if it was, the record affirmatively shows Ash was not prejudiced by his attorney's failure to object. There was no dispute at trial that the skeletal remains were Guitron's, and at least one other expert testified the remains were identified as belonging to Guitron. The record here affirmatively shows the admission of Schilke's testimony did not amount to prejudicial error sufficient to support a claim for ineffective assistance of counsel.

(c) Ash's Recorded Interview

During trial, portions of an April 7, 2010, recorded interview between Ash and law enforcement were played for the jury. Trial counsel did not object. On appeal, Ash contends the failure to object was deficient performance. He does not, however, explain why or on what grounds an objection should have been made.

[18,19] When making an ineffective assistance of counsel claim on direct appeal, allegations of prejudice are not required.[34] However, a defendant must make specific allegations of the conduct that he or she claims constitutes deficient performance.[35] Appellate counsel must present the claim with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.[36] A general allegation that counsel failed to object, without any

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[33] *State v. Stricklin, supra* note 6.

[34] *State v. Casares, supra* note 27.

[35] *State v. Filholm, supra* note 8.

[36] See, *State v. Abdullah, supra* note 8; *State v. Filholm, supra* note 8.

kind of assertion as to what grounds supported any objection, is insufficient to preserve a claim that trial counsel performed deficiently.[37]

Because he has not indicated any grounds which support an objection to this evidence, Ash has not raised this claim with sufficient particularity, and we therefore conclude it is not properly raised in this direct appeal.[38]

(d) DNA Analysis

Ash argues in his brief that his trial counsel possessed a report showing female DNA was on the barrel of the murder weapon, and he claims counsel performed deficiently by failing to offer the DNA report at trial. We need not determine whether counsel was deficient in failing to offer the report, because even if he was, the record affirmatively shows Ash was not prejudiced by the failure to offer the report. Evidence at trial demonstrated that two females—Meehan and Ash's sister—came in contact with the gun after the murder but before the gun was recovered by police. Under the circumstances, the presence of female DNA evidence on the barrel of the gun was not exculpatory to Ash. This assignment of error is without merit.

(e) Aquilla Rios' Statement

Ash argues his trial counsel had a statement from Aquilla Rios wherein Rios stated that Meehan told her she was in the car when the murder happened. Ash argues his trial counsel performed deficiently by failing to get the statement from Rios into evidence. Ash suggests Rios' statement would have affected Meehan's credibility, because Meehan testified at trial that she was walking to the car when she heard the gunshot. We conclude the record on direct appeal is insufficient to address this claim.

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[37] See *State v. Filholm, supra* note 8.

[38] See, *State v. Abdullah, supra* note 8; *State v. Filholm, supra* note 8.

(f) Investigation of Rios and Drug Psychosis Expert

In our prior opinion,[39] we concluded Ash was prejudiced when the district court denied his motion for a continuance, because he did not have an opportunity to investigate either Meehan's statements that she experienced drug-induced hallucinations or her prior statement to Rios about the murder. In his brief, Ash generally asserts that his trial counsel failed to investigate either of these matters after remand. He does not specifically state why trial counsel was deficient in not doing so, but implies that if we deemed it necessary to permit a continuance in order to allow counsel the opportunity to investigate these matters, it was important enough that counsel should have conducted further investigation.

We conclude the record is insufficient to review this claim on direct appeal.

(g) Psychiatric Evaluation of Meehan

Ash claims his trial counsel possessed a psychiatric evaluation performed on Meehan when she was 16, but never offered or used the evaluation at trial. Ash makes no further allegation about what the contents of the evaluation were, how it could have been used, or what it might have been offered to prove. We conclude Ash has not alleged deficient performance with sufficient particularity, and therefore this claim is not properly raised in this appeal.[40]

(h) Motion to Suppress

Ash argues his trial counsel was ineffective because he did not file a motion to suppress any of the State's evidence. Ash does not identify any specific evidence which should have been suppressed, nor does he specify any legal basis for filing such a motion. We conclude Ash has not alleged deficient

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[39] *State v. Ash, supra* note 1.

[40] See, *State v. Abdullah, supra* note 8; *State v. Filholm, supra* note 8.

performance with sufficient particularity, and therefore this claim is not properly raised in this appeal.[41]

(i) Attorney Visits and Letter From Meehan

Ash asserts that his trial counsel visited him only two or three times while he was incarcerated. Ash also asserts he gave his trial counsel a letter from Meehan in which she confessed to the murder, but his counsel made no use of that letter at trial.

We understand this assignment to allege trial counsel performed deficiently by not adequately preparing for trial and not presenting exculpatory evidence. We determine the record is insufficient to review this claim on direct appeal.

(j) Ash's Former Trial Testimony

Ash's testimony from the first trial was offered into evidence at the second trial. His counsel objected to portions of the prior testimony, and those portions were redacted and not admitted at the second trial. Ash contends his trial counsel was ineffective for failing to object to the entirety of Ash's former trial testimony.

Ash does not, however, explain what was objectionable about the remainder of his prior testimony or allege why his counsel performed deficiently in failing to object to the prior testimony in its entirety. We conclude this claim has not been presented with sufficient particularity, and therefore it is not properly raised in this appeal.[42]

(k) Venue of Murder

Ash argues his trial counsel never followed up on Ash's assertions that the crime was committed in Colorado, rather than Nebraska. We conclude the record affirmatively

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[41] See *id.*

[42] See *id.*

disproves this allegation of ineffective assistance of counsel. Ash testified at his first trial that the crime occurred in Nebraska. After his second trial, during the hearing on his motion for new trial, Ash testified that after the guilty verdict was returned, he called his attorney and provided the attorney with information that the murder occurred in Colorado. The record affirmatively shows that Ash's counsel followed up on the information, and eventually filed a motion for new trial based on the information. This assignment of error is without merit.

(l) Evidence at Hearing on Motion for New Trial

At the hearing on the motion for new trial, the State offered exhibits 138 to 143, which generally consisted of prior statements made by Ash concerning the location of Guitron's murder and revealing Ash's motivation for challenging the location of the murder after his conviction. Ash contends his trial counsel was ineffective in failing to object to his prior statements.

Ash does not indicate on what grounds counsel could have objected. We conclude deficient performance has not been alleged with sufficient particularity, and therefore this claim is not properly raised in this appeal.[43]

(m) Witness Todd Rowell

Ash argues his trial counsel had information about a witness named "Todd Rowell" who "had some information which would have corroborated [Ash's] testimony."[44] He contends trial counsel was deficient in failing to further investigate Rowell or subpoena him.

Ash does not explain what information Rowell possessed or what part of Ash's testimony would have been corroborated

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[43] See *id.*

[44] Brief for appellant at 44.

by Rowell. This allegation of deficient performance is not made with sufficient particularity, and therefore this claim is not properly raised in this appeal.[45]

(n) Motion for Directed Verdict

Ash contends his trial counsel was deficient for failing to move for a directed verdict. He implies such a motion should have been made because the evidence was insufficient to convict. We disagree.

As already noted, there was sufficient evidence in the record to support the jury verdict. The record thus affirmatively shows counsel was not deficient in failing to move for a directed verdict, and this claim is without merit.

VI. CONCLUSION

Ash's claim that there was insufficient evidence to support the verdict is without merit. None of Ash's claims of trial court error have merit. The motion for new trial was properly denied. Any claim of ineffective assistance of counsel is either affirmatively disproved by the record, not sufficiently presented for our review, or not able to be reviewed on the record before us. Accordingly, Ash's conviction and sentence are affirmed.

Affirmed.

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[45] See, *State v. Abdullah, supra* note 8; *State v. Filholm, supra* note 8.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Heath A. Shurigar, appellant, v. Nebraska State Patrol, appellee.

879 N.W.2d 25

Filed May 20, 2016. No. S-15-396.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
6. **Statutes: Legislature: Intent.** When construing a statute, a court's objective is to determine and give effect to the legislative intent of the enactment.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Justin J. Cook, of Lincoln Law, L.L.C., for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Kelch, JJ.

Kelch, J.

NATURE OF CASE

This is an appeal, pursuant to the Administrative Procedure Act, from the district court's order affirming an order of the Nebraska State Patrol (State Patrol), which denied Heath A. Shurigar's application for a permit to carry a concealed handgun. The State Patrol denied Shurigar's application because it determined that a prior conviction in Oklahoma disqualified Shurigar under Neb. Rev. Stat. § 69-2433(8) (Cum. Supp. 2014). That decision was affirmed following an administrative hearing. Shurigar appealed to the district court, which also affirmed. Now, Shurigar appeals to this court.

FACTS

On April 18, 2013, Shurigar submitted a "Nebraska Concealed Handgun Permit Application" to the State Patrol. On the application, Shurigar acknowledged that he had been convicted of violating a law relating to firearms in the past 10 years. In a handwritten attachment to the application, Shurigar explained that 1 year prior to his application, he had been found to be in possession of a loaded pistol in the State of Oklahoma and later had pled guilty to the Oklahoma crime of "Transporting Loaded Firearm in Motor Vehicle, Misdemeanor." Because of this prior conviction, the State Patrol denied Shurigar's application.

After receiving notice that his application was denied, Shurigar requested an administrative hearing before the State Patrol. The request was granted. At the administrative hearing, a court document from Oklahoma was received into evidence; that document reflected that Shurigar had pled guilty to the charge of transporting a loaded firearm in a motor vehicle. Shurigar also testified and admitted to his conviction. A copy of the Oklahoma criminal statute that Shurigar pled guilty of violating was also admitted into evidence.

After the administrative hearing, the State Patrol again denied Shurigar's application for a concealed handgun permit, reasoning that Shurigar's conviction in Oklahoma disqualified him from obtaining such permit pursuant to § 69-2433(8). That statute provides, in relevant part:

An applicant shall:

. . . .

(8) Not have had a conviction of any law of this state relating to firearms, unlawful use of a weapon, or controlled substances or of any similar laws of another jurisdiction within the ten years preceding the date of application. This subdivision does not apply to any conviction under Chapter 37 or under any similar law of another jurisdiction, except for a conviction under section 37–509, 37–513, or 37–522 or under any similar law of another jurisdiction.

From the State Patrol's order, Shurigar appealed to the district court. Shurigar alleged that he was not disqualified from obtaining the concealed handgun permit under § 69-2433(8), because his conviction for transporting a loaded firearm in a motor vehicle was not similar to Neb. Rev. Stat. § 37-522 (Reissue 2008). Section 37-522 provides in part: "It shall be unlawful to have or carry, except as permitted by law, any shotgun having shells in either the chamber, receiver, or magazine in or on any vehicle on any highway."

The applicable portion of the Oklahoma statute which Shurigar was convicted of violating, Okla. Stat. Ann. tit. 21, § 1289.13 (West 2015), provides: "[I]t shall be unlawful to transport a loaded pistol, rifle or shotgun in a landborne motor vehicle over a public highway or roadway."

The district court determined that Shurigar's conviction in Oklahoma for transporting a loaded firearm in a motor vehicle was similar to § 37-522 and therefore affirmed the State Patrol's denial of Shurigar's application. Shurigar appeals.

ASSIGNMENTS OF ERROR

Shurigar assigns, restated, that the district court erred (1) in deciding that the Oklahoma conviction was sufficiently similar to a conviction under § 37-522 so as to disqualify him under § 69-2433(8) and (2) in failing to consider the legislative intent and primary purpose of § 69-2433.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Underwood v. Nebraska State Patrol*, 287 Neb. 204, 842 N.W.2d 57 (2014).

[2-4] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Underwood, supra.* When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Underwood, supra.* Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id*.

ANALYSIS

The issue in this case is whether Okla. Stat. Ann. tit. 21, § 1289.13, is a law "similar" to § 37-522 within the meaning of § 69-2433. Shurigar argues it is not, and we disagree.

[5,6] The phrase "similar laws" is not defined by § 69-2433(8). Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013); *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011). When construing a statute, a court's objective is to determine and give effect to the legislative intent of the enactment. *State v. Mena-Rivera*, 280 Neb.

948, 791 N.W.2d 613 (2010). Turning to the plain and ordinary meaning of the word "similar," Merriam-Webster's Collegiate Dictionary 1090 (10th ed. 2001) defines the term as "having characteristics in common."

Next, we must consider the similarities or "characteristics in common" between the Oklahoma and Nebraska statutes at issue. As noted, the applicable portion of § 37-522 states: "It shall be unlawful to have or carry, except as permitted by law, any shotgun having shells in either the chamber, receiver, or magazine in or on any vehicle on any highway." In comparison, the applicable portion of Okla. Stat. Ann. tit. 21, § 1289.13, states: "[I]t shall be unlawful to transport a loaded pistol, rifle or shotgun in a landborne motor vehicle over a public highway or roadway." Both statutes prohibit the transportation of loaded guns on a highway. The main difference is that Nebraska's statute prohibits the transportation of a loaded *shotgun*, whereas, Oklahoma's statute prohibits the transportation of a loaded *pistol, rifle, or shotgun*. We find that this constitutes "characteristics in common" and that Okla. Stat. Ann. tit. 21, § 1289.13, is a law "similar" to § 37-522 within the meaning of § 69-2433. This assignment is without merit.

Lastly, we must also address Shurigar's claim that the district court failed to consider the legislative intent and primary purpose of § 69-2433. To the contrary, the district court stated that "[t]he obvious purpose of § 69-2433 is to prevent people with a demonstrated propensity to commit crimes, including crimes involving acts of violence, from carrying concealed weapons so as to minimize the risk of future gun violence." Citing *Underwood*, 287 Neb. at 211, 842 N.W.2d at 62. This court observed in *Underwood* that in enacting the Concealed Handgun Permit Act, the Legislature was "'concerned with the future behavior of a holder of a [gun] permit,'" and that the Legislature had deemed certain past crimes to be indicative of future behavior and therefore precluded persons who had committed those crimes from being eligible to obtain a concealed handgun permit. 287 Neb. at 211, 842 N.W.2d at 62.

Further, Shurigar argues that transporting a loaded pistol on a highway "cannot possibly be construed as a 'crime of violence.'" Brief for appellant at 13. This argument assumes that the Legislature, in enacting the Concealed Handgun Permit Act, is concerned solely with crimes of violence. However, § 69-2433 disqualifies persons from obtaining a concealed handgun permit, not only if they "have been convicted of a misdemeanor crime of violence" under subsection (5), but also if they have been convicted of certain laws "relating to firearms [or] unlawful use of a weapon" under subsection (8).

The Legislature clearly deems a person to be a risk if they have violated § 37-522, which makes it unlawful to transport a loaded shotgun on a highway in Nebraska. We see no reason why a person violating another jurisdiction's law against transporting a loaded *pistol* on a highway would be any less of a risk of committing future crimes than a person transporting a loaded shotgun. To the contrary, a violation of such a law shows the person's unwillingness to conform to the law. Accordingly, the district court properly considered the legislative intent and primary purpose of § 69-2433.

CONCLUSION

The district court did not err in deciding that the Oklahoma conviction was sufficient grounds to deny the application under § 69-2433(8) based upon a firearm conviction of "similar laws" of another jurisdiction. The decision of the district court affirming the State Patrol's order denying Shurigar's application for a permit to carry a concealed handgun is hereby affirmed.

Affirmed.

Stacy, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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Brian J. Adams, appellant, v. State of Nebraska Board of Parole et al., appellees.

879 N.W.2d 18

Filed May 20, 2016. No. S-15-612.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Constitutional Law: Statutes.** The constitutionality of a statute presents a question of law.
3. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
4. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
5. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
6. ____: ____: ____. The unconstitutionality of a statute must be clearly established before it will be declared void.
7. **Constitutional Law.** Nebraska's separation of powers clause prohibits the three governmental branches from exercising the duties and prerogatives of another branch.
8. ____. The separation of powers clause prohibits a branch from improperly delegating its own duties and prerogatives—except as the constitution directs or permits.
9. **Constitutional Law: Judicial Construction.** Deciding whether the Nebraska Constitution has committed a matter to another governmental branch, or whether the branch has exceeded its authority, is a delicate exercise in constitutional interpretation.
10. **Constitutional Law: Probation and Parole.** The Nebraska Constitution vests the Board of Parole with the power to grant paroles.

11. **Legislature: Sentences: Probation and Parole.** The Legislature has declared that every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence, as adjusted for good time.
12. **Constitutional Law: Intent.** Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary.
13. **Constitutional Law: Courts: Intent.** If the meaning is clear, the Nebraska Supreme Court gives a constitutional provision the meaning that laypersons would obviously understand it to convey.
14. **Constitutional Law: Criminal Law: Probation and Parole.** The conditions clause of Neb. Const. art. IV, § 13, gives the Board of Parole power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state except treason and cases of impeachment.
15. **Constitutional Law: Legislature: Probation and Parole.** The conditions clause of Neb. Const. art. IV, § 13, permits the Legislature to enact laws placing conditions on when a committed offender is eligible for parole.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Jonathan J. Papik and Stephen E. Gehring, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Kelch, JJ., and Riedmann, Judge.

Cassel, J.

INTRODUCTION

As interpreted by this court, a statute[1] disqualifies a convicted offender sentenced to life imprisonment from parole eligibility until the life sentence is commuted to a term of years.

[1] Neb. Rev. Stat. § 83-1,110(1) (Reissue 2014).

An inmate challenged the statute's constitutionality, claiming that it violated the constitutional authority of Nebraska's Board of Parole (Board) to grant paroles.[2] The district court disagreed and dismissed the action. Because we conclude that the statute properly exercises the Legislature's constitutional power to prescribe "conditions" for paroles,[3] we affirm the judgment of the district court.

BACKGROUND

Occasionally, the constitutional separation of powers[4] generates a dispute between two separate and coequal branches of state government. The Nebraska Constitution confers on the Board the power to grant paroles. The constitution also empowers the Legislature to define crimes and fix their punishment.[5] But in the case before us, both branches agree that the Board lacks the power to do what the inmate desires. Thus, the dispute is between the inmate and the State.

The dispute focuses on a provision conferring upon the Board, or a majority of its members, the "power to grant paroles after conviction and judgment, *under such conditions as may be prescribed by law*, for any offenses committed against the criminal laws of this state except treason and cases of impeachment."[6] We will refer to the italicized language as the "conditions clause."

A Nebraska statute addresses parole eligibility. Section 83-1,110(1) provides:

> Every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence as provided in sections 83-1,107 and 83-1,108. The board shall conduct a parole review

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[2] See Neb. Const. art. IV, § 13.

[3] See *id*.

[4] See Neb. Const. art. II, § 1.

[5] See *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[6] Neb. Const. art. IV, § 13 (emphasis supplied).

> not later than sixty days prior to the date a committed offender becomes eligible for parole as provided in this subsection, except that if a committed offender is eligible for parole upon his or her commitment to the department, a parole review shall occur as early as is practical. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term.

Because it is impossible to determine when an offender has served one-half of a life sentence, we have interpreted § 83-1,110(1) to mean that an inmate sentenced to life imprisonment is not eligible for parole until the Board of Pardons commutes the sentence to a term of years.[7]

Brian J. Adams, an inmate serving two sentences of life imprisonment, brought a declaratory judgment action against the Board and its individual members. He sought a determination that § 83-1,110(1) was an unconstitutional usurpation of the authority conferred upon the Board and a declaration that he was eligible for parole. The Board and its individual members, in their official capacities, filed a motion to dismiss for failure to state a claim upon which relief could be granted.

The district court granted the motion to dismiss Adams' complaint. The court reasoned that the commutation requirement was a "condition" prescribed by the Legislature within the meaning of the conditions clause and that the conditions clause authorized the Legislature to condition parole eligibility on the commutation of a life sentence, as long as the offender was not convicted of treason or impeachment. The court concluded that the conditions clause "reserves to the Legislature the ability to add to or subtract from the [Board's] power to grant paroles in all cases except in cases of treason or impeachment."

Adams filed a timely appeal, and we granted his petition to bypass review by the Nebraska Court of Appeals.

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[7] See *Poindexter v. Houston*, 275 Neb. 863, 750 N.W.2d 688 (2008).

ASSIGNMENTS OF ERROR

Adams assigns three errors but, restated and consolidated, they present one issue: Whether the district court erred in concluding that § 83-1,110(1) does not violate Neb. Const. art. IV, § 13.

STANDARD OF REVIEW

[1-3] A district court's grant of a motion to dismiss is reviewed de novo.[8] The constitutionality of a statute presents a question of law.[9] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.[10]

ANALYSIS

Principles Governing Constitutional Challenge

[4-6] The principles applicable to a constitutional challenge to a state statute are well known. A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[11] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[12] The unconstitutionality of a statute must be clearly established before it will be declared void.[13]

Separation of Powers

[7-9] Nebraska's separation of powers clause[14] prohibits the three governmental branches from exercising the duties and

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[8] *Neun v. Ewing*, 290 Neb. 963, 863 N.W.2d 187 (2015).

[9] *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015).

[10] *Board of Trustees v. City of Omaha*, 289 Neb. 993, 858 N.W.2d 186 (2015).

[11] *Big John's Billiards v. State*, 288 Neb. 938, 852 N.W.2d 727 (2014).

[12] *Id.*

[13] *Id.*

[14] Neb. Const. art. II, § 1.

prerogatives of another branch.[15] It also prohibits a branch from improperly delegating its own duties and prerogatives—except as the constitution directs or permits.[16] Deciding whether the Nebraska Constitution has committed a matter to another governmental branch, or whether the branch has exceeded its authority, is a delicate exercise in constitutional interpretation.[17]

All three governmental branches play a part in a convicted offender's sentencing. The Legislature declares the law and public policy by defining crimes and fixing their punishment. The responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.[18] The executive branch exercises prosecutorial discretion.[19] This includes the power to determine what, if any, charges should be brought against a person accused of committing a crime.[20] And another function of the executive branch is to commute sentences and to grant paroles and pardons.[21]

[10] The Board falls under the executive branch, and its powers are prescribed by the Nebraska Constitution and by statute. The constitution vests the Board with the power to grant paroles.[22] A statute authorizes the Board to, among other things, "[d]etermine the time of release on parole of committed offenders eligible for such release,"[23] "[f]ix the conditions

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[15] *In re Petition of Nebraska Community Corr. Council*, 274 Neb. 225, 738 N.W.2d 850 (2007).

[16] *Id.*

[17] *Id.*

[18] *State v. Huff, supra* note 5.

[19] See *Polikov v. Neth*, 270 Neb. 29, 699 N.W.2d 802 (2005).

[20] *Id.*

[21] See *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996).

[22] See Neb. Const. art. IV, § 13.

[23] Neb. Rev. Stat. § 83-192(1)(a) (Reissue 2014).

of parole . . . ,"[24] and "[d]etermine the time of discharge from parole."[25]

[11] While the Board determines release on and from parole, fixing eligibility for parole consideration is within the province of the Legislature. The Legislature has declared that "[e]very committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence . . . ," as adjusted for good time.[26] The Legislature has also provided that certain offenders must complete evaluations and programming before being considered eligible for parole.[27] And the Legislature prescribes when the Board shall review the record of a committed offender based on the offender's parole eligibility date.[28]

Conditions Clause

[12,13] As in statutory interpretation, the construction of constitutional provisions requires us to apply basic tenets of interpretation.[29] Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary.[30] If the meaning is clear, we give a constitutional provision the meaning that laypersons would obviously understand it to convey.[31]

[14] The conditions clause gives the Board "power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed

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[24] § 83-192(1)(b).

[25] § 83-192(1)(c).

[26] See § 83-1,110(1).

[27] See Neb. Rev. Stat. § 83-1,112.01 (Reissue 2014).

[28] See § 83-192(1)(f).

[29] *Conroy v. Keith Cty. Bd. of Equal.*, 288 Neb. 196, 846 N.W.2d 634 (2014).

[30] *Id.*

[31] *Id.*

against the criminal laws of this state except treason and cases of impeachment." Adams contends that the conditions clause prohibits the Legislature from imposing conditions upon when an offender, other than one convicted of treason or upon impeachment, may become eligible for parole. We disagree.

[15] The plain language of the conditions clause recognizes that the Legislature may place conditions on parole eligibility. The conditions clause confers on the Board the power to grant paroles for any offenses except treason and cases of impeachment. But the conditions clause permits the Legislature to enact laws placing conditions on when a committed offender is eligible for parole. Thus, a committed inmate must meet statutory requirements—i.e., "conditions"—before being considered eligible for parole. But once eligible for parole, the Board alone has authority to grant parole—the Legislature has no power over the decision whether to grant release on parole. We conclude that § 83-1,110(1) does not infringe on the Board's authority to grant paroles.

Adams first argues that because the conditions clause gives the Board the power to grant paroles for "any offenses" aside from treason or cases of impeachment, the Board must be authorized to grant paroles in all other cases. It is—so long as the offender is eligible for parole.

But Adams extends this argument and, in so doing, misapprehends the Legislature's constitutional authority. He contends that the Legislature may not restrict the Board's power by a statute limiting eligibility for parole. But if the Board had the power to parole any committed offender—without adhering to any conditions on eligibility made by the Legislature—the Legislature's authority to determine penalties, including the length of time an offender must serve (absent a pardon or commutation), would be meaningless. Allowing the Legislature the ability to place conditions on parole eligibility strikes a balance between the power of the Legislature to define punishments and the power of the Board to grant

paroles to eligible offenders. And we note that a committed offender deemed to be ineligible for parole by virtue of a life sentence may become eligible for parole upon commutation of the sentence by the Board of Pardons, a department of the executive branch.

History

Finally, we address Adams' assertion that the history of the conditions clause demonstrates its intent was to allow the Legislature only to establish conditions that a parolee must follow in order to maintain his or her parole status. To the contrary, the history of article IV, § 13, supports our interpretation of the conditions clause.

The Nebraska Constitution initially gave clemency power to the Governor alone. The conditions clause stated in part:

> The governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by laws relative to the manner of applying for pardons.[32]

Thus, the Governor alone had the power to grant a pardon, but the Legislature was authorized to control the manner of applying for a pardon.

A statute enacted in 1893 further gave the Governor the power to parole any prisoner, subject to certain conditions.[33] The Governor could parole any prisoner, other than one convicted of murder in the first or second degree, "who may have served the minimum term provided by law for the crime for which he was convicted (and who has not previously been convicted of a felony and served a term in any penal institution

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[32] Neb. Const. art. V, § 13 (1875).

[33] See Comp. Stat. § 7305 (1897).

within the United States of America)."[34] The Governor was authorized to parole a prisoner convicted of murder in the first or second degree "who has now, or hereafter shall have served twenty-five full years."[35] Through this statute, the Legislature placed conditions on a prisoner's eligibility for parole by the Governor.

The conditions clause was amended following the Nebraska Constitutional Convention of 1919-20. The pardoning power was the subject of several proposals, and members expressed concern about the great number of pardons and conditional paroles being granted by the various governors. Thus, a Board of Pardons—consisting of the Governor, Attorney General, and Secretary of State—was created. After being amended and transferred to art. IV, § 13, the conditions clause stated:

> Said board, or a majority thereof, shall have power to remit fines and forfeitures and to grant commutations, pardons and paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state except treason and cases of impeachment.

The conditions clause was last amended following voter approval in 1968.[36] That amendment required the Legislature to create a law establishing the Board and the qualifications of its members. As we have already stated, this version of the conditions clause gave the Board the "power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state except treason and cases of impeachment." A parole statute in effect at that time stated in part that "[n]o such parole shall be granted in any case

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[34] *Id.*

[35] *Id.*

[36] See 1967 Neb. Laws, ch. 319, §§ 1 through 3, pp. 852-53.

unless the minimum term fixed by law for the offense has expired . . . ."[37]

As early as 1893, there was a law conditioning parole eligibility on the serving of a minimum term. And the two constitutional provisions which expressly referred to parole authorized paroles to be granted "under such conditions as may be prescribed by law." A law governing parole eligibility—such as § 83-1,110—is such a condition prescribed by law.

We must resolve all reasonable doubts in favor of the constitutionality of § 83-1,110. Having done so, we conclude that Adams has failed to meet his burden of clearly establishing that the statute is unconstitutional.

CONCLUSION

Under the conditions clause, the Board has the power to grant paroles for any offenses except treason and cases of impeachment, subject to conditions established by the Legislature. Section 83-1,110(1) imposes such a "condition," making an offender serving a life sentence ineligible for parole consideration until the sentence is commuted. We conclude the statute does not infringe on the Board's authority to grant paroles for any offenses. We affirm the decision of the district court dismissing Adams' complaint.

Affirmed.

Stacy, J., not participating.

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[37] Neb. Rev. Stat. § 29-2623 (Reissue 1964).

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

Aline Bae Tanning, Inc., a Nebraska corporation, et al., appellants and cross-appellees, v. Nebraska Department of Revenue, an agency of the State of Nebraska, and Kimberly K. Conroy, Tax Commissioner, appellees and cross-appellants.

JB & Associates, Inc., doing business as Suntan City, a Nebraska corporation, appellant, v. Nebraska Department of Revenue, an agency of the State of Nebraska, and Kimberly K. Conroy, Tax Commissioner, appellee.

880 N.W.2d 61

Filed May 20, 2016. Nos. S-15-643, S-15-644.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
2. **Administrative Law: Statutes: Appeal and Error.** On review, an appellate court determines the meaning of a statute independently of the determination made by an administrative agency.
3. **Administrative Law: Parties: Standing: Appeal and Error.** Under the Administrative Procedure Act, only an aggrieved party may seek judicial review of an agency action; an appellate court addresses the aggrieved party in terms of standing.
4. **Parties: Standing: Jurisdiction.** A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.

5. **Standing: Words and Phrases.** Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.
6. **Taxation: Standing.** The consumer is the taxpayer of an admissions tax, and thus, only the consumer has standing to claim a refund.
7. **Taxation: Proof.** The legal incidence of a tax depends upon who the law declares has the ultimate burden of the tax.

Appeals from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Steve Grasz and Henry L. Wiedrich, of Husch Blackwell, L.L.P., for appellants.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellees.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Kelch, JJ., and Irwin, Judge.

Heavican, C.J.

NATURE OF CASE

Several indoor tanning salon businesses appeal from the district court's decision affirming the denial of tax refund claims by the Tax Commissioner (Commissioner). The salons assert that the Nebraska Department of Revenue (Department) improperly collected more than $1.7 million in admissions taxes from the salons. The Commissioner reasoned that the salons were not the taxpayers and, therefore, found that the salons lacked standing to claim refunds. The district court affirmed the Commissioner's decision. The salons appealed, and we granted their petition to bypass. The Department and Commissioner cross-appeal, claiming the district court lacked subject matter jurisdiction over some of the claims. We affirm.

BACKGROUND

In May 2013, Aline Bae Tanning, Inc.; Ashley Lynn's, Inc.; Maple 110 Tanning, L.L.C.; RSB LLC; Tanning Horizons,

L.L.C.; and Wilson-Bonn, L.L.C. (collectively Ashley Lynn's) filed a total of 15 claims for tax refunds with the Department. The Ashley Lynn's salons claimed refunds of admissions taxes on gross receipts totaling more than $1 million. In December 2013, JB & Associates, Inc., doing business as Suntan City (JB), filed a claim with the Department for a refund of over $600,000 in admissions tax.

Though not entirely clear, it appears that in November 2012, the Attorney General's office had issued an opinion that Neb. Rev. Stat. § 77-2703(1) (Reissue 2009) did not authorize subjecting tanning salons to admissions taxes. The Department has since repealed the regulation listing tanning salons among the businesses subject to the tax[1] and has ceased collecting the tax. The Ashley Lynn's and JB salons (collectively salons) argue that as the Attorney General had opined, they are not subject to the admissions tax and, as such, are entitled to a refund of the tax paid.

The Commissioner disallowed the Ashley Lynn's salons' claims on October 7, 2013, and disallowed JB's claims on December 31. The Commissioner sent all of the salons nearly identical letters separately denying each claim. The letters explained that "[a] refund of a tax improperly or erroneously collected can only be issued by the State directly to the purchaser who paid the tax." (Emphasis in original.)

The salons sought judicial review in both cases, naming both the Department and the Commissioner as defendants. In November 2013, the Ashley Lynn's salons filed one petition for all 15 of the Commissioner's disallowances. Each of the 15 disallowance notice letters were attached to the petition. JB filed a petition for judicial review in January 2014. The district court consolidated the two cases and heard arguments in January 2015.

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[1] See 316 Neb. Admin. Code, ch. 1, § 044.06 (2013).

Neb. Rev. Stat. § 77-2708(2)(b) (Reissue 2009) permits "the person who made the overpayment" to file a claim for a refund of erroneously or illegally collected taxes. The district court below held that under § 77-2708 and our opinions in *Governors of Ak-Sar-Ben v. Department of Rev.* (Ak-Sar-Ben)[2] and *Anthony, Inc. v. City of Omaha*,[3] the salons were not the "person[s]" who made the overpayments and thus lacked standing to claim refunds.

The salons jointly appealed and petitioned for bypass, which this court granted. The Department and Commissioner cross-appealed. We affirm because the salons lack standing.

ASSIGNMENTS OF ERROR

The salons assign, restated, that the district court erred by (1) finding the salons had no standing to claim refunds and (2) failing to reach the merits and find that the salons were entitled to refunds.

The Department and Commissioner cross-appeal, assigning that the district court erred in finding it had subject matter jurisdiction over the claims by the Ashley Lynn's salons.

STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act (APA) may be reversed, vacated, or modified by an appellate court for errors appearing on the record. When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[4]

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[2] *Governors of Ak-Sar-Ben v. Department of Rev.*, 217 Neb. 518, 349 N.W.2d 385 (1984).

[3] *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

[4] *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 797 N.W.2d 28 (2011).

[2] On review, an appellate court determines the meaning of a statute independently of the determination made by an administrative agency.[5]

ANALYSIS

Standing.

In the salons' first assignment of error, they argue that the district court erred by affirming the Commissioner's conclusion that the salons lacked standing to claim refunds. Both the Commissioner and the district court found that the salons' customers, and not the salons themselves, were the proper parties to bring claims for refunds. We affirm the district court's determination, because the salons were not the taxpayers.

[3-5] Under the APA, only an "aggrieved party" may seek judicial review of an agency action.[6] We have addressed the "aggrieved party" in terms of standing.[7] A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.[8] Standing involves a real interest in the cause of action, meaning some legal or equitable right, title, or interest in the subject matter of the controversy.[9] Section 77-2708(2)(b) permits "the person who made the overpayment" to claim a refund of erroneously or illegally collected sales or use tax. Thus, only the person who made the overpayment has a real interest in the controversy of a sales tax refund claim.

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[5] *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995).

[6] Neb. Rev. Stat. § 84-917(1) (Reissue 2014).

[7] See *Central Neb. Pub. Power v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

[8] *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res.*, 281 Neb. 992, 801 N.W.2d 253 (2011).

[9] *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015).

[6] We have previously addressed whether businesses that remit admissions taxes to the Department have standing to claim refunds. In *Ak-Sar-Ben*, we held that operators of a horseracing track did not have standing to claim refunds of admissions taxes.[10] Instead, we determined that the consumer is the taxpayer and that thus, only the consumer has standing to claim a refund of admissions tax.

As we explained in *Ak-Sar-Ben*, § 77-2703 requires purchasers to pay the admissions tax to the seller, and then requires the seller to remit the tax to the Department. The tax constitutes both a debt of the purchaser to the seller, and of the seller to the State. The statute prohibits businesses from absorbing the cost of admissions taxes. Under the terms of § 77-2703, the tax revenue is merely held in trust by the seller for the State, and the State reimburses the seller for expenses associated with collection.

The salons argue that *Ak-Sar-Ben* is either inapplicable or incorrect. They assert that the legal incidence of the admissions tax falls upon the salons and that therefore, they are the persons who made the overpayments and who have standing.

[7] In *Anthony, Inc.*, we used the legal incidence test to determine whether a municipal tax on restaurants in Omaha, Nebraska, was a sales tax or an occupation tax.[11] As a municipality, Omaha was without the authority to impose a sales tax, but could establish an occupation tax. The primary difference between a sales tax and an occupation tax, we held, is who bears the legal incidence, or "who the law declares has the ultimate burden of the tax."[12] The legal incidence of a true sales tax falls upon the purchaser, whereas the legal incidence of an occupation tax is on the seller for the privilege of operating a particular type of business. Neither the name given to a

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[10] *Ak-Sar-Ben, supra* note 2.

[11] *Anthony, Inc., supra* note 3.

[12] *Id.* at 877, 813 N.W.2d at 476.

tax, nor the fact that a tax is assessed from gross receipts, are dispositive of where the legal incidence falls.[13]

In *Anthony, Inc.*, we distinguished *Ak-Sar-Ben*, noting that § 77-2703 (at issue in both *Ak-Sar-Ben* and the present case) explicitly requires that the purchaser pay the cost of the admissions tax. The restaurant tax at issue in *Anthony, Inc.*, however, explicitly imposed the legal burden upon restaurants and merely gave restaurants the discretion to decide whether to pass along the cost (i.e., the economic incidence) to the purchaser. Therefore, we held that the restaurant tax was a valid exercise of municipal power to create occupation taxes.

The salons argue that *Ak-Sar-Ben* is not binding in this case because it is inconsistent with the test set forth in *Anthony, Inc*. In *Anthony, Inc.*, we stated:

> If the customer refuses to pay the occupation tax when itemized on his or her bill, action by the City will be taken against the restaurant, not against the consumer. Because the legal incidence of the tax falls on the business and not the customer, the Restaurant Tax is an occupation tax, not a sales tax.[14]

The salons argue that this passage supports the contention that legal incidence falls upon them, because taxes under § 77-2703(1)(a) "constitute[] a debt owed by the retailer to this state" and the retailers are subject to penalties for failure to perform collection duties and remit the taxes to the State.[15] The salons do not challenge their statutory duty to collect the taxes, nor do they challenge any penalties imposed for a failure to fulfill that duty.

Though the above language from *Anthony, Inc.* could appear to support the salons' contention, when read in context, it does not. In *Anthony, Inc.*, we clearly stated that the

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[13] *Id.*

[14] *Id.* at 881-82, 813 N.W.2d at 479.

[15] See Neb. Rev. Stat. §§ 77-2709 and 77-2713(1) (Reissue 2009).

legal incidence of a tax depends upon "who the law declares has the *ultimate* burden of the tax."[16] That a party acting as a tax collector is subject to penalties for failing to perform its statutory duties is irrelevant. Rather, as we did in *Anthony, Inc.* and *Ak-Sar-Ben*, we must look backward from the point at which the Department receives the revenue until we find the final person legally liable for payment under the statute.

While § 77-2703(1)(a) calls the admissions tax a debt from the retailer to the State, the immediately preceding sentence specifically states that the tax "shall constitute a part of the purchase price and until collected shall be a debt from the consumer to the retailer and shall be recoverable at law in the same manner as other debts." Clearly, while the retailer is legally responsible for passing the revenue on to the Department, the ultimate burden of the tax falls upon the consumer who is legally liable to the retailer. Thus, the fact that retailers may be subject to penalties for failing to perform collection duties has no bearing upon our analysis; even when such penalties are imposed, the consumer is still liable for the tax under § 77-2703(1)(a). As the salons themselves admit, the legal incidence of a tax is not placed upon a retailer simply because the retailer "'is typically required to collect the tax . . . and remit it to the taxing authority.'"[17]

The salons argue that by looking backward in this manner, we are confusing legal incidence with economic incidence. To prove this point, the salons cite an array of case law from other jurisdictions. We have reviewed these cases and find that they are distinguishable; none of the cases interpret a statute that imposes liability upon the consumer in the same

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[16] *Anthony, Inc., supra* note 3, 283 Neb. at 877, 813 N.W.2d at 476 (emphasis supplied).

[17] Brief for appellants at 25 (quoting *Southern Pacific Transp. Co. v. State*, 202 Ariz. 326, 44 P.3d 1006 (Ariz. App. 2002)).

manner as does § 77-2703.[18] Instead, the salons cite only to tax schemes in which retailers are permitted, but not required, to pass along costs to consumers. In other words, these cases consider scenarios in which the businesses shifted the economic incidence of a tax, but the legal incidence remained upon the businesses. Therefore, the cases cited by the salons are distinguishable.

The salons also allege due process violations. This argument fails because, as discussed above, the consumers are the taxpayers. As Neb. Rev. Stat. § 77-3905(6) (Reissue 2009) makes clear, taxes collected by retailers "as agent[s] for the State of Nebraska . . . shall constitute a trust fund in the hands of the . . . retailer . . . and shall be owned by the state." Therefore, in this narrow context, the taxes collected never belonged *to* the salons and the salons have no property interest in the taxes sufficient to warrant due process rights.

Finally, the salons assert that because § 77-2708(2)(c) prohibits refund claims of fewer than $2, none of their customers will be able to claim refunds and those customers' due process rights will be violated. Therefore, they argue, we should find that the salons have standing and permit the customers to seek refunds from the salons. We note three reasons this argument fails. First, the record does not contain evidence that no customers would have refund claims of $2 or greater. The salons claim that none of their customers paid more than $2 in admissions tax, but have not provided records of all of their customers' payments. Second, the salons do not have standing to challenge a statute's constitutionality on the basis of third-parties' due process rights; they have not shown that

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[18] See, e.g., *Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 324 P.3d 50, 171 Cal. Rptr. 3d 189 (2014); *South Cent. Bell Telephone Co. v. Olsen*, 669 S.W.2d 649 (Tenn. 1984); *Ferrara v. Director, Div. of Taxation*, 127 N.J. Super. 240, 317 A.2d 80 (1974); *Martin Oil Ser. Inc. v. Dept. of Revenue*, 49 Ill. 2d 260, 273 N.E.2d 823 (1971).

the $2 minimum in § 77-2708(2)(c) will cause a deprivation of their own protected rights.[19] Third, to find that the salons have standing in this case could limit customers' ability to later claim refunds.

As discussed in *Ak-Sar-Ben* and above, the customers were the taxpayers of the admissions tax. We will not rewrite the law and completely overhaul the refund scheme put in place by the Legislature because of a hypothetical argument the salons attempt to make on their customers' behalf.

For these reasons, we find that the salons do not have standing to claim a refund and their first assignment of error has no merit.

Merits.

Because we find that the salons did not have standing, we do not address whether the tanning salons' gross receipts should have been subject to the admissions tax. Therefore, we do not reach the salons' second assignment of error.

Subject Matter Jurisdiction.

On cross-appeal, the Department and Commissioner assign that the district court erred by finding it had subject matter jurisdiction over the 15 claims filed jointly by the Ashley Lynn's salons. We have already held that the Ashley Lynn's salons lacked standing; therefore, the district court lacked jurisdiction over the claims. Thus, we do not reach the assigned error on cross-appeal.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Irwin, Judge, not participating in the decision.

Stacy, J., not participating.

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[19] See *Bullock v. J.B.*, 272 Neb. 738, 725 N.W.2d 401 (2006).

Nebraska Supreme Court
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Michael P. Burns, appellee, v. Kerry E. Burns, appellant.

879 N.W.2d 375

Filed May 27, 2016. No. S-14-789.

1. **Judgments: Jurisdiction.** A jurisdictional question that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Modification of Decree: Child Custody: Service of Process.** A modification proceeding relating to child custody shall be commenced by filing a complaint to modify, and summons shall be served upon the other party by personal service or in the manner provided in Neb. Rev. Stat. § 25-517.02 (Reissue 2008).
4. **Jurisdiction: Service of Process: Parties.** For purposes of personal jurisdiction, the voluntary appearance of the party is equivalent to service of process.
5. **Jurisdiction: Service of Process: Waiver.** Participation in the proceedings on any issue other than the defenses of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process, waives all such issues except as to the objection that the party is not amenable to process issued by a court of this state.
6. **Service of Process: Waiver.** A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof.
7. **Actions: Judicial Notice.** A court may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding.
8. **Actions: Judicial Notice: Appeal and Error.** In interwoven and interdependent cases, an appellate court can examine its own records and take judicial notice of the proceedings and judgment in a former action involving one of the parties.

9. **Actions: Judicial Notice: Records: Appeal and Error.** An appellate court can take judicial notice of a document, including briefs filed in an appeal, in a separate but related action concerning the same subject matter in the same court.
10. **Jurisdiction: Pleadings: Parties.** A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party.
11. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
12. **Jurisdiction: Appeal and Error.** Generally, once an appeal has been perfected, the trial court no longer has jurisdiction.
13. **Jurisdiction: Minors.** A trial court retains jurisdiction under Neb. Rev. Stat. § 42-351(2) (Reissue 2008) for certain matters.
14. **Jurisdiction: Minors: Appeal and Error.** Neb. Rev. Stat. § 42-351(2) (Reissue 2008) does not grant a trial court authority to hear and determine anew the very issues then pending on appeal and to enter permanent orders addressing these issues during the appeal process.
15. **Minors: Intent.** Neb. Rev. Stat. § 42-351(2) (Reissue 2008) was meant to protect the interests of dependent children.

Petition for further review from the Court of Appeals, Irwin, Inbody, and Riedmann, Judges, on appeal thereto from the District Court for Adams County, James E. Doyle IV, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Robert M. Sullivan, of Sullivan Shoemaker, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Cassel, J.

INTRODUCTION

Kerry E. Burns appealed from a final order granting Michael P. Burns' June 2013 application to modify child

custody. The application commenced a second modification proceeding that overlapped one begun by Kerry in 2011. The Nebraska Court of Appeals vacated the custody modification order and remanded the cause for dismissal, premised upon a statutory dismissal by operation of law for failure to complete service of process within 6 months.[1] On further review, we conclude that (1) Kerry waived service of process by making a general appearance in the second proceeding and (2) the district court retained jurisdiction to modify custody while an appeal on other issues was pending. We therefore reverse the decision of the Court of Appeals and remand the cause with direction.

BACKGROUND

A 2004 decree dissolved the parties' marriage. Among other things, the decree awarded Kerry custody of the parties' three minor children, provided Michael with parenting time, and ordered Michael to pay child support.

This case later became procedurally complicated, in part because a second modification proceeding commenced before an earlier modification proceeding was completed. For purposes of this opinion, we will refer to the proceedings as the "first modification" and the "second modification." The first modification resulted in appeals docketed as cases Nos. A-13-387 and A-13-1053. Proceedings in the second modification led to this appeal. We briefly summarize each modification proceeding. Although we generally indicate when some events occurred, we provide specific dates only for events directly related to our analysis.

First Modification

In 2011, Kerry filed a complaint for modification requesting an increase in Michael's child support. She amended her complaint to add requests to eliminate a $100 negative deviation

[1] See *Burns v. Burns*, 23 Neb. App. 420, 872 N.W.2d 900 (2015).

in Michael's child support, to change the parenting plan, and to obtain reimbursement for some of the children's health care expenses. In a "Counterclaim," Michael sought an order finding Kerry in contempt.

In 2012, the parties apparently entered into a "Memorandum of Understanding" to settle all matters. Under the settlement agreement, Michael's child support increased to $1,650 per month net, based on a gross of $1,750 less the $100 deviation. The agreement stated that it would settle all pending matters and that both parties would file motions to dismiss. However, the settlement agreement was not filed with the court, and neither party moved to dismiss his or her pending proceedings.

In April 2013, Michael filed a motion for an order compelling Kerry to comply with the settlement's terms. Seven days later, the district court determined that the settlement agreement was enforceable and ordered the parties to abide by it. Kerry timely appealed. It was docketed as case No. A-13-387.

Because the April 2013 order did not include child support worksheets, the Court of Appeals remanded the cause to the district court with direction to prepare the applicable worksheets. The remand was ordered on June 5. The mandate was issued on July 15 and was spread on the district court's record on August 8. In October, the district court entered an order, purporting to comply with the remand. The court changed the monthly child support to $1,750 per month, eliminated the $100 deviation, and attached child support worksheets. Kerry appealed, and Michael cross-appealed. This appeal was docketed as case No. A-13-1053.

In March 2015, the Court of Appeals issued a memorandum opinion.[2] It affirmed the April 2013 order incorporating the settlement, but reversed and vacated the portion of the

[2] See *Burns v. Burns*, No. A-13-1053, 2015 WL 1084264 (Neb. App. Mar. 10, 2015) (selected for posting to court Web site).

October 2013 order eliminating the $100 deviation. Kerry sought further review, and we denied her petition on June 17, 2015.

Second Modification

On June 28, 2013, while the first modification was ongoing, Michael filed an "Application to Modify," seeking a change of custody and a corresponding change to child support and parenting time. A summons was issued, but a deputy sheriff was unable to serve Kerry. Michael then filed a motion to appoint a special process server. The special process server later certified that personal service upon Kerry had been "effectuated." But there is no dispute that the special process server did not serve Kerry with a summons.

In September 2013, Kerry filed a "Special Appearance"[3] to object to the district court's jurisdiction over her. She claimed that no summons had been served upon her and that her daughter had received an envelope containing the application to modify. In February 2014, the district court overruled Kerry's special appearance. The court reasoned that Kerry received actual notice of the application and that there was no indication she had been prejudiced by the manner of service. Kerry subsequently filed an answer in which she alleged that the court lacked subject matter jurisdiction.

In August 2014, the district court granted Michael's application to modify. The court awarded Michael custody of the parties' youngest son, modified parenting time, and adjusted the parties' child support obligations. Upon Kerry's subsequent motion to amend the order, the court changed provisions relating to parenting time.

Appeal of Second Modification

Kerry timely appealed. She assigned that the district court erred in (1) exercising jurisdiction over the second modification

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[3] See Neb. Rev. Stat. § 25-801.01(2)(c) (Reissue 2008) ("special appearances shall not be used").

proceeding and (2) "permanently modifying child support and visitation, and therefore, inherently, custody, while a prior order pertaining to such issues was pending appeal."

The Court of Appeals affirmed the decision of the district court in a memorandum opinion. Upon Kerry's motion for rehearing, the Court of Appeals sustained the motion in part and withdrew its memorandum opinion.

Thereafter, in a published opinion,[4] the Court of Appeals vacated the district court's judgment and remanded the cause with directions. The court determined that Michael was required to serve summons on Kerry when he filed the application for modification and that failure to serve the summons on her within 6 months deprived the district court of jurisdiction. The Court of Appeals determined that the action stood dismissed as of December 28, 2013, and that any subsequent orders or pleadings were a nullity.

The Court of Appeals overruled Michael's motion for rehearing. Michael then filed a petition for further review, which we granted.

ASSIGNMENTS OF ERROR

Michael's petition for further review assigns eight errors. We consider only two issues: (1) whether jurisdiction was conferred on the district court such that the Court of Appeals erred in finding the case had been dismissed under Neb. Rev. Stat. § 25-217 (Reissue 2008) at the expiration of 6 months from the filing of Michael's application to modify custody and (2) whether the district court had jurisdiction under Neb. Rev. Stat. § 42-351(2) (Reissue 2008) to enter an order in the second modification proceeding.

STANDARD OF REVIEW

[1,2] A jurisdictional question that does not involve a factual dispute presents a question of law.[5] On a question of law, an

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[4] See *Burns v. Burns, supra* note 1.

[5] *Murray v. Stine*, 291 Neb. 125, 864 N.W.2d 386 (2015).

appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[6]

ANALYSIS

Personal Jurisdiction

The Court of Appeals determined that the district court lacked personal jurisdiction over Kerry at the time she filed her special appearance. The court observed that Neb. Rev. Stat. §§ 42-352 (Reissue 2008) and 42-364(6) (Cum. Supp. 2014) direct that summons be served upon the other party to the marriage in a modification proceeding and that summons was not served on Kerry. The court further concluded that under § 25-217, the case was dismissed by operation of law on December 28, 2013, and that all subsequent pleadings and orders were a nullity.

[3] The plain language of the statutes supports the Court of Appeals' conclusion that a summons is required to be served on the defendant in a modification proceeding. Section 42-364(6) provides: "Modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction of the court shall be commenced by filing a complaint to modify. . . . Service of process and other procedure shall comply with the requirements for a dissolution action." And a dissolution action requires summons to be served upon the other party by personal service or in the manner provided in Neb. Rev. Stat. § 25-517.02 (Reissue 2008).[7]

[4-6] But for purposes of personal jurisdiction, the voluntary appearance of the party is equivalent to service of process.[8] Participation in the proceedings on any issue other than the defenses of lack of jurisdiction over the person, insufficiency

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[6] *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015).

[7] See § 42-352.

[8] See, Neb. Rev. Stat. § 25-516.01(1) (Reissue 2008); *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001).

of process, or insufficiency of service of process, waives all such issues except as to the objection that the party is not amenable to process issued by a court of this state.[9] Thus, we have said that a general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof.[10]

The Court of Appeals' opinion did not address whether Kerry made a general appearance. Admittedly, the transcript on appeal for the second modification proceeding sheds little light on the issue. The district court's October 2013 order references "post-mandate filings by the parties" that "did not respond to the mandate but instead raised matters outside the mandate." But it is impossible to tell from this vague reference whether any such filing by Kerry would constitute a general appearance.

[7-9] Due to the procedural posture of the first and second modification proceedings and their interwoven nature, we take judicial notice of the transcripts in the appeals of the first modification proceeding. In a postargument brief, Kerry urges us not to take judicial notice of the record related to the appeals in the first modification, particularly because there was no indication that the Court of Appeals considered those records. But we are not persuaded that it would be improper for us to do so. A court may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding.[11] In interwoven and interdependent cases, we can examine our own records and take judicial notice of the proceedings and judgment in a former action involving one of the parties.[12] We can also take judicial notice of a document, including briefs filed in an appeal, in a separate

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[9] See, § 25-516.01(2); *Friedman v. Friedman, supra* note 6.

[10] See *Friedman v. Friedman, supra* note 6.

[11] *Bauermeister Deaver Ecol. v. Waste Mgmt. Co.*, 290 Neb. 899, 863 N.W.2d 131 (2015).

[12] *Id.*

but related action concerning the same subject matter in the same court.[13]

We take judicial notice of the fact that Kerry filed two motions between the time she received the application to modify and the time she filed the special appearance. In the first motion, an "Omnibus Motion to Vacate, Modify, and Strike," Kerry requested that the district court vacate certain orders, including its August 12, 2013, order; modify an order to reset a trial date; and strike certain motions. Although the orders and motions referenced in the omnibus motion deal primarily with the first modification, the August 12 order included a provision related to the second modification: it granted Michael's motion to appoint a process server. In the second motion, a "Motion to Disqualify and Sanction Counsel for Plaintiff and to Award Attorney Fees and Expenses," Kerry requested, among other things, an order disqualifying Michael's counsel "from the proceedings in the above-captioned matter." Because both modifications proceeded under the same trial court case number and caption, granting Kerry's request would have resulted in disqualifying Michael's counsel from both modification proceedings.

We also take judicial notice of the bill of exceptions from the hearing on Michael's motion to appoint a special process server—a hearing that occurred after Michael had filed his application to modify and on the same day as the spreading of the Court of Appeals' mandate on remand. During the hearing, Kerry's counsel objected to the motion as follows:

> I would object to the motion on the basis that the motion seeks to appoint a process server to serve a Complaint to Modify; that such pleading is inappropriate and should be stricken because the matter is pending before the Court, whatever the remand is; and that the appropriate procedure is a Motion for either Temporary Relief or a Motion for Leave to Amend [Michael's] previously filed

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[13] *Id.*

> answer and counterclaim; and I, also, think that service of a party, when that party is represented is — I mean, it creates its own set of special problems as well.
>
> So I would object to the motion really on the basis that the pleading that is sought to be served by the special process server is inappropriate.

The judicially noticed filings and bill of exceptions show that Kerry made a general appearance. In the case of the hearing, it does not matter that Kerry's counsel made this general appearance before Kerry received a copy of Michael's application to modify.

[10] It does not take much to make a general appearance. A party will be deemed to have appeared generally if, by motion or other form of application to the court, he or she seeks to bring its powers into action on any matter other than the question of jurisdiction over that party.[14] For example, we have held that a motion for a continuance constitutes a general appearance that confers jurisdiction over the moving party.[15]

Kerry's actions through her counsel clearly crossed this threshold. Kerry asked the district court to vacate an order which, among other things, granted Michael's motion to appoint a special process server in the second modification; to disqualify Michael's counsel from participating in the proceedings; and to strike Michael's application to modify. These requests addressed issues other than lack of jurisdiction over her, insufficiency of process, or insufficiency of service of process. By making them, Kerry made a general appearance and waived service of process.

Because Kerry waived service of process, we reverse the decision of the Court of Appeals finding that Michael's application to modify was dismissed by operation of law on December 28, 2013, on the basis that Kerry had not been served with a summons.

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[14] *Friedman v. Friedman, supra* note 6.

[15] See *Hunt v. Trackwell, supra* note 8.

Continuing Jurisdiction

[11] Upon reversing a decision of the Court of Appeals, we may consider, as we deem appropriate, some or all of the assignments of error the Court of Appeals did not reach.[16] Because of the Court of Appeals' conclusion that all orders after December 28, 2013, were a nullity, it did not consider Kerry's assignment of error that the district court had no authority to permanently modify custody, visitation, or child support due to the pending appeal of another order which included provisions relating to child support and visitation. Moreover, one of Michael's assignments of error in his petition for further review touches on the district court's continuing jurisdiction under § 42-351(2). We will consider whether the district court had jurisdiction to enter the August 2014 order in the second modification proceeding.

[12,13] Generally, once an appeal has been perfected, the trial court no longer has jurisdiction.[17] However, a trial court retains jurisdiction under § 42-351(2) for certain matters. Section 42-351(2) provides:

> When final orders relating to proceedings governed by sections 42-347 to 42-381 are on appeal and such appeal is pending, the court that issued such orders shall retain jurisdiction to provide for such orders regarding support, custody, parenting time, visitation, or other access, orders shown to be necessary to allow the use of property or to prevent the irreparable harm to or loss of property during the pendency of such appeal, or other appropriate orders in aid of the appeal process. Such orders shall not be construed to prejudice any party on appeal.

Normally, then, a trial court retains jurisdiction to provide for an order concerning custody even while an appeal of one of its orders is pending.

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[16] *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008).

[17] *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

[14] But there is a limit on a trial court's jurisdiction to modify a decree concerning an issue which is pending appeal. Section 42-351(2) does not grant a trial court authority to hear and determine anew the very issues then pending on appeal and to enter permanent orders addressing these issues during the appeal process.[18] For example, in *Bayliss v. Bayliss*,[19] the Court of Appeals determined that the trial court lacked jurisdiction to enter an order of modification concerning child support and visitation transportation expenses when an appeal of an earlier modification order addressing child support and transportation expenses was pending.

The district court was not divested of jurisdiction to enter an order on custody, because the orders on appeal did not address custody. Custody was not a point of contention in the first modification. The orders that were pending on appeal centered on the existence and enforceability of the settlement agreement, which agreement contained provisions addressing child support and parenting time.

[15] On the other hand, custody was the focus of Michael's application to modify. He asked that he be awarded custody of two of the children and that child support and parenting time be modified accordingly. Michael alleged in his application to modify that Kerry was no longer providing shelter or any support for one child and that she failed to ensure adequate parental care for another child. As the district court observed, "Requiring a parent to hold in abeyance activities the parent believes are necessary to preserve the best interests of the minor child while an appeal is pending on other issues would be contrary to the intent behind §[]42-351(2)." Indeed, we have said that § 42-351(2) was meant to protect the interests of dependent children.[20]

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[18] See, *Furstenfeld v. Pepin*, 23 Neb. App. 673, 875 N.W.2d 468 (2016); *Bayliss v. Bayliss*, 8 Neb. App. 269, 592 N.W.2d 165 (1999).

[19] *Bayliss v. Bayliss, supra* note 18.

[20] See *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991).

Because custody was not at issue in the first modification, the district court retained authority to enter an order concerning that issue in the second modification while the appeal in the first modification was pending.

CONCLUSION

Although a summons was never served on Kerry, we conclude that she waived the defect by making a general appearance. Because the issue of custody was not an issue pending on appeal, the district court retained jurisdiction in the second modification to enter an order which modified custody. We reverse the decision of the Court of Appeals and remand the cause with direction to affirm the final order of the district court.

Reversed and remanded with direction.

Connolly, J., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

In re Adoption of Madysen S. et al., minor children. Nicole K. and William K., appellees, v. Jeremy S., appellant.

879 N.W.2d 34

Filed May 27, 2016. No. S-15-032.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
4. **Judgments: Final Orders: Words and Phrases.** A judgment is the final determination of the rights of the parties in an action.
5. ____: ____: ____. A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant.
6. **Judgments: Words and Phrases.** Every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.
7. **Final Orders: Appeal and Error.** The general rule prohibiting immediate appeals from interlocutory orders seeks to avoid piecemeal appeals arising out of the same set of operative facts, chaos in trial procedure, and a succession of appeals in the same case to secure advisory opinion to govern further actions of the trial court.
8. ____: ____. There are only limited exceptions to the general rule that interlocutory orders are not immediately appealable.
9. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
10. **Final Orders.** It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.

11. ____. Whether the effect of an order is substantial depends upon whether it affects with finality the rights of the parties in the subject matter.
12. **Final Orders: Appeal and Error.** Having a substantial effect on a substantial right depends most fundamentally on whether the right could otherwise effectively be vindicated through an appeal from the final judgment.
13. ____: ____. Generally, an immediate appeal from an order is justified only if the right affected by the order would be significantly undermined or irrevocably lost by waiting to challenge the order in an appeal from the final judgment.
14. **Adoption.** The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.
15. **Adoption: Parent and Child: Parental Rights.** Consent of a biological parent to the termination of his or her parental rights is the foundation of our adoption statutes, and an adoption without such consent must come clearly within the exceptions contained in the statutes.
16. **Adoption: Abandonment: Parental Rights.** In an adoption proceeding, the county court does not terminate parental rights upon a finding of abandonment; the court thereby merely eliminates the need for the abandoning parent's consent and authorizes the execution of substitute consent.
17. **Adoption: Parent and Child.** A determination regarding parental consent, a finding under Neb. Rev. Stat. § 43-104(2) (Reissue 2008), or a determination regarding substitute consent does not end the court's inquiry as to whether the petition for adoption should be approved.
18. **Adoption: Final Orders.** An order in an adoption proceeding is not final if the underlying adoption is still under consideration by the county court.
19. **Minors: Adoption: Abandonment: Final Orders.** In the context of whether an order is final, a finding under Neb. Rev. Stat. § 43-104(2)(b) (Reissue 2008) in an ongoing adoption proceeding is distinguishable from an adjudication of a child as abandoned under Neb. Rev. Stat. § 43-247(3) (Supp. 2015) of the juvenile code.
20. **Standing: Jurisdiction.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
21. **Adoption: Standing: Parent and Child: Parental Rights.** Even after a finding of abandonment under Neb. Rev. Stat. § 43-104(2)(b) (Reissue 2008), a parent in adoption proceedings continues to have a personal stake in the outcome of the litigation and standing to contest the

pending issue of whether the adoption is in the child's best interests, because an evidentiary finding on best interests affects whether the parent retains his or her parental rights.

22. **Minors: Adoption: Abandonment: Final Orders.** Allowing interlocutory appeals from findings of abandonment under Neb. Rev. Stat. § 43-104(2)(b) (Reissue 2008) would only delay adoption proceedings, which ultimately is to the detriment of the child who is the subject of the adoption petition.
23. **Adoption: Parent and Child: Abandonment.** A finding under Neb. Rev. Stat. § 43-104(2)(b) (Reissue 2008) that the consent of the parent who has abandoned the child is not required is not a final, appealable order.

Petition for further review from the Court of Appeals, Irwin, Inbody, and Riedmann, Judges, on appeal thereto from the County Court for Lincoln County, Michael E. Piccolo, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Todd M. Jeffers, of Brouillette, Dugan & Troshynski, P.C., L.L.O., for appellant.

Angela M. Franz and Patrick M. Heng, of Waite, McWha & Heng, for appellees.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Wright, J.

NATURE OF CASE

This is an appeal from an interlocutory order of the county court in a stepparent adoption proceedings finding that the natural father abandoned his children and therefore his consent to the adoption would not be required. We find that the order appealed from is not a final order, and the Nebraska Court of Appeals and this court lack jurisdiction over the appeal.

BACKGROUND

Nicole K. and Jeremy S. were married, and three children were born of the marriage. Madysen S. was born in February

2001, Orion S. was born in January 2004, and Leo S. was born in November 2005. The family lived in Missouri.

In 2007, Madysen, who was then 6 years old, reported that Jeremy had been sexually abusing her for more than a year. Jeremy was arrested and charged with first degree statutory sodomy—deviate sexual intercourse with a person less than 14 years old and four counts of first degree child molestation.

Nicole moved with the children to Nebraska and filed for divorce. The decree of dissolution was entered in July 2007. The decree granted sole custody of the children to Nicole and stated that Jeremy "shall not have any parenting time." The court ordered Jeremy to pay $50 per month in child support.

In August 2009, pursuant to a plea agreement, Jeremy was convicted of three counts of child molestation. He was committed to a total term of 16 years' confinement in Missouri.

Nicole married William K. in 2013. In 2014, Nicole and William simultaneously filed in the county court for Lincoln County, the county where the children reside, a petition for adoption by a stepparent and a "Petition to Terminate Parental Rights" for each child. The petitions asked that the court approve the adoption of the children by William. Jeremy opposed the adoptions. He refused to voluntarily relinquish his parental rights and consent to the adoptions. The petitions asked the court to find that Jeremy had abandoned the children, as provided under Neb. Rev. Stat. § 43-104 (Reissue 2008), such that Jeremy's consent to the adoptions would not be required.

A hearing was held on the consolidated "Petition[s] to Terminate Parental Rights." Nicole testified that she allowed the children to visit their extended family on Jeremy's side, but asked Jeremy's family not to allow any contact between the children and Jeremy. Jeremy indicated that he had not seen the children since he was arrested, approximately 7 years prior to the filing of the petitions. While incarcerated, he sent the children cards and letters. He also occasionally listened over the telephone to the children talk to his family members when

they visited them. Jeremy consistently paid the $50 per month in child support ordered in the dissolution decree. The child support was paid by Jeremy's mother.

The county court issued an order on the consolidated "Petition[s] to Terminate Parental Rights." However, the court acknowledged that in adoption proceedings, it is the adoption itself which terminates the parental rights, and that until the adoption is granted, the parental rights are not terminated.[1] And a "Petition to Terminate Parental Rights," as such, is not a pleading provided for in the adoption statutes.

The county court's order found that Jeremy had abandoned his children for purposes of § 43-104. Accordingly, the court ordered that Jeremy's consent would not be required for the adoptions and that the guardian ad litem could provide all substitute consents as may be required by statute. The hearing on the adoptions was scheduled and is still pending.

In finding that Jeremy abandoned his children, the court stated that Jeremy was "unavailable to parent his children." The court noted that this unavailability was due to incarceration stemming from "his depraved choice to sexually molest his own daughter multiple times over the course of several months." The court also reasoned that Jeremy abandoned his children by virtue of the "negligible and supervised contact" with his children for the past 7 years. Jeremy had not acted as a "significant parental figure" for his children for most of their lives.

Jeremy appealed from the order finding that he abandoned his children and that his consent to the stepparent adoptions was not required. The Court of Appeals reversed.[2] The Court of Appeals explained that the only issue was whether Jeremy abandoned the children; i.e., whether he had acted in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights.

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[1] See *In re Guardianship of Sain*, 211 Neb. 508, 319 N.W.2d 100 (1982).

[2] *In re Adoption of Madysen S. et al.*, 23 Neb. App. 351, 871 N.W.2d 265 (2015).

The Court of Appeals concluded that the record did not support a finding upon clear and convincing evidence that Jeremy had abandoned his children. It noted that although Jeremy was incarcerated, he had continually paid his child support obligation, had sent letters and cards to the children, and had adamantly refused to relinquish his parental rights.

We granted Nicole and William's petition for further review.

ASSIGNMENT OF ERROR

Nicole and William assign on further review that the Court of Appeals erred in determining that there was insufficient evidence to support the county court's finding of abandonment.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law.[3]

ANALYSIS

[2,3] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.[5]

[4-6] A judgment is the final determination of the rights of the parties in an action.[6] We have said that a final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant.[7] Conversely, every

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[3] *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015).

[4] *Id.*

[5] *Id.*

[6] Neb. Rev. Stat. § 25-1301 (Reissue 2008).

[7] See, e.g., *Kometscher v. Wade*, 177 Neb. 299, 128 N.W.2d 781 (1964).

direction of a court or judge, made or entered in writing and not included in a judgment, is an order.[8]

The final judgment in proceedings under an adoption petition is an order granting or denying adoption. Such a final judgment is yet to be rendered in this case. Therefore, we must determine whether the order of the county court finding that Jeremy had abandoned his children and that his consent will not be required for the adoptions under consideration is a final order.

[7,8] In general, this court prohibits immediate appeals from interlocutory orders so as to avoid piecemeal appeals arising out of the same set of operative facts, chaos in trial procedure, and a succession of appeals in the same case to secure advisory opinion to govern further actions of the trial court.[9] There are only limited exceptions to the general rule that interlocutory orders are not immediately appealable.[10] Because adoption proceedings are special proceedings,[11] the question presented is whether the order falls under the exception that it was "an order affecting a substantial right made in a special proceeding" under Neb. Rev. Stat. § 25-1902 (Reissue 2008).

[9-11] A substantial right is an essential legal right, not a mere technical right.[12] It is a right of "substance." But it is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[13] We have said that an order "affects" a substantial right if it "'affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order

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[8] *Huskey v. Huskey*, 289 Neb. 439, 855 N.W.2d 377 (2014).

[9] *State v. Jackson, supra* note 3.

[10] *Id.*

[11] *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

[12] *Furstenfeld v. Pepin*, 287 Neb. 12, 840 N.W.2d 862 (2013).

[13] *State v. Jackson, supra* note 3.

from which he or she is appealing.'"[14] We have also said that "[w]hether the effect of an order is substantial depends upon 'whether it affects with finality the rights of the parties in the subject matter.'"[15]

[12,13] Having a substantial effect on a substantial right depends most fundamentally on whether the right could otherwise effectively be vindicated through an appeal from the final judgment.[16] We have said that an order affects a substantial right when the right would be "'significantly undermined'"[17] or "'irrevocably lost'"[18] by postponing appellate review. The duration of the order is also relevant to whether there is substantial effect on the substantial right.[19] Generally, an immediate appeal from an order is justified only if the right affected by the order would be significantly undermined or irrevocably lost by waiting to challenge the order in an appeal from the final judgment.

Having given the parties the opportunity to respond to jurisdictional issues raised sua sponte by this court, we conclude that the order appealed in this case concerned an important right, but there is no irreparable harm caused by postponing appeal of the order until the final judgment is entered in the

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[14] *Id.* at 914, 870 N.W.2d at 138.

[15] *Id.*, quoting *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000).

[16] See *State v. Jackson, supra* note 3. See, also, *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977); *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007); *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

[17] *State v. Jackson, supra* note 3, 291 Neb. at 914, 870 N.W.2d at 138. See, also, *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003); *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997).

[18] *State v. Jackson, supra* note 3, 291 Neb. at 914, 870 N.W.2d at 138. See, also, *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006); *State v. Wilson*, 15 Neb. App. 212, 724 N.W.2d 99 (2006).

[19] *State v. Jackson, supra* note 3. See, also, *In re Interest of T.T.*, 18 Neb. App. 176, 779 N.W.2d 602 (2009).

adoption proceedings. We reach this conclusion based on our examination of the adoption procedures, which are set forth in chapter 43, article 1, of the Nebraska Revised Statutes.

[14,15] The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.[20] Consent of a biological parent to the termination of his or her parental rights is the foundation of our adoption statutes, and an adoption without such consent must come clearly within the exceptions contained in the statutes.[21] As relevant to a child born in lawful wedlock, § 43-104(2) provides that consent shall not be required of any parent who (a) has relinquished the child from adoption by written instrument, (b) *has abandoned the child for at least 6 months next preceding the filing of the adoption petition*, (c) has been deprived of his or her parental rights to such child by the order of any court of competent jurisdiction, or (d) is incapable of consenting.

In addition to the consent of the biological parents, § 43-104(1) requires the consent of any district court, county court, or separate juvenile court in Nebraska having jurisdiction of the custody of the minor child by virtue of prior proceedings in those courts or by virtue of the Uniform Child Custody Jurisdiction and Enforcement Act. This includes district courts that have issued a dissolution decree concerning the minor child.[22]

[16,17] The county court does not terminate parental rights upon a finding of abandonment; the court thereby merely eliminates the need for the abandoning parent's consent and authorizes the execution of substitute consent.[23] A determination regarding parental consent, a finding under § 43-104(2), or

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[20] *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995).

[21] See, *id.*; *In re Adoption of Carlson*, 137 Neb. 402, 289 N.W. 764 (1940).

[22] See *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993).

[23] See *In re Guardianship of Sain, supra* note 1.

a determination regarding substitute consent does not end the court's inquiry as to whether the petition for adoption should be approved.

Upon a hearing, if the statutory requirements are otherwise satisfied, the court may decree an adoption only after finding that such adoption is for the best interests of the child.[24] As stated, the decree granting or denying the petition for adoption after such a determination of the child's best interests is the final judgment and is, therefore, appealable.

In *Klein v. Klein*,[25] we held that an order of a district court having continuing jurisdiction over the child pursuant to a dissolution decree and granting consent to an adoption was not a final, appealable order. We reasoned that the order of consent to adoption did not resolve the issue of adoption and only meant that the parent would have to defend against the petition for adoption in county court.[26] We explained that the parent could wait to appeal from the final judgment, which would be the order of adoption.[27]

[18] *Klein* dealt with a district court's order consenting to an adoption, and not a county court's order determining as a preliminary matter that a parent's consent in the pending adoption proceedings was unnecessary due to abandonment and that substitute consent would therefore be required. But our implicit reasoning in *Klein* that a parent could effectively vindicate his or her rights by waiting until an appeal from the final judgment of adoption supports the broad proposition that an order in an adoption proceeding is not final if the underlying adoption is still under consideration by the county court. Because the underlying adoption is still under consideration upon an interlocutory finding of abandonment, such interlocutory finding is not immediately appealable.

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[24] See Neb. Rev. Stat. § 43-109 (Cum. Supp. 2014).

[25] *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988).

[26] See *id.*

[27] See *id.*

Abandonment for purposes of adoption is not always determined in proceedings separate from the underlying adoption and set forth by an order separate from a final judgment, as it was in the case at bar. Certainly nothing in the adoption statutes requires bifurcated proceedings.

[19] We have specifically stated in a different context that the relationship between abandonment and termination of parental rights in adoption proceedings is different from the relationship between abandonment and termination of parental rights in proceedings under the juvenile code.[28] We conclude that, in the context of whether an order is final, a finding under § 43-104(2)(b) in an ongoing adoption proceeding is distinguishable from an adjudication of a child as abandoned under Neb. Rev. Stat. § 43-247(3) (Supp. 2015) of the juvenile code.

Unlike a finding under § 43-104(2)(b), adjudication under the juvenile code ends a discreet phase of inherently multifaceted proceedings in the juvenile court.[29] Furthermore, unlike a finding of abandonment in adoption proceedings, statutory procedures surrounding adjudication in juvenile court oftentimes result in an immediate and real effect on parenting time that would be irrevocably lost by postponing appellate review.[30] Jeremy fails to illustrate how a finding of abandonment in adoption proceedings, in contrast, has any real and immediate effect on parental obligations, visitation, custody, or other matters pertaining to the parent's contact with the child during the pendency of the final judgment granting or denying the petition for adoption. It does not follow that because orders of adjudication and disposition

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[28] See *In re Guardianship of Sain, supra* note 1.

[29] John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239 (2001).

[30] See, *In re Guardianship of Sain, supra* note 1; Neb. Rev. Stat. § 43-245 (Supp. 2015).

under the juvenile code are immediately appealable,[31] all orders determining abandonment under § 43-104(2)(b) are likewise immediately appealable before rendition of the final judgment.

Parental rights are not terminated by an order deciding the limited issue of abandonment under § 43-104(2)(b). Since the parent, despite a finding of abandonment under § 43-104(2)(b), retains parental rights until the final judgment denying or granting the petition for adoption, the parent may still participate in the proceedings to present evidence that adoption is not in the child's best interests. Ultimately, if the county court finds that the adoption is not in the child's best interests, then the rights of the parent, who was deemed under § 43-104(2)(b) to have abandoned the child, are returned to the status quo.

Jeremy does not adequately explain how his parental rights would be significantly lost or undermined by postponing appellate review of a determination of abandonment under § 43-104(2)(b) until the final judgment has been entered in the adoption proceedings. We are unconvinced that such finding results in a substantial effect on an important right, which cannot be adequately vindicated on appeal from the final judgment in the adoption proceedings. Thus, there is no justification for an immediate and piecemeal appeal from the important, but ultimately preliminary, matter of abandonment, which requires appointment of a guardian ad litem in order to obtain the necessary substitute consent.

Granted, if the county court later determines the adoption is in the child's best interests, the finding of abandonment proves significant. But the adoption itself and the concurrent termination of parental rights does not take effect while an appeal from the final judgment granting the adoption is pending. No significantly greater harm to the parent or child results

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[31] See, e.g., *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985).

from an erroneous determination of abandonment if reversed in an appeal after the final judgment as opposed to being reversed in an immediate appeal from the interlocutory order finding abandonment. In other words, the rights at issue in an interlocutory determination of abandonment under § 43-104(2)(b) can be adequately vindicated through an appeal of the final judgment granting or denying the adoption.

Although we held in *In re Adoption of David C.*[32] that a finding of abandonment in bifurcated adoption proceedings is a final, appealable order, we did so under the finding that abandonment by the putative biological father terminates the parental relationship. We did not consider our case law establishing that it is the adoption, not the finding of abandonment under § 43-104(2)(b), that terminates parental rights. Nor did we consider whether parental rights could be terminated before conducting a best interests analysis. By failing to consider the fact that the parent retained parental rights even after a finding of abandonment under § 43-104(2)(b), we incorrectly surmised, "An order of abandonment disturbs the parent's relationship with the child forever because the parent no longer has any right to be a part of the adoption proceedings. Once the relationship is terminated, the parent has no standing to object to the adoption."[33]

[20,21] Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.[34] As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the

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[32] *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[33] *Id.* at 723-24, 790 N.W.2d at 209.

[34] *Field Club v. Zoning Bd. of Appeals of Omaha*, 283 Neb. 847, 814 N.W.2d 102 (2012).

litigant's behalf.[35] Even after a finding of abandonment under § 43-104(2)(b), a parent in adoption proceedings continues to have a personal stake in the outcome of the litigation and standing to contest the pending issue of whether the adoption is in the child's best interests, because an evidentiary finding on best interests affects whether the parent retains his or her parental rights.[36]

A somewhat similar situation was recently presented in *In re Adoption of Douglas*,[37] wherein the Massachusetts Supreme Judicial Court explained that until parental rights have been terminated by entry of a decree, parents have the right to participate in the proceedings, including the "best interests" hearing. The court explained that deferring the entry of a termination decree until after completion of a best interests hearing on issues such as adoption and visitation permits the proceedings to be expedited, while preserving a parent's right to participate in the hearing and maintaining the parent's standing to challenge the resulting adoption or similar order on appeal.[38]

[22] There are only limited exceptions to the general rule prohibiting immediate appeals from orders that fail to finally determine the rights of the parties in the action. The general rule prohibiting interlocutory appeals is based in significant part upon the fact that immediate appeals from interlocutory orders unnecessarily prolong the ultimate resolution of the case. Allowing interlocutory appeals from findings of abandonment under § 43-104(2)(b) would only delay adoption proceedings, which ultimately is to the detriment of the child who is the subject of the adoption petition.

[23] To the extent that *In re Adoption of David C.* recognized jurisdiction over an interlocutory appeal of an abandonment

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[35] *Hawkes v. Lewis*, 255 Neb. 447, 586 N.W.2d 430 (1998).

[36] See *In re Guardianship of Sain, supra* note 1. See, also, e.g., *In re L. Y. L.*, 101 Cal. App. 4th 942, 124 Cal. Rptr. 2d 688 (2002).

[37] *In re Adoption of Douglas*, 473 Mass. 1024, 45 N.E.3d 595 (2016).

[38] *Id.*

determination under § 43-104(2)(b), we overrule that decision.[39] We also disapprove of *In re Guardianship of T.C.W.*[40] to the extent that, by entertaining an appeal from the district court that had reviewed an order finding abandonment before finally determining the adoption petition, we implicitly held the interlocutory order was a final, appealable order. We expressly hold that a finding under § 43-104(2)(b) that the consent of the parent who has abandoned the child is not required is not a final, appealable order. Such an order does not finally decide the rights of the parent. It is the decree of adoption that finally decides the rights of the parent in such circumstances.

Accordingly, we hold that the order of the county court finding that Jeremy had abandoned his children and that his consent to the adoptions was not required was not a final, appealable order. The current appeal must be dismissed for lack of jurisdiction.

CONCLUSION

The county court's order finding, under § 43-104(2)(b), that Jeremy's consent would not be required for the adoptions under consideration does not fall under one of the limited exceptions to the general rule that interlocutory orders are not immediately appealable. We conclude our finding will ultimately reduce any delay in adoption proceedings. Because the order appealed from was not a final order, we, as did the Court of Appeals, lack jurisdiction over this appeal. We reverse the order of the Court of Appeals and remand the cause with directions to vacate its opinion and dismiss the appeal for lack of jurisdiction.

Reversed and remanded with directions.

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[39] See *In re Adoption of David C., supra* note 32.

[40] *In re Guardianship of T.C.W.*, 235 Neb. 716, 457 N.W.2d 282 (1990).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Klaus P. Lindner, appellant, v. Douglas Kindig, mayor of the City of La Vista, et al., appellees.

881 N.W.2d 579

Filed May 27, 2016. No. S-15-630.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Limitations of Actions.** The determination of which statute of limitations applies is a question of law.
4. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
5. **Summary Judgment.** On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists.
6. ____. Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
7. **Summary Judgment: Proof.** A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
8. ____: ____. Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible

contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law.

9. **Constitutional Law: Limitations of Actions.** A constitutional claim can become time barred just as any other claim can.
10. **Limitations of Actions.** The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit.
11. ____. The time at which a cause of action accrues will differ depending on the facts of the case.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Affirmed.

K.C. Engdahl for appellant.

Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellees.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Miller-Lerman, J.

NATURE OF CASE

This is the second time this case has been before us. On December 16, 2011, Klaus P. Lindner filed a complaint in the district court for Sarpy County against the City of La Vista, Nebraska (City), and its mayor and city council members (collectively appellees), seeking a declaratory judgment that ordinance No. 979, creating an offstreet parking district adjoining a Cabela's store, is unconstitutional. The district court found that the action was time barred and granted appellees' motion to dismiss. Lindner appealed. In *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013) (*Lindner I*), we determined that we could not tell from the face of Lindner's complaint when Lindner's cause of action accrued. Therefore, we reversed the judgment of the district court and remanded the cause for further proceedings.

Upon remand, appellees filed a motion for summary judgment. A hearing was held at which evidence was received.

On June 15, 2015, the district court filed an order in which it determined that the 4-year catchall limitations period set forth in Neb. Rev. Stat. § 25-212 (Cum. Supp. 2014) applied and that Lindner's action accrued more than 4 years before he filed his complaint. The district court identified several accrual dates, to wit, when appellees opted to pay for the cost of offstreet parking through general revenues and sales tax revenues, enacted ordinance No. 983 authorizing the issuance of general obligation bonds, issued the bonds, and first paid on the bonds. Because each of these events occurred greater than 4 years before Lindner filed his complaint, the district court granted appellees' motion for summary judgment. We determine that the district court did not err when it granted appellees' motion for summary judgment, and we affirm.

STATEMENT OF FACTS

In *Lindner I*, we set forth the facts underlying this case as follows:

> On January 17, 2006, the City . . . passed and approved ordinance No. 979. The ordinance provided for "the creation of vehicle offstreet parking District No. 1 of the City" as authorized under Neb. Rev. Stat. § 19-3301 et seq. (Reissue 2012). According to the ordinance, the costs of the offstreet parking facilities—estimated by the city engineer to be $9 million—would be paid for from general taxes, special property taxes or assessments on property within the offstreet parking district, and/or general property taxes, with financing by issuance of the City's general obligation bonds.
>
> On December 16, 2011, . . . Lindner, a resident of the City, filed a complaint against . . . appellees. . . . Lindner sought declaratory judgment and a declaration of the unconstitutionality of the ordinance.
>
> Lindner alleged that the ordinance violated the Nebraska Constitution in two ways: first, by paying for

the costs through a general property tax levy in violation of article VIII, § 6, and second, by granting a Cabela's store a special benefit in violation of article III, § 18. . . . [H]e alleged that under the ordinance, appellees had agreed to pay for and bear the entire cost of the parking facilities directly benefiting the Cabela's store. Lindner believed that the cost was paid with sales tax revenues drawn from municipal general funds. . . . Lindner alleged that as a resident of the City, he was "aggrieved as a consequence of municipal revenues having been applied in an unconstitutional manner for the peculiar benefit of a private enterprise and in a manner which contravenes the constitutional prohibition on granting or establishment of special privileges and immunities."

Lindner therefore asked the district court to order and declare that "any and all agreements or practices as above detailed are null, void and unconstitutional" and to issue an order restraining and enjoining ongoing enforcement of or adherence to the ordinance. He also requested that appellees be ordered to impose and levy any necessary special assessments upon the property which was specially benefited by the parking facilities.

Appellees filed a motion to dismiss the complaint under Neb. Ct. R. Pldg. § 6-1112(b)(6). They alleged that the claim was barred by the "applicable time periods" for challenging the ordinance.

The district court granted appellees' motion to dismiss and dismissed the complaint with prejudice. The court reasoned that the complaint was subject to the 4-year catchall statute of limitations set forth in Neb. Rev. Stat. § 25-212 (Cum. Supp. 2012). The court determined that the limitations period began to run on the date that the ordinance was passed and approved—January 17, 2006—giving Lindner until January 17, 2010, to bring the current action. Because Lindner did not file the complaint until December 16, 2011, the court

> concluded that the complaint was barred by the statute of limitations.
>
> Lindner timely appealed . . . .

285 Neb. at 387-89, 826 N.W.2d at 870-71.

On appeal in *Lindner I*, Lindner claimed that

> the district court erred in (1) concluding that his complaint failed to state a claim upon which relief could be granted, (2) dismissing his complaint with prejudice, and (3) determining that the complaint was barred by a 4-year statute of limitations. Lindner also assert[ed] that it was error as a matter of law to determine that a 4-year statute of limitations can operate to bar claims of unconstitutionality directed to a municipal ordinance.

285 Neb. at 389, 826 N.W.2d at 871.

In our analysis in *Lindner I*, we noted that the question of the ordinance's constitutionality was not properly before us. We nevertheless assumed without deciding that the constitutional provisions identified in Lindner's complaint applied to the ordinance, but we did not express an opinion regarding the constitutionality of the ordinance or its continued viability.

In *Lindner I*, we then considered the issue of whether Lindner's claim that the ordinance was unconstitutional was barred by a statute of limitations, and we stated that a "'constitutional claim can become time-barred just as any other claim can.'" 285 Neb. at 391, 826 N.W.2d at 872, quoting *Block v. North Dakota*, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983). We further noted that "[t]he period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit." *Id.* at 392, 826 N.W.2d at 873.

In *Lindner I*, we stated:

> Lindner's claim of harm ultimately depends upon the funding mechanism actually employed by appellees. According to the ordinance, the costs of the offstreet parking facilities would be paid for from general taxes,

> special property taxes or assessments on property within the offstreet parking district, and/or general property taxes, with financing by issuance of the City's general obligation bonds. In other words, the language of the ordinance was broad enough to allow for payment of the costs through a special assessment on Cabela's. And if that had occurred, Lindner's allegations of unconstitutionality would seem to disappear, because his complaint appears to concede that a special assessment would have been constitutional.
>
> But instead, [upon consideration of a ruling granting a motion to dismiss and] accepting as we must at this stage the truth of Lindner's allegations, appellees opted to pay for the costs of the offstreet parking district through a general property tax levy or sales tax revenues drawn from municipal general funds. It was this decision or its implementation that adversely affected Lindner's rights and allegedly gave rise to his right to institute suit.

285 Neb. at 392, 826 N.W.2d at 873.

In *Lindner I*, we could not tell from the face of Lindner's complaint when appellees made the decision choosing the specific funding mechanism to be used or implemented that decision, and we stated that "[i]t is certainly plausible that the decision to use general funding sources or the implementation of that decision was made within 4 years immediately before the filing of Lindner's complaint." 285 Neb. at 393, 826 N.W.2d at 874. Because Lindner's complaint did not allege when appellees decided to pay the costs from general sources or when they implemented the decision, we determined that the complaint did not disclose on its face that Lindner's claim was time barred. We stated:

> Although we agree with the district court that the 4-year catchall limitations period set forth in § 25-212 potentially applies, we disagree with the court's conclusion that the limitations period began to run when

> the ordinance was passed. Because we cannot determine when Lindner's cause of action accrued in this case, we reverse the judgment and remand the cause for further proceedings.

Id. at 393-94, 826 N.W.2d at 874.

After the cause was remanded to the district court, appellees filed a motion for summary judgment on May 22, 2015. At the hearing on the motion for summary judgment, appellees offered and the court received 14 exhibits, and Lindner offered and the court received 3 exhibits. The undisputed evidence showed that on March 21, 2006, the City passed and approved ordinance No. 983, which authorized "THE ISSUANCE OF GENERAL OBLIGATION OFF-STREET PARKING BONDS, SERIES 2006," in the principal amount of $7,940,000 to pay the costs of the offstreet parking facilities. The ordinance stated that the date of the original issue for the bonds was April 15, 2006, and that interest on the bonds was payable on April 15 and October 15 of each year, commencing with October 15, 2006.

An affidavit of the City's director of administrative services was admitted into evidence, and the director stated that the City had a certain checking account into which some of the City's general revenues and all of its sales tax revenue were deposited. The director further stated in his affidavit that "[a]ll payments of principal and interest on the Off-Street Parking Bonds" were made from that checking account. According to the director's affidavit and bank statements that were admitted into evidence, on October 16, 2006, the City made the first interest payment on the bonds in the amount of $179,366.25. On April 16, 2007, the City made a payment of interest in the amount of $179,366.25 and a payment of principal in the amount of $280,000.

The evidence further showed that on July 11, 2007, Lindner sent an e-mail to the City's administrator asking if the City was going to impose a special assessment on Cabela's to pay for the offstreet parking. In a letter to Lindner dated July 12,

2007, the administrator stated that the City did "not intend to specially assess Cabela's for the off-street parking."

On June 15, 2015, the district court filed an order in which it granted appellees' motion for summary judgment. The district court concluded that the 4-year catchall statute of limitations found in § 25-212 applied. In its order, the court stated:

> The undisputed facts show that [the City] paid the costs of the off-street parking facility not by special assessments, but through general revenues and sales tax revenues. Further, the undisputed facts also show that [the City] made and implemented its decision to pay for the off-street parking facilities with sales tax revenues (1) in March 2006, when it passed Ordinance No. 983; (2) on April 15, 2006, when the General Obligation Off-Street Parking Bonds, Series 2006 were issued; and (3) on October 16, 2006, when it made its first payment of interest on the General Obligation Off-Street Parking Bonds, Series 2006. All of these events occurred more than four years prior to December 16, 2011, the date in [sic] which [Lindner] filed this action. Accordingly, [Lindner] failed to comply with the applicable 4 year statute of limitations.

The district court determined there was no genuine issue of material fact, and it granted appellees' motion for summary judgment.

Lindner appeals.

ASSIGNMENTS OF ERROR

Lindner claims, consolidated and restated, that the district court erred when it (1) determined that Lindner's complaint is barred by the 4-year statute of limitations, (2) relied on our opinion in *Lindner I* "as being dispositive or controlling with regard to the issue of whether [Lindner's] claim is barred by operation of a four year period of limitations," and (3) determined that the 4-year statute of limitations applies to Lindner's claim even though the nature of Lindner's claim is an "ongoing

and continuously accruing constitutional wrong, deprivation or violation."

STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Sulu v. Magana, ante* p. 148, 879 N.W.2d 674 (2016). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id*.

[3,4] The determination of which statute of limitations applies is a question of law. *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013). An appellate court independently reviews questions of law decided by a lower court. *Adair Asset Mgmt. v. Terry's Legacy*, 293 Neb. 32, 875 N.W.2d 421 (2016).

ANALYSIS

Lindner generally contends that the district court erred when it granted appellees' motion for summary judgment based upon its determination that Lindner's constitutional challenge to ordinance No. 979 is subject to and barred by the 4-year catchall statute of limitations found in § 25-212. As explained below, we find no merit to Lindner's contentions.

[5,6] The principles regarding summary judgment are well established. On a motion for summary judgment, the question is not how the factual issue is to be decided but whether any real issue of material fact exists. *Phillips v. Liberty Mut. Ins. Co.*, 293 Neb. 123, 876 N.W.2d 361 (2016). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment

was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Sulu v. Magana, supra*. Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Phillips v. Liberty Mut. Ins. Co., supra*.

[7,8] A party moving for summary judgment makes a prima facie case for summary judgment by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Id*. Once the moving party makes a prima facie case, the burden shifts to the party opposing the motion to produce admissible contradictory evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. *Id*.

We first note that in Lindner's complaint, he sought a declaratory judgment that ordinance No. 979 is unconstitutional because it violates article VIII, § 6, and article III, § 18, of the Nebraska Constitution. As we did in *Lindner I*, for the purposes of this opinion, we will assume without deciding that these constitutional provisions identified in Lindner's complaint apply to the ordinance; however, we note that in doing so, we make no determinations regarding the constitutionality of the ordinance or its continued viability. With this framework in mind, we turn to whether the district court correctly determined that Lindner's claim is barred by the 4-year statute of limitations.

Lindner alleged in his amended reply that "each day" constitutes a "separate accrual date," and he therefore generally asserts that his claim that the ordinance is unconstitutional is not the type of claim that is subject to any statute of limitations. Lindner more specifically contends that his claim is not subject to any limitations period, because the nature of his claim is that of "an alleged ongoing and continuously accruing constitutional wrong, deprivation or violation."

[9] We rejected this argument in *Lindner I*, in which we quoted the U.S. Supreme Court and stated that a "'constitutional claim can become time-barred just as any other claim can.'" 285 Neb. at 391, 826 N.W.2d at 872, quoting *Block v. North Dakota*, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983). With respect to the purpose of statutes of limitations periods, in *Lindner I* we stated:

> Statutes of limitations rest on a common understanding that wrongs for which the law grants a remedy are subject to a requirement that, in fairness, the party wronged must pursue the remedy in a timely fashion. This understanding, in turn, addresses three concerns: first, for stale claims, where memories fade and witnesses and records may be missing; second, for repose—that after some period of time, claims should not continue unresolved; and third, that a plaintiff cannot sleep on his or her rights and then suddenly demand a remedy, without creating a greater wrong against the party charged and a wrong against the peace of the community.

285 Neb. at 391, 826 N.W.2d at 872-73.

We then recognized in *Lindner I* that Lindner was making a facial challenge to the constitutionality of the ordinance, but we observed that the distinction between a facial challenge as opposed to an "'as-applied'" challenge "is not of great import for statute of limitations purposes." 285 Neb. at 391-92, 826 N.W.2d at 873. We stated:

> "[A] case alleging facial unconstitutionality is ripe not simply when the law is passed but, just like an as-applied challenge, when the government acts pursuant to that law and adversely affects the plaintiff's rights." "There is simply no categorical rule that a law becomes insulated from facial challenge by the mere passage of time."

Id. at 392, 826 N.W.2d at 873.

In his complaint, Lindner alleged that he was the aggrieved party, and in *Lindner I*, we identified certain events which would affect Lindner's rights. And because Lindner is the

aggrieved party, we need not consider facial challenge timing issues brought by third parties. See Timothy Sandefur, *The Timing of Facial Challenges*, 43 Akron L. Rev. 51 (2010).

[10,11] Accrual is a preliminary "question necessary for getting the plaintiff through the courthouse door." *Id*. at 61. Regarding when a limitations period begins to run, we stated in *Lindner I*:

> The period of limitations begins to run upon the violation of a legal right, that is, when an aggrieved party has the right to institute and maintain suit. "The time at which a cause of action accrues will differ depending on the facts of the case, but it will come whenever the plaintiff's rights are finally and clearly affected pursuant to the law that [he or] she believes is unconstitutional."

285 Neb. at 392, 826 N.W.2d at 873.

Lindner has not persuaded us that our reasoning in *Lindner I* was in error. Based upon our reasoning and determination set forth in *Lindner I*, we do not agree with Lindner's contention that his claim should be subjected to perennial review, and we therefore reject his argument that his claim that the ordinance is unconstitutional is not subject to any statute of limitations.

Our reasoning is in accord with that of other jurisdictions. In *H & B Builders, Inc. v. City of Sunrise*, 727 So. 2d 1068 (Fla. App. 1999), a Florida appellate court concluded that a 4-year statute of limitations applied to the plaintiff's challenge to a city's special assessment bonds. In determining that the statute of limitations should apply to the plaintiff's claim, the court stated that the city "'has a need for certainty in its economic affairs,' and that its policy decisions should not be subjected to a perennial review." *Id*. at 1071. See, also, *Fredrick v. Northern Palm Beach Cty. Imp.*, 971 So. 2d 974 (Fla. App. 2008) (determining that homeowners' challenge to validity of property assessments was barred by statute of limitations).

Having determined that Lindner's claim is subject to a statute of limitations, we must determine which statute of limitations applies. The determination of which statute of limitations applies is a question of law. *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013). An appellate court independently reviews questions of law decided by a lower court. *Adair Asset Mgmt. v. Terry's Legacy*, 293 Neb. 32, 875 N.W.2d 421 (2016).

The district court determined that the 4-year catchall limitations period set forth in § 25-212 applies to Lindner's claim. Section 25-212 provides that "[a]n action for relief not otherwise provided for in Chapter 25 can only be brought within four years after the cause of action shall have accrued." In *Lindner I*, it was not necessary to determine which statute of limitations applied, and we stated that the 4-year statute of limitations set forth in § 25-212 "potentially applies." 285 Neb. at 393, 826 N.W.2d at 874.

Lindner has not pointed us to a statute of limitations other than the 4-year catchall statute of limitations that could potentially apply to his claim. Appellees contend that the 4-year catchall statute of limitations applies. We are aware that in certain instances, a public entity is subject to a specific limitations period set by statute. See *Block v. North Dakota,* 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983). However, having reviewed the nature of Lindner's allegations, we see no statute of limitations that specifically applies to Lindner's constitutional claim.

We have stated that § 25-212 "provides the catchall limitations period for *any* action seeking relief for which the Legislature has not enacted a more specific statute of limitations." *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 161, 615 N.W.2d 469, 472 (2000) (emphasis in original). Consistent with this purpose and in the absence of a specific limitations period set by statute which applies to Lindner's claim, we conclude that the 4-year catchall limitations period set forth in § 25-212 controls.

Having concluded that the 4-year statute of limitations applies to Lindner's claim, we must consider whether the district court correctly determined that Lindner's claim is barred by the 4-year statute of limitations. In *Lindner I*, we determined that the district court had erred when it determined that the 4-year statute of limitations began to run when ordinance No. 979 was passed. We stated that according to the ordinance, the costs of the offstreet parking facilities would be paid from general taxes, special property taxes or assessments on property within the parking district, and/or general property taxes, with financing by issuance of the City's general obligation bonds. We recognized that the language of the ordinance was broad enough to pay for the costs through a special assessment on Cabela's, and if this had occurred, then Lindner's claim would seem to disappear.

We further noted in *Lindner I* that if appellees opted to pay for the costs of the offstreet parking district through a general property tax levy or sales tax revenues drawn from municipal general funds, it would have been "this decision or its implementation that adversely affected Lindner's rights and allegedly gave rise to his right to institute suit." 285 Neb. at 392, 826 N.W.2d at 873. However, we stated in *Lindner I* that we could not tell from the face of Lindner's complaint "*when* appellees made the decision choosing the specific funding mechanism to be used or implemented that decision." 285 Neb. at 393, 826 N.W.2d at 873 (emphasis in original). In remanding the cause in *Lindner I*, we stated that

> [b]ecause the complaint does not allege when appellees decided to pay the costs from general sources or when [they] implemented the decision, the complaint does not disclose on its face that it is time barred. And in the absence of such allegations, we cannot determine with specificity when the claim accrued.

285 Neb. at 393, 826 N.W.2d at 874.

Upon remand, following an evidentiary hearing, the district court filed an order in which it stated that the evidence

showed that appellees opted to pay for the costs of the offstreet parking through general revenues and sales tax revenues, and not through special assessments. The district court identified three possible dates upon which Lindner's claim accrued. It stated:

> [T]he undisputed facts . . . show that [the City] made and implemented its decision to pay for the off-street parking facilities with sales tax revenues (1) in March 2006, when it passed Ordinance No. 983; (2) on April 15, 2006, when the General Obligation Off-Street Parking Bonds, Series 2006 were issued; and (3) on October 16, 2006, when it made its first payment of interest on the General Obligation Off-Street Parking Bonds, Series 2006.

These dates represent when appellees made their decision regarding which funding mechanism to use and when they implemented that decision, and the district court stated that "[a]ll of these events occurred more than four years prior to December 16, 2011, the date in [sic] which [Lindner] filed this action." The district court therefore determined that Lindner's action was time barred and granted appellees' motion for summary judgment.

As noted, in *Lindner I*, we indicated that the alleged harm to Lindner's rights occurred when appellees declined to pay for the offstreet parking facilities through special assessments and instead paid for the costs through a general property tax or sales tax revenue drawn from municipal general funds. But in *Lindner I*, we could not tell from the face of Lindner's complaint when the decisions were made or when the decisions were implemented. Hence, the necessity of the remand.

Following the hearing and decision on remand, Lindner appeals. Upon our review of the record, we determine that the district court correctly identified the three undisputed dates when appellees chose the funding mechanism to be used and implemented that decision. Even if we were to use the latest of these events, October 16, 2006, as the date upon which

Lindner's claim accrued, Lindner's December 16, 2011, complaint was filed more than 4 years after the action accrued. Therefore, the district court did not err when it determined that Lindner's claim is time barred by the 4-year statute of limitations.

CONCLUSION

We conclude that the 4-year catchall statute of limitations period set forth in § 25-212 applies to Lindner's claim. We determine that the district court did not err when it granted summary judgment in favor of appellees based upon its determination that Lindner's claim is barred by the statute of limitations.

Affirmed.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Stephen Lindsay, Special Administrator of the Estate of Mary F. Lindsay, et al., appellants, v. Patricia M. Fitl, Personal Representative of the Estate of James G. Fitl, appellee.

879 N.W.2d 385

Filed May 27, 2016. No. S-15-757.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Motions to Dismiss: Claims: Parties.** If, on a motion asserting the defense to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 2008), and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.
4. **Standing: Jurisdiction.** Standing requires that a litigant have a personal stake in the outcome of a controversy that warrants invocation of a court's jurisdiction and justifies exercise of the court's remedial powers on the litigant's behalf.
5. **Standing: Claims: Parties: Proof.** To have standing, a litigant must assert its own rights and interests and demonstrate an injury in fact, which is concrete in both a qualitative and temporal sense.

6. **Corporations: Actions: Parties: Proof.** In order to establish an individual harm to support a claim, the shareholder must allege a separate and distinct injury or a special duty owed by the party to the individual shareholder.
7. **Corporations: Actions: Parties: Damages.** Even if a shareholder establishes that there was a special duty, he or she may only recover for damages suffered in his or her individual capacity, and not injuries common to all the shareholders.
8. **Corporations: Actions: Parties.** Even though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

Thomas M. White, C. Thomas White, and Amy S. Jorgensen, of White & Jorgensen, for appellants.

Michael S. Degan, of Husch Blackwell, L.L.P., for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Kelch, J.

NATURE OF CASE

Mary F. Lindsay, Mary H. Lindsay, Daniel Lindsay, Michael Lindsay, Alice Lindsay, Stephen Lindsay, and Marguerite Ford (collectively the Lindsays) filed suit against James G. Fitl (Fitl) for breach of various fiduciary duties. A motion to dismiss was granted on the bases that the Lindsays' claims were derivative and that they were divested of their standing when the Federal Deposit Insurance Corporation (FDIC) filed an action in federal court. Now, the Lindsays have appealed to this court. We affirm.

FACTS

This case arises out of the Lindsays' claim that Fitl, another minority shareholder, breached fiduciary duties in connection

with his role as an officer and director of Mid City Bank, Inc., and the 304 Corporation. The Lindsays were minority shareholders of the 304 Corporation, a Nebraska corporation, its principal asset being Mid City Bank.

Although unrelated to issues presented in this appeal, we note that the Lindsays have twice amended their complaint to reflect substitutions of the parties. Mary F. Lindsay passed away in 2013, and in August 2014, Stephen Lindsay, as the special administrator of her estate, was substituted in her place. Defendant Fitl also passed away, and in the third amended complaint, Patricia M. Fitl, the personal representative of Fitl's estate (personal representative), was substituted in his place.

In August 2010, the Nebraska Department of Banking and Finance and the FDIC began a joint examination of the condition of Mid City Bank. On November 4, 2011, the Department of Banking and Finance appointed the FDIC as receiver of the bank, stating as its reason that "'large commercial real estate loan and poor management practices . . . led to a deterioration of the bank's capital'" and that the department was left with "'no option but to declare the insolvent institution receivership.'" After some time, the bank reopened, and the receiver continued to operate the bank, which was in good standing as of the date of the hearing. The FDIC did not place any of the 304 Corporation's other assets into receivership.

On July 17, 2012, the Lindsays filed their first complaint against defendant Fitl, now defendant personal representative, alleging breach of fiduciary duties. The complaint was amended with minor changes in August and October 2014 and in April 2015. The Lindsays did not allege breach of contract in any version of the complaint.

On November 4, 2014, the FDIC filed a federal action against Fitl's estate in the U.S. District Court for the District of Nebraska, in case No. 8:14-cv-00346, alleging, among other things, that Fitl "was grossly negligent and breached his fiduciary duties" and that because of the receivership, and pursuant

to 12 U.S.C. § 1821(d)(2)(A)(i) (2012), the FDIC succeeded to all rights, titles, powers, and privileges of Mid City Bank and its shareholders, accountholders, and depositors, "including, but not limited to, [the bank's] claims against [its] former directors and officers."

On April 16, 2015, the personal representative filed a motion to dismiss the third amended complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). In support of this motion, the personal representative alleged that all the claims asserted by the Lindsays in their third amended complaint were "the exclusive province of the [FDIC], as receiver for Mid-City Bank," and were the subject of pending litigation in federal court.

On May 27, 2015, before the hearing on the personal representative's motion to dismiss, the Lindsays filed a motion for leave to file a fourth amended complaint. The proposed fourth amended complaint merely added an allegation that the Lindsays filed a claim with the personal representative, which was disallowed.

The hearing on the personal representative's motion to dismiss was held on June 16, 2015. Although the Lindsays had not previously alleged a breach of contract, they argued at the hearing that Fitl breached the "Fitl Lindsay 304 Corporation Buy-Sell Agreement" (Buy-Sell Agreement).

On July 29, 2015, the district court granted the personal representative's motion to dismiss, finding that the Lindsays' claims were derivative of the corporation and that as a result of the FDIC's federal action, the Lindsays' claims were exclusively vested with the FDIC. Therefore, the Lindsays had no standing to pursue them. The district court also denied the Lindsays' motion to amend and found that any further amendments would be futile due to the FDIC's federal action. The trial court signed and filed the same order again on August 3, without any explanation. The Lindsays appeal from both the July 29 and August 3 orders.

ASSIGNMENTS OF ERROR

The Lindsays assign, combined and restated, that the district court erred (1) in finding that their claims were derivative of the corporation, (2) in finding that the FDIC's federal action divested them of their standing, and (3) in stating that further amendment would be futile.

STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Waldron v. Roark*, 292 Neb. 889, 874 N.W.2d 850 (2016). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

[3] As an initial matter, we must determine whether the district court's decision to receive the Buy-Sell Agreement transformed the motion to dismiss into a motion for summary judgment. Section 6-1112(b) provides, in relevant part:

> If, on a motion asserting the defense . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in §§ 25-1330 to 25-1336, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.

At the commencement of the hearing, the district court took judicial notice of documents within the public record. However, later in the proceedings, the district court received an affidavit of Stephen Lindsay and the Buy-Sell Agreement.

For purposes of a motion to dismiss, "'"the court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings."'" *DMK Biodiesel v. McC*oy, 285 Neb. 974, 980, 830 N.W.2d 490, 496 (2013), quoting *Miller v. Redwood Toxicology Laboratory, Inc*., 688 F.3d 928 (8th Cir. 2012). These documents embraced by the complaint are not considered matters outside the pleading. Documents embraced by the pleadings are materials "'"alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading."'" *Id.*, citing *Enervations, Inc. v. Minnesota Mining*, 380 F.3d 1066 (8th Cir. 2004), and quoting *Ashanti v. City of Golden Valley*, 666 F.3d 1148 (8th Cir. 2012). The Buy-Sell Agreement would be a "matter outside the pleading," since it was not referenced by the third amended complaint. With this court's having already determined that the word "shall" is mandatory and not permissive, in regard to § 6-1112(b), see *DMK Biodiesel v. McC*oy, *supra*, the personal representative's motion to dismiss became a motion for summary judgment.

We now consider the Lindsays' first two assignments that the district court erred in finding (1) that their claims were derivative of the corporation and (2) that the FDIC's federal action divested them of their standing.

[4,5] Standing requires that a litigant have a personal stake in the outcome of a controversy that warrants invocation of a court's jurisdiction and justifies exercise of the court's remedial powers on the litigant's behalf. *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013). To have standing, a litigant must assert its own rights and interests and demonstrate an injury in fact, which is concrete in both a qualitative and temporal sense. *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012).

Both parties agree that the FDIC took control of Mid City Bank pursuant to 12 U.S.C. § 1821, which provides:

> (d) Powers and duties of Corporation as conservator or receiver
>
> . . . .
>
> (2) General powers
>
> (A) Successor to institution
>
> The Corporation shall, as conservator or receiver, and by operation of law, succeed to—
>
> (i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution[.]

[6,7] The personal representative argues that 12 U.S.C. § 1821(d)(2)(A)(i) grants exclusive jurisdiction of shareholder claims to the FDIC and that because the FDIC filed its lawsuit, the Lindsays now lack standing to bring an action which is derivative in nature. A derivative action is an action brought by a shareholder to enforce a cause of action belonging to the corporation. *McGill v. Lion Place Condo. Assn.*, 291 Neb. 70, 864 N.W.2d 642 (2015). In countering, the Lindsays argue that their claims are direct, not derivative, by stating in their brief: "Fitl breached the [Buy-Sell] Agreement by fraudulently misrepresenting facts affecting the value of the 304 Corporation . . . . These breaches create direct claims for breach of contract which are separate and distinct from the claims of other shareholders." Brief for appellants at 6. They assert that if a shareholder can establish an individual cause of action because the harm to the corporation also damaged the shareholder in his or her individual capacity, then the individual can pursue his or her claims. In order to establish an individual harm to support a claim, the shareholder must allege a separate and distinct injury or a special duty owed by the party to the individual shareholder. *Freedom Fin. Group v. Woolley*, 280 Neb. 825, 792 N.W.2d 134 (2010). Even

if a shareholder establishes that there was a special duty, he or she may only recover for damages suffered in his or her individual capacity, and not injuries common to all the shareholders. *Id.* The Lindsays contend that the breach of the Buy-Sell Agreement is a distinct injury and not common to all shareholders.

The personal representative points out that not one of the Lindsays' four filed complaints or the proposed fourth amended complaint alleges the existence of or breach of a Buy-Sell Agreement. The Lindsays' complaint places the personal representative on notice that their claim is in tort for breach of fiduciary duty, not a contract action. Although the rules of notice pleading have now been liberalized, the pleading must give fair notice of the claims asserted. See, *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010); *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). The Lindsays argued for the first time at the hearing on the personal representative's motion to dismiss that their theory of recovery was for contract, not tort. With the Lindsays' third amended complaint clearly alleging a breach of fiduciary duty, it did not provide "fair" notice of a contract claim. The district court properly proceeded to evaluate the Lindsays' third amended complaint as alleging a breach of fiduciary duty.

[8] The Lindsays' third amended complaint alleges that as shareholders, they incurred injury due to the loss in value of their 304 Corporation stock caused by the breach of fiduciary duties by Fitl as an officer and director of Mid City Bank and the 304 Corporation. Previously, this court stated that "'[e]ven though all shares of stock of a corporation may be owned by a small number of shareholders or by one shareholder alone, a shareholder cannot sue individually concerning rights which belong to the corporation.'" *Freedom Fin. Group v. Woolley*, 280 Neb. at 833, 792 N.W.2d at 141, quoting *Meyerson v. Coopers & Lybrand*, 233 Neb. 758, 448 N.W.2d 129 (1989). Further, a "'"diminution in value of a

stockholder's investment is a concomitant of the corporate injuries resulting in lost profits."'" *Id*. In this instance, the Lindsays' breach of fiduciary duties claim as alleged is similar to all other shareholders and did not arise from a special duty, since the injury was not "separate and distinct." Accordingly, the district court correctly concluded that the Lindsays' claims were derivative in nature and that as a result of the FDIC lawsuit, the Lindsays had no standing to bring a derivative action on behalf of the corporation. See, *Womble v. Dixon*, 752 F.2d 80 (4th Cir. 1984); *American Cas. Co. of Reading, Pa. v. FDIC*, 713 F. Supp. 311 (N.D. Iowa 1988); *Freedom Fin. Group v. Woolley, supra*.

After viewing the pleadings and evidence admitted at the hearing in a light most favorable to the party against whom judgment was granted and giving such party the benefit of all reasonable inferences deducible from the evidence, we perceive no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts. Thus, the personal representative was entitled to judgment as a matter of law. Although the district court followed a different standard in regard to the third amended complaint, no error was committed. See *Hamilton Cty. EMS Assn. v. Hamilton Cty.*, 291 Neb. 495, 866 N.W.2d 523 (2015) (where record demonstrates that decision of trial court is ultimately correct, although such correctness is based on ground or reason different from that assigned by trial court, appellate court will affirm).

Lastly, the Lindsays contend that the district court erred when it stated that further amendment would be futile. We read this assignment of error to effectively be a claim that the district court erred when it denied the Lindsays an opportunity to amend their complaint yet again to allege a contract cause of action. We reject this assignment of error.

The Lindsays first raised the contract theory in argument at the summary judgment hearing. However, the record shows no motion seeking to set aside the judgment or for leave to

amend based on contract either before or after summary judgment had been entered. So there was no matter on which to rule. The district court did not err when it merely commented on a hypothetical amended complaint.

CONCLUSION

We determine that the district court did not err in granting a judgment which dismissed the Lindsays' third amended complaint.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Abejide Abejide, also known as Gaylord Mason, appellant.

879 N.W.2d 684

Filed June 3, 2016. No. S-15-180.

1. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
3. **Convictions: Evidence: Appeal and Error.** In reviewing a claim that the evidence was insufficient to support a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
6. **Lesser-Included Offenses.** Whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law. Under the statutory elements approach, for an offense to be a lesser-included offense, it must be impossible to commit the greater offense without also committing the lesser offense.

7. **Lesser-Included Offenses: Sexual Assault.** Attempted third degree sexual assault is not a lesser-included offense of attempted first degree sexual assault.
8. **Criminal Law: Juries: Verdicts.** Where a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act. It need not be unanimous in its conclusion as to which of several consistent theories it believes resulted in the violation.
9. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
10. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.
11. **Habitual Criminals: Sentences: Convictions.** By its terms, Neb. Rev. Stat. § 29-2221 (Reissue 2008) requires the triggering offense to be "a felony" before the habitual criminal statute will apply to the sentencing of the triggering offense. But in order to be one of the prior convictions that establishes habitual criminal status, § 29-2221 does not require that the prior conviction was a "felony" per se; instead, it requires that the prior conviction resulted in a sentence of imprisonment for a term "of not less than one year."
12. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Lancaster County: Paul D. Merritt, Jr., Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and Kristi J. Egger Brown for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, and Cassel, JJ.

Miller-Lerman, J.

I. NATURE OF CASE

Abejide Abejide, also known as Gaylord Mason, was convicted by a jury of attempted first degree sexual assault and terroristic threats. The district court for Lancaster County found Abejide to be a habitual criminal and sentenced him to imprisonment for 10 to 20 years for attempted first degree sexual assault and for 10 to 10 years for terroristic threats. Abejide appeals his convictions and sentences. His assignments of error challenge the court's refusal to give certain proposed instructions, the sufficiency of the evidence, the effectiveness of trial counsel, and the alleged excessiveness of his sentence. We affirm Abejide's convictions and sentences.

II. STATEMENT OF FACTS

Abejide was arrested and charged with attempted first degree sexual assault and terroristic threats in connection with an incident that occurred on May 24, 2014. At Abejide's jury trial, the victim testified that she was walking to a grocery store when a man she knew called out to her. The man was Howard Mason, who is Abejide's brother. The victim crossed the street to talk with Mason, who was on the sidewalk drinking beer with a few other people, including Abejide. She talked and drank beer with the group for a while. At some point, Mason and Abejide got into an argument and Mason left. Later, as the victim was leaving, Abejide pulled her into an alley, where he started choking her and told her he was going to "knock [her] out." The victim testified that she thought that Abejide was going to kill her. She further testified that she thought that Abejide was trying to rape her, because he pushed her against a wall and pulled her pants down and took his own pants down. She testified that Abejide told her that he was going to do something which she understood to mean that he was going to sexually assault her. The victim started screaming and told him to stop. The next thing she remembered was that a police officer arrived and handcuffed

Abejide. The victim testified that she had never met Abejide before that day and that she did not consent to having sexual intercourse with him in the alley.

A Lincoln police officer testified that he received a call to respond to a report of a possible domestic disturbance in an alley. He parked his patrol car nearby and walked to the alley. When he turned a corner, he saw Abejide holding a woman face first against the wall. The woman's pants were pulled down and Abejide's penis was exposed. The officer testified that the woman appeared "shaken," "upset," and "fearful" and that when she saw him, she said, more than once, "'Help me. He's trying to rape me.'" The officer pulled Abejide away from the woman and put him into handcuffs. The officer and another officer who later arrived at the scene of the incident both testified that Abejide appeared to be intoxicated but that he was able to comply with instructions and could walk on his own.

After the State rested its case, the court overruled Abejide's motion to dismiss the terroristic threats charge. Abejide did not move to dismiss the attempted first degree sexual assault charge, and he did not thereafter present any evidence in his defense.

At the jury instruction conference, the court refused a number of Abejide's proposed instructions, three of which are at issue in this appeal. The first proposed instruction was an instruction which included attempted third degree sexual assault as a lesser-included offense of attempted first degree sexual assault. The court instead gave an instruction which set forth no lesser-included offense to attempted first degree sexual assault.

The second proposed instruction at issue in this appeal was an instruction setting forth the elements of the offense of terroristic threats. Abejide's proposed instruction required the jury to reach unanimous agreement regarding whether Abejide acted with the intent to terrorize the victim or whether he acted in reckless disregard of the risk of causing terror to the

victim. The court instead instructed the jury that it "need not agree unanimously on whether . . . Abejide intended to terrorize [the victim] or acted in reckless disregard of terrorizing [the victim]," so long as the jury agreed unanimously that the State established either state of mind of the defendant beyond a reasonable doubt.

The third and final proposed instruction at issue in this appeal was an instruction setting forth an intoxication defense and instructing the jury that it could consider evidence of Abejide's intoxication in deciding whether he had the required intent or whether he was so overcome by the use of alcohol that he could not have formed the required intent. In refusing Abejide's proposed instruction, the court cited Neb. Rev. Stat. § 29-122 (Cum. Supp. 2014), which generally provides that voluntary intoxication is not a defense to any criminal offense and may not be considered in determining the existence of a mental state of the defendant where mental state is an element of the offense. The court noted that to the extent there was evidence that Abejide was intoxicated, there was no evidence that his intoxication was not voluntary. The court therefore instructed the jury that it could not consider Abejide's voluntary intoxication in deciding whether he had the required intent. Abejide objected to the court's instruction on the basis that it unconstitutionally diminished the State's burden to prove each and every element of the offense and that § 29-122 improperly imposed a burden on Abejide to present evidence which might require him to give up other constitutional rights, such as the right to remain silent. The court overruled Abejide's objection.

The jury found Abejide guilty of both attempted first degree sexual assault and terroristic threats. After the court entered judgment based on the jury's verdicts, the court held a hearing to consider the State's charge that Abejide was a habitual criminal. Based on evidence presented by the State, the court found that Abejide had three prior convictions, each of which involved a sentence of not less than 1 year: a conviction in

1994 for attempted first degree sexual assault of a child, for which he was sentenced to imprisonment for 6 to 9 years; a conviction in 2007 for a violation of the Sex Offender Registration Act (SORA), second offense, for which he was sentenced to imprisonment for 2 to 4 years; and a conviction in 2011 for a violation of the SORA, for which he was sentenced to imprisonment for 20 months to 4 years. The court further found that Abejide was represented by counsel in each prior conviction. The court found that Abejide was a habitual criminal. The court thereafter sentenced Abejide to imprisonment for 10 to 20 years for attempted first degree sexual assault and for 10 to 10 years for terroristic threats; the court ordered the sentences to be served consecutively to one another.

Abejide appeals his convictions and sentences.

III. ASSIGNMENTS OF ERROR

Abejide claims that the district court erred when it rejected his proposed jury instructions regarding attempted third degree sexual assault as a lesser-included offense of attempted first degree sexual assault, the elements of terroristic threats and the requirement of unanimity with regard to the defendant's state of mind, and the intoxication defense. He also claims that there was not sufficient evidence to support the verdicts and that he was denied effective assistance of counsel in certain respects. Abejide finally claims that the court imposed an excessive sentence. In connection with the claim of an excessive sentence, Abejide argues that his prior convictions for violations of the SORA should not have been used to support a finding that he was a habitual criminal.

IV. STANDARDS OF REVIEW

[1,2] Whether the jury instructions given by a trial court are correct is a question of law. *State v. Armagost*, 291 Neb. 117, 864 N.W.2d 417 (2015). When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court. *Id*.

[3] In reviewing a claim that the evidence was insufficient to support a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Russell*, 292 Neb. 501, 874 N.W.2d 8 (2016).

V. ANALYSIS

1. The District Court Did Not Err in Its Rulings Regarding Jury Instructions

[5] Abejide claims that the district court erred when it rejected his proposed jury instructions on the offense of attempted first degree sexual assault, the offense of terroristic threats, and the defense of intoxication. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *Armagost, supra*. We conclude that the district court did not commit reversible error when it refused each of the proposed instructions.

(a) Attempted First Degree Sexual Assault Instruction

Abejide proposed an elements instruction which included attempted third degree sexual assault as a lesser-included offense of attempted first degree sexual assault. The court refused Abejide's proposed instruction and instead gave an

instruction which set forth no lesser-included offense. Abejide contends that the jury should have been instructed on attempted third degree sexual assault as a lesser-included offense. We reject Abejide's contention.

[6] We addressed this issue in *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012), wherein the defendant claimed that the trial court erred when it refused to instruct the jury on third degree sexual assault as a lesser-included offense of first degree sexual assault. We noted in *Kibbee* that whether a crime is a lesser-included offense is determined by a statutory elements approach and is a question of law. Under the statutory elements approach, for an offense to be a lesser-included offense, it must be impossible to commit the greater offense without also committing the lesser offense. With respect to whether third degree sexual assault is a lesser-included offense of first degree sexual assault, we adopted the reasoning of the Nebraska Court of Appeals in *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997), and rejected the defendant's contention.

[7] In *Schmidt*, the Court of Appeals concluded that attempted third degree sexual assault is not a lesser-included offense of attempted first degree sexual assault. The Court of Appeals reasoned that, given the statutory definitions applicable to sexual assault crimes, it is possible to have "sexual penetration," an element of first degree sexual assault, without having "sexual contact," an element of third degree sexual assault, and that therefore, the crime of first degree sexual assault can be committed without at the same time committing third degree sexual assault. *Schmidt*, 5 Neb. App. at 675, 562 N.W.2d at 875-76. We concluded in *Kibbee, supra*, that third degree sexual assault is not a lesser-included offense of first degree sexual assault.

The holdings in *Kibbee* and *Schmidt* apply here. Abejide acknowledges the precedent of *Kibbee* and *Schmidt* but argues that those decisions were erroneous and urges us to revisit the issue. We find no error in the reasoning in *Kibbee* and *Schmidt*.

Abejide's tendered instruction, which included attempted third degree sexual assault as a lesser-included offense of attempted first degree sexual assault, was not a correct statement of the law, and therefore, the district court did not commit reversible error when it refused the instruction.

(b) Terroristic Threats Instruction

Abejide proposed an instruction setting forth the elements of terroristic threats and instructing the jury that it had to reach a unanimous decision regarding intent. He proposed instructing the jury that it could find him guilty of either "intentional terroristic threats" or "reckless terroristic threats" but that it must unanimously agree on whether he acted "with the intent to terrorize" or whether he acted "in reckless disregard of the risk of causing such terror." The court refused Abejide's proposed instruction. Instead, the court instructed the jury that it could find Abejide guilty of terroristic threats if it found that he acted either with intent to terrorize or in reckless disregard of terrorizing the victim but that "you need not agree unanimously on whether . . . Abejide intended to terrorize [the victim] or acted in reckless disregard of terrorizing [the victim], so long as you agree unanimously that the state has established either of the elements . . . beyond a reasonable doubt." We find no error in the court's refusal to instruct as requested by Abejide.

[8] We have stated that where a single offense may be committed in a number of different ways and there is evidence to support each of the ways, the jury need only be unanimous in its conclusion that the defendant violated the law by committing the act. *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009). It need not be unanimous in its conclusion as to which of several consistent theories it believes resulted in the violation. *Id.* As an example, we have applied these standards in cases involving a charge of first degree murder which may be committed under either a felony murder theory or a premeditated murder theory. In such cases, we have

held that a jury need not be unanimous as to the theory upon which it relies to convict a defendant, as long as each juror is convinced beyond a reasonable doubt that the defendant committed the crime. E.g., *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008) (citing *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998)).

By similar reasoning, we have concluded that for a defendant to be convicted of driving under the influence, the jury is not required to be unanimous on whether the defendant is guilty of the offense because he was driving "while impaired by alcohol" or because he was driving while his blood alcohol concentration was over the statutory legal limit. *State v. Parker*, 221 Neb. 570, 573, 379 N.W.2d 259, 261 (1986). See, also, *State v. Casillas*, 279 Neb. 820, 840, 782 N.W.2d 882, 899 (2010) (stating that "a driving-under-the-influence offense can generally be shown either by evidence of physical impairment and well-known indicia of intoxication or simply by excessive alcohol content shown through a chemical test and that the jury need not be unanimous in its determination of under which means the offense was committed"). In this regard, in *Parker, supra*, we held that "the defendant is not entitled to an instruction that in order for the defendant to be found guilty, the jury must be unanimous with regard to any one theory or the jury must find the defendant not guilty." 221 Neb. at 573, 379 N.W.2d at 261.

Citing to *Parker, supra*, the Court of Appeals has determined with respect to terroristic threats that there is generally no requirement that the jury unanimously agree whether the crime was intentional or reckless. *State v. Rye*, 14 Neb. App. 133, 705 N.W.2d 236 (2005). However, in *Rye*, the Court of Appeals noted that where an additional charge such as use of a weapon to commit a felony requires that the predicate offense be an intentional crime, then in that case, the jury must unanimously agree that the predicate offense of terroristic threats was intentional in order to convict the defendant of the additional charge.

As relevant to this case, Neb. Rev. Stat. § 28-311.01(1) (Reissue 2008), regarding the crime of terroristic threats, provides: "A person commits terroristic threats if he or she threatens to commit any crime of violence: (a) With the intent to terrorize another; . . . or (c) In reckless disregard of the risk of causing such terror . . . ." Thus, the statute defines terroristic threats as a single offense which may be committed different ways. A juror in this case could find, consistent with the evidence, that Abejide threatened to commit a crime of violence and that he did so either with the intent to terrorize the victim or in reckless disregard of causing such terror. Given the statute and our application thereof, the jury was not required to be unanimous as to which state of mind Abejide possessed.

Abejide's proposed instruction requiring such unanimity was not a correct statement of law. We therefore reject his claim that the district court erred when it refused his proposed instruction.

(c) Intoxication Defense Instruction

Abejide proposed an instruction setting forth an intoxication defense. The proposed instruction stated that the jury could "consider evidence of alcohol use along with all the other evidence in deciding whether . . . Abejide had the required intent" but that it could "not consider intoxication if . . . Abejide voluntarily became intoxicated so that he could commit the crime or crimes charged in the information." The court refused this proposed instruction, and based on the evidence and the controlling statute, § 29-122, the court instructed the jury that it could not consider Abejide's voluntary intoxication in deciding whether he had the required intent.

In its ruling refusing Abejide's proposed intoxication defense instruction, the court cited § 29-122, regarding intoxication as a defense. Section 29-122 provides as follows:

> A person who is intoxicated is criminally responsible for his or her conduct. Intoxication is not a defense to any criminal offense and shall not be taken into

> consideration in determining the existence of a mental state that is an element of the criminal offense unless the defendant proves, by clear and convincing evidence, that he or she did not (1) know that it was an intoxicating substance when he or she ingested, inhaled, injected, or absorbed the substance causing the intoxication or (2) ingest, inhale, inject, or absorb the intoxicating substance voluntarily.

In connection with its ruling refusing Abejide's proposed intoxication defense instruction, the court noted that there was no evidence that Abejide did not know that he had ingested an intoxicating substance or that he had not voluntarily ingested it. Abejide's proposed instruction did not correctly state the law under § 29-122, and the evidence did not warrant an instruction setting forth an instruction regarding involuntary intoxication. See § 29-122. Abejide therefore has not shown that the district court's refusal to give his proposed instruction was reversible error.

Abejide acknowledges that pursuant to § 29-122, "intoxication can only be used as a defense if a defendant did not know they [sic] were ingesting an intoxicating substance, or did not ingest the intoxicating substance voluntarily." Brief for apellant at 28. Apparently acknowledging that there was no evidence in this case that Abejide did not know that he had ingested an intoxicating substance or that he had not voluntarily ingested it, Abejide contends that it was unconstitutional to put the burden on the defendant to provide such evidence and that when there is evidence that the defendant was intoxicated, the burden should be on the State to prove that the defendant knew he or she was ingesting an intoxicating substance and that the defendant did so voluntarily.

We note two significant features of § 29-122. First, the statute provides that "[a] person who is intoxicated is criminally responsible for his or her conduct" and that, generally, "[i]ntoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the

existence of a mental state that is an element of the criminal offense . . . .” However, the statute provides an exception to this general rule when “the defendant proves, by clear and convincing evidence, that he or she did not (1) know that it was an intoxicating substance when he or she ingested, inhaled, injected, or absorbed the substance causing the intoxication or (2) ingest, inhale, inject, or absorb the intoxicating substance voluntarily.” Section 29-122 is generally understood to make a distinction between voluntary intoxication, which may not either provide a defense or be considered in determining the existence of a mental state, and involuntary intoxication, which may be so used.

With regard to whether the statute may constitutionally provide that voluntary intoxication is not a defense and may not be considered when determining the existence of a mental state, we note that in *Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996), the U.S. Supreme Court rejected a due process challenge to a Montana statute with provisions similar to § 29-122. The Montana statute provided in part that voluntary intoxication “‘may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense.’” *Egelhoff*, 518 U.S. at 39-40. Two pluralities of four justices in *Egelhoff* disagreed on whether the statute violated due process when characterized as an evidentiary rule designed to prevent the defendant from presenting evidence of voluntary intoxication in his or her defense. However, Justice Ginsburg wrote a concurrence in which she characterized the statute as a “legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions.” 518 U.S. at 57 (Ginsburg, J., concurring in judgment). As such, Justice Ginsburg reasoned, the statute removed the subject of voluntary intoxication from the mens rea inquiry, “thereby rendering evidence of voluntary intoxication logically irrelevant to proof of the requisite mental state.” 518 U.S. at 58. Because “[s]tates enjoy wide latitude in defining the elements of criminal offenses,” Justice

Ginsburg concluded that the statute, read as a law "[d]efining *mens rea* to eliminate the exculpatory value of voluntary intoxication," did not offend due process. 518 U.S. at 58-59. The plurality which found no due process violation when the statute was viewed as an evidentiary rule stated that it was "in complete agreement" with Justice Ginsburg's characterization of the statute and that it had analyzed the statute as an evidentiary rule "simply because that [was] how the [court below] chose to analyze it." 518 U.S. at 50 n.4.

We believe that, similar to the statute at issue in *Egelhoff, supra*, § 29-122 is a "legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions." See *Egelhoff*, 518 U.S. at 57 (Ginsburg, J., concurring in judgment). Although the statute redefined the circumstances under which the requisite state of mind may be found, the statute did not relieve the State of the burden of proving a state of mind that is a required element of a criminal offense. See *Egelhoff, supra* (Scalia, J., for plurality) (burden was not shifted under statute and court instructed jury that State had burden of proving guilt beyond reasonable doubt). By removing voluntary intoxication from consideration of whether the defendant had the required mental state, § 29-122 redefines the circumstances under which the requisite mental state may be found but it does not relieve the State of its burden to prove the requisite mental state.

Abejide does not contend that the Legislature could not provide that voluntary intoxication is not a defense and cannot be considered in determining the existence of a mental state that is an element of a crime. Instead, he focuses on the second feature of the statute which allows the use of involuntary intoxication for such purposes, but only if the defendant "proves, by clear and convincing evidence" that intoxication was involuntary as set forth in the statute. Abejide argues that it violates due process to put the burden on the defendant to prove that intoxication was involuntary. He cites *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39

(1979), in which the U.S. Supreme Court held that a conclusive presumption or a presumption that shifts to the defendant the burden of persuasion with respect to an element of a crime deprives the defendant of due process because it relieves the State of its duty to prove every element beyond a reasonable doubt.

In response to Abejide's due process argument, the State cites *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), for the proposition that it is not unconstitutional to put the burden on the defendant to prove an affirmative defense. The Court in *Patterson* stated that "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required" and that it is "constitutionally permissible to provide that various affirmative defenses [are] to be proved by the defendant." 432 U.S. at 210-11. See, also, *Smith v. United States*, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013). However, the Court was careful in *Patterson* to distinguish between an affirmative defense that "constitutes a separate issue on which the defendant is required to carry the burden of persuasion" and a defense that "serve[s] to negative any facts of the crime which the State is to prove in order to convict." 432 U.S. at 207. *Patterson* makes an important distinction between a defense that merely negates an element of the crime and a defense that constitutes an issue separate from the elements of the crime.

Therefore, whether § 29-122 violates due process by placing on the defendant the burden to prove by clear and convincing evidence that the defendant was involuntarily intoxicated may depend in part on whether involuntary intoxication is a defense that presents an issue separate from the elements of the crime or whether it is a defense that merely negates the mental state that is an element of the crime. In this regard, we discuss below the types of burdens of proof, the constitutional implications of those burdens, and the facts of this case relative thereto. And we determine that it does not violate due process to put the burden on the defendant to

produce at least some evidence that intoxication was involuntary and that, here, where there was no evidence presented by either Abejide or the State to indicate that Abejide's intoxication was involuntary, the court did not unconstitutionally refuse Abejide's proposed instruction regarding involuntary intoxication.

While § 29-122 puts the burden on the defendant to prove involuntary intoxication by clear and convincing evidence, the burden of proof is generally understood to include two separate burdens—the burden of production and the burden of persuasion. See *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996) (Gerrard, J., dissenting), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). In *Ryan*, the dissent recognized that "[t]here is a clear constitutional distinction between casting the burden of *production* on an accused and casting the burden of *persuasion* on an accused" and that "it is the *burden of persuasion* that the state is required to bear beyond a reasonable doubt . . . not the burden of production." 249 Neb. at 251, 543 N.W.2d at 150 (emphases in original). See, also, *Patterson, supra* (referring to allocation of burden of persuasion). With regard to putting on the defendant the burden of production with regard to a defense, it has been stated:

> As to the burden of production of evidence, it is uniformly held that the defendant is obliged to start matters off by putting in some evidence in support of his defense—e.g., evidence of his insanity, or of his acting in self-defense, or of one of the other affirmative defenses—unless of course the prosecution, in presenting its own side of the case, puts in some evidence of a defense, in which case the matter of defense is properly an issue though the defendant himself produces nothing further to support it. Experience shows that most people who commit crimes are sane and conscious; they are not compelled to commit them; and they are not so intoxicated that they cannot entertain the states of mind

> which their crimes may require. Thus it makes good sense to say that if any of these unusual features are to be injected into the case, the defendant is the one to do it; it would not be sensible to make the prosecution in all cases prove the defendant's sanity, sobriety and freedom from compulsion.

1 Wayne R. LaFave, Substantive Criminal Law § 1.8(c) at 82-83 (2d ed. 2003). Other commentators have noted that even when a defense serves to negate an element of the crime, "[t]he defendant may have to bear a burden of production if he seeks to inject a particular theory for or seeks an instruction suggesting a particular theory for the absence of the required element . . . ." 1 Paul H. Robinson, Criminal Law Defenses § 4(a)(2) at 23 (1984).

With regard to the issue whether intoxication was involuntary under § 29-122, it is an "unusual feature" that intoxication is involuntary as set forth in the statute. Therefore, regardless of whether involuntary intoxication is a defense that negates the mental state required to commit a crime or whether it is a separate issue, it is the sort of issue that, if the defendant wishes to inject the issue into the case, does not violate due process to put the burden on the defendant to produce at least some evidence that his or her intoxication was involuntary. In the present case, Abejide produced no evidence to show that his intoxication was involuntary and the evidence presented by the State did not so indicate. Given the absence of evidence to support a finding of involuntary intoxication, we therefore conclude that the district court did not violate due process when it refused Abejide's proposed instruction.

For completeness, we note that the facts of this case do not require us to address—and we do not address—whether other features of § 29-122 comply with due process requirements. In this regard, because there was no evidence that Abejide's intoxication was involuntary, we need not consider whether § 29-122 may constitutionally require "clear and convincing evidence" that intoxication was involuntary. In addition,

because Abejide failed to meet the burden of production, we need not consider whether § 29-122 may constitutionality require the defendant to bear the burden of persuasion on the issue of involuntary intoxication.

Based on the facts of this case, we conclude that the district court did not err and did not violate Abejide's due process rights when it refused Abejide's instruction regarding involuntary intoxication.

2. There Was Sufficient Evidence to Support Abejide's Convictions

Abejide claims that the evidence in this case was insufficient to support his convictions for attempted first degree sexual assault and terroristic threats. He generally argues that the only evidence against him on certain elements was the victim's testimony at trial and that the victim's testimony was not credible. The credibility of witnesses was for the jury to decide. Therefore, if the jury found the testimony in this case to be credible, we determine that there was sufficient evidence to support Abejide's convictions. See *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

With regard to the conviction for terroristic threats, Abejide notes that at trial, the victim testified on direct examination that he had threatened to "'knock her out'" but that on cross-examination, he presented evidence of the victim's pretrial deposition testimony in which she denied that Abejide had verbally threatened her. Brief for appellant at 29. Abejide contends that the victim's trial testimony was the only evidence to support a finding that he had threatened the victim and that such testimony was contradicted by the victim's own deposition testimony. With regard to both convictions, Abejide asserts that the victim's testimony as a whole was not credible because portions of her testimony were contradicted by the testimony of other witnesses and she frequently testified that she did not know or could not recall certain details due to her intoxication at the time.

Having reviewed the evidence in this case, in particular the testimony of the victim and the testimony of the police officer who came upon the scene during the incident, we conclude that there was sufficient evidence, if believed, to support the convictions. Abejide's arguments focus on his claim that the victim was not credible because of inconsistencies in her testimony and her inability to clearly remember certain events. In this regard, we observe that the inconsistencies in the victim's testimony were demonstrated to the jury through cross-examination, and therefore, the jury was in a position to fully evaluate the victim's testimony.

In reviewing for sufficiency of the evidence, we do not resolve conflicts in the evidence or pass on the credibility of witnesses, because such matters are for the finder of fact. See *Custer, supra*. By its verdict, the jury as fact finder determined, based on all the evidence, including that of the victim, that the crimes charged had been committed. We determine that the evidence admitted at trial, viewed and construed most favorably to the State, was sufficient to support the convictions for attempted first degree sexual assault and terroristic threats.

3. Abejide's Claims of Ineffective Assistance of Trial Counsel Are Either Without Merit or Not Reviewable on Direct Appeal

Abejide claims that he received ineffective assistance of trial counsel for a number of reasons. We conclude with respect to each claim that either the claim is without merit or that the record on direct appeal is insufficient to determine the merits of the claim.

[9,10] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016). The determining factor is whether the record is sufficient to adequately review the question. *Id*. An ineffective

assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *Id*.

Abejide first claims that he received ineffective assistance when counsel failed to move to dismiss the attempted sexual assault charge. We determined above that the evidence presented by the State was sufficient to support the convictions. The district court would have properly overruled a motion to dismiss, and Abejide cannot show that he was prejudiced by counsel's purported failure to so move. Therefore, such claims are without merit.

Abejide also claims that he received ineffective assistance because trial counsel failed to adequately prepare his defense. He asserts that counsel did not diligently pursue potential witnesses to testify on his behalf and that counsel did not adequately present a consent defense, either in opening statement, in cross-examination of the victim, or in closing argument. Abejide's claims involve allegations regarding evidence and arguments not presented at trial and not present in the record, and furthermore, his claims would require proof of matters outside the trial record. We therefore conclude that these claims cannot be adequately reviewed in this direct appeal.

Abejide finally claims that trial counsel failed to properly challenge the constitutionality of § 29-122. As we determined above, the district court did not violate due process when it refused Abejide's proposed instruction on involuntary intoxication. Therefore, to the extent the constitutionality of § 29-122 was implicated by the facts of this case, Abejide's challenge was without merit. Therefore, Abejide's claim of ineffective assistance of counsel with regard to counsel's presentation of the challenge is without merit.

In sum, Abejide's claims regarding trial counsel's failure to file a motion to dismiss and to properly challenge the constitutionality of § 29-122 are without merit. Abejide's claim of ineffective assistance of counsel with respect to presenting a proper defense cannot be reviewed in this direct appeal.

4. The Court Properly Used Abejide's Prior SORA Violation Convictions to Find That He Was a Habitual Criminal, and His Sentence Was Not Otherwise Excessive

Abejide finally claims that the court imposed an excessive sentence. He argues, inter alia, that he should not have been sentenced as a habitual criminal, because the court improperly considered two prior convictions for violations of the SORA to support its finding that he was a habitual criminal. We conclude that such convictions could be used to support the habitual criminal determination and that the court did not otherwise abuse its discretion in sentencing.

(a) Habitual Criminal Enhancement

We first address Abejide's claim that the district court erred when it used the prior SORA violation convictions to support the habitual criminal determination. As explained below, we reject this assignment of error and affirm the district court's finding that Abejide was a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 2008).

Abejide was found to be a habitual criminal and was sentenced as such pursuant to § 29-2221, which provides:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal . . . .

The district court found that Abejide was a habitual criminal based on evidence of three prior convictions: a conviction in 1994 for attempted first degree sexual assault of a child, for which he was sentenced to imprisonment for 6 to 9 years; a conviction in 2007 for a violation of the SORA, second offense, for which he was sentenced to imprisonment for 2 to 4 years; and a conviction in 2011 for a violation of the SORA

for which he was sentenced to imprisonment for 20 months to 4 years.

Abejide acknowledges that the current felony convictions for attempted first degree sexual assault and terroristic threats are felonies subject to application of the habitual criminal statute. However, he argues that the two prior convictions for violations of the SORA were, by their nature, subsequent offenses, and that as such, the SORA convictions cannot serve as prior convictions to support a finding that he was a habitual criminal in the current proceeding. Abejide claims that using the SORA prior convictions results in a "double penalty enhancement," which is invalid under *State v. Chapman*, 205 Neb. 368, 287 Neb. 697 (1980). Brief for appellant at 37.

In *Chapman, supra*, a jury found the defendant guilty of operating a motor vehicle while under the influence of alcohol. After a hearing, the trial court determined that the defendant had three previous convictions for driving while intoxicated and the court therefore found that the current offense should be treated as a third offense. Because the current offense in *Chapman* was found to be a "third offense," it was reclassified from a misdemeanor to a felony—unlike the "true" felonies at issue in the current appeal. See, similarly, *Goodloe v. Parratt*, 605 F.2d 1041, 1048 (8th Cir. 1979) (generally noting distinction between enhanced offenses and "'true'" felonies). After an additional hearing, the court in *Chapman* determined that the defendant should be sentenced as a habitual criminal. The two prior convictions used to support the habitual criminal finding were a conviction for driving while intoxicated, third offense, and a conviction for malicious destruction of property.

In *Chapman*, we held that "offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute 'felonies' within the meaning of prior felonies that enhance penalties under the habitual criminal statute." 205 Neb. at 370, 287 N.W.2d at 698. Among other observations, we disapproved of the trial court's use of such prior convictions under the habitual criminal statute, because

such use resulted in impermissible "double penalty enhancement through application of both a specific subsequent offense [provision found in the driving under the influence] statute and a habitual criminal statute." 205 Neb. at 370, 287 N.W.2d at 699. We therefore determined that the defendant's sentencing was controlled by the driving under the influence statutes and that he was exempt from operation of the habitual criminal provisions.

Although Abejide does not cite the case, his argument may be more similar to and could arguably find support in *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). In *Hittle*, the defendant was convicted of felony flight to avoid arrest and felony driving under a 15-year license suspension. The trial court found that the defendant was a habitual criminal based on evidence that he had two prior convictions, each of which resulted in imprisonment for not less than 1 year. One of the prior convictions was for operating a motor vehicle while his operator's license was suspended or revoked.

The defendant in *Hittle* cited *Chapman, supra*, to support his argument that driving under suspension is a "subsequent offense" that enhances the punishment for a prior conviction for driving under the influence. 257 Neb. at 355, 598 N.W.2d at 29. In *Hittle*, we said that a conviction for driving under suspension was not a "subsequent offense" in the same sense as the conviction for driving under the influence, third offense, was a "subsequent offense" of driving under the influence in *Chapman.* However, in *Hittle*, we noted that the statute making it an offense to drive under suspension was an integral "part of the statutory scheme designed by the Legislature to criminalize the operation of a motor vehicle while under the influence of alcoholic liquor or drugs," 257 Neb. at 355-56, 598 N.W.2d at 29, and that one can commit the offense of driving under suspension only after having first committed multiple offenses of driving under the influence.

In *Hittle*, we said that "in a real sense, the penalty for this particular act [of driving under suspension] has been enhanced

by virtue of the defendant's prior violations of other provisions within the same statute." 257 Neb. at 356, 598 N.W.2d at 29. We therefore held in *Hittle* that "a felony conviction for driving under a suspended license . . . may not be used either to trigger application of the habitual criminal statute or as a prior offense for purposes of penalty enhancement pursuant thereto." *Id*. We specifically determined in *Hittle* that because the defendant's prior conviction for driving under suspension could not be considered as a prior conviction for purposes of the habitual criminal determination, the trial court had erred in sentencing the defendant as a habitual criminal.

In the present case, two of Abejide's prior convictions were for violations of the SORA. And because Abejide acknowledges that the two current felonies are suitable true felonies subject to the habitual criminal statute, Abejide's arguments are directed to the propriety of using the SORA offenses as prior convictions. In particular, Abejide argues that a conviction for a violation of the SORA "seeks to further punish an individual for a sex offense conviction if they [sic] do not abide by the SORA requirements." Brief for appellant at 37. In effect, his argument is that one can violate Neb. Rev. Stat. § 29-4011 (Supp. 2015), which generally makes it an offense to violate a registration requirement of the SORA, only after having first committed a sex offense that required the defendant to be subject to the SORA and that therefore, § 29-4011 is part of a statutory scheme to criminalize and punish the underlying sex offense. Abejide's argument is reminiscent of *Hittle*.

At this juncture, it is important to distinguish the facts of this case compared to the facts in *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980), and *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). The difference brings important language contained in the habitual criminal statute into greater focus and demonstrates why application of the habitual criminal statute to enhance Abejide's sentence is appropriate. In *Hittle*, we noted the difference between a triggering offense, which is the offense for which the defendant is currently being

sentenced, and a prior offense, which is one of the offenses that establishes that the defendant was a habitual criminal at the time he or she committed the triggering offense. In *Chapman*, both the triggering offense and one of the prior offenses were convictions for driving under the influence, third offense. In *Hittle*, one of the triggering offenses and one of the prior offenses were convictions for driving under suspension.

In the present case, Abejide's triggering offenses are felony convictions for attempted first degree sexual assault and for terroristic threats; Abejide makes no argument that either of these felony offenses cannot be a triggering offense for habitual criminal enhancement. Instead, Abejide's contentions focus on the prior convictions; his argument is solely that his convictions for violations of the SORA cannot be prior offenses used to establish his status as a habitual criminal at the time he committed the triggering offenses in this case. For the reasons discussed below, we determine that the SORA convictions may be used as prior convictions under the habitual criminal statute, but we take this opportunity to indicate that we erroneously suggested in *Chapman* and *Hittle* that driving under the influence, third offense, and driving under suspension, respectively, could not be used as prior convictions where a defendant is sentenced under the habitual criminal statute.

[11] As noted above, the habitual criminal statute, § 29-2221, describes the triggering offense as "a felony," but it describes the prior convictions as crimes for which the defendant has been "convicted . . . , sentenced, and committed to prison . . . for terms of not less than one year each." By its terms, § 29-2221 requires the triggering offense to be "a felony" before the habitual criminal statute will apply to the sentencing of the triggering offense. But in order to be one of the prior convictions that establishes habitual criminal status, § 29-2221 does not require that the prior conviction was a "felony" per se; instead, it requires that the prior conviction resulted in a sentence of imprisonment for a term "of not less than one year."

In *State v. Ramirez*, 274 Neb. 873, 883, 745 N.W.2d 214, 222 (2008), we recognized that a "felony conviction" and "a prior conviction resulting in a term of imprisonment of no less than 1 year" are not coextensive. In *Ramirez*, we determined that a previous felony "conviction for manufacturing or distributing marijuana" could be used both to prove an element of the triggering offense of being a felon in possession of a firearm under Neb. Rev. Stat. § 28-1206 (Cum. Supp. 2014), which required that the defendant had "previously been convicted of a felony," as well as to prove a prior conviction under § 29-2221 to establish that the defendant was a habitual criminal and should be sentenced as a habitual criminal for the offense of being a felon in possession. 274 Neb. at 877, 745 N.W.2d at 219. We reasoned that "the predicates for §§ 28-1206 and 29-2221 [are not] necessarily coextensive," because the "predicate for violating § 28-1206 is a felony conviction, which may or may not result in the term of imprisonment of 'not less than one year' necessary to establish a predicate [prior conviction] for sentence enhancement under § 29-2221." 274 Neb. at 883, 745 N.W.2d at 222. We therefore recognized in *Ramirez* that the description of prior convictions in § 29-2221 focuses on the length of the sentence and are not the equivalent of prior "felonies."

The distinction between the descriptions in § 29-2221 of the triggering offense and the prior convictions which we recognized in *Ramirez* had been blurred in *State v. Chapman*, 205 Neb. 368, 370, 287 N.W.2d 697, 698 (1980), when we stated that prior "offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute 'felonies' within the meaning of *prior felonies* that enhance penalties under the habitual criminal statute." (Emphasis supplied). As we noted above, contrary to the expression stated in *Chapman*, § 29-2221 does not describe the prior convictions as "prior felonies" but instead as prior convictions that resulted in a term of imprisonment of "not less than one year." And as we recognized in *Ramirez*, a "felony conviction" and "a prior

conviction resulting in a term of imprisonment of no less than 1 year" are not coextensive. 274 Neb. at 883, 745 N.W.2d at 222. Thus, the description that applies to the triggering offense, described in § 29-2221 as a "felony," does not necessarily apply to prior convictions which are described differently in the same statute. In sum, under the habitual criminal statute, the triggering offense must be "a felony," but the focus on prior convictions must simply be on convictions which resulted in imprisonment of not less than 1 year.

Abejide has recognized that his triggering offenses are true felonies and, as such, can trigger application of the habitual criminal statute, § 29-2221. Abejide's triggering felonies are unlike the triggering felonies discussed in *Chapman, supra*, and *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999). In *Chapman*, the crime of driving under the influence, third offense, was a misdemeanor enhanced to a felony, and in *Hittle*, the triggering crime of driving under suspension was a felony as a result of a statutory scheme based on repetition of misdemeanor driving under the influence offenses. For triggering offense purposes, they were not "true" felonies.

Abejide raises an issue regarding double penalty enhancement with respect to the prior convictions; however, the concern to avoid double penalty enhancement is more properly directed to the propriety of penalizing the current triggering crime under the habitual criminal statute. Although double penalty enhancement is disfavored, see *Chapman, supra*, we have long recognized that the habitual criminal statute is an enhanced penalty permissible to punish repetitive criminal conduct reflected in the felony case now before the court. See *State v. Ramirez*, 274 Neb. 873, 745 N.W.2d 214 (2008). Under the habitual criminal statute, impermissible double penalty enhancement is a concept consideration which is applied to the triggering crime, but not applied to a prior conviction as urged by Abejide. The habitual criminal statute penalizes current crimes but it is not a further punishment or double penalty for the previous convictions. The role of the previous convictions

in the habitual criminal statute is to demonstrate that the defendant has been twice convicted of crimes each of which resulted in imprisonment of "not less than one year."

In *Chapman* and *Hittle*, we reasoned that the crimes of driving under the influence, third offense, and driving under suspension, respectively, were part of discrete statutory schemes which already incorporated enhancement mechanisms and could not be further enhanced as triggering felonies under § 29-2221. The reasoning does not lead to the conclusion that convictions of such crimes can never be used as prior convictions under the habitual criminal statute.

The habitual criminal statute does not enhance the penalty for prior convictions; it is applied to the penalty for the triggering offense. If the penalty for the triggering offense is enhanced only pursuant to the habitual criminal statute, the fact that the penalty for one of the prior convictions was itself enhanced does not result in a double penalty enhancement of the triggering offense. As noted, the habitual criminal statute is focused on enhancing the penalty for the current conviction when the defendant has prior convictions of a certain type; the Legislature chose to describe that type of crime in terms of the sentence imposed rather than in terms of the classification of the prior offense as a felony.

Given the foregoing understanding, *Chapman* and *Hittle* should have been limited to holding that driving under the influence, third offense, and driving under suspension were ineligible to serve as triggering offenses under § 29-2221. We disapprove *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980), and *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999), to the extent they suggest or hold that the prior convictions of driving under the influence, third offense, and driving under suspension, each resulting in imprisonment of not less than 1 year, cannot be used as prior convictions to establish habitual criminal status when applying § 29-2221. Instead, such convictions may be used as prior convictions under the habitual criminal statute as long as they meet the statutory

requirement that such convictions resulted in terms of imprisonment for not less than 1 year.

In the present case, each of the two current offenses is a felony and Abejide had prior convictions for violations of the SORA for which he was sentenced to terms of imprisonment for not less than 1 year. Whether the SORA offenses could serve as the triggering offense for a habitual criminal enhancement is not before us. However, it was proper to use them as prior convictions, because they each met the requirement under § 29-2221 of a sentence of "not less than one year." We therefore determine that the district court did not err when it found Abejide to be a habitual criminal and sentenced him accordingly.

(b) Excessiveness in General

Having determined that the court did not err when it found Abejide to be a habitual criminal, we consider his argument that his sentences were excessive. We first note that at the time of the offenses in this case, attempted first degree sexual assault was a Class III felony pursuant to Neb. Rev. Stat. § 28-319(2) (Reissue 2008) and Neb. Rev. Stat. § 28-201(4)(b) (Cum. Supp. 2014), and making terroristic threats was a Class IV felony pursuant to § 28-311.01(2). At the time, the sentencing range for a Class III felony was imprisonment for 1 to 20 years, and the sentencing range for a Class IV felony was imprisonment for a maximum of 5 years. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014). However, because Abejide was found to be a habitual criminal, § 29-2221(1) set the sentencing ranges for both felony convictions as imprisonment for a mandatory minimum of 10 years and a maximum of 60 years. Therefore, the sentences of imprisonment for 10 to 20 years for attempted first degree sexual assault and for 10 to 10 years for terroristic threats were within statutory limits.

Because the sentences were within statutory limits, we review the sentences imposed for an abuse of discretion. See *State v. Russell*, 292 Neb. 501, 874 N.W.2d 8 (2016). With

regard to both sentences, we note that by the operation of § 29-2221(1), the court was required to impose a mandatory minimum sentence of 10 years for each offense; therefore, because the court had no discretion to impose a minimum sentence of less than 10 years and because the court imposed the mandatory minimum for each conviction, it did not abuse its discretion with regard to the minimum. With regard to the sentence for terroristic threats, the court imposed a maximum term of 10 years which was equal to the mandatory minimum sentence. Therefore, because the court imposed the shortest sentence permissible under § 29-2221(1), there can be no argument that the court abused its discretion or imposed an excessive sentence for the terroristic threats conviction.

[12] With regard to the conviction for attempted first degree sexual assault, the court imposed a maximum sentence of 20 years. In imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016). Abejide contends that the district court did not properly consider his criminal history. Abejide asserts that although his history admittedly included convictions for first degree sexual assault and attempted first degree sexual assault of a child, such convictions were in 1977 and 1993, respectively, and since the time of these prior offenses, his criminal history reflects convictions only for less serious offenses. He also asserts that the court failed to adequately consider that the victim in this case did not suffer physical injury and did not complete a victim impact statement.

Abejide further argues that, in addition to the length of the sentences, the court abused its discretion when it ordered the sentences to be served consecutive to one another. He cites *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006),

in which we found an abuse of discretion in sentencing, and for relief ordered, inter alia, that the sentences for two of the convictions should run concurrently because both offenses resulted from the same act. Our disposition in *Iromuanya* was not a categorical statement regarding whether sentences must be ordered to be served concurrently, and we note further that in other cases, we have found that there was not an abuse of discretion when a court ordered sentences to be served consecutively where the charged offenses were alleged to have arose from a single transaction. See *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

We find no merit to Abejide's claim that the district court imposed excessive sentences based on either the maximum term for the attempted first degree sexual assault or its order directing the sentences to run consecutively. The court stated in its sentencing order that it based its sentencing on "the nature and circumstances of the crimes and the history, character and condition" of Abejide and its determination that "imprisonment of [Abejide] is necessary for the protection of the public because a lesser sentence would depreciate the seriousness of his crimes and promote disrespect for the law." Given the statutes, the record before us, and the court's stated reasoning, we do not think that the considerations argued by Abejide indicate the court abused its discretion.

VI. CONCLUSION

Having rejected Abejide's assignments of error, we affirm his convictions and sentences for attempted first degree sexual assault and terroristic threats.

Affirmed.

Stacy, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. John R. Oldson, appellant.

884 N.W.2d 10

Filed June 10, 2016. No. S-13-562.

1. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
2. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on some other ground not specified at trial.
3. **Rules of Evidence: Other Acts.** Whether evidence is admissible for any proper purpose under the rule governing admissibility of evidence of other crimes, wrongs, or acts rests within the discretion of the trial court.
4. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under the balancing rule and the other acts rule, and the trial court's decision will not be reversed absent an abuse of discretion.
5. **Juries: Evidence: Proof.** Propensity evidence may lead a jury to convict, not because the jury is certain the defendant is guilty of the charged crime, but because it has determined the defendant is "a bad person who deserves punishment," whether or not the crime was proved beyond a reasonable doubt.
6. **Rules of Evidence: Other Acts: Proof.** Under Neb. Evid. R. 404(1), Neb. Rev. Stat. § 27-404(1) (Cum. Supp. 2014), proof of a person's character is barred only when in turn, character is used in order to show action in conformity therewith.
7. **Rules of Evidence: Other Acts.** The State cannot present the defendant's other acts so that the jury makes the intermediate inference of the defendant's bad character, leading to the ultimate inference that the defendant is guilty.

8. ____: ____. Evidence of specific instances of conduct that only incidentally impugns a defendant's character is not prohibited by Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014).
9. ____: ____. All relevant evidence is subject to the overriding protection of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), including other acts evidence.
10. **Rules of Evidence.** Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), allows the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
11. **Evidence: Words and Phrases.** Relevant evidence is that which has 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.
12. **Evidence.** The probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the fact from the ultimate issue of the case.
13. **Evidence: Words and Phrases.** Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.
14. ____: ____. Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.
15. **Evidence: Intent.** If character evidence is admitted for a proper purpose, then, ipso facto, it is not admitted for the purpose of showing propensity.
16. **Trial: Appeal and Error.** A defendant may not gain an advantage on appeal by failing to pursue strategies at trial to minimize prejudice.
17. **Constitutional Law: Trial: Juries: Witnesses.** An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness or (2) a reasonable jury would have received a significantly different impression of the witnesses' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.
18. **Trial: Evidence: Presumptions: Proof.** Under the presumption of innocence, the State must establish guilt solely through the probative evidence introduced at trial.
19. **Rules of Evidence: Other Acts: Due Process: Presumptions.** While Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014), may

prevent the admission of other acts evidence for propensity purposes as a protection of the presumption of innocence, it does not follow that the State violates due process by adducing testimony that could result in the revelation of other acts if the defense chooses to pursue certain lines of questioning on cross-examination.

20. **Criminal Law: Constitutional Law: Due Process: Rules of Evidence.** Whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clause of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.
21. **Constitutional Law: Criminal Law: Trial.** The right to present a defense is not unqualified and is subject to countervailing public interests such as preventing perjury and investigating criminal conduct.
22. **Due Process: Evidence: Presumptions.** The aim of the requirement of due process is not to exclude presumptively false or unreliable evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.
23. **Confessions: Police Officers and Sheriffs: Evidence.** Mere deception will not render a statement involuntary or unreliable; the test is whether the officer's statements overbore the will of the defendant.
24. **Police Officers and Sheriffs.** Police practices of deception during interrogation are not inherently offensive.
25. **Criminal Law: Due Process: Time.** A criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact.
26. **Trial: Due Process: Time: Appeal and Error.** When reviewing a trial court's determination of a claim of denial of due process resulting from preindictment delay, an appellate court will review determinations of historical fact for clear error, but will review de novo the trial court's ultimate determination as to whether any delay by the prosecutor in bringing charges caused substantial prejudice to the defendant's right to a fair trial.
27. **Due Process: Criminal Law: Pretrial Procedure: Time.** The Fifth Amendment's Due Process Clause has only a limited role to play in protecting against oppressive delay in the criminal context.
28. **Due Process: Criminal Law: Pretrial Procedure: Time: Proof.** The Due Process Clause requires dismissal only if a defendant can prove that the preindictment delay caused actual prejudice to his or her defense and was a deliberate action by the State designed to gain a tactical advantage.
29. **Trial: Evidence: Appeal and Error.** Because authentication rulings are necessarily fact specific, a trial court has discretion to determine

whether evidence has been properly authenticated. An appellate court reviews the trial court's ruling on authentication for abuse of discretion.

30. **Rules of Evidence.** Authentication or identification of evidence is a condition precedent to its admission and is satisfied by evidence sufficient to prove that the evidence is what the proponent claims.
31. **Motions for New Trial: Appeal and Error.** The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion.
32. **Judges: Motions for New Trial: Evidence: Witnesses: Verdicts.** A trial judge is accorded significant discretion in granting or denying a motion for new trial, because the trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict.
33. **Criminal Law: Motions for New Trial: Evidence: Proof.** A criminal defendant who seeks a new trial because of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would probably have produced a substantially different result.
34. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
35. **Sentences: Appeal and Error.** An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.
36. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
37. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
38. **Homicide: Sentences.** A life-to-life sentence for second degree murder is a permissible sentence under Neb. Rev. Stat. § 29-2204 (Cum. Supp. 2014).
39. **Sentences.** When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense.
40. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Howard County: Karin L. Noakes, Judge. Affirmed.

James R. Mowbray and Sarah P. Newell, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

Heavican, C.J., Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ., and Bishop, Judge.

McCormack, J.

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I. NATURE OF CASE

John R. Oldson appeals from his conviction of second degree murder and sentence to life imprisonment. The victim, Catherine Beard, disappeared in 1989. Her remains were found in 1992. Oldson makes numerous arguments on appeal, including that journal entries written by Oldson while incarcerated for another crime and entered into evidence against him at trial were inadmissible and that the testimony of certain witnesses should have been excluded because he was presented with a "Hobson's choice" of either conducting effective cross-examination that would bring to light other bad acts or not conducting an effective cross-examination. We affirm both the conviction and the sentence.

II. BACKGROUND

On December 5, 2012, Oldson was charged with first degree murder in relation to the death of Beard on or about May 31, 1989. The information alleged that the murder was premeditated or committed during the perpetration or attempt to kidnap or sexually assault Beard. The following evidence was presented at trial.

1. Night of May 31, 1989

(a) Oldson and Beard Leave Tavern Together

On May 31, 1989, Oldson, Oldson's father, Oldson's uncle, and two other members of a work crew, Lawrence Kittinger and Dale Hoppes, were laying brick. They were working on a project at the home of Bonnie McCartney and Roger McCartney. The testimony varied as to how long the project took. Hoppes testified that the project lasted approximately 3½ days. Roger McCartney testified that based on his review of the bills, the brickwork started after May 29 and took a couple of weeks to complete.

After work around 4:30 to 5 p.m., the crew went to the Someplace Else Tavern in Ord, Nebraska. Oldson, Kittinger, and Hoppes rode in Oldson's father's two-tone, cream-and-brown Ford pickup. Oldson's father drove. Oldson's father parked the pickup in the alley behind the bar. The back of the pickup was full of masonry tools.

Numerous witnesses testified that they saw Oldson speaking with Beard, who was sitting at the end of the bar in the Someplace Else Tavern. Though Oldson and Beard were acquainted with one another, there was testimony that they had never been romantically involved. Kittinger and Hoppes testified that Oldson went over to talk with Beard almost immediately after their arrival. Witnesses reported that Oldson and Beard went to stand close together near the jukebox and the pool table. At some point, Oldson had his hand or arm on Beard's shoulder.

Hoppes testified that Oldson asked his father for the keys to the pickup. Several witnesses saw Oldson and Beard walk out of the bar through the back door and into the back alley. It was approximately 6:30 p.m. when Oldson and Beard left the tavern together. No one ever saw either Oldson or Beard return to the tavern that night. Beard never returned home.

Beard left her half-finished drink, cigarettes, jacket, house key, and umbrella at the bar. When Beard's sister later checked

Beard's room in the house where Beard resided with her mother, she found Beard's belongings undisturbed.

(b) Oldson Goes Home

Oldson's father, Kittinger, and Hoppes waited for a while for Oldson to return with the pickup to give them a ride, but Oldson "never showed up." Oldson's father and Kittinger walked together back to Oldson's father's house. Kittinger testified that he and Oldson's father arrived at Oldson's father's house about an hour after Kittinger saw Oldson and Beard leave together. In a statement read to the jury by the defense, Oldson's father, deceased at that time of trial, reported to law enforcement that he and Kittinger left the tavern about 30 minutes after Oldson. It takes about 15 minutes to walk from the Someplace Else Tavern to Oldson's father's house.

When Oldson's father and Kittinger arrived at the house, Oldson was on his way out. Oldson appeared freshly showered. Kittinger asked Oldson if he had gotten "lucky," and Oldson responded that he had not. Instead, according to Kittinger, Oldson told him that "two guys had hustled her away from him in a pickup."

(c) Possible Telephone Call to Oldson

Roger McCartney (hereinafter Roger) testified that one evening after he got home from work, anywhere between 6:30 and 7 p.m., he tried to call Oldson's father at his home, but reached Oldson. Roger testified that he had concerns about the brickwork. This was the only time he called Oldson's home. Roger did not recall the specific date of the telephone call. He testified that if the call was on May 31, 1989, the crew would have had only 1½ days to have completed a substantial amount of brickwork. Roger recalled speaking to an investigator approximately 1 week after Beard's disappearance. In the report of that conversation, the officer reported that Roger said he made the telephone call around 7:30 to 8:30 p.m. on May 31. Roger testified that further reflection caused him to question the date given to the investigator.

(d) Sharlene Whitefoot Calls Oldson

Sharlene Whitefoot, an employee of the Someplace Else Tavern in 1989, discovered that Beard's personal items had been left at the bar, and she called Oldson at his father's home. Whitefoot testified that it was approximately 10:30 p.m. on May 31, 1989, when she spoke with Oldson. When Whitefoot asked Oldson if he had seen Beard, Oldson said he was just getting out of the bathtub and indicated that he did not know where Beard was. Whitefoot and the owner of the Someplace Else Tavern reported Beard as missing.

(e) Rex White and Glen Hall

Around 3 a.m. on the day after Beard's disappearance, there was a robbery at an Ord motel, located 1 mile from the Someplace Else Tavern. Law enforcement never found any connection between the robbery and Beard's disappearance. The robbery was committed by Rex White and Glen Hall. The victim was a man from out of town.

White and Hall, accompanied by five acquaintances, including the robbery victim, had been at another bar in town from 3 to 7:30 p.m. on May 31, 1989. The victim was "flashing" around a lot of cash, wanted to have a party in his motel room, and offered White and Hall $100 each if they could "find him a girl." White and Hall went to the Someplace Else Tavern around 7:30 p.m. to try to find Beard. According to White, Beard was not there.

2. Year Following Beard's Disappearance

(a) Oldson's Statement Heard by Kittinger

Kittinger testified that the day following Beard's disappearance, the crew was at the McCartney jobsite when they saw a marked police car nearby. Oldson's father wondered aloud what the police officer might want, to which Oldson replied, "It's probably something I did."

(b) Oldson's Statements to Whitefoot

The day after Beard's disappearance, Oldson went back to the Someplace Else Tavern to confront Whitefoot. Oldson asked Whitefoot why she and the bar owner had reported Beard missing. Oldson reportedly said, "[W]hat's going to happen if her body comes floating down the river, who do you think they're going to blame? . . . [M]e."

Oldson explained to Whitefoot that he had grabbed Beard and had "ahold of her by her arms out in the alley but she got away." Whitefoot told Oldson that she did not believe him, because Oldson was a tall, muscular man and Beard was a very petite woman. At that point, Oldson left.

(c) Oldson's Statements to Law Enforcement

(i) Statements on June 2, 1989

On or around June 2, 1989, Oldson was interviewed by Gerald Woodgate, who was the Valley County Sheriff at that time, and John Young, the Ord police chief. Oldson told him that when Oldson and Beard were in the alley, Oldson propositioned Beard for sex. Beard refused Oldson. Oldson said he went to his father's pickup with the intention of leaving. There was no indication by Oldson during this interview that he had grabbed or struggled with Beard.

As Oldson started to leave, he saw Beard go to another truck that had just pulled into the alley. Oldson described the truck as a "custom 150" Ford pickup about 7 years old, but shiny, with fog lights, and "88 county" license plates. Oldson described the driver as having long hair; he could not tell if the driver was male or female. Oldson gave a similar interview to another police officer around that time.

(ii) Statement on June 6, 1989

On June 6, 1989, Oldson was interviewed by an investigator for the Nebraska State Patrol. Oldson described that he saw Beard at the bar and asked her if she wanted to "play a little touch and feel outside." She said, no, that she did not think of

him "in that way." However, when Oldson continued to ask Beard, she eventually agreed to go outside to "at least talk about it." Oldson reported that it was 7:30 p.m. when he and Beard stepped into the alley.

Oldson reported that he and Beard stood by the passenger side of his father's pickup. He again asked Beard if "she would like to do something." Beard again said that she did not think of him in that way. Oldson became upset and tried to grab Beard by her wrists to pull her into the pickup, but Beard pulled away from him. According to Oldson, Beard never entered the pickup.

Oldson reported that he slid over to the driver's side and began to drive away. As he was leaving, he noticed a dark blue or black Ford pickup pull into the alley. He saw Beard walk over to the pickup and begin talking with the driver. Beard then walked over to the passenger side of the truck and got in. Oldson described the driver of the truck as male, possibly with a mustache, possibly long, blond hair. He did not describe any other occupants. Oldson said it was a commercial pickup with "88 county" plates.

Oldson reported that he went home and took a bath. He got out of the tub to answer a telephone call from Roger at about 7:45 p.m. After the brief call with Roger about work being done on the McCartney house, Oldson finished his bath. Oldson then gathered up clothes and detergent to go to the Laundromat. When he was on his way to the Laundromat, Oldson ran into his father and Kittinger. Oldson reported that Whitefoot called him later that night.

The state trooper testified that local law enforcement investigated the owners of all vehicles similar to Oldson's description located in county No. 88, or Loup County. All such individuals were ruled out as having any information or involvement in Beard's disappearance.

(d) Pickup Cleaned

Three to ten days after Beard's disappearance, a local resident saw Oldson's father's pickup in the driveway with

both doors open and the seat completely removed and lying on the ground. A water hose ran to the truck, and a bucket was nearby.

(e) Witness to Oldson's Statements to Minnie Eggers

In 1990, an Ord resident observed Oldson with his girlfriend and future wife, Minnie Eggers (Minnie), at the Someplace Else Tavern. She testified that she overheard Oldson tell Minnie that "if she didn't do whatever it was he wanted that he would do the same thing to her that he had done to Cathy." She testified that Minnie seemed scared. Oldson looked around to see if anyone had heard him. Minnie told Oldson that she loved him and would do whatever he wanted.

(f) Oldson's Statements to Barbara Dasher

Ord resident, Barbara Dasher, testified that she and Oldson would often converse at the Someplace Else Tavern. One day while conversing at the bar after Beard's disappearance, Oldson suddenly "look[ed] mean" and said "right in my ear" that "[t]hey'd never be able to find [Beard]." On another occasion, Oldson told Dasher that "Beard was dead and that we'll never see her again" and that "Beard deserved what she got."

Dasher testified that later, after Beard's remains were found, Oldson threatened her. Oldson told her that if she ever "said anything," she "could get the same thing as . . . Beard."

3. Oldson's Diary Excerpts (Exhibits 263 Through 271)

Woodgate testified that between December 1989 and September 1990, he had "occasion to come into contact with . . . writings of . . . Oldson." His agency made copies of those writings, and he verified that nine exhibits, exhibits 263 through 271, were accurate copies, with certain portions redacted. The exhibits will be fully set forth in the analysis section below. They include Oldson's musing: "Maybe the

problem has been my making girls too high a priority - and having real problems with accepting rejection. Which may be how all this got started. 'Get it any way you can' (?) Doesn't sound like a good attitude. It got me in trouble." They also include Oldson's statement: "I really have no idea about what to do or where to go. My first priority is to get rid of something A.S.A.P.! That is, if I can still find them. The only . . . link left between me and . . . ." Another exhibit states that he "must rate C.B. as most gratifying, . . . YUH! Go on and gitcha some!"

During cross-examination, the defense elicited testimony from Woodgate that the journal excerpts were but small portions of a document that consisted of over 200 pages. Woodgate also affirmed that the document concerned various different topics, such as politics, religion, world events, personal letters, lists of actresses, and letters to public figures. Woodgate testified that, based on the writings, law enforcement obtained search warrants. However, investigators were unable to find anything incriminating in either the Oldson house or the pickup. Furthermore, Woodgate affirmed that during the 9-month period overlapping the search warrants, Oldson had no access to the house, grounds, or pickup to be able to dispose of any evidence located therein.

4. Beard's Remains Found in 1992

Beard's remains were found in April 1992. Most of the remains were found in the alluvial fan of a pasture beyond a fence alongside a minimum maintenance road about 6 miles outside of Ord. Traveling the speed limit from the Someplace Else Tavern to the place where the remains were found takes 9 minutes. Traveling the speed limit from the place the remains were found to Oldson's residence also takes approximately 9 minutes.

(a) Cause of Death

A forensic anthropologist specializing in bone trauma testified that Beard's remains indicated perimortem blunt trauma

to the chest, face, and skull. In addition, the remains indicated stab wounds in the ribs, the lumbar vertebrae, sacrum, and wrist. These together indicated "foul play and a violent death." While the blunt trauma could be consistent with being struck by either a vehicle or some sort of tool, the stab wounds could not have been caused by a pedestrian-vehicle collision.

A forensic pathologist similarly testified that Beard's death was a homicide and was caused by blunt force trauma to the head and trunk in association with sharp force injuries in the ribs and lumbar. The pathologist testified that when a pedestrian is hit by a moving vehicle, the pedestrian suffers a characteristic basilar fracture of the skull caused when the body lands while in rotation off of the vehicle. Beard did not suffer such a fracture.

(b) Oldson Visits Site Where Remains Found

A friend of Minnie's testified that when Beard's remains were discovered, Oldson and Minnie suggested they go to the site where the remains were found. Oldson was "driving like he was really anxious and nervous" and was "talking very excitedly" on the way there. The friend did not recall what Oldson said, though. Part of the time, Oldson was speaking with Minnie through sign language, which the friend did not understand.

(c) Oldson's Statements to Journalist

A journalist interviewed Oldson after Beard's remains were found. Oldson generally denied being responsible for Beard's death. He said he was merely an acquaintance of Beard's. Oldson also claimed to be a virgin until he married Minnie.

Oldson told the journalist that he had tried to get Beard into his father's truck with him the night she disappeared. Oldson said that he had become more desperate as the night went on and that "'[f]inally I just reached the bottom of the barrel, what the hell, we'll try [Beard], and she wouldn't

have anything to do with me.'" According to Oldson, she refused him, saying, "'[O]h, John, I like you as a friend but never in that way. No, no, get away. No, no.'" Then Oldson drove off. As he was leaving, Oldson saw Beard get into another truck.

5. Oldson's Statements While in Prison Awaiting Trial

While incarcerated awaiting trial for the murder of Beard, Oldson's conversations with his wife, Minnie, were recorded. In one conversation, Oldson speculated that law enforcement may have been able to find "a few molecules of DNA" evidence linking him to Beard. Minnie questioned how that could be possible if Oldson had never been there.

Oldson explained that in May 1989, he had approached the "town floozy" at the "saloon" and said, "Hey baby come on out back." He got into the passenger side of the pickup, sat down, and said, "Come on in here with me and we'll go do something." But Beard told him, "No, I don't like you in that way." Oldson then tried to pull her into the truck. They "scrambled around a little bit," and Beard may have "bumped her head." Beard "managed to jerk herself away."

Oldson said he was embarrassed because the "town floozy" was not interested in him. Upset and angry, and unable to face his coworkers in the bar, he left with the pickup. He went to the jobsite and "did some things." Then he went home, took a bath, and grabbed some laundry. He ran into his father when he was on his way to the Laundromat.

In another conversation, Oldson again wondered what kind of evidence law enforcement might have. Oldson wondered whether law enforcement had found DNA evidence on his "brick hammer," the bumper of the truck, or on a gas can. He explained that his and Beard's DNA "would have mingled." Beard's DNA could have been in the truck and on him, because he had grabbed Beard by the arm and Beard had "struggled back."

6. Defense

(a) No Physical Evidence Linking Oldson to Crime

The defense emphasized that no physical evidence was found linking Oldson to Beard, despite several searches. Without stating that Oldson was incarcerated at the time, the defense emphasized that when law enforcement executed the search warrant based on Oldson's journal entries, Oldson was "more or less quarantined and had no access to the house or the grounds or the trucks for a nine-month period." Furthermore, during the time the search warrants were sought and executed, Oldson had limited, supervised communication with the house's inhabitants. The defense also pointed out that Oldson indicated in his diary that he knew law enforcement was reading it.

(b) Minnie Denies Strange Behavior or Being Threatened

Minnie testified for the defense. She said that there was nothing out of the ordinary in the way Oldson drove out to the site where the remains were found. Further, she did not think that Oldson would have been proficient enough in sign language to carry on a conversation with her at that time. Minnie denied that Oldson ever threatened to do to her what he had done to Beard. She testified that Oldson never made any incriminating statements to her concerning Beard. Minnie testified that Dasher had a reputation in the community for being untruthful.

(c) Beard Commonly Left Tavern With Other Men

The defense adduced evidence that it was common for Beard to leave the bar with different men. The defense then presented other likely suspects.

(d) Michael Hawley

The defense presented the prior statements of former Ord resident, Michael Hawley, deceased at the time of trial. Hawley

carried in his wallet a picture from a "dirty magazine" of a woman who looked like Beard. He said he did not like Beard and described her as a thief and a hustler, and he stated she had "narced off" a friend of his. Hawley did not have an alibi for the night of Beard's disappearance. One witness, a former Ord resident who was also deceased at the time of trial, reported to police that he arrived at the Someplace Else Tavern at 6:30 p.m. on the night of Beard's disappearance and saw Beard talking to Hawley. The witness left at 6:45 p.m. Hawley drove a "maroon with white top" Pontiac Grand Prix with "56 county" plates.

(e) Rex White

John Hopkins, deceased at the time of trial, had given a statement to law enforcement that shortly after Beard's disappearance, he had a conversation with White about where Beard might be. Hopkins was White's supervisor on a cement job. White told Hopkins, "'I know where she is. I can show you where she's at. . . . We skinned her alive and I think she liked it.'" Hopkins reported that White seemed to be telling the truth. Furthermore, Hopkins got the impression from the conversation that Beard was out in the open somewhere.

Hopkins' live-in girlfriend testified that she recalled coming home and finding Hopkins "sobbing." The girlfriend testified over the State's objection that Hopkins was upset because White had told him that White killed Beard. Specifically, White told Hopkins that he skinned Beard and buried her under concrete under a restroom project north of Ord where White was working. She and Hopkins drove to the jobsite and found a bag of lime missing.

(f) Brian Mentzer and Carnival Workers

In a statement to police, Mel Ellingson, a former boyfriend of Beard's and deceased at the time of trial, reported that Beard once told him that a person by the name of Brian Mentzer was going to kill her and had threatened her once in a bar. Ellingson also recalled Beard's telling him that two "'guys from the

carnival'" she was acquainted with had called her because they were going to be visiting. Ellingson said the men drove a green pickup while they were in Ord. Ellingson also said that the owner of the carnival lived in Taylor, Nebraska, and therefore would have "88 county" license plates.

(g) Reported Sightings of Beard After Her Disappearance

The defense further presented evidence that Beard may have been seen in the days following her disappearance. One witness testified that the night of Beard's disappearance, he saw an unfamiliar man and woman at the convenience store on the highway leading into Burwell, Nebraska, about 17 miles from Ord. The woman was approximately Beard's weight and stature, but had darker hair. She appeared "drunk or doped."

Two other witnesses had reported to law enforcement that on the day after Beard's disappearance, they saw someone who matched the picture and physical description of Beard walk into a cafe in Morrill, Nebraska, which is about 360 miles from Ord. She was carrying a jacket and a military green duffelbag. The bag was "full clear up to the top with clothing or personal items," and she appeared tired.

Ellingson said in a statement to police that he was traveling back to Ord from Valentine, Nebraska, the day after Beard's disappearance. En route, at about 6 p.m., he saw a vehicle traveling in the opposite direction. He was traveling about 60 miles per hour; the other vehicle was traveling about 90 miles per hour. He noticed there were three people in the vehicle and he "'could swear'" that Beard was seated in the middle between the driver and the other occupant. He believed he recognized the vehicle as belonging to a person who had previously lived across from Beard's house and had dated Beard at one time.

(h) Sex Ranch Diary

The defense suggested that Beard had been with Jean Backus and Wetzel Backus after her disappearance and ultimately was

murdered by Jean Backus. The Backuses owned 2,300 acres in Garfield County, Nebraska, near Ord.

The defense called the current sheriff for Valley County, who indicated that in March 2012, he came into contact with handwritten pages from a diary. The diary contained information regarding the possible death of a woman by the name of "Kathy" from Ord. The sheriff testified that the diary facially appeared to belong to Jean Backus, who was married at that time to Wetzel Backus.

The diary indicated that "Kathy's" death, as well as the death of three other women, had occurred on the Backus ranch. The sheriff testified that the other women listed in the diary were Sharon Bald Eagle, Karen Weeks, and Jill Dee Cutshall. All these women were known to have disappeared. Bald Eagle disappeared in 1984, and Weeks and Cutshall disappeared in 1987.

The sheriff testified the diary indicated that the Backuses had found Cutshall during a trip to Fremont, Nebraska, walking and without any clothes, and that the Backuses had found Bald Eagle in South Dakota. Bald Eagle had in fact disappeared from a reservation in South Dakota. Cutshall's clothes had been found in a forest.

The diary referred to "Kathy" as missing from Ord in 1989, and the sheriff affirmed that the diary indicated a "local man" was being blamed for "Kathy's" disappearance. Further, the diary indicated the author of the diary had run "Kathy" over with a pickup.

The sheriff testified that he had conducted an investigation into the diary. The sheriff explained that Jean Backus denied writing the diary and had granted law enforcement permission to search the ranch. Law enforcement conducted a thorough search and was unable to find any human remains or other suspicious evidence on the Backus property. The sheriff did not believe the diary to be valid.

(i) Jerome Walkowiak

Over defense counsel's request to declare him unavailable and utilize only prior statements made to the police, Jerome Walkowiak testified that he was at the Someplace Else Tavern on May 31, 1989, and saw Beard talking with a man with a red beard and other "common-looking guys" with black beards. The man with the red beard had a ponytail and a knife "hanging on his side."

Walkowiak remembered that Oldson and Beard were also talking, and he saw Oldson and Beard go out to the back alley after Oldson went to the restroom. The bearded men had left the Someplace Else Tavern just before that. Walkowiak looked out the back alley and saw a blue, but not dark blue, truck with "88 county" license plates. The same men he saw Beard talking to in the bar were in the pickup. Walkowiak testified that he saw Oldson get into the truck with Beard and the other men.

Defense counsel then confronted Walkowiak with his statement from 1989 wherein he told law enforcement that he saw Oldson walk away and that Oldson did not get into the truck with Beard and the other men. Walkowiak testified that he did not know why he had said that. The defense proceeded to read extensively and repeatedly from Walkowiak's 1989 interview. Walkowiak testified that he did not remember the 1989 interview and that his memory of the night of May 31, 1989, was better now than it was then.

7. Verdict and Sentence

The jury returned a verdict of guilty of second degree murder. The court sentenced Oldson to life-to-life imprisonment.

III. ASSIGNMENTS OF ERROR

Oldson makes 12 assignments of error. He assigns that the trial court erred (1) by admitting excerpts from Oldson's journals which were inadmissible under Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014), in violation of his rights to be presumed innocent, due process, and a fair

trial; (2) by admitting excerpts from Oldson's journals which were inadmissible under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), in violation of his rights to be presumed innocent, due process, and a fair trial; (3) by allowing Oldson's journal excerpts to go back with the jury during deliberations, in violation of his rights to be presumed innocent, due process, and a fair trial; (4) by not admitting the alleged Jean Backus diary at trial, in violation of his rights to present a defense, due process, and a fair trial; (5) by failing to suppress evidence as requested by the defense, in violation of the 4th and 14th Amendments and their Nebraska counterparts; (6) by failing to dismiss the case as a violation of Oldson's right to a speedy trial under the Due Process Clause of the 5th and 14th Amendments and their Nebraska counterparts; (7) by forcing Oldson to choose between effectively cross-examining witnesses and opening the door to highly prejudicial evidence of other bad acts, in violation of Oldson's right to confrontation under the Sixth Amendment and its Nebraska counterpart; (8) by overruling his motion for a new trial, in violation of his rights to present a defense, due process, and to a fair trial; and (9) by giving Oldson a life sentence when the jury found him guilty of a lesser offense. Oldson also asserts that (10) the State's tampering with witnesses Rhonda Donnelson and Walkowiak violated Oldson's rights to a fair trial, to present a defense, and to due process under the 5th, 6th, and 14th Amendments and their Nebraska counterparts; (11) there was insufficient evidence to support the conviction; and (12) his conviction should be reversed on the ground of cumulative error.

IV. ANALYSIS

1. Motion to Suppress

We begin our analysis by addressing Oldson's assignment of error that the trial court erred in denying his motion to suppress. Oldson argues that by virtue of omitting exculpatory information, the affidavit in support of the warrant for Oldson's

arrest contained deliberately or recklessly false information, in violation of the Fourth Amendment under *Franks v. Delaware*.[1] Therefore, his recorded conversations while in jail awaiting trial should have been excluded as fruit of the poisonous tree. When Oldson's recorded conversations were offered at trial, defense counsel did not object to the evidence under the Fourth Amendment and did not renew the motions to suppress. Defense counsel instead objected to the statements on the grounds of foundation, confrontation, and due process. When the court specifically asked defense counsel if there were any other objections to the recorded conversations, defense counsel said that there were not.

[1,2] Where there has been a pretrial ruling regarding the admissibility of evidence, a party must make a timely and specific objection to the evidence when it is offered at trial in order to preserve any error for appellate review.[2] The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.[3] Furthermore, an objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on some other ground not specified at trial.[4] Because the defense failed to renew its Fourth Amendment objection at trial, he waived his assignment of error concerning his motion to suppress.

2. Oldson's Journal Excerpts

We turn next to Oldson's journal excerpts, which are the subject of two assignments of error and the central focus of Oldson's appeal.

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[1] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

[2] *State v. Herrera*, 289 Neb. 575, 856 N.W.2d 310 (2014).

[3] *Id.*

[4] See *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013).

(a) Standard of Review

[3] Whether evidence is admissible for any proper purpose under the rule governing admissibility of evidence of other crimes, wrongs, or acts rests within the discretion of the trial court.[5]

[4] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under the balancing rule and the other acts rule, and the trial court's decision will not be reversed absent an abuse of discretion.[6]

(b) Analysis

The defense objected to exhibits 263 through 271 under either rule 403 or rule 404, often both. Oldson makes several unique arguments in this appeal as to the meaning and applicability of those statutes, based on his interpretation of their guiding principles. Before addressing the particular exhibits, therefore, we find it helpful to set forth in detail the guiding principles of rules 403 and 404. We begin with rule 404.

(i) Rule 404

a. Forbidden Propensity Reasoning

[5] Rule 404, found at § 27-404, codifies the common-law tradition prohibiting "'resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt.'"[7] "'The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.'"[8] This is because propensity evidence may

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[5] See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[6] See *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

[7] *Old Chief v. United States*, 519 U.S. 172, 181, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

[8] *Id.*

lead a jury to convict, not because the jury is certain the defendant is guilty of the charged crime, but because it has determined the defendant is "'a bad person [who] deserves punishment,'" whether or not the crime was proved beyond a reasonable doubt.[9]

[6] Rule 404 thus prohibits the admission of "[e]vidence of a person's character or a trait of his or her character . . . for the purpose of proving that he or she acted in conformity therewith on a particular occasion."[10] The prohibition in rule 404(1) consists of two parts: to prove "a person's character" in order to show that "he or she acted in conformity therewith."[11] "Proof of a person's character is barred only when in turn, character is used 'in order to show action in conformity therewith.'"[12]

Though difficult to define, character has been described as the generalized disposition or tendency to act in a particular way in all the varying situations of life, caused by something internal to the actor that arises from that person's moral being.[13] For example, a person's character may be "quarrelsome and contentious,"[14] peaceable,[15] chaste,[16] honest,[17] or the opposite

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[9] *Id.*

[10] Rule 404(1).

[11] See, 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 2:19 (rev. ed. 2002); 22B Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5233 (2014).

[12] 1 Imwinkelried, *supra* note 11 at 105.

[13] See, *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012); *State v. Crider*, 375 Mont. 187, 328 P.3d 612 (2014); *State v. Marshall*, 312 Or. 367, 823 P.2d 961 (1991); *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989); David P. Leonard, The New Wigmore: Evidence of Other Misconduct and Similar Events § 8.3 (Richard D. Friedman ed., 2009).

[14] *Trousil v. Bayer*, 85 Neb. 431, 433, 123 N.W. 445, 446 (1909).

[15] *Gering v. School Dist.*, 76 Neb. 219, 107 N.W. 250 (1906).

[16] *Brooks v. Dutcher*, 22 Neb. 644, 36 N.W. 128 (1888), *overruled on other grounds, City of Omaha v. Richards*, 49 Neb. 244, 68 N.W. 528 (1896).

[17] *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995).

of any of those characteristics. The concept of character is generally understood to have a moral component.[18]

The second part of the prohibition, to show that "he or she acted in conformity therewith," is to ask the trier of fact to infer what a person did from who that person is.[19] It is an attempt to prove, by initiating an attack on the defendant's character, that the defendant committed the acts constituting the crime charged.[20]

b. Other Acts Evidence to Show Propensity

[7] What the State cannot do through direct testimony of the defendant's character it cannot do indirectly through evidence of the defendant's acts for the purpose of illustrating bad character. The State cannot introduce other acts that are relevant only through the inference that the defendant is "'by propensity a probable perpetrator of the crime.'"[21] Stated another way, the State cannot present the defendant's other acts so that the jury makes the intermediate inference of the defendant's bad character, leading to the ultimate inference that the defendant is guilty.[22]

This approach of establishing guilt through other acts is even more egregious than presenting reputation or opinion evidence of the defendant's bad character. The admission of other acts evidence presents a special danger of confusion of the issues and undue prejudice. Not only might the jury

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[18] See, e.g., 22B Wright & Graham, Jr., *supra* note 11.

[19] 1 Imwinkelried, *supra* note 11. See, also, 12 Robert Lowell Miller, Jr., Indiana Evidence § 404.101 (3d ed. 2007 & Cum. Supp. 2015).

[20] See, Barbara E. Bergman et al., Wharton's Criminal Evidence § 4:18 (15th ed. 1997 & Cum. Supp. 2014-15); 1 Edward J. Imwinkelried et al., Courtroom Criminal Evidence § 801 (4th ed. 2005). See, also, e.g., *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[21] *State v. Yager*, 236 Neb. 481, 490, 461 N.W.2d 741, 747 (1990).

[22] See, e.g., 1 Imwinkelried, *supra* note 11, § 2:21.

infer action based on the defendant's general lawbreaking character, but the jury might subconsciously penalize the defendant for the proven misdeeds.[23] In other words, such evidence of other acts might encourage a "preventive conviction even if [the defendant] should happen to be innocent momentarily."[24]

c. When Propensity Reasoning Is Permissible

The prohibition against proving the character of a person in order to show action in conformity therewith—in other words, the use of propensity reasoning—is subject to limited exceptions. Those exceptions are generally favorable to the defendant's use of propensity evidence in his or her defense, while maintaining the prohibition against the prosecution's use of propensity evidence in its case in chief. Rule 404(1)(a) allows the defendant to offer a pertinent trait of his or her character, allowing the prosecution to rebut the same only if the defendant offers such evidence. Rule 404(1)(b) allows the defendant to present evidence of a pertinent character trait of the victim and allows the prosecution to rebut the same only if the defendant presents such evidence.

Under Neb. Evid. R. 405, Neb. Rev. Stat. § 27-405 (Reissue 2008), the manner in which either party can prove character in order to show action in conformity therewith, when allowed, is generally limited to reputation or opinion evidence. In accordance with the special danger that instances of misconduct entails, other prior acts can be introduced to show character in order to show action in conformity therewith only if a trait of character is an essential element of a charge, claim, or defense, or during cross-examination of reputation or opinion testimony.[25]

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[23] *Id.*, § 1:03.

[24] *Old Chief v. United States, supra* note 7, 519 U.S. at 181.

[25] Rule 405.

d. Other Acts Evidence Not for Propensity Purposes

[8] Evidence of specific instances of conduct that only incidentally impugns a defendant's character is not prohibited by rule 404.[26] If the underlying theory of the logical relevance of the other acts evidence is independent of propensity; i.e., if there is a "'rational chain of inferences that does not require an evaluation of character,'" then the court may admit the evidence of specific instances of conduct.[27] The other acts evidence in such circumstances is referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity.[28]

Rule 404(2) thus states that evidence of "other crimes, wrongs, or acts" are admissible for purposes other than "to prove the character of a person in order to show that he or she acted in conformity therewith." Rule 404(2) provides the examples of proper purposes of other acts evidence as being "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This list of proper purposes is illustrative and not meant to be exclusive.[29]

Authorities note that uncharged misconduct evidence routinely supports two inferences—one legitimate and one illicit.[30] Rule 404(2) permits introduction of relevant evidence concerning the occurrence of "other crimes, wrongs, or acts," so long as the sole purpose for the offer is not to establish a defendant's propensity to act in a particular manner, and thereby supply a basis for the inference that the defendant committed

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[26] See, e.g., 40A Am. Jur. 2d *Homicide* § 286 (2008).

[27] *State v. Torres, supra* note 13, 283 Neb. at 158, 812 N.W.2d at 232 (quoting Leonard, *supra* note 13).

[28] *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011).

[29] See, *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Myers*, 15 Neb. App. 308, 726 N.W.2d 198 (2006); *State v. Bockman*, 11 Neb. App. 273, 648 N.W.2d 786 (2002); *State v. Maggard*, 1 Neb. App. 529, 502 N.W.2d 493 (1993).

[30] 1 Imwinkelried, *supra* note 11, § 1:03.

the crime charged.[31] The "litmus test is noncharacter logical relevance"[32] of the other acts.

e. Proof of Other Acts

As a threshold matter, the evidence of the other act will be admissible only if the trier of fact could reasonably conclude that the act occurred and that the defendant was the actor.[33] It cannot be the product of mere speculation. Rule 404(3) states that when, in a criminal case, evidence of other crimes, wrongs, or acts is admissible for a proper purpose, the prosecution must prove "to the court by clear and convincing evidence," "outside the presence of any jury," that the accused committed the crime, wrong, or act.

f. Articulating Proper Purpose

In *State v. Sanchez*,[34] we also established the procedure, not explicitly set forth in the statutory scheme, that the proponent of other acts evidence shall state on the record the specific purpose or purposes for which the evidence is being offered, upon objection to its admissibility.[35] The trial court is similarly required to state the purpose or purposes for which such evidence is received.[36] We explained that such a procedure provides further protection for the defendant and simplifies our appellate review.[37]

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[31] See, *State v. McGuire, supra* note 6; *State v. Yager, supra* note 21; Michael H. Graham, Handbook of Federal Evidence § 404:5 (7th ed. 2012).

[32] 1 Imwinkelried et al., *supra* note 20, § 904 at 372.

[33] Bergman et al., *supra* note 20, § 4:27.

[34] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[35] See, *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000); *State v. Sanchez, supra* note 34; *State v. Wisinski*, 12 Neb. App. 549, 680 N.W.2d 205 (2004); *State v. Powers*, 10 Neb. App. 256, 634 N.W.2d 1 (2001), *disapproved on other grounds, State v. Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004).

[36] See *id.*

[37] See *State v. Sanchez, supra* note 34.

g. Limiting Instructions

And since evidence of other acts submitted for a proper purpose may at the same time lead the jury to infer bad character and employ propensity reasoning, the trial court must, *if requested by the defendant*,[38] instruct the jury to focus only on the proper purpose of the evidence. This requirement does not derive from rule 404, but from the more general provisions of Neb. Evid. R. 105, Neb. Rev. Stat. § 27-105 (Reissue 2008). Under rule 105, "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." (Emphasis supplied.)

While, normally, the better practice is for a trial court to instruct the jury regardless of request, so as to ensure the evidence is not used for an improper purpose, the majority view is that the court does not have a duty to present a limiting instruction to the jury sua sponte.[39] We have thus said that the failure to provide limiting instructions absent a

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[38] *State v. Torres, supra* note 13; *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011); *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011); *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010); *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009); *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999); *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997); *State v. Newman, supra* note 29; *State v. Bockman, supra* note 29; *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000), *overruled on other grounds, State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001).

[39] See, *U.S. v. Perkins*, 94 F.3d 429 (8th Cir. 1996); *United States v. Multi-Management, Inc.*, 743 F.2d 1359 (9th Cir. 1984); *United States v. Price*, 617 F.2d 455 (7th Cir. 1979); *State v. Hill*, 307 Conn. 689, 59 A.3d 196 (2013); *State v. Russell*, 171 Wash. 2d 118, 249 P.3d 604 (2011); *State v. Miles*, 211 Ariz. 475, 123 P.3d 669 (Ariz. App. 2005); *Brown v. State*, 890 So. 2d 901 (Miss. 2004); *People v. Griggs*, 110 Cal. App. 4th 1137, 2 Cal. Rptr. 3d 380 (2003); *Stallworth v. State*, 868 So. 2d 1128 (Ala. Crim. App. 2001); *People v. Rice*, 235 Mich. App. 429, 597 N.W.2d 843 (1999); *State v. Williams*, 593 N.W.2d 227 (Minn. 1999); *State v. Shuman*, 622 A.2d 716 (Me. 1993); *People v. Pennese*, 830 P.2d 1085 (Colo. App. 1991); Leonard, *supra* note 13, § 4.5.

request is not reversible error.[40] Indeed, it may at times be a tactical decision by defense counsel not to highlight, through a limiting instruction, the evidence itself or the fact that the jury could infer from the evidence anything other than its proper purpose.[41]

(ii) Rule 403

[9,10] We now turn more briefly to the principles underlying rule 403. All relevant evidence is subject to the overriding protection of rule 403, including other acts evidence. Rule 403 allows the exclusion of evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[42]

[11,12] Relevant evidence is that which has 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.[43] The probative value of evidence involves a measurement of the degree to which the evidence persuades the trier of fact that the particular fact exists and the distance of the fact from the ultimate issue of the case.[44]

[13,14] Most, if not all, evidence offered by a party is calculated to be prejudicial to the opposing party.[45] Unfair prejudice means an undue tendency to suggest a decision based on an improper basis.[46] Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder

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[40] *State v. Valverde, supra* note 4.

[41] See, e.g., *State v. Washington*, 693 N.W.2d 195 (Minn. 2005).

[42] See *State v. Myers, supra* note 29.

[43] *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

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

[45] *Id.*

[46] *Id.*; *State v. Newman, supra* note 29.

into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.[47] When considering whether evidence of other acts is unfairly prejudicial, we consider whether the evidence tends to make conviction of the defendant more probable for an incorrect reason.[48]

(iii) Application

Applying these principles to the exhibits in question, we begin with exhibit 266.

a. Exhibit 266

i. Background

In exhibit 266, Oldson writes: "Maybe the problem has been my making girls too high a priority - and having real problems with accepting rejection. Which may be how all this got started. 'Get it any way you can' (?) Doesn't sound like a good attitude. It got me in trouble."

a) Theory of Logical Relevancy

The theory of logical relevancy propounded by the State and adopted by the trial court was that this entire statement referred to Oldson's murder of Beard and his reason for killing her. The statement tied into other statements by Oldson that Beard had rejected him on the night of her disappearance.

The court concluded that the exhibit was admissible as evidence of motive and consciousness of guilt. In essence, the court found that the jury could reasonably infer from exhibit 266 that Oldson was acknowledging he had gotten himself into "trouble" because he attempted to "'[g]et it any way you can'" when Beard rejected him on the night of her disappearance.

The defense objected to this statement under rules 403 and 404.

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[47] See *Old Chief v. United States, supra* note 7.

[48] *State v. Christian*, 237 Neb. 294, 465 N.W.2d 756 (1991).

b) Court Concluded Exhibit Not Other Acts Evidence

The trial court specifically found that exhibit 266 was not evidence of another act under rule 404(2). The court also reasoned, "[t]he State is not offering this to prove [Oldson] has a character trait (problem with accepting rejection) that causes him or has caused him to murder other women" and, further, that the exhibit "does not indicate or imply that [Oldson] kills women who reject him."

c) Court Gave Limiting Instruction

In consideration of the proper purpose for which the court admitted the statement that Oldson had "problems with accepting rejection," the trial court sua sponte instructed the jury to limit its consideration of exhibit 266. The court orally instructed: "You have seen this evidence for a specific limited purpose. This evidence is being offered for the limited purpose to help you decide motive for the crime [Oldson] is currently charged with. You must consider this evidence only for this limited purpose."

ii. Analysis

a) Probative Value: Whether Statement Referred to Beard Was Question for Jury

We agree with Oldson that the obtuse style of Oldson's journal writing somewhat lessened the probative value of the journal excerpts.[49] But this does not render them inadmissible.

The probative value of exhibit 266 depended upon the determination that Oldson was writing about Beard. The determination of that foundational fact—that Oldson was referring to Beard—was a fact conditioning the relevancy of exhibit 266.[50]

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[49] See, *Com. v. Avila*, 454 Mass. 744, 912 N.E.2d 1014 (2009); *Winfield v. U.S.*, 676 A.2d 1 (D.C. 1996).

[50] See, Neb. Evid. R. 104(2), Neb. Rev. Stat. § 27-104(2) (Reissue 2008); 45 Am. Jur. *Trials* 1 (1992).

It was the province of the jury to determine if the excerpt referred to Beard.[51]

The trial court's gatekeeping function was limited to determining whether the jury could reasonably find that conditioning fact by a preponderance of the evidence.[52] The trial court did not abuse its discretion in performing that function. The reasonableness of an inference that the statement in exhibit 266 referred to Beard must be viewed in light of the other evidence presented, especially the other journal excerpts.[53] In exhibit 263, Oldson describes his knowledge that the county attorney wished to bring charges against him regarding "the 'missing one.'" And in exhibit 267, Oldson laments: "I really have no idea about what to do or where to go. My first priority is to get rid of something A.S.A.P.! That is, if I can still find them. The only . . . link left between me and . . . ."

As will be explained below, we find these other journal excerpts admissible in their own right and supportive of the reasonable inference that Oldson was referring in those excerpts to Beard. Viewing the exhibits together, the jury could reasonably infer that when Oldson referred in exhibit 266 to "trouble" and "how all this got started," he was referring, in a purposefully vague way, to the anticipated charges against him for the disappearance of Beard.

b) Excerpts Not Taken Out of Context, and Defense Could Have Completed Evidence

Oldson argues that the excerpts were unfairly prejudicial because they were taken from the journal out of context. We disagree. If the defense truly thought these excerpts were unfairly taken from the entire journal in a way that was

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[51] See *id*.

[52] See *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

[53] See, e.g., David P. Leonard, *Character and Motive in Evidence Law*, 34 Loy. L.A. L. Rev. 439 (2001).

misleading, the defense could have sought admission of other diary excerpts under the rule of completeness.[54] Moreover, the trial court was presented with the entirety of the journal in performing its gatekeeping function. We have likewise reviewed the journal in its entirety. We do not find any support for Oldson's assertion that by pulling exhibit 266 from its overall context, it became misleading.

c) Hobson's Choice Argument

Neither was there a so-called Hobson's choice that rendered exhibit 266 inadmissible. The defense was free to present to the jury the contextual evidence that Oldson was incarcerated for the attempted assault of another woman at the time he wrote this journal entry.

Hobson's choice traditionally means no real choice at all—a choice of taking what is available or nothing at all.[55] It is used to a lesser extent to denote the choice between one of two or more equally objectionable things.[56] This latter definition is apparently the one being used by Oldson, as he does not argue that rule 404 barred him from adducing the evidence. Oldson considered it equally objectionable to stay silent as to other possible contextual explanations of exhibit 266 or to present evidence of the assault for which Oldson was incarcerated at the time exhibit 266 was written. Oldson's solution to this dilemma is that the State should not have been allowed to create it.

Oldson presents no legal authority for this Hobson's choice claim. Oldson tries to incorporate rule 404 into his Hobson's choice argument, but rule 404 does not address the admissibility of evidence based on potential avenues of cross-examination. Furthermore, the logical relevance of any elicitation during cross-examination of the context of the writings

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[54] See Neb. Evid. R. 106, Neb. Rev. Stat. § 27-106 (Reissue 2008).

[55] Concise Oxford American Dictionary 425 (2006).

[56] Webster's Third New International Dictionary of the English Language, Unabridged 1076 (1993).

would be independent of propensity and accordingly not prohibited under rule 404.

Admittedly, it might be a tough choice between standing silent and presenting evidence that Oldson was referring to an unrelated attempted assault conviction. But tough choices are not uncommon in trials. Hobson's choice arguments such as presented here are rarely found in case law. To the extent such arguments have been raised in similar contexts, most courts have rejected them.

For example, most courts reject "Catch 22" reasoning when considering whether the State can introduce escape as evidence of consciousness of guilt, when it is factually unclear whether the defendant was escaping from the crime he was being tried for or from other charges relating to other bad acts.[57] Courts reason that the defendant should not receive more favorable treatment on the ground that the defendant is alleged to have committed several offenses rather than a single crime.[58]

We are similarly unpersuaded here that the evidence may be rendered inadmissible because it presents a difficult strategic decision due to the defendant's criminal history. We find no legally supportable reason why Oldson's Hobson's choice meant the State could not admit exhibit 266 into evidence for the jury's consideration.

d) "Pure" Character Evidence

Oldson also argues that exhibit 266 was inadmissible because the statement that he had problems accepting rejection

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[57] 1 Imwinkelried, *supra* note 11, § 3:05. See, also, *United States v. De Parias*, 805 F.2d 1447 (11th Cir. 1986), *overruled on other grounds, U.S. v. Kaplan*, 171 F.3d 1351 (11th Cir. 1999); *United States v. Kalish*, 690 F.2d 1144 (5th Cir. 1982); *United States v. Boyle*, 675 F.2d 430 (1st Cir. 1982); *State v. Hughes*, 596 S.W.2d 723 (Mo. 1980); *People v. Remiro*, 89 Cal. App. 3d 809, 153 Cal. Rptr. 89 (1979); *Fentis v. State*, 582 S.W.2d 779 (Tex. Crim. App. 1976); *Fulford v. State*, 221 Ga. 257, 144 S.E.2d 370 (1965).

[58] *Id.*

was "pure" character evidence, which he asserts is inadmissible under rule 404(1) under any circumstances.

i) Oldson's Argument Abstracts Single Phrase

In arguing that there is a "pure" character statement rendering exhibit 266 inadmissible, Oldson focuses solely on the phrase, "having real problems with accepting rejection," abstracted from the references to "how all this got started" and "[i]t got me in trouble." Oldson thus extracts this one phrase from any context that it referred to Oldson's actions with Beard on the night of her disappearance and his motive for those actions. We find this extraction approach to a single phrase in exhibit 266 unfounded.

ii) Statement Not Character Trait

In any event, we find no merit to Oldson's "pure" character arguments as they pertain to this statement. First and most fundamentally, we do not consider that "having real problems with accepting rejection" is a character trait as contemplated by rule 404. It is not a generalized disposition or tendency to act in a particular way in all the varying situations of life, arising from that person's moral being.[59] At most, it is a recurring emotion when encountering a certain situation.

iii) Even if Statement Reflects Character, Admissible for Motive

Even if "having real problems with accepting rejection" were reflective of a character trait, it would not thereby be rendered inadmissible. Exhibit 266 was found by the court to be admissible for the limited purpose of showing Oldson's motive for killing Beard. We have explained that motive is the specific state of mind that leads or tempts a person to indulge in a specific criminal act.[60] Motive qualifies as a legitimate noncharacter theory because although character carries a connotation of an enduring general propensity, a

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[59] See sources cited *supra* note 13.

[60] See, *State v. Torres, supra* note 13; *State v. Floyd, supra* note 38.

motive is a situationally specific emotion.[61] We have already concluded that the jury could reasonably infer from exhibit 266 that Oldson was reflecting upon the fact that he had killed Beard because she rejected him. Thus, the jury could infer that Oldson was stating a situationally specific emotion intrinsic to the charged act. The exhibit was not robbed of this noncharacter logical relevance simply because Oldson chose to write his journal entries in a generalized, obscure, and self-reflective fashion.

iv) "Character" Evidence Not Prohibited by Rule 404 When Admitted for Proper Purpose

Oldson asserts that because his journal entry is worded in a generalized and obscure fashion, it is "pure" character evidence and is inadmissible even for a proper purpose. Oldson argues that character demonstrated by anything besides other acts can never be admissible for a proper purpose.

[15] We find no merit to this argument. If character evidence is admitted for a proper purpose, then, ipso facto, it is not admitted for the purpose of showing propensity. As such, it does not fall under the general, two-part prohibition found in rule 404(1), that evidence of a person's character or a trait of his or her character is inadmissible for the purpose of proving that he or she acted in conformity therewith.

And Oldson's underlying premise that there ought to be a distinction between when evidence is admissible for a proper purpose based on the form of the proof is inconsistent with the underlying policies of rule 404, which recognize the special danger of other acts evidence. As we have already discussed, indirect evidence of bad character through bad acts is even more harmful than direct opinion or reputation evidence of bad character, because the jury might subconsciously punish the defendant for the prior bad acts, in addition to his or her bad character.

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[61] 1 Imwinkelried, *supra* note 11, § 3:15.

Admittedly, we find it hard to imagine circumstances where a more traditional notion of a character trait—a generalized characteristic with moral connotations, such as being a violent or dishonest person—could legitimately have "special" or "independent" relevance. But we have already said that this phrase concerning problems with rejection is not really a "character trait" as contemplated by rule 404.

To the extent that character under rule 404 could be seen as encompassing more particular thoughts or feelings, courts generally reject the argument that character can never be admitted for a proper purpose.[62] Under circumstances where the relevance of the evidence is not outweighed by any unfairly prejudicial effect, evidence of far more worse traits than "having real problems with accepting rejection" have been held admissible for a demonstrated proper purpose. This is true regardless of whether the trait was illustrated through other acts evidence or through opinion, reputation, or self-reflective statements by the defendant.[63] Traits such as misogyny,[64] racism,[65] alcoholism,[66] Satanism or witchcraft,[67] and being interested in "wealth, power, and death,"[68] have been found

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[62] See, *People v. Griffin*, 224 P.3d 292 (Colo. App. 2009); *Masters v. People*, 58 P.3d 979 (Colo. 2002); *People v. Hoffman*, 225 Mich. App. 103, 570 N.W.2d 146 (1997); *State v. Powell*, 793 S.W.2d 505 (Mo. App. 1990); *State v. Crumb*, 277 N.J. Super. 311, 649 A.2d 879 (1994); *State v. Waterhouse*, 513 A.2d 862 (Me. 1986). Compare, *Dunkle v. State*, 139 P.3d 228 (Okla. Crim. App. 2006); *Turpin v. Com.*, 780 S.W.2d 619 (Ky. 1989), *abrogated on other grounds, Thomas v. Com.*, 864 S.W.2d 252 (Ky. 1993); *State v. Johnson*, 71 Ohio St. 3d 332, 643 N.E.2d 1098 (1994).

[63] See *id.*

[64] See, *Masters v. People, supra* note 62; *State v. Johnson, supra* note 62.

[65] See, *People v. Griffin, supra* note 62; *People v. Hoffman, supra* note 62; *State v. Crumb, supra* note 62.

[66] See *State v. Powell, supra* note 62.

[67] See, *Dunkle v. State, supra* note 62; *State v. Powell, supra* note 62, *State v. Waterhouse, supra* note 62.

[68] *Turpin v. Com., supra* note 62, 780 S.W.2d at 620.

admissible for proper purposes, most commonly, to establish motive for what would otherwise be an unprovoked and random act of violence.

Most apposite to the case at hand, courts have found that a defendant's self-reflective statements indicating motive or state of mind for the crime he or she is being charged with are admissible for a proper purpose, especially if made in the context of an admission or statement against interest.[69] Thus, for example, in *People v. Greenlee*,[70] the court held that the defendant's statement in a letter to a friend after the victim's death, commenting on a thriller novel and how he loved when the murder plan came together, "'[w]hich is, of course, how I got in this mess anyway,'" was admissible.[71] The court explained that this statement, combined with statements before the victim's death that the defendant had a plan to shoot and kill a woman and hide her body, was relevant for the proper purpose of proving the defendant's mental state when he shot the victim.[72]

v) Conclusion

Exhibit 266 was not rendered inadmissible by virtue of being "pure" character evidence.

e) Unfair Prejudice Did Not Outweigh Probative Value

It is unclear what prejudicial inferences could be made from the phrase "having real problems with accepting rejection" outside of the inference that this statement referred particularly to Beard. That inference is not "unfair." In other words, to the extent Oldson's concern really is that the State

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[69] See, e.g., *Com. v. Bradshaw*, 86 Mass. App. 74, 13 N.E.3d 638 (2014); *People v. Greenlee*, 200 P.3d 363 (Colo. 2009); *Masters v. People, supra* note 62.

[70] *People v. Greenlee, supra* note 69.

[71] *Id.* at 367.

[72] *Id.*

is trying to obtain a conviction through a prohibited character attack, then we cannot fathom what bad character trait leading to a conviction could be derived from this so-called pure character statement. Many people dislike rejection. There is no inherent propensity inference that people who have problems with accepting rejection are violent to those who reject them.

Balancing the probative value of evidence against the danger of unfair prejudice is within the discretion of the trial court, whose decision we will not reverse unless there is an abuse of discretion.[73] As one court said, "'Only rarely—and in extraordinarily compelling circumstances—will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect.'"[74] The trial court did not abuse its discretion in determining that the danger of unfair prejudice did not outweigh the probative value of exhibit 266.

b. Exhibit 270

We turn next to exhibit 270.

i. Background

Oldson states:

> Love that gut, tummy, belly, abdomen, stomach, midriff, middle, torso, etc. Extensive experience comes with Sandy, Dondie, C.B., and Linda. Other mediocre experiences with Robin, Cathie, Shirley,(o) Shawna, Alyce, K.P., ([illegible]) Donna H., Irma S., Allison, Ronda (from G.I. 1980), Mary Jane, Teresa, 2116; resident upstairs; 1980, Salinas 1987, Lincoln 48th/Leighton (1989), Darlene, Connie, Pam, Tammy S., Cami G, Bonnie M, Carolyn D, et. al. List remains incomplete. Will add more as

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[73] See, *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), *disapproved on other grounds, State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015); *State v. Payne-McCoy, supra* note 44.

[74] *U.S. v. Bello-Perez*, 977 F.2d 664, 670 (1st Cir. 1992).

> more comes available. For now, must rate C.B. as most gratifying, Sandy as most comfortable, Teresa as prettiest, maybe Darlene. Just don't know - they[']re all so nice. YUH! Go on and gitcha some!

Defense counsel argued that the exhibit was inadmissible in its entirety. The defense objected at trial to exhibit 270 under rules 403 and 404(1) and (2). The defense resisted any compromise that would strike portions of this excerpt.

a) Theory of Logical Relevancy

In allowing exhibit 270 into evidence, the trial court implicitly determined that exhibit 270 supported the reasonable inference that Oldson had sexual contact with Beard on the night of her disappearance. The court also specifically stated that exhibit 270 was relevant to "disprove an exculpatory statement made by [Oldson] that he did not have sex until he was married and/or that he did not have sex with . . . Beard."

b) Limiting Instruction

The court did not specifically instruct the jury as to exhibit 270, but generally instructed, sua sponte, as to all the journal excerpts as follows:

> Jurors, you are now seeing evidence that is being submitted to you for a specific limited purpose. This evidence is being offered for the limited purpose to help you decide what if any knowledge [Oldson] had of . . . Beard, the nature and extent of any relationship he and . . . Beard may have had, and for the purpose of evaluating [Oldson's] credibility with respect to any other statements that he made. You must consider this evidence only for this limited purpose.

ii. Analysis

Oldson makes several disparate arguments on appeal concerning exhibit 270. First, Oldson argues that the sentence referring to Oldson's affinity for the midriff area is, similarly to the "having real problems with accepting rejection,"

inadmissible "pure" character evidence. Oldson claims that the sentence indicates a "stomach fetish" and that the State was attempting to influence the jury to convict Oldson because of his "creepy" sexual interests.[75]

Second, Oldson argues that it was improper for the State to introduce this excerpt for "impeachment" purposes when the inconsistent statements Oldson made indicating he was a virgin and that he had no sexual relationship with Beard were introduced by the State, not by Oldson.[76]

Third, Oldson argues that in order for the diary excerpt to be relevant for any proper purpose, the State needed to prove by clear and convincing evidence that sexual "acts" with all the women listed actually occurred.[77]

Fourth, and apparently alternative to his third argument, Oldson asserts that the excerpt is ambiguous—that the list of names might refer "merely to fantasies" instead of actual acts.[78] Further, "C.B." might not actually refer to Beard. In such case, Oldson argues that in order to clarify that the list referred only to fantasies, he was presented again with the Hobson's choice of either not making such argument or submitting to the jury unfairly prejudicial character evidence of his "unusual sexual proclivities."[79]

Finally, Oldson generally argues that any probative value of exhibit 270 was outweighed by its unfair prejudice and its tendency to confuse and mislead the jury.

a) Relevant for Consciousness of Guilt

We agree with the trial court that exhibit 270 was relevant insofar as it supported the reasonable inference that Oldson had sexual contact with Beard. Evidence that Oldson had sexual

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[75] Brief for appellant at 55, 61.

[76] *Id.* at 61.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 66.

contact with Beard was circumstantial evidence of his guilt because Oldson had stated he was a virgin, Oldson and Beard had apparently not had a sexual relationship prior to her disappearance, and Oldson said that Beard rejected Oldson's sexual advances on the night of her disappearance.

In other words, if Oldson had sexual contact with Beard, then at least some of his prior exculpatory statements about his relationship with Beard and the events of the night of her disappearance were false. Prior false exculpatory statements are probative of the defendant's consciousness of guilt.[80] When the evidence is sufficient to justify an inference that the defendant acted with consciousness of guilt, the fact finder can consider such evidence even if the conduct could be explained in another way.[81]

b) Sexual Contact With Beard Contemporaneous With Killing Is Not Other Acts Evidence

Evidence supporting the reasonable inference that Oldson had sexual contact with Beard on the night of her disappearance does not present a rule 404 issue, because it does not concern "other" acts. Rather, it concerns an act intrinsic to the crime. The State's theory of the case was that Oldson killed Beard in the course of a sexual assault. That the jury did not ultimately convict on that concurrent assault charge does not retrospectively change the nature of the evidence to be of "other acts."

c) List of Other Women

i) Whether Oldson Had Sexual Contact With Other Women Listed Is Irrelevant to Logical Relevance of Excerpt

The trial court explicitly stated that exhibit 270 was not to show that Oldson had sexual contact with the other women

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[80] *State v. Draganescu*, 276 Neb. 448, 775 N.W.2d 57 (2008).

[81] *Id.*

listed. The relevancy of this list of names, as the State pointed out, was to support the inference that "C.B." referred to Beard.

In a list of names, "C.B." is the only person referred to solely by two initials. In his brief on appeal, even Oldson recognizes that "the entire list is needed to demonstrate that Oldson is referring to . . . Beard."[82] Rule 404 has no application when the relevancy of the evidence does not depend on the actual occurrence of the other act indicated by a statement, but instead upon the statement itself.[83]

Oldson's argument that the other women listed could have been mere fantasies does nothing to further the argument that the list of women somehow fell under rule 404. Such a possibility likewise does not undermine the logical relevance of the list of women. In other words, it would not follow that because Oldson's sexual "experiences" with the other women listed were fantasies, the "most gratifying" "experience" with "C.B." was also a fantasy.

We have already rejected Oldson's Hobson's choice arguments and find them no more persuasive in the context of exhibit 270.

ii) Limiting Instruction

We find it pertinent that the court specifically instructed the jury with regard to the diary excerpts that it was to focus on the limited purposes of the nature and extent of any relationship Oldson had with Beard and the credibility of Oldson's prior statements. While it may have been appropriate to give the jury a more specific limiting instruction for exhibit 270, defense counsel did not request any such limiting instruction. Thus, the defense has waived any error in the failure to give

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[82] Brief for appellant at 66.

[83] See *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). See, also, *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

one.[84] Likewise, to the extent that there was a special risk of prejudice because one of the listed names may have referred to Oldson's sister, defense counsel could have asked that particular name be stricken. Defense counsel did not.

iii) Other Women Not Uncharged Misconduct to Be Proved by Clear and Convincing Evidence

Because the relevancy of the references to other women did not depend on the occurrence of any actual sexual acts with those women, there was nothing that needed to be proved under rule 404(3) by clear and convincing evidence.

iv) Reference to Other Women Not Unfairly Prejudicial

Any unfair prejudice from other acts inferences that the jury could have derived as to the other women listed would be minimal. When the evidence merely implies uncharged misconduct, courts tend to find any error in admitting the evidence to be harmless.[85] Furthermore, "[w]hen the act is lawful or a mere tort rather than a crime, there is less risk of prejudice; and evidence of the act is all the more admissible."[86] While promiscuity or even sexual fantasies might be considered by some people to be reflective of a bad character trait, it is hardly the kind of character trait that would compel a jury by improper propensity reasoning to convict a defendant of murder.

d) No "Creepy" Fetish Reference

Turning our attention to the first sentence of exhibit 270, we are generally unconvinced by Oldson's characterization

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[84] See, *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013); *Olson v. Sherrerd*, 266 Neb. 207, 663 N.W.2d 617 (2003); *State v. Scott*, 200 Neb. 265, 263 N.W.2d 659 (1978); *Stapleman v. State*, 150 Neb. 460, 34 N.W.2d 907 (1948); *Sedlacek v. State*, 147 Neb. 834, 25 N.W.2d 533 (1946).

[85] 1 Imwinkelried, *supra* note 11, § 2:16.

[86] 1 Imwinkelried et al., *supra* note 20, § 904 at 371.

of exhibit 270 as "character evidence" of a "creepy" "stomach fetish."[87]

To begin with, Oldson's perspective on this sentence seems clouded by a plethora of evidence and a theory of the prosecution that was never presented to the jury. Although the State sought to introduce evidence that Oldson had a fetish that involved cutting the abdomen area and that Beard's abdomen had been cut in the course of her murder, it was not allowed to do so. Such evidence, had it been presented, would have portrayed Oldson's midriff affinity in a darker light.

But the only evidence presented to the jury even remotely touching upon Oldson's sexual preferences was the first sentence of exhibit 270: "Love that gut, tummy, belly, abdomen, stomach, midriff, middle, torso, etc." The jury was presented with absolutely no evidence that such an affinity for the midriff area was connected with violence, or that Beard's murder involved her midriff area.

Reference to a female body part simply clarified the sexual nature of the other sentences. This illustrated that the "experiences" Oldson referred to throughout the excerpt were sexual experiences, either real or imagined. As even defense counsel noted, "[Y]ou can't understand what this means without seeing the stomach issues and talking about the sexual interests."

[16] This brings us to another point. If the defense was particularly concerned about references to the midriff area, it could have sought a compromise whereby that sentence was stricken and substituted with a more general explanation of context. Instead, defense counsel pursued a scorched earth policy. We will not allow defendants to gain an advantage on appeal by failing to pursue strategies at trial to minimize prejudice.

We have already rejected Oldson's arguments pertaining to so-called pure character statements when used for nonpropensity purposes. The logical relevancy of Oldson's affinity

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[87] Brief for appellant at 55, 61.

toward midriffs did not depend upon propensity reasoning. And it is hard to imagine how the jury could ever derive, through propensity reasoning, that because Oldson liked women's midriffs, he killed Beard.

e) No Abuse of Discretion in Concluding Exhibit 270 More Probative Than Unfairly Prejudicial

Whether Oldson was referring to Beard and a sexual experience with Beard the night of her disappearance was for the jury to decide, and the inferences that might follow from such determination would not be unfairly prejudicial. Balanced against this probative nature of exhibit 270 was the possible inference of promiscuity, an affinity for midriffs, and the extremely remote inference of incest that defense counsel arguably waived by failing to ask the court to strike one name from the list of names in the excerpt. The trial court did not abuse its discretion in its exercise of its gatekeeping function by determining that the probative value of exhibit 270 outweighed the danger of unfair prejudice.

f) Not Inadmissible Because Relevance Dependent Upon Other Evidence Entered by State

Finally, we find no merit to Oldson's argument that the admission of exhibit 270 was improper because its relevance depended in part upon Oldson's previous statements, introduced by the State, which indicated that he did not have sexual contact with Beard. The case law Oldson relies on does not stand for the proposition he propounds. We have said that impeachment may not be utilized as an artifice for the purpose of putting before the jury substantive evidence that is otherwise inadmissible.[88] But demonstrating that a prior, nontestamentary exculpatory statement is false is not the same thing

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[88] See *State v. Jackson*, 217 Neb. 363, 348 N.W.2d 876 (1984). See, also, e.g., *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

as impeachment. Besides that, the evidence in exhibit 270 pertaining to Oldson's relationship with Beard cannot be said to be otherwise inadmissible. Finally, the evidence of Oldson's prior statements concerning his relationship with Beard and the events of the night of her disappearance cannot be characterized as merely an artifice. We find no basis for concluding that exhibit 270 is inadmissible simply because its relevance is connected to other evidence properly admitted by the State.

c. Exhibits 263, 264, 265, 267, 268, 269, and 271

The remaining excerpts from Oldson's journal concern Oldson's apparent reflections on being a suspect in police investigations of Beard's disappearance, and we address them together.

i. Background

In exhibit 263, Oldson writes: "I guess the whole import of this thing with the 'missing one' has not hit home, yet. But it should, as they are now looking for charges. If they do prefer charges, well - ? I don't see how they can hang me for anything."

In exhibit 265, he writes: "Well, it looks as if this foolishness about the missing doo-doo has reached a point where the end is in sight. That's good. I like it - perhaps now I can ease my mind."

In exhibit 267, Oldson writes:

> I really have no idea about what to do or where to go. My first priority is to get rid of something A.S.A.P.! That is, if I can still find them. The only . . . link left between me and . . .
>
> But after that, I imagine I'll stay in the Midwest and try something. Maybe stick around here to work for Pop. He no doubt needs the help. And I could use the $ . . . .

In exhibit 268, Oldson writes: "Well, there it is. What's next, I wonder? It's gettin' closer - and G.S. and the Fried Eggplant gang aren't movin' - although they still could, conceivably.

How, I don't know - in fact, [illegible] wonder if there is any way he could even manufacture something? I doubt it."

Finally, in exhibit 269, Oldson writes:

> Fried Eggplant gang ain't makin' it - they're gonna slip and fall and just generally fu— up! That's nice . . .
>
> I'm gonna get away and I'll bet it breaks their yellow hearts - they're so dead-set that I did this and they're not gonna look any farther unless they are forced to. Well; now, they'd best look elsewhere, 'cuz I refuse to be a part of this charade any longer. I'm well fed up with this . . . tomfoolery - they can stick it in their asses. So there.

ii. Analysis

a) Exhibits Not Unfairly Prejudicial

For the most part, Oldson argues only that these exhibits were inadmissible under rule 403. Oldson argues that these excerpts have limited probative value due to their ambiguity. Oldson claims this ambiguity is due, in part, to the excerpts' being taken out of context. Oldson asserts that the exhibits' limited probative value must be balanced against the unfair prejudice of the Hobson's choice Oldson was faced with in deciding whether to give the excerpts more proper context for the jury.

We have already discussed at length the Hobson's choice theory formulated by Oldson in this appeal, and we find no merit to it. Moreover, we find no basis for concluding that the excerpts have been manipulated into a disingenuous light by being taken out of the overall context of the journal.

Specifically, our reading of the exhibits in the context of the entirety of the journal supports the inference that Oldson was referring in these exhibits to Beard and not to the crime for which he was incarcerated at the time the diary was written or for some other crime for which he was under investigation. Surrounding these excerpts, Oldson repeatedly expressed his frustration that he was not allowed a work release. He mentions Beard by name, stating that the Valley County Attorney

was "so obsessed with Beard." It appears Oldson thought he was not getting a work release because the county attorney and other law enforcement, which he called the "Fried Eggplant gang," considered him the primary suspect in Beard's disappearance. As Oldson approached his release date, he expressed concern that law enforcement did not want to let him out of jail and that he would have to come back.

Although Oldson points out that when he wrote about getting rid of something "A.S.A.P.," he was incarcerated and therefore could not have access to whatever thing he wished to get rid of, he was approximately 2 months from release. The surrounding context of that excerpt indicates Oldson was writing about his plans upon release.

b) Future Intention Is Not Other Acts Evidence

We reject any suggestion by Oldson that writing one's future intention to destroy evidence is evidence of other acts within the purview of rule 404. The writing, stating an intention to get rid of evidence, was not itself a legally cognizable act. Moreover, we have said that destruction of evidence of the crime charged is inextricably intertwined with the crime.[89]

c) Probativeness, Though Sometimes Limited, Not Outweighed by Unfair Prejudice

We agree with Oldson that many of these exhibits are "barely inculpatory."[90] But to the extent that some of these exhibits lack great probative value, neither are they particularly prejudicial. And those exhibits that are somewhat more prejudicial also have more probative value.

As Oldson points out, exhibits 268 and 269 are largely exculpatory. Oldson opines in exhibits 268 and 269 that the only way law enforcement could bring charges against him

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[89] See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[90] Brief for appellant at 64.

is if it manufactured evidence. But, for the most part, we disagree with Oldson's characterization of the exhibits as painting Oldson to be a "strange and obnoxious" character.[91] Instead, Oldson paints himself as justifiably angry.

In exhibits 269 and 271, Oldson admittedly expresses some unseemly disdain for law enforcement. But balanced against the prejudicial nature of the expressions of disrespect for law enforcement, exhibits 269 and 271 are probative of Oldson's guilt. The jury could reasonably infer from exhibit 269 that Oldson thought he would "get away," because law enforcement was going to make mistakes. The jury could reasonably infer from exhibit 271 that law enforcement would not find any incriminating evidence, because Oldson had particular knowledge about the evidence.

The oblique nature of Oldson's references to Beard in exhibits 263, 264, 265, and 267 or evidence relating to her disappearance—"the 'missing one,'" "certain things," "the missing doo-doo," and Oldson's stating he needed to "get rid of something A.S.A.P."—are even more probative and less "unfairly" prejudicial. These excerpts support the inference of a guilty conscience. "'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.'"[92]

Consciousness of guilt may generally be inferred from the intent of or an attempt by the accused to conceal, alter, or remove evidence of the crime. In this case, consciousness of guilt could be inferred from Oldson's reference to a need to "get rid of something A.S.A.P."[93] Consciousness of guilt

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[91] *Id*.

[92] *State v. Clancy*, 224 Neb. 492, 499, 398 N.W.2d 710, 716 (1987) (quoting 2 John Henry Wigmore, Evidence in Trials at Common Law § 273(1) (James H. Chadbourn rev. ed. 1979)), *disapproved in part on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989).

[93] See 29A Am. Jur. *Evidence* § 819 (2008).

may also be inferred from the secretive way in which Oldson referred to Beard throughout his writings. Balanced against such probative value is only the disrespectful tone that such references demonstrate.

The court did not abuse its discretion in finding exhibits 263, 264, 265, 267, 268, 269, and 271 admissible under rule 403.

d. Taking Exhibits Into Jury Room

Oldson's last argument and assignment of error pertaining to all the journal excerpts is that the court erred in allowing them in the jury room during deliberations. On this point, Oldson asks that we reconsider our opinion in *State v. Vandever*.[94] In *Vandever*, we held that heightened procedures under Neb. Rev. Stat. § 25-1116 (Reissue 2008), for refreshing the jury's memory with regard to recorded testimony, is limited to testimonial evidence. We explained that "testimonial evidence" for purposes of § 25-1116 encompasses only live testimony at trial by oral examination or by some substitute for live testimony that is a recording of an examination conducted prior to the time of trial and for use at trial.[95]

Oldson's journal was neither an examination nor a preparation for use at trial. It was not introduced as a substitute for live testimony. We decline Oldson's invitation to reconsider our opinion in *Vandever*. Therefore, we conclude that the trial court did not abuse its discretion in allowing exhibits 263 through 271 to go back to the jury room like any other exhibit entered into evidence during trial.

3. Witnesses Kittinger and Dasher: Hybrid Hobson's Choice With Right to Confrontation and Presumption of Innocence

Oldson next makes several arguments pertaining to witnesses Dasher and Kittinger, asserting that the admission of their testimony presented a different kind of Hobson's choice:

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[94] *State v. Vandever*, 287 Neb. 807, 844 N.W.2d 783 (2014).

[95] *Id.* at 815, 844 N.W.2d at 790.

one that violated his right to confrontation and the presumption of innocence.

(a) Background

(i) Dasher

Dasher testified at trial that both Oldson and Oldson's father had threatened her in order to prevent her from reporting the comments Oldson had made to her concerning Beard. When Dasher testified that Oldson's father had threatened her, the defense moved for a mistrial. The defense argued that the fact that Dasher was mentioning the threat by Oldson's father for the first time at trial indicated her credibility was questionable. The defense then argued it was not in a position to attack Dasher's credibility in the way it fully merited "because of the 404 issues."

The defense elaborated outside the presence of the jury that according to past statements, Dasher had heard Oldson also threaten his sister. The defense claimed that Dasher was making things up and that the defense was unable to properly cross-examine Dasher without presenting prior bad acts to the jury concerning Oldson's relationship with his sister. The defense also noted that Dasher had previously made allegations against Oldson that were never pursued by law enforcement or corroborated, but it did not want to present those accusations to the jury.

The court overruled the motion for mistrial. When Dasher continued to testify that she did not report Oldson's statement to law enforcement right away because she did not think Oldson was guilty, the defense again moved for a mistrial, arguing that the line of questioning was "walking down a path or expecting her to say . . . I didn't say it because I was scared of him which are 404 issues." The second motion for mistrial was overruled. Little testimony was elicited from Dasher afterward.

Subsequently, a hearing was held for purposes of creating a record for appellate review on the motion for mistrial.

The defense entered into evidence investigative reports of interviews which the defense argued demonstrated Dasher's inconsistent statements and lack of truthfulness. The reports generally describe transgressions by Oldson against Dasher, her daughter, and Oldson's sister.

(ii) Kittinger

The defense had moved in limine to exclude Kittinger's testimony reporting that the day after Beard's disappearance, when a law enforcement vehicle approached, Oldson said law enforcement was probably looking for him. As relevant here, the defense objected on the ground that Kittinger's testimony presented a Hobson's choice, wherein the defense would be unable to effectively cross-examine Kittinger without opening the door to inadmissible prior bad acts, in violation of rule 404(2). In this regard, the defense explained that in a prior statement to law enforcement, Oldson's father, deceased, said that the statement Kittinger referred to had really occurred after a different incident in November 1989, for which Oldson was ultimately incarcerated in 1990.

Defense counsel was allowed to question Kittinger, under oath, outside the presence of the jury. But the defense did not question Kittinger about whether Oldson's statement could have been made at a later date, sometime in November 1989. The court overruled the motion in limine.

(b) Standard of Review

A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[96]

(c) Analysis

Oldson argues broadly that the admission of the testimony of Dasher and Kittinger violated his right to confrontation and

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[96] *Sturzenegger v. Father Flanagan's Boys' Home, supra* note 5.

the presumption of innocence by placing him in a Hobson's choice. Oldson claims both witnesses were actually recalling unrelated other acts. He argues that, at the very least, this Hobson's choice rendered the testimony of these witnesses more prejudicial than probative under rule 403. He does not argue specifically that the court erred in denying his motion for mistrial on these grounds. Thus, we consider these arguments in the context of the admissibility of Dasher's and Kittinger's testimony, and whether the trial court abused its discretion in allowing those witnesses to testify.

[17] An accused's constitutional right of confrontation is violated when either (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness or (2) a reasonable jury would have received a significantly different impression of the witnesses' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.[97]

[18] Under the presumption of innocence, the State must establish guilt solely through the probative evidence introduced at trial.[98] The right to a fair trial requires courts to be alert to courtroom practices that undermine the fairness of the factfinding process.[99] The jury's verdict must rest on a dispassionate consideration of the evidence.[100] Guilt shall not be founded on official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.[101]

The principles underlying the rights to confrontation or to a fair trial add nothing to our analysis of the merits of Oldson's Hobson's choice argument. In fact, that argument seems especially disingenuous as it pertains to Dasher and Kittinger. The

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[97] *State v. Ballew*, 291 Neb. 577, 867 N.W.2d 571 (2015).

[98] *State v. Iromuanya, supra* note 88.

[99] *Id.*

[100] *Id.*

[101] *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008).

trial court went out of its way to allow a cross-examination of those witnesses outside the presence of the jury in order to determine that their testimony was not a confused recollection of other acts. Furthermore, Oldson argues that much of the incidents of misconduct Dasher reported were "wild accusations."[102] We do not understand how making the choice to reveal wild accusations during cross-examination could violate rule 404.

[19] While rule 404 may prevent the admission of other acts evidence for propensity purposes as a protection of the presumption of innocence,[103] it does not follow that the State violates due process by adducing testimony that could result in the revelation of other acts if the defense chooses to pursue certain lines of questioning on cross-examination. Whatever choice was presented to defense counsel through the presentation of these two witnesses, such choice did not violate Oldson's right to confrontation, to a fair trial, or rule 404. And no unfair prejudice derived from Kittinger's and Dasher's testimony insofar as the other acts evidence was not presented to the jury by the State. Thus, neither did their testimony violate rule 403.

4. Tampering With Witnesses

We turn next to Oldson's argument that, in violation of due process principles concerning the right to present a complete defense, the police tampered with witnesses Donnelson and Walkowiak. With regard to Donnelson, the defense moved in limine to exclude her testimony. And, although the motion was overruled, she was not called as a witness by the State. The defense did not articulate at trial a due process, witness tampering claim outside of the motion to exclude Donnelson's testimony. We conclude that the defense has presented no

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[102] Brief for appellant at 120.

[103] See *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

cognizable assignment of error concerning any alleged witness tampering of Donnelson that was preserved below. Therefore, we address only the allegations regarding Walkowiak.

(a) Background

(i) Objections and Rulings

The defense moved in limine to prevent "any law enforcement officer to testify in any manner to rebut . . . Walkowiak's past recollection recorded using any information that was obtained from an interview that law enforcement conducted on August 24, 2011." The court granted the motion. The court found that a significant number of the 2011 statements were obtained in an "unfair manner," as they were based on questions that misrepresented facts and confused the witness.

Defense counsel asked the court, further, to declare Walkowiak incompetent to testify and unavailable, so that rather than allowing Walkowiak to testify at trial, the defense could simply publish to the jury a statement Walkowiak made to law enforcement in 1989. The defense argued that Walkowiak's recollection was irreparably confused by the 2011 interview and that the only reliable evidence as to what Walkowiak witnessed on the night of Beard's disappearance was what he had said in the 1989 interview. The court overruled the defense's motion to declare Walkowiak unavailable. The defense thereafter withdrew any prior motion it had made to declare Walkowiak incompetent to testify.

(ii) 1989 Statement

In a 1989 statement to law enforcement, Walkowiak said that he looked out the window of the back door to the alley after Oldson and Beard walked out. He witnessed Beard get into a medium-blue Ford pickup truck with "88 county" license plates. He said there were two men in the truck. The driver had a red beard and a ponytail, and the other man had a black beard and black hair. Oldson was still standing in the alley, and Walkowiak saw Oldson walk away.

(iii) Multiple Interviews and Multiple Stories

Law enforcement interviewed Walkowiak multiple times after the 1989 interview. These other interviews were apparently conducted in 1990, 1992, and 2010 and are not in the record.

(iv) Walkowiak's Testimony at Hearing on Motion in Limine

At a hearing outside the presence of the jury, Walkowiak testified that when interviewed more recently in 2011, law enforcement told him there was no window in the back door at the Someplace Else Tavern. Walkowiak said when he insisted that he must have opened the door, the officer became upset and threatened to throw him in jail.

Walkowiak testified that he still vaguely remembered some parts of what had occurred on May 31, 1989. He was presented with the 1989 interview to refresh his recollection. Walkowiak testified that he remembered Beard voluntarily crawled into a blue truck with "88 county" plates. The driver had a red beard and carried a "big knife on his side." Walkowiak testified that he saw Oldson climb into the truck with Beard and the red-bearded man.

(v) 2011 Interview

A full transcript of the 2011 interview was entered into evidence for purposes of the hearing. In the beginning of the interview, Walkowiak testified that he saw Beard leave with Oldson out the back door into the alley. He said he did not see Oldson or Beard after that. The door to the alley, Walkowiak said, was solid; there was no window in it. When thereafter confronted with his 1989 interview, Walkowiak recalled that there was a window in the door to the alley and that he had watched Beard climb into a pickup with a man with a red beard.

When, moments later, law enforcement assured Walkowiak that he had nothing to fear from Oldson anymore, Walkowiak

said he did not see anything after Beard and Oldson left through the back door of the Someplace Else Tavern. When law enforcement officers pressed Walkowiak to tell him who had him make up the story about the "88 county" truck, Walkowiak denied that anyone had told him to tell the story. He could not recall why he had told that story before. Then Walkowiak said that sometimes he thought the red-bearded man story was the truth and that sometimes he thought it was not.

The officers tried to focus Walkowiak's attention on getting justice for Beard and closure for Beard's sister. The officers emphasized that they knew Walkowiak was not involved in Beard's disappearance but that they needed him to tell the truth. At some later point in the interview, as tensions rose, an officer suggested that there was no window in the back door of the bar, so the statement in 1989 could not be accurate. Walkowiak said he simply did not remember giving the statement in 1989.

The interviewing officers continued to press Walkowiak for information about why he told the red-bearded-man story. The questioning became more forceful. Eventually, one of the officers told Walkowiak firmly that there was no window in the back door of the Someplace Else Tavern. After a break, Walkowiak stated, "The more I think about it, that story comes to mind." And because he had apparently seen it with his "own two eyes," if there were no window in the back door, he must have walked into the alley. Walkowiak could not imagine himself making up a story about Beard's leaving with a red-bearded man, so "that's what I must have seen."

Shortly after that, however, upon the law enforcement officers' suggestions, Walkowiak confirmed he probably had just heard the story around town and repeated it. Five minutes later, Walkowiak said that that was a lie; he did not hear the story from anybody. When one of the officers eventually pointed out that they were "just going in a big circle," Walkowiak responded, "Yeah, I know it. I wish I could get off the circle. I don't want to be in no circle anymore." When asked by law

enforcement what they were supposed to think, Walkowiak responded, "That I'm a confused person on this."

(vi) Walkowiak's Testimony at Trial

As set forth in the background section, Walkowiak testified before the jury that he was at the Someplace Else Tavern on May 31, 1989, and saw Beard talking with a man with a red beard and other "[c]ommon-looking guys" with black beards. The man with the red beard had a ponytail and a knife "hanging on his side." Walkowiak also saw Oldson and Beard talking and go out together to the back alley. The bearded men had left the Someplace Else Tavern just prior to that. Walkowiak looked out the back alley and saw a blue truck with "88 county" license plates. The same men he saw Beard talking to in the bar were in the pickup. It seemed like an "awful crowded pickup." Walkowiak testified that he saw Oldson get into the truck with Beard and the other men.

Defense counsel confronted Walkowiak with his statement from 1989 wherein he said that Oldson had walked away and did not go into the truck. Walkowiak testified that he did not know why he had said that. The defense proceeded to read extensively and repeatedly from Walkowiak's 1989 interview. Walkowiak testified that he did not remember the 1989 interview and that his memory of the night of May 31, 1989, was better now than it was then.

(b) Standard of Review

It is within the discretion of the trial court to determine whether the unavailability of a witness under Neb. Evid. R. 804, Neb. Rev. Stat. § 27-804 (Reissue 2008), has been shown.[104] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and the evidence.[105]

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

[105] *Id.*

(c) Analysis

It is not entirely clear what precise error Oldson asserts the trial court made. Oldson was denied his request to have Walkowiak declared unavailable so that Oldson could submit to the jury only prior police reports in which he said he saw Beard leave with other men on the night of her disappearance. Oldson sought to avoid the jury's learning of Walkowiak's more recent recollection that Oldson also left with Beard and the other men on the night of her disappearance. We find no error in this ruling.

Oldson's argument that Walkowiak was unavailable—despite his presence, willingness to testify, and affirmation that he recalled the events of the evening in question—was based loosely on accusations that the police had deliberately confused Walkowiak during questioning in order to turn what were once exculpatory accounts into inculpatory ones. Rule 804 sets forth the examples of witness unavailability. The most pertinent provisions are in rule 804(1)(c) and (d): "(c) Testifies to lack of memory of the subject matter of his statement; or (d) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." Rule 804 also generally provides: "A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying."

[20] Oldson does not rely on rule 804, however. He relies on broad due process propositions to argue Walkowiak was unavailable. He points out that whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clause of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.[106] We can find no case law discussing whether an

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[106] *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013).

alleged due process violation based on improper police questioning could render a defense witness unavailable, and Oldson points to none.

[21,22] The right to present a defense is not unqualified and is subject to countervailing public interests such as preventing perjury and investigating criminal conduct.[107] Furthermore, the aim of the requirement of due process is not to exclude presumptively false or unreliable evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.[108] "Only when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice'" has the U.S. Supreme Court imposed a "constraint tied to the Due Process Clause."[109]

Webb v. Texas[110] is the principal case that Oldson relies on in making his due process arguments. In *Webb*, the trial judge on his own motion admonished the defense's only witness during a temporary recess before the witness was to be called. The U.S. Supreme Court described the trial judge as having "gratuitously" singled out the witness for not only a lengthy admonition on the dangers of perjury, but also to imply he expected the witness to lie, and to "assure" the witness that he would personally see that the witness would be prosecuted if he lied.[111] The trial court had also described in detail to the defense witness the detrimental consequences of a perjury

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[107] See, *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); *Buie v. Sullivan*, 923 F.2d 10 (2d Cir. 1990); *United States v. Whittington*, 783 F.2d 1210 (5th Cir. 1986).

[108] See *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

[109] *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 723, 181 L. Ed. 2d 694 (2012).

[110] *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972). See, also, e.g., *U.S. v. Heller*, 830 F.2d 150 (11th Cir. 1987).

[111] *Webb v. Texas, supra* note 110, 409 U.S. at 97.

conviction for the witness' present sentence and possibility for parole.[112] The witness chose not to testify.[113]

The U.S. Supreme Court reasoned that in light of the great disparity between the posture of the presiding judge and that of the witness, and the unnecessarily strong terms used, the judge "could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify."[114] The Court held that the trial judge had driven the witness off the stand and had thereby deprived the defendant of due process of law under the 14th Amendment.

We similarly held in *State v. Ammons*,[115] that the defendant was deprived of due process when the prosecutor drove a material defense witness off the stand by threatening that the witness' prior plea agreement would be null and that the witness would be prosecuted if he testified at the defendant's trial. The witness was going to admit that he, not the defendant, was the true perpetrator.[116] But after the discussion with the prosecutor, the witness took the Fifth Amendment and refused to testify. We said that "[t]he constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. A prosecutor may impeach a witness in court but he may not intimidate him in or out of court."[117] We explained that if prejudice results from intimidation of a witness, a defendant is deprived of due process.[118]

[23,24] Oldson argues that the police, during the 2011 interview, acted on behalf of the State in intimidating Walkowiak

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[112] *Id.*

[113] *Id.*

[114] *Id.*, 409 U.S. at 98.

[115] *State v. Ammons*, 208 Neb. 797, 305 N.W.2d 808 (1981).

[116] *Id.*

[117] *Id.* at 801, 305 N.W.2d at 811.

[118] *State v. Ammons, supra* note 115.

into changing his eyewitness report. But even in the context of confessions by an accused, lying, good cop/bad cop, and other tactics designed to play on the interrogee's sense of responsibility or guilt have been held under the circumstances not to violate due process. For example, the U.S. Supreme Court, in *Frazier v. Cupp*,[119] held that a defendant's confession was not coerced, despite the fact that during somewhat vigorous questioning, the police lied and told the defendant that his accomplice had confessed and had incriminated him. We have explained that mere deception will not render a statement involuntary or unreliable; the test is whether the officer's statements overbore the will of the defendant.[120] Furthermore, we have said that police practices of deception during interrogation are not inherently offensive.[121]

We have rejected in several cases the assertion that police imposition of psychological pressure rendered a defendant's confession involuntary under the circumstances presented.[122] In *State v. Melton*,[123] for instance, the police had interviewed the defendant immediately upon his release from the hospital after sustaining injuries in a car crash in which his friend had been killed. Both the defendant and his friend had been drinking heavily. The defendant claimed the friend had been driving. But the officers obtained a confession that the defendant was driving after showing him pictures of the accident and telling him that "as a man," it "would be the right thing to do to tell the truth," and that "to place blame on a dead person merely as a means of escaping responsibility would be a

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[119] *Frazier v. Cupp*, 394 U.S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969).

[120] See, *State v. Nissen, supra* note 83; *State v. Walker*, 242 Neb. 99, 493 N.W.2d 329 (1992).

[121] See *State v. Haywood*, 232 Neb. 97, 439 N.W.2d 511 (1989).

[122] *State v. Melton*, 239 Neb. 506, 476 N.W.2d 842 (1991); *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986); *State v. Tucker*, 215 Neb. 636, 340 N.W.2d 376 (1983).

[123] *State v. Melton, supra* note 122.

cowardly thing to do."[124] We affirmed the trial court's determination that the defendant's confession was not coerced.

The Second Circuit describes three basic elements of any claim under the right to present a defense: (1) deprivation of material and exculpatory evidence that could not reasonably be obtained by other means, (2) bad faith or misconduct on the part of the government, and (3) that the absence of fundamental fairness infected the trial and prevented a fair trial.[125] If any claim could be made that police questioning confused a potentially exculpatory eyewitness or intimidated the witness into changing his or her story, then we agree that, minimally, these elements would apply.

Assuming without deciding that due process could mandate witness unavailability because of intimidating or deceptive police questioning, the defense has failed to demonstrate a due process violation. The defense did not call the interviewing officers to testify at the hearings on the motions in limine or the motion to declare Walkowiak unavailable. And there is little to suggest from the 2011 interview itself that the officers acted in bad faith when interviewing Walkowiak. Oldson claims law enforcement confused Walkowiak into believing there was no window in the door, but Walkowiak himself began his 2011 interview saying that there was no window in the door and that he did not see Beard or Oldson after they walked to the alley. It is not even clear that the officer who later pressed upon Walkowiak that there was no window in the door in 1989 knew that statement to be false; there was no longer a window in that door at the time of questioning. And regardless, lying and emotional manipulation are usually insufficient to violate due process.

We find no merit to Oldson's assignment of error concerning the alleged tampering with Walkowiak.

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[124] *Id.* at 508, 476 N.W.2d at 844.

[125] See, e.g., *U.S. v. Pinto*, 850 F.2d 927 (2d Cir. 1988).

5. Speedy Trial Under Due Process Clause

We turn next to Oldson's speedy trial arguments.

(a) Background

The allegation that the State violated Oldson's constitutional right to a speedy trial formed the basis of both Oldson's plea in abatement and motion for new trial, which were both overruled by the trial court. Oldson asserted that the State deliberately delayed for purposes of obtaining a tactical advantage and that this was evidenced by the fact that there was no evidence submitted at trial that was not available in the early 1990's. The State pointed out that there was no intended or actual advantage from the delay and that the State had attempted to be exceptionally accommodating with regard to the defense's use of residual hearsay. The record is unclear as to why the delay in prosecution occurred.

(b) Standard of Review

[25,26] A criminal defendant's claim of denial of due process resulting from preindictment delay presents a mixed question of law and fact.[126] When reviewing a trial court's determination of a claim of denial of due process resulting from preindictment delay, an appellate court will review determinations of historical fact for clear error, but will review de novo the trial court's ultimate determination as to whether any delay by the prosecutor in bringing charges caused substantial prejudice to the defendant's right to a fair trial.[127]

(c) Analysis

[27] The Fifth Amendment's Due Process Clause has only a "'limited role to play in protecting against oppressive delay'" in the criminal context.[128] It is the measure against which

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[126] *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

[127] *Id.*

[128] *State v. Hettle*, 288 Neb. 288, 304, 848 N.W.2d 582, 596 (2014).

prearrest or indictment delay is scrutinized,[129] and statutes of limitations are the primary safeguard against prejudicial preindictment delay.[130] The due process claimant's burden is a "'heavy'" one, requiring a showing of both substantial actual prejudice resulting from the delay and bad faith on the part of the government.[131]

[28] Thus, the Due Process Clause requires dismissal only if a defendant can prove that the preindictment delay caused actual prejudice to his or her defense and was a deliberate action by the State designed to gain a tactical advantage.[132] We have stated that a defendant bears the burden to show actual prejudice, and not just prejudice due to dimmed memories, inaccessible witnesses, and lost evidence.[133]

Oldson argues that the State waited and reinterviewed witnesses until their memories improved to the advantage of the State. He generally asserts that evolving town gossip turned against Oldson as the subsequent assault conviction became known and that this also affected witnesses' memories.

Oldson illustrates that one witness, a local resident, did not mention seeing the Oldson family truck's being cleaned shortly after Beard's disappearance until his third statement to police in October 1992. Oldson also illustrates Donnelson's and Walkowiak's changing reports. Oldson generally asserts that nearly every favorable witness has died during the State's delay, but he does not illustrate which favorable witnesses he might be referring to.

The reason for the delay in bringing the indictment is less obvious here than it was in a similar case of *State v. Watson*,[134] where advances in technology allowed the State to finally

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[129] *Id.*

[130] *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992).

[131] *State v. Hettle, supra* note 128, 288 Neb. at 305, 848 N.W.2d at 596.

[132] See *State v. Trammell, supra* note 130.

[133] *State v. Watson, supra* note 126; *State v. Glazebrook, supra* note 103.

[134] *State v. Watson, supra* note 126.

obtain additional evidence against the defendant. But, in *State v. Glazebrook*,[135] we concluded without elaborating on the justification for the delay that there was simply no evidence demonstrating the State had intentionally caused the approximately 30-year delay in order to gain an unfair tactical advantage. Such is likewise true here.

It is the defendant's burden to prove both bad faith on the part of the government in intentionally delaying prosecution in order to gain a tactical advantage and substantial actual prejudice resulting from the delay. This burden in not sustained through speculation over what witnesses' memories would otherwise be or through the defense's inability to "imagine" any explanation for the delay other than intentional calculation.[136] We agree with the trial court that Oldson did not sustain his burden to demonstrate a constitutional speedy trial violation.

6. Alleged Backus Diary

Next, Oldson assigns as error the trial court's refusal to admit into evidence photocopies of a diary that Oldson claims was written by Jean Backus (hereinafter Backus).

(a) Background

As previously described, the defense was able to adduce at trial testimony that a diary had been found and that the diary was purportedly authored by Backus. The defense was also able to adduce testimony detailing the events described in the diary, such as the abduction and sexual abuse of the missing women and the killing of "Kathy" from Ord. And the defense adduced evidence that the diary's description of the missing women was somewhat consistent with real events.

But the defense was unable to enter the diary pages themselves into evidence. After a separate hearing, the court had sustained the State's objection to the admission of the diary pages on the ground of lack of authenticity. The court explained

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[135] *State v. Glazebrook, supra* note 103.

[136] Brief for appellant at 116.

that there was insufficient evidence to support a finding that the writing was what Oldson purported it to be.

(i) Mailed From Unknown Address in Omaha

The parties had stipulated at the hearing that the purported diary pages were mailed from an unknown address in Omaha, Nebraska, to Oldson's home address while he was awaiting trial. The mailing envelope was handwritten in print and indicated it was from "Lonnie," with no return address. Inside were 54 pages of handwritten entries by an unnamed authorship, which appeared to have been torn from a bound diary, and are contained in the record pursuant to Oldson's offer of proof.

(ii) Backus' Deposition

The defense submitted Backus' deposition testimony at the hearing. Backus was 88 years old at the time of her deposition. Backus testified that she never kept a diary or journal. She did not recognize the leather diary cover or the diary pages presented to her. She did not recognize the handwriting of the inscription or the diary pages.

(iii) Handwriting

Although defense counsel obtained several exemplars of Backus' handwriting during the deposition, no handwriting analysis was conducted. Nor did defense counsel argue at the hearing that a jury might find, pursuant to Neb. Rev. Stat. § 25-1220 (Reissue 2008), that the diary was written in Backus' handwriting.

Facially, the handwriting on the envelope seems to match to a handwritten inscription on what was purportedly the inside of the diary's cover. Although it is not entirely clear from the record where the diary cover was found, the exhibit is a photograph of a leather-bound diary with numerous pages torn out. The inside of the cover has a handwritten inscription: "Merry Xmas, Jean," as well as Backus' address at the ranch.

(iv) Douglas Olson

A person of some acquaintance with Backus, Douglas Olson (Douglas), was suspected by all parties of having mailed the diary pages to Oldson. Backus testified in her deposition that Douglas worked at a sale barn in O'Neill, Nebraska, where she sold her cattle. Sometimes, Douglas would work for her at the ranch hauling and vaccinating her cattle.

(v) Testimony by Private Investigator

Defense counsel's private investigator testified at the hearing that Katie Bowers, Douglas' former live-in girlfriend, had found that Douglas possessed three boxes of information that appeared to pertain to Backus, including Backus' mail. Bowers had turned these items over to law enforcement, and a private investigator had gained access to them. In addition, Bowers had directly given the private investigator other writings that Douglas had sent her since she had turned over the boxes to law enforcement. Bowers worked at the veterinary clinic where Backus brought her animals. Bowers had a protection order against Douglas.

The private investigator testified that as of the time of the hearing, he had been unable to locate Douglas. Douglas' last known residences were a halfway house in Omaha and, prior to that, the Regional Center in Norfolk, Nebraska.

(vi) Douglas' Other Writings

In support of the authenticity of the diary pages, the defense presented copies of several letters apparently either sent by Douglas to Bowers or found in the boxes of Backus-related items kept by Douglas in Bowers' house. These included several typed letters from an unnamed author to Bowers and sent in a handwritten envelope to her, in handwriting facially similar to that of the envelope in which the diary pages had been mailed to Oldson and similar to the diary cover inscription.

The letters themselves are largely incomprehensible. They seem to refer to a conspiracy, with the ultimate end of Backus' keeping the ranch and other parties' gaining money. The letters

also refer to a man being held for several weeks, drugged, in Douglas' basement and Douglas' attempts to free him. There is no reference in these letters to a diary or to kidnapped women kept at the Backus ranch.

The private investigator also obtained a handwritten letter that was in the possession of the owners of the O'Neill sale barn where Douglas had worked. The letter, offered for purposes of the hearing, had been addressed to Douglas and had been sent to the sale barn. It purported to threaten Douglas and made reference to having "her diary," that "Jean will lose her ranch," and that Douglas should "[k]eep [his] mouth shut or [he] could wind up sleeping with the others."

Another letter sent to Bowers in 2011—in an envelope with writing similar to the one in which the diary pages were sent to Oldson—contained a handwritten note: "KATE THEY DONT KNOW I MADE COPIES." The note appears to be in the same distinctive handwriting as the mailing envelopes and the diary inscription. An attached map, in what appears to be the same handwriting, is written on the back of a 2010 correspondence to Backus from her optometrist. The map refers to a gun, Backus, and "BURN THIS WHEN DONE." A typed letter from "Marie" to "JORGE," and contained in the same envelope, referred to the directions on the map for the pickup point for a rifle. It also states, "This is between jean and kate for her dog . . . ."

(vii) Consistencies of Diary With Real Events

In addition to this supposed chain of custody evidence, defense counsel's argument for the authenticity of the diary pages as being authored by Backus was that the entries could be corroborated by real events. The defense pointed out the real kidnappings of Cutshall, Weeks, and Bald Eagle.

Defense counsel also pointed out that neighbors who were mentioned in the diary were Backus' actual neighbors. The diary also described cattle escaping and wandering onto the neighbors' property, and Backus confirmed in her deposition

that sometimes that occurred. The diary indicated that Backus and Wetzel Backus preferred Hereford cows and that they had horses. Backus also confirmed those things to be true.

One diary entry states, "[F]riday we get to go to SD to look for our new guest we can have 3 guest[s] stay in there we have 3 sets of the shackles but can make more." Defense counsel pointed out that Backus admitted in her deposition that they had sometimes gone to South Dakota to buy bulls.

On September 18, 1989, the diary states that Wetzel, born in January 1910, had died. Defense counsel pointed out that these dates of Wetzel's birth and death are correct.

Thereafter, a diary entry states, "what to do with Kathy now," then describes that "Kathy" ran away and will not come back, and "I hit her with pickup will haul her to some place else as they R lookin for her." Defense counsel emphasized that the blunt trauma found on Beard's remains could be consistent with being struck by a vehicle.

(b) Standard of Review

[29] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. An appellate court reviews the trial court's ruling on authentication for abuse of discretion.[137]

An abuse of discretion, warranting reversal of a trial court's evidentiary decision on appeal, occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[138]

(c) Analysis

[30] We find that the trial court did not abuse its discretion in determining that the purported Backus diary had not been properly authenticated. Authentication or identification of evidence is a condition precedent to its admission and is satisfied

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[137] *State v. Elseman*, 287 Neb. 134, 841 N.W.2d 225 (2014).

[138] *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013).

by evidence sufficient to prove that the evidence is what the proponent claims.[139] A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis.[140] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated; we review a trial court's ruling on authentication for abuse of discretion.[141]

Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2008), lists by way of illustration 10 means of adequately authenticating a document, none of which directly corresponds to the corroboration argument made by Oldson in this appeal. The most similar statutory illustration is rule 901(2)(d): "Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances."

Under such provision, other courts have found a writing to be adequately authenticated when, for instance, the writing was attributed to someone who was the only known resident of an isolated and remote area where the writings were found.[142] Writings have also been adequately authenticated by virtue of the fact that they disclose information that is likely known only to the purported author.[143]

But the circumstances of the diary pages' having been apparently in Douglas' possession and mailed by Douglas do not uniquely authenticate them as being written by Backus. Furthermore, none of the corroborated facts mentioned in the diary are the kind of facts that only Backus would know. The corroborated facts are either public record or facts Douglas could have discovered in his work at the ranch and at the sale barn.

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[139] *State v. Draganescu, supra* note 80.

[140] *Id.*

[141] *State v. Elseman, supra* note 137.

[142] See *U.S. v. Harvey*, 117 F.3d 1044 (7th Cir. 1997).

[143] See *State v. Love*, 691 So. 2d 620 (Fla. App. 1997).

These facts did not satisfy Oldson's burden to present evidence sufficient to support a finding that the diary was written by Backus. And they must be viewed in light of the fact that Backus denied writing the diary. In addition, there was no evidence that the diary pages were ever seen in Backus' possession or in a place where Backus solely had access.

Finally, it would have been natural for the trial court to have considered the elephant in the room: Why, despite being in possession of the alleged author's writing exemplars, obtained during Backus' deposition, did Oldson make no attempt to demonstrate or even argue that the diary pages were written in Backus' handwriting.[144] We are troubled by the lack of discussion below of the handwriting of the diary, especially when it seems from our layperson's perspective that the handwriting on the envelopes—which the parties seem to assume was Douglas' handwriting—is much more similar to the handwriting of the diary than to any of Backus' handwriting exemplars.

While not a high hurdle, as Oldson points out, it is still the burden of the proponent of the evidence to provide the court with sufficient evidence that the writing is what it purports to be. And to establish on appeal that the trial court abused its discretion in finding that the evidence was not properly authenticated is a higher hurdle. An abuse of discretion occurs only when the decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[145] The trial court did not abuse its discretion in concluding that there was insufficient evidence that the diary was actually written by Backus. It did not abuse its discretion in concluding that the exhibit had not been authenticated to be Backus' diary.

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[144] See, e.g., *Bishop v. State*, 252 Ga. App. 211, 555 S.E.2d 504 (2001); *Box v. State*, 74 Ark. App. 82, 45 S.W.3d 415 (2001).

[145] *State v. Merchant, supra* note 138.

7. Motion for New Trial

Shortly after trial, Douglas was finally found and arrested. The defense moved for a new trial based on this event as well as on the ground that there had been a late disclosure of the DNA evidence presented at trial determining that hairs found on Beard's sweater belonged to cows and to a DNA technician. Oldson asserts on appeal that the trial court erred in denying his motion for new trial on both these grounds.

(a) Standard of Review

[31] The standard of review for the denial of a motion for new trial is whether the trial court abused its discretion in denying the motion.[146]

(b) Ground One: Douglas Found After Trial

(i) Background

Douglas was interviewed by defense counsel's private investigator and by law enforcement, and those interviews were entered into evidence in support of a motion for new trial. The defense also offered a recorded conversation between Douglas and his girlfriend while Douglas was in jail. Finally, the defense called Douglas to testify at the hearing.

a. Telephone Conversation With Girlfriend

In the telephone conversation with his girlfriend, Douglas stated that he cannot tell law enforcement what he knows or "they" will hurt his mother. Douglas said he knew Backus had a diary and knew where she buried it and why it did not burn in a fire on her property. He denied writing the diary. Douglas later made reference to how "these people have told me everything what to write and what to do," but it does not seem from the context that he was referring to the diary.

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[146] *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996).

b. Interview With Private Investigator and Police

In the interviews with law enforcement and with defense counsel's private investigator, Douglas denied sending the diary pages or writing the diary. He was confronted with the fact that his DNA was found on the envelope the pages were mailed in. Douglas explained that he had envelopes and stamps in his backpack. Douglas speculated that when he was staying at a homeless shelter, the backpack was stolen.

In the interview with defense counsel's private investigator, Douglas made oblique references to Backus' having once told him she had had young girls living with her on the ranch in the past to help with washing and cooking. Douglas also talked about hauling scrap metal out of a wood shanty built into a hill. Douglas denied any knowledge of kidnappings at the ranch.

In the interview with law enforcement, Douglas referred to having just passed a mental evaluation in Norfolk. He explained that he had most recently been living at a homeless shelter in Omaha and spent most of his days at the library looking on the Internet at the local news.

Douglas explained that he previously worked odd jobs for Backus. Douglas said that Backus owed him money. Douglas described that, one day, three men who said they worked for Backus threatened Douglas and told him to forget he had ever seen them. Douglas thought that Backus and these men were "moving drugs." Douglas explained that sometime after that, he woke up in the hospital with no recollection of why he was there.

Law enforcement accused Douglas of writing the diary, indicating that it appeared to be Douglas' handwriting on the diary. Douglas did not specifically deny the handwriting was his. But Douglas claimed he had never seen the diary pages or the envelope in which they were mailed.

c. Douglas' Testimony at Hearing

In his testimony at the hearing on the motion for new trial, Douglas said he started doing odd jobs for Backus at the ranch

in 2007. He testified that Backus stopped paying him. Douglas eventually again stopped working for Backus; Douglas testified that Backus owed him over $30,000 for work he had done for her. Douglas claimed some of what was owed him was eventually paid by a man named "Claire," last name unknown, who lived near Chambers, Nebraska. Douglas came into contact with "Claire" after "a guy that had worked for [Backus] before called me and told me, he said if you want to get paid to go see this Claire."

Douglas testified that he had seen Backus writing cattle prices and similar things in a journal that she carried with her when she went to the sale barns. He had never touched the journal, but had once seen it lying open and saw entries about her cattle.

Even though defense counsel submitted evidence that Douglas' DNA was found on the seal and the stamp of the envelope in which the diary pages had been mailed to Oldson, Douglas continued to deny having either written or mailed the diary. Douglas testified that he did not recognize the diary pages that defense counsel showed him at the hearing. Douglas also testified that he did not recognize the handwriting in the diary pages as Backus', although he stated that "[i]t's similar . . . ."

Douglas stated that there were balloons in a spot on the ranch where Backus told him one of her cutting horses was buried. Douglas also reiterated that he had torn apart a structure built into a hill on the ranch and had found heavy chains in 50-gallon barrels that were inside the structure. He saw two bedframes in the structure. Douglas reiterated that Backus had told him that she once had girls living on the ranch who helped with the chores.

Douglas mentioned that one day, he opened a "wood shell box" that Backus carried around with her. In that box were "napkins and stuff" with writing on them, including several small books. He saw a reference to "Barbara" and how she had run away. Also, once when he proposed digging on the ranch

to place a water line, Backus "blew up right away and told me you ain't digging nothing on my land."

Douglas testified that he was scared of "[t]he guy in Grand Island that [Backus] had with her," an "Antonio Rodriguez," because Rodriguez had threatened Douglas several times. Douglas described a dog that became sick after eating "white powder" that looked like "drug stuff" in a box in the back of Backus' truck. Douglas said that Rodriguez made him take care of the dog and "keep [Douglas'] mouth shut," so that Backus would not get in trouble. Later, Douglas purportedly found a list of names that Backus and Rodriguez were "delivering stuff to." He said he was threatened to keep quiet.

d. Defense Arguments at Hearing

At the hearing on the motion for new trial, defense counsel argued that DNA evidence confirming that the diary was in Douglas' possession somehow further authenticated the diary—apparently by providing a better chain of custody. Defense counsel also pointed out that Douglas did not know Oldson and had no motive for fabricating a diary and sending it to Oldson in order to exculpate him. Defense counsel's theory was that Douglas was trying to blackmail Backus with the diary. Defense counsel also pointed out that Douglas' testimony at the hearing provided information that corroborated other pieces of the diary, thus providing sufficient authentication of the diary as Backus' writing. The trial court denied the motion for new trial.

(ii) Analysis

Oldson makes arguments on appeal similar to those made below. Oldson also makes new arguments about the authenticity of the diary that have little to do with finding Douglas. Oldson asserts for the first time on appeal that Backus was able to alter her handwriting for purposes of the deposition and asserts that Backus used similar shorthand abbreviations in the deposition exemplars as those in the diary. Oldson also argues

that Backus' request to speak with counsel during the deposition, as well as Backus' evasive behavior during her deposition, such as "well-timed heart palpitations," "punctuate [Backus'] culpability."[147] Oldson argues that the fact that Backus denied writing the diary should be given little weight, because it would be imprudent for Backus to admit to kidnapping and killing the women described.

[32] We find no abuse of discretion in the trial court's determination to deny the motion for new trial based upon information gleaned after Douglas' arrest. A trial judge is accorded significant discretion in granting or denying a motion for new trial, because the trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict.[148]

Neb. Rev. Stat. § 29-2101 (Reissue 2008) provides that a new trial may be granted for any of the following grounds affecting materially the defendant's substantial rights: (1) irregularity in the proceedings which prevented the defendant from having a fair trial; (2) misconduct of the jury, the prosecuting attorney, or the witnesses for the state; (3) accident or surprise which ordinary prudence could not have guarded against; (4) the verdict is not sustained by sufficient evidence or is contrary to law; (5) newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at trial; (6) newly discovered exculpatory DNA or similar forensic testing evidence obtained under the DNA Testing Act; or (7) error at law occurring at trial.

[33] We address whether a new trial was warranted on the ground that locating Douglas was newly discovered evidence material to Oldson's case. A criminal defendant who seeks a new trial because of newly discovered evidence must show that if the evidence had been admitted at the former trial, it would

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[147] Brief for appellant at 75, 143.

[148] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

probably have produced a substantially different result.[149] Evidence tendered in support of a motion for new trial on the ground of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict.[150]

Oldson apparently believes that Douglas' testimony would have, in conjunction with the other corroborating evidence, sufficiently authenticated the diary as a writing by Backus, thereby making it admissible. Oldson also apparently believes that the admission of the diary into evidence at a trial would have probably produced a substantially different result. We disagree on both points.

We find no abuse of discretion in the trial court's conclusion that the additional evidence did not cure the foundational and reliability deficiencies that existed prior to finding Douglas. Douglas' arrest provided little more than the circular foundation of Douglas' own statements to support his assertion that he did not write the diary and his insinuations that Backus did. Oldson did not present at the hearing any independent evidence corroborating Douglas' testimony, including that Backus kept a diary, that Backus had a shanty built into a hill with beds and chains in it, that Douglas was an unwilling witness to Backus' apparent illegal drug operations, that Backus owed him a substantial amount of money, or that Rodriguez had threatened Douglas and possibly assaulted and kidnapped him.

Moreover, even if the court should or would have admitted the diary pages into evidence had it been presented with Douglas' statements during trial, Oldson failed to establish the probability that the jury would have reached a different result if the evidence had been admitted at trial. The jury had already been presented with the theory that Backus was the real killer. The jury had been told that there was a diary purportedly

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[149] *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

[150] *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

written by Backus in which she had described kidnapping and killing Beard and the other missing women.

The jury clearly rejected this theory, in spite of testimony that there was "corroborating evidence," such as the diary listing the correct names, dates, physical descriptions, and other correct details pertaining to the missing women named in the diary. It is unclear exactly how Oldson hypothesizes that presenting to the jury the photocopies of the actual diary pages or Douglas' testimony would have probably resulted in the jury's accepting the theory that Backus and Wetzel kept several kidnapped women as sex slaves and that Backus killed Beard by running her down with a truck.

We conclude that, as relates to the alleged Backus diary, the trial court did not abuse its discretion in denying Oldson's motion for new trial.

(c) Ground Two: Late Disclosure of DNA Report of Hairs on Sweater

There was testimony at trial, without objection, that a hair found on Beard's sweater ultimately was found to belong to a DNA technician and that other hairs found on the sweater were cow hairs. According to defense counsel, the defense did not receive a copy of the DNA report concerning the hairs until approximately 2 weeks before trial. Beside the fact that this argument appears waived by the failure to object at trial, it is unclear from Oldson's cursory arguments how the alleged nondisclosure would fall under one of the grounds listed in § 29-2101 or how the alleged nondisclosure materially affected his substantial rights. Oldson does not allege that the State violated *Brady v. Maryland*,[151] and Oldson does not argue that ordinary prudence would have guarded against whatever surprise Oldson thinks occurred. Most importantly, Oldson has failed to demonstrate how earlier disclosure of the DNA report

[151] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

would have probably led to a different verdict. We find no abuse of discretion in denying Oldson's motion for new trial on the grounds that the State had allegedly failed to timely disclose a DNA report demonstrating that a male hair found on Beard's remains did not belong to Oldson, but to a DNA technician, and that other hairs were cow hairs.

8. Cumulative Error

Having found no error, we find no merit to Oldson's assertion that cumulative error warrants a new trial.

9. Sufficiency of Evidence

Neither do we find merit to Oldson's claim that the evidence admitted at trial was insufficient to sustain the verdict.

The law imposes a heavy burden on a defendant who claims on appeal that the evidence is insufficient to support a conviction.[152] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[153]

Oldson asserts that the only evidence supporting his conviction are Oldson's own statements and the fact that he was last seen leaving the Someplace Else Tavern with Beard on the night of her disappearance. Oldson argues, "Given the plethora of other suspects, . . . the lack of physical evidence, and the implausibility of the State's scant theory, this conviction cannot stand."[154]

[34] We have reviewed all the evidence submitted at trial and find it sufficient to support the verdict. While there is no physical or eyewitness evidence directly linking Oldson to the crime, circumstantial evidence is not inherently less probative than direct evidence. In finding a defendant guilty beyond a

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[152] *State v. Escamilla*, 291 Neb. 181, 864 N.W.2d 376 (2015).

[153] *Id.*

[154] Brief for appellant at 134.

reasonable doubt, a fact finder may rely upon circumstantial evidence and the inferences that may be drawn therefrom.[155]

Beard was last seen leaving the Someplace Else Tavern with Oldson. Oldson's own statements indicated that he took Beard out to the alley behind the bar, where some violence occurred in his attempt to get her into his truck. Oldson was expected to come back to the Someplace Else Tavern and give his father and Kittinger a ride home, but he did not. Instead, Oldson's father and Kittinger arrived at home to find Oldson freshly showered and on his way to the Laundromat.

There was evidence from which the jury could reasonably infer that from the moment Oldson left the Someplace Else Tavern until the time he arrived home to shower, Oldson had enough time to kill Beard and leave her remains outside of Ord. Viewing the evidence in a light most favorable to the prosecution, there was also evidence that Oldson indicated to his wife, Minnie, he would kill her just as he had killed Beard.

It was the province of the jury to reject Oldson's story that after an unsuccessful and somewhat violent attempt to get Beard into his truck, Beard immediately left the Someplace Else Tavern in the truck of an unidentified person, leaving all her personal belongings inside the bar. And it was the province of the jury to reject the notion that Beard was killed by Hawley, White, Mentzer, or unidentified carnival workers, or that she became involved in a sex-slave operation at the Backus ranch and was eventually run over by Backus' truck. In sum, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Oldson killed Beard.

10. Life Sentence

Lastly, Oldson asserts that the trial court erred in sentencing him to life-to-life imprisonment when the jury found him guilty of the lesser offense of second degree murder. Oldson

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[155] *State v. Escamilla, supra* note 152.

argues that imposing the maximum sentence for second degree murder, which corresponds to the mandatory sentence for first degree murder, constitutes an abuse of discretion and undermines the sentencing structure created by the Legislature. He also argues his sentence is excessive.

(a) Standard of Review

[35] An appellate court will not disturb sentences that are within statutory limits, unless the district court abused its discretion in establishing the sentences.[156]

[36] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[157]

[37] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[158]

(b) Analysis

[38] Murder in the first degree without a notice of aggravating circumstances is a Class IA felony.[159] The sentence for a Class IA felony is life imprisonment.[160] Murder in the second degree is a Class IB felony. The maximum penalty for a Class IB felony is life imprisonment; the minimum sentence is 20 years' imprisonment.[161] We have repeatedly said that a life-to-life sentence for second degree murder is a permissible sentence under Neb. Rev. Stat. § 29-2204 (Cum. Supp. 2014).[162]

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[156] *State v. Dominguez*, 290 Neb. 477, 860 N.W.2d 732 (2015).

[157] *State v. Casterline*, 290 Neb. 985, 863 N.W.2d 148 (2015).

[158] *Id.*

[159] See Neb. Rev. Stat. § 28-303 (Reissue 2008).

[160] Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2011).

[161] *Id.*

[162] See, *State v. Casterline, supra* note 157; *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013); *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009); *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

We have explained that the Legislature has had numerous opportunities to amend the statutory scheme in the event that this interpretation was not what it had intended.[163] It has not done so. It is not this court's place to rewrite legislation.[164]

[39,40] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[165] When imposing a sentence, the sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense.[166] The sentencing court is not limited to any mathematically applied set of factors.[167] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[168]

This case concerns a brutal murder. The trial court explained that in reaching its sentence, it considered the amount of violence involved in the commission of this crime. The court explained, "Although we are not certain as to the exact circumstances surrounding . . . Beard's death, there is no doubt it was vicious and violent." The court also considered Oldson's prior convictions for third degree assault in 1989, attempted third degree sexual assault in 1992, and intentional child abuse in

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[163] *State v. Casterline, supra* note 157.

[164] *Id.*

[165] *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

[166] *State v. Dominguez, supra* note 156.

[167] *Id.*

[168] *Id.*

1998. The court noted Oldson's failure to accept responsibility for his actions and his failure to express remorse or empathy for Beard or the victims of his other crimes.

An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[169] The trial court's reasoning was neither untenable nor unreasonable. And the trial court's sentence of life to life was not clearly against justice, conscience, reason, or the evidence. We find no error in the trial court's imposition of a life-to-life sentence.

V. CONCLUSION

For the foregoing reasons, we affirm the judgment below.

Affirmed.

Stephan, J., not participating.

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[169] See *State v. Kozisek*, 22 Neb. App. 805, 861 N.W.2d 465 (2015).

Connolly, J., concurring.

I concur in the judgment. But I disagree with the majority opinion in three key respects:

- First, I disagree with the majority's analysis of the court's admission of exhibits 263 through 266 and exhibits 268 through 271. I believe the trial court improperly admitted seven of these redacted pages from Oldson's journal to show his consciousness of guilt and one to show his motive for killing Cathy Beard.
- Second, I disagree with the majority's mischaracterization of our evidentiary admission standard under Neb. Evid. R. 404.[1] To uphold the trial court's evidentiary rulings, the majority misstates the meaning of our independent relevance standard under rule 404. And it ignores the propensity inference that was necessarily in the chain of reasoning for one exhibit and likely present for another one.

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[1] Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014).

- Third, I believe the majority similarly ignores our precedent under Neb. Evid. R. 403[2] that prohibits a court from admitting speculative evidence. Under rule 403, it ignores that consciousness of guilt evidence must reasonably support every necessary inference in the chain of reasoning to infer Oldson's guilt.

But because I conclude that the court's errors were harmless beyond a reasonable doubt, I concur in the judgment.

I. INDEPENDENT RELEVANCE IS THE ADMISSIBILITY STANDARD FOR EVIDENCE OFFERED UNDER RULE 404(2)

Because the majority has drifted from our rule 404 jurisprudence, I believe it is necessary to restate the rule's admission requirements under our precedents. Apart from exceptions that are not at issue here, rule 404(1) provides that "[e]vidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion . . . ." Section 27-404(2) similarly prohibits proving a defendant's conforming behavior with a character trait through evidence of a defendant's acts that are extrinsic to the charged crime:

> 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.

In 1987, this court held that evidence showing a defendant's consciousness of guilt is relevant to support an inference that the defendant committed the charged crime. We further held that rule 404(2) governs consciousness of guilt

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

evidence.[3] So the standard of admissibility for consciousness of guilt evidence is the same as the standard for evidence offered for any other purpose under rule 404(2): independent relevance.

To be independently relevant for a proponent's stated purpose, evidence offered under rule 404(2) must not depend upon a forbidden propensity inference about the defendant's character:

> Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. But evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means that its relevance does not depend upon its tendency to show propensity. An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.[4]

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[3] See, *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987), *disapproved in part on other grounds, State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989), *abrogated on other grounds, J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). But see *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

[4] *State v. McGuire*, 286 Neb. 494, 511-12, 837 N.W.2d 767, 784-85 (2013). Accord, e.g., *State v. Almasaudi*, 282 Neb. 162, 802 N.W.2d 110 (2011); *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011); *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011); *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010); *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999); *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999).

We have specifically held that evidence of a defendant's extrinsic act lacked independent relevance when a fact finder could have only found that it was relevant through classic propensity reasoning about the defendant's character.[5] To facilitate appellate review of independent relevance under rule 404(2), we require the proponent to state its purpose when offering the evidence. We also require the trial court to state the purpose for which it was admitted:

> A proponent of evidence offered pursuant to rule 404(2) shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court shall similarly state the purpose or purposes for which such evidence is received. And any limiting instruction given upon receipt of such evidence shall likewise identify only those specific purposes for which the evidence was received.[6]

We first set out this procedural requirement and our admissibility standard of independent relevance in 1999.[7] Both rules are well-established components of our rule 404 jurisprudence.[8] Nevertheless, the majority, in a tortuous analysis, relies on secondary authorities to undermine that jurisprudence. Worse, they suggest independent relevance has the same meaning as the pre-1999, standardless rule that we have abandoned.

The majority does not state that a fact finder's chain of reasoning must not depend on propensity reasoning about the

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[5] See, *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *Sanchez, supra* note 4; *McManus, supra* note 4. See, also, *State v. Sutton*, 16 Neb. App. 185, 741 N.W.2d 713 (2007).

[6] *Almasaudi, supra* note 4, 282 Neb. at 179, 802 N.W.2d at 125. Accord, e.g., *Collins, supra* note 4; *Sanchez, supra* note 4.

[7] See, *Sanchez, supra* note 4; *McManus, supra* note 4.

[8] See cases cited *supra* notes 4 through 6.

defendant's character. Instead, it cites a legal encyclopedia and states that extrinsic evidence that "only incidentally impugns a defendant's character is not prohibited by rule 404." It cites a legal commentator who has pointed out that evidence of a defendant's extrinsic bad acts always contains legitimate and illegitimate inferences. From this, the majority makes a giant leap to draw this erroneous conclusion:

> Rule 404(2) permits introduction of relevant evidence concerning the occurrence of "other crimes, wrongs, or acts," *so long as the sole purpose for the offer is not to establish a defendant's propensity* to act in a particular manner, and thereby supply a basis for the inference that the defendant committed the crime charged.

(Emphasis supplied.) But we have rejected this reasoning by adopting our independent relevance standard.

Moreover, the two Nebraska cases that the majority cites do not support its conclusion. One of the cited cases, *State v. McGuire*,[9] is the most recent statement of our independent relevance standard that is set out above. I am puzzled how citing the correct standard supports the majority's misstatement of the standard. We decided the other cited case, *State v. Yager*,[10] in 1990, before we adopted the independent relevance standard in 1999. Under the standardless rule urged by the majority, anything goes. And the majority's reliance on a pre-1999 case ignores our concern about rule 404's potential "to trample on a defendant's right to a fair trial."[11] That recurring concern resulted in adopting the independent relevance test and its related procedural requirements in 1999.

Our independent relevance standard guards against the danger that jurors will overestimate the value of extrinsic acts and convict a defendant for an improper reason.[12] And the majority

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[9] *McGuire, supra* note 4.

[10] See *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990).

[11] See *id.* at 500, 461 N.W.2d at 752 (Shanahan, J., dissenting).

[12] See *McManus, supra* note 4.

saps that principle by implying that extrinsic acts evidence should be admissible unless the proponent's sole purpose is to establish a defendant's propensity to act in conformity with a character trait. To the contrary, it is because jurors usually cannot ignore a propensity inference, even when a court properly instructs them, that legal commentators have advocated the independent relevance test that we adopted in 1999.[13]

Finally, and most important, the majority's statements are contrary to the statute itself. Rule 404(2) does not provide that extrinsic acts are admissible if the proponent's sole purpose is not to prove the defendant's conforming behavior. Rule 404(2) precludes the use of extrinsic acts to prove a defendant acted in conformity with a character trait—period. It does not provide that extrinsic acts *are* admissible as proof of a defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." It provides that extrinsic acts evidence *may* be admissible for such purposes:

> (2) 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.[14]

So, contrary to the majority's statement, the question is not whether a proponent has offered extrinsic acts evidence solely to prove a defendant's propensity to act in conformity with a character trait. Such evidence would clearly be inadmissible in Nebraska. Under our independent relevance test, the question is whether the proponent's evidence is relevant for

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[13] See, 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 2:19 (rev. ed. 2002); 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:28 (4th ed. 2013); 22B Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5239 (Supp. 2014).

[14] § 27-404(2) (emphasis supplied).

an ostensibly legitimate purpose *only* through the forbidden propensity reasoning. Although the majority's statement may reflect the admissibility standard for a defendant's extrinsic acts in some other jurisdictions,[15] it is an incorrect statement of our standard under rule 404(2).

The majority, not satisfied with misstating our admissibility standard for rule 404(2) evidence, goes even further. It states that "[i]f character evidence is admitted for a proper purpose, then, ipso facto, it is not admitted for the purpose of showing propensity." This is misleading. We do not determine whether a court's stated purpose for admitting rule 404(2) evidence was proper in a vacuum. The purpose is only proper if a fact finder could conclude the evidence is relevant to establish the proponent's intended proof *without* engaging in propensity reasoning about the defendant's character.

II. THE MAJORITY IS BOUND BY OUR PREVIOUS HOLDINGS

As stated, our independent relevance standard and procedures for admitting evidence under rule 404(2) has been the law since 1999. Yet, the majority has not overruled any of these cases, nor could it convincingly do so. When we have interpreted or established a rule, the doctrine of stare decisis applies. It requires us to adhere to our previous decisions "unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so."[16] The doctrine "is grounded in the public policy that the law should be stable, fostering both equality and predictability of treatment."[17]

And major legal commentators have advocated our independent relevance standard.[18] It is consistent with the holdings of

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[15] See *U.S. v. Curley*, 639 F.3d 50 (2d Cir. 2011).

[16] *Potter v. McCulla*, 288 Neb. 741, 753, 851 N.W.2d 94, 104 (2014).

[17] *State v. Hausmann*, 277 Neb. 819, 828, 765 N.W.2d 219, 226 (2009).

[18] See sources cited *supra* note 13.

many other courts.[19] So there is nothing manifestly wrong with our approach to this evidentiary rule—and much to lament about the standardless rule to which the majority would apparently revert. But the majority's mere suggestion that it disagrees with our established precedent is ineffective to change it unless it overrules or disapproves our precedent.

By requiring appellate courts to adhere to their previous decisions in most circumstances, the doctrine of stare decisis

> "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." . . . Although "not an inexorable command" . . . *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop "in a principled and intelligible fashion."[20]

And the doctrine should apply with greatest force to our decisions on evidentiary issues because lower courts and practitioners must predictably apply these rules daily. But the important point here is that the majority has not overruled our established precedent. Under the doctrine of stare decisis then, the standard of admissibility under rule 404(2) continues to be independent relevance—as we have defined and applied it. That means that the trial court properly admitted evidence of Oldson's extrinsic acts or statements only if it was relevant to a fact of consequence independent of an inference that Oldson acted in conformity with a character trait. But before addressing that issue, I turn to the meaning of independent

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[19] See, e.g., *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010); *U.S. v. Commanche*, 577 F.3d 1261 (10th Cir. 2009); *U.S. v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000); *State v. Cassavaugh*, 161 N.H. 90, 12 A.3d 1277 (2010); *State v. Johnson*, 340 Or. 319, 131 P.3d 173 (2006); *State v. Clifford*, 328 Mont. 300, 121 P.3d 489 (2005); *Masters v. People*, 58 P.3d 979 (Colo. 2002).

[20] *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 134 S. Ct. 2024, 2036, 188 L. Ed. 2d 1071 (2014) (citations omitted).

relevance as it specifically relates to a defendant's consciousness of guilt.

III. CONSCIOUSNESS OF GUILT EVIDENCE MUST REASONABLY SUPPORT ALL NECESSARY INFERENCES TO CONCLUDE A DEFENDANT WAS GUILTY OF THE CHARGED CRIME

As stated, rule 404(2) governs the admissibility of consciousness of guilt evidence.[21] And it is relevant as a circumstance supporting an inference that the defendant committed the crime charged.[22] In *State v. Clancy*,[23] we considered, under rule 404(2), whether a defendant's intimidation of a State's witness was admissible to show his consciousness of guilt. We explained that the chain of reasoning from his threat to his guilt of the charged crime required two inferences: "'from conduct to consciousness of guilt, and then from consciousness of guilt to the guilty deed.'"[24] And we quoted Wigmore's treatise to emphasize the strength of such evidence: "'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.'"[25] And as the Ninth Circuit put it, evidence showing consciousness of guilt is "second only to a confession in terms of probative value."[26]

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[21] See *Clancy, supra* note 3.

[22] See *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008); *Clancy, supra* note 3.

[23] *Clancy, supra* note 3.

[24] *Id.* at 499, 398 N.W.2d at 716, quoting 1 John Henry Wigmore, Evidence in Trials at Common Law § 173 (James H. Chadbourn rev. ed. 1979).

[25] *Id.*, quoting 2 John Henry Wigmore, Evidence in Trials at Common Law § 273(1) (James H. Chadbourn rev. ed. 1979).

[26] *U.S. v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1995).

Our reasoning in *Clancy* is consistent with legal authorities who agree that under rule 404(2), consciousness of guilt evidence is logically relevant to establish a defendant's guilty "knowledge" of the charged crime under rule 404(2). The guilty knowledge, in turn, serves as an intermediate inference to prove the defendant's "identity" under rule 404(2). That is, guilty knowledge is an intermediate inference that the defendant is the perpetrator of the charged crime.[27] The logical relevance of such evidence rests on a fact finder's assumption that an innocent person would not have committed the act or made the statement that the prosecution holds up as "'an expost facto indication' of the defendant's identity as the criminal."[28]

But our statement in *Clancy* that "'nothing but an hallucination or a most extraordinary mistake will otherwise explain its presence'"[29] speaks to another important requirement for admitting evidence to show consciousness of guilt: The evidence should be sufficient to reasonably support the inference that the defendant had guilty knowledge of the charged crime. As Wigmore recognized, "in the process of inferring the existence of that inner consciousness from the outward conduct, there is ample room for erroneous inference; and it is in this respect chiefly that caution becomes desirable and that judicial rulings upon specific kinds of conduct become necessary."[30] So our opinions upholding consciousness of guilt evidence have generally involved conduct or statements that firmly linked the defendant's extrinsic conduct or statement to the defendant's guilty knowledge of the charged crime. For example, in *Clancy*, a fact finder could confidently

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[27] See, 1 Barbara E. Bergman & Nancy Hollander, Wharton's Criminal Evidence § 4:36 (15th ed. 1997); 1 Imwinkelried, *supra* note 13, § 3:04.

[28] See 1 Imwinkelried, *supra* note 13, § 3:04 at 10.

[29] *Clancy, supra* note 3, 224 Neb. at 499, 398 N.W.2d at 716.

[30] 2 Wigmore, *supra* note 25, § 273(1) at 115-16.

infer that a person innocent of a charged crime would not threaten a witness against him or her in the pending trial for that crime.

Courts have found that many different types of acts are relevant to show a defendant's consciousness of guilt. Many of these acts have involved a defendant's flight or avoidant behavior to escape arrest or detection, or a defendant's attempt to influence jurors or witnesses.[31] But some cases dealing with a defendant's alleged flight illustrate that consciousness of guilt evidence can be unreliable, depending on the surrounding circumstances. We have recognized this problem.

In a case involving a defendant's alleged flight from a burglary, we stated the following rule:

> Departure from the scene after a crime has been committed, of itself, does not warrant an inference of guilt. . . . [T]he proper rule [is] that for departure to take on the legal significance of flight, there must be circumstances present and unexplained which, in conjunction with the leaving, reasonably justify an inference that it was done with a consciousness of guilt and pursuant to an effort to avoid apprehension or prosecution based on that guilt.[32]

Similarly, we affirmed a court's admission of flight evidence to show the defendant's consciousness of guilt when the "testimony indicate[d] that [the defendant] could have only leapt out of a second-story window to avoid apprehension."[33] Accordingly, we have said that *when the evidence is sufficient to justify an inference that the defendant acted with consciousness of guilt*, the fact finder can consider such evidence even if the conduct could be explained in another way.[34]

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[31] See 1 Imwinkelried, *supra* note 13.

[32] *State v. Lincoln*, 183 Neb. 770, 772, 164 N.W.2d 470, 472 (1969) (citations omitted).

[33] *State v. Freemont*, 284 Neb. 179, 195, 817 N.W.2d 277, 293 (2012).

[34] See *Draganescu, supra* note 22.

But not all evidence will justify an inference of a defendant's guilty knowledge. There are limits to how far a trial court can allow the State to stretch inferences from circumstantial evidence that is relevant to prove the elements of a crime beyond a reasonable doubt. An inference resting on speculation or conjecture cannot support a criminal conviction.[35] So if the State's circumstantial evidence only supports an inference through speculation or only supports two equally speculative inferences, a trial court should exclude it when a party has properly invoked rule 403.

Under rule 403, a court may exclude relevant evidence if it presents a danger of unfair prejudice, of confusing the issues, or of misleading the jury that substantially outweighs its probative value. Evidence is unfairly prejudicial if it has a tendency to suggest a decision on an improper basis.[36] Courts should generally exclude speculative evidence as irrelevant and unfairly prejudicial under rule 403 because it encourages jurors to reach a determination on an improper basis—that is, by drawing unreasonable inferences.[37]

For example, we have held that a court should exclude an expert's opinion when it gives rise to conflicting inferences of equal probability, because the choice between them is a matter of conjecture.[38] Federal courts agree that evidence which requires speculation to be relevant is inadmissible under their

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[35] See *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999). Accord, e.g., *U.S. v. Katakis*, 800 F.3d 1017 (9th Cir. 2015); *U.S. v. Adams*, 722 F.3d 788 (6th Cir. 2013); *U.S. v. Friske*, 640 F.3d 1288 (11th Cir. 2011); *U.S. v. Pinckney*, 85 F.3d 4 (2d Cir. 1996).

[36] *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), *disapproved in part on other grounds, State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

[37] See, *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015); *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

[38] See *Johnson, supra* note 37; *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

counterpart to rule 403.[39] And because speculative evidence has little, if any, probative value, its potential for unfair prejudice under rule 403 will usually substantially outweigh its probative value.

Regarding flight fact patterns, legal commentators and other courts have extensively discussed how circumstances unrelated to a defendant's guilt of a charged crime can often explain a defendant's alleged avoidance or flight from law enforcement officials.[40] Because evidence of flight can be unreliable and therefore unfairly prejudicial, flight cases illustrate how courts should consider rules 403 and 404 in tandem when the State offers evidence of a defendant's consciousness of guilt. Federal courts require "careful deliberation" in the admission of flight evidence.[41] Specifically, whether evidence of flight is admissible as circumstantial evidence of a defendant's guilt depends on how confidently it supports all four necessary inferences in the chain of logic to reach a determination of guilt from the extrinsic conduct: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.[42]

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[39] See, *Yellow Pages Photos, Inc. v. Ziplocal*, 795 F.3d 1255 (11th Cir. 2015); *U.S. v. Iron Hawk*, 612 F.3d 1031 (8th Cir. 2010); *U.S. v. Jordan*, 485 F.3d 1214 (10th Cir. 2007); *U.S. v. Sellers*, 906 F.2d 597 (11th Cir. 1990).

[40] See, *U.S. v. Williams*, 33 F.3d 876 (7th Cir. 1994), citing *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977); 1 Imwinkelried, *supra* note 13, § 3:05 (citing cases).

[41] *Williams, supra* note 40, 33 F.3d at 879. Accord *United States v. Blue Thunder*, 604 F.2d 550 (8th Cir. 1979).

[42] See, *U.S. v. Carrillo*, 660 F.3d 914 (5th Cir. 2011); *Myers, supra* note 40. Accord, *U.S. v. Harrison*, 585 F.3d 1155 (9th Cir. 2009); *U.S. v. Al-Sadawi*, 432 F.3d 419 (2d Cir. 2005); *Williams, supra* note 40; *U.S. v. Hankins*, 931 F.2d 1256 (8th Cir. 1991); *U.S. v. Porter*, 821 F.2d 968 (4th Cir. 1987); *Escobar v. State*, 699 So. 2d 988 (Fla. 1997), *abrogated on other grounds, Connor v. State*, 803 So. 2d 598 (Fla. 2001).

In a seminal case, the Fifth Circuit held that the court erred in admitting evidence of the defendant's flight because it could not support the third inference: consciousness of guilt *for the charged crime*. In *United States v. Myers*,[43] the government charged the defendant with robbing a bank in Florida. Between the Florida robbery and his arrest in California—when he allegedly tried to flee arrest—he was known to have committed an armed robbery in Pennsylvania. The Fifth Circuit concluded that even assuming that the defendant had tried to flee arrest in California, the evidence did not rule out the possibility that he was fleeing arrest for the Pennsylvania robbery, his guilt of which would have been a sufficient cause for his flight in itself. Accordingly, it was error to allow the jury to infer from his flight that he was guilty of the charged robbery in Florida.

And the same reasoning applies to the string of necessary inferences to conclude that the excerpts from Oldson's journal showed his guilt. In these excerpts, Oldson did not confess to physically or sexually assaulting Beard. Nor did he confess to kidnapping or killing her. And the court did not admit any of these excerpts to show a confession. So to conclude that any excerpt was relevant to show Oldson's guilt for Beard's murder, a juror would need to make the following string of inferences: (1) Oldson's statement in the excerpt referred to Beard; (2) he did not explicitly refer to Beard in the excerpt because he was trying to conceal the information in it from law enforcement officers who were still investigating her disappearance; (3) he was trying to conceal the information in the excerpt because it would show either that he had previously lied about not having a sexual relationship with Beard, or about his interactions with her on the night she disappeared, or that he had guilty knowledge about her murder; (4) if the excerpt showed that he had previously lied, he did so because

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[43] *Myers, supra* note 40.

he was guilty of committing a crime against Beard; and (5) the crime he was guilty of was her murder.

Because a chain of inferences is necessary to reach a determination of guilt, the extrinsic evidence should reasonably support each inference in the chain of logic. Especially under these circumstances, it is insufficient to conclude that the evidence supports an inference that Oldson was guilty of a crime if it does not also reasonably support an inference that he was conscious of his guilt for the *charged* crime.

Second, although the State can show a defendant's consciousness of guilt from the defendant's inculpatory statements, instead of acts, such statements should also reasonably support an inference of the defendant's guilty knowledge of the charged crime. An example would be a verbal threat to a State's witness, as in *Clancy*. Our decision in *State v. Ellis*[44] also speaks to this issue.

In *Ellis*, the inculpatory statements made by the defendant, Roy Ellis, showed his guilty knowledge of facts specific to a child's murder before the State charged him with the crime. We concluded that the trial court erred under rule 404 in admitting evidence that he had sexually assaulted his stepdaughters 10 years earlier to show his intent for the child's murder. We reasoned that this evidence was relevant only through classic propensity reasoning, but we concluded that the error was harmless. In doing so, we emphasized witnesses' testimonies about suspicious statements that the defendant made while he was in jail for unrelated crimes. We concluded the witnesses had described details that they could not have known unless they had learned them from the person who killed the child:

> There was no innocent explanation for how Ellis' DNA came to be on [the victim's] bloody clothing. Nor is there any innocent explanation for how several witnesses came forward with information *before* [the victim's] body or

[44] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

> Ellis' DNA on her clothing had been discovered linking Ellis to the killing—some of whom even accurately described [the victim's] cause of death and the possible location of her body. This evidence can only be explained by the conclusion that Ellis was the killer.[45]

The reason for requiring the State's evidence to reasonably support each inference necessary to a determination of guilt should be apparent. Consciousness of guilt evidence usually casts the defendant in an unfavorable light and always requires more than one inference to reach a determination of guilt. So unless the evidence reasonably supports each inference in the chain, the danger is high that the jurors will engage in outright conjecture or resort to propensity reasoning to conclude that a defendant is guilty. The danger exists because the court has instructed them that the evidence is relevant for a specific purpose or has allowed them to consider it for any purpose. Finding guilt based on conjectural facts or propensity reasoning is obviously unfairly prejudicial and necessarily outweighs the probative value of a weak or nonexistent chain of inferences.

So under our case law, the ultimate test of admissibility should be whether a juror could reasonably conclude—i.e., without relying on speculation or propensity reasoning—that the circumstantial evidence shows a defendant's guilt for the charged crime. Having established the relevant admissibility standard for rule 404(2) evidence generally and consciousness of guilt evidence specifically, I turn to the court's admission of Oldson's statements in his journal.

IV. ALL BUT ONE OF OLDSON'S JOURNAL EXCERPTS WERE INADMISSIBLE TO SHOW HIS GUILT OF BEARD'S MURDER

1. General Background Evidence

Beard disappeared from Ord, Nebraska, on May 31, 1989. In June, local and state law enforcement investigators

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[45] *Id.* at 581-82, 799 N.W.2d at 282-83.

interviewed Oldson at least three times about his interactions with Beard on the night she disappeared. Evidence not presented to the jury showed that in July, officers arrested Oldson for assaulting a woman in Burwell, Nebraska. While he was serving the sentence for this assault in the county jail, he kept a journal. From December 1989 to September 1990, when Oldson was not in his cell, county jail officers copied the pages of Oldson's journal every other week during searches of his cell. Almost 2 years later, in April 1992, investigators found Beard's remains in a pasture outside of Ord. In January 2012, 23 years after Beard's disappearance, a sheriff's officer in Missouri, where Oldson was then living, arrested him for Beard's murder.

2. Trial Proceedings

On the sixth day of Oldson's trial, the court conducted an in camera hearing on the admissibility of evidence. The State sought to submit nine redacted pages from Oldson's journal while he was in jail for committing the assault in Burwell. It argued that a rule 404(3) hearing was unnecessary. The prosecutor stated that "every single admission or inculpatory statement that's made in that diary specifically addresses what took place and the facts and circumstances between Mr. Oldson and Cathy Beard on May 31st, 1989, nothing else."

In response to Oldson's objections to this argument, the court went through the redacted pages individually. Oldson's attorney explained that in a proceeding to obtain a search warrant, an officer stated that county jail officers had found Oldson's journal in the trash. But when the court later asked the prosecutor what the State's foundation would be for one of these pages, the prosecutor gave a different account. He said that while Oldson was in jail, county jail officers performed cell checks every other week. At these times, the officers would remove Oldson from his cell, take him to the library, and then copy his journal. The prosecutor said that this went on from December 1989 to September 1990, when the State released Oldson.

The court admitted Oldson's entire 230-page journal to rule on the admissibility of the redacted pages. The next day, the court issued a written order admitting all nine pages of Oldson's journal. The court admitted exhibits 263 through 271 during the testimony of Gerald Woodgate, who said only that he was the sheriff of Valley County, Nebraska, in 1989 when Beard disappeared. But the evidence and parties' statements at the pretrial hearings to exclude the evidence showed that Oldson was in the Valley County jail for an unrelated assault when he wrote these journal entries. The State asked Woodgate only if he had come into contact with any of Oldson's writings between December 1989 and September 1990. The State provided no explanation for when Oldson would have written this journal or how the State came to possess it. In a sidebar discussion, Oldson repeated his pretrial objections, which the court overruled.

After the court instructed the jury not to speculate about the text that had been redacted, the State published these excerpts to the jury. Except for exhibits 266 and 270, the court provided no explanation to the jury for why these exhibits were relevant to prove a fact of consequence in the prosecution. Out of the jury's presence, the court overruled Oldson's motion for a mistrial. Later, the court submitted exhibits 263 through 271 to the jury for review during its deliberations.

3. Evidence Fails to Show That Oldson Used a Pattern of Concealment or Encryption to Refer to Beard

(a) Exhibit 263 Did Not Show Consciousness of Guilt

(i) Trial Court's Ruling

In exhibit 263, Oldson wrote the following entry: "I guess the whole import of this thing with the 'missing one' has not hit home, yet. But it should, as they are now looking for charges. If they do prefer charges, well - ? I don't see how they can hang me for anything."

The court ruled that exhibit 263 was admissible to show that Oldson knew he was a suspect: "Further, the content directly relates to this charge. This is not character evidence and is not unfairly prejudicial."

(ii) Trial Court Erred in Admitting Exhibit 263

I assume that in exhibit 263, Oldson's reference to the "'missing one'" was a reference to Beard. But I believe the court erred in admitting this evidence to show that Oldson knew he was a suspect in Beard's disappearance. It is true that Oldson's statement that he doubted investigators could "hang [him] for anything" could be reasonably interpreted to mean he knew he was a suspect. But that evidence was unnecessary. Oldson knew that he was a suspect because investigators had questioned him at least three times in June 1989. And standing alone, his knowledge that he was a suspect was not probative of any fact of consequence. So the court's implicit agreement with the State that exhibit 263 showed Oldson's consciousness of guilt was speculative.

I agree that Oldson's statement could reasonably support an inference that he doubted the State would charge him with a crime. But apart from speculation, that inference could not support the further inferences of Oldson's guilty knowledge about the crime or his guilt of murder. And it could equally support an inference that he was innocent of Beard's murder but concerned that investigators would suspect him of being involved in her disappearance because he was allegedly the last man to have been seen with her. Another reasonable inference could be that Oldson was expressing a doubt that investigators would manufacture evidence against him. He explicitly questioned whether investigators might try to manufacture evidence against him in exhibit 268. And the majority concedes that Oldson's statement in exhibit 268 was largely exculpatory. So if Oldson was expressing the same sentiment in exhibit 263—i.e., doubting that investigators would try to frame him—his

statement did not reasonably support an inference that he had guilty knowledge of Beard's murder.

It is true that Oldson's statement could have also been interpreted to mean that he doubted investigators would find evidence that he murdered Beard. That interpretation would have supported the State's argument that Oldson's statement was relevant to show his consciousness of guilt. But the actual meaning of his statement in exhibit 263 requires guesswork. To interpret his statement to mean that he doubted investigators would find evidence that he murdered Beard required a fact finder to engage in complete speculation about Oldson's meaning.

As stated, courts generally exclude speculative evidence as irrelevant and unfairly prejudicial under rule 403. It encourages jurors to determine an issue by drawing an unreasonable inference.[46] And evidence of a defendant's conduct or statement does not justify an inference of his or her consciousness of guilt under rule 404 if it requires a fact finder to make speculative connections. Here, the evidence supports three equally speculative interpretations: one inculpatory and two innocent. So the court erred in failing to recognize that admitting exhibit 263 would allow the jurors to speculate that it was relevant to show his consciousness of guilt. Its potential for unfair prejudice outweighed its weak and possibly nonexistent probative value.

(iii) The Majority's Alternative Reasoning Is Incorrect

The majority ignores the court's error under rule 403 in admitting exhibit 263 to show (1) Oldson's knowledge that he was a suspect and (2) implicitly, his consciousness of guilt. Instead, it zeros in on the State's alternative argument at trial.

In a single paragraph, the majority summarily opines that the "oblique nature of Oldson's references to Beard . . . or

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[46] See cases cited *supra* notes 35 and 37 through 39.

evidence relating to her disappearance" in exhibit 263, 264, 265, and 267 support an inference of Oldson's consciousness of guilt. It incorrectly reasons that his consciousness of guilt can be "inferred from the secretive way in which Oldson referred to Beard throughout his writings." If this analysis of "secretive" references seems weak, it is because the majority necessarily avoids scrutinizing the State's reasoning. The majority states that evidence showing a defendant's consciousness of guilt is strong evidence of guilt *because nothing else will explain the evidence*. Yet, the majority concludes that the court did not abuse its discretion under 403 in admitting these "oblique" references to Beard or the facts of her disappearance.

There are two problems with this reasoning. First, the trial court gave the jurors no instructions on how they were to consider exhibit 263. Oldson would not have requested a limiting instruction because he argued that the evidence was inadmissible for any purpose. So even if the majority's alternative reasoning were correct, the court's failure to limit the jury to considering exhibit 263 for a proper purpose would have only compounded its error in admitting it for a speculative purpose. Because the jurors would have assumed that the evidence was relevant for proving Oldson's guilt, the danger was high they would have speculated about the meaning of his statement.

Equally important, the majority's alternative theory of relevance—to show Oldson's consciousness of guilt under rule 404(2)—also invites speculation about the meaning of Oldson's statements. The majority points to no other excerpts from his journal that show the "'missing one'" was Oldson's secret code for Beard. Nor does the majority show that he used any pattern of encryption to conceal his statements about Beard. And the evidence does not support that conclusion.

First, a review of Oldson's entire journal, which the court received for ruling on these excerpts, shows that there is no other reference to the "'missing one.'" Second, the majority

acknowledges that Oldson directly referred to Beard by her last name when he wrote that the Valley County Attorney was '"so obsessed with Beard.'" Oldson also mused about "Cathie" in at least three journal entries, which writings may have also been references to Beard. At least, the record does not show they are not. So Oldson's journal, viewed as a whole, suggests with an equal degree of confidence that he was not attempting to conceal his writings about Beard. Third, Oldson referred to other people by derogatory labels throughout his journal. So his mere use of a label in exhibit 263 is insufficient to show that he deliberately concealed references to Beard. In sum, his references to Beard as the "'missing one'" in exhibit 263 did not reasonably support an inference that he was deliberately concealing his references to Beard. That interpretation is speculative.

More important, even accepting the majority's premise that Oldson was attempting to conceal his references to Beard, exhibit 263 did not show his consciousness of guilt. Even a hundred "oblique" references to Beard could not do that unless the statements themselves were sufficient to support a reasonable inference that he had guilty knowledge of the charged crime. The majority fails to set out the chain of necessary inferences to conclude that Oldson had guilty knowledge of Beard's murder from his statement in exhibit 263. The reason for its omission is clear. As explained above, exhibit 263 could not support that inference apart from speculation. And even if the trial court considered exhibit 263 with exhibits 264, 265, and 267, they do not reasonably support that inference.

(b) Exhibit 264 Did Not Show Consciousness of Guilt

(i) Trial Court's Ruling

The State redacted all but one sentence of exhibit 264: "Well, one doesn't write certain things in his journal, does he?" The court concluded that this page was admissible because it

"contains an inference that [Oldson] is hiding something and is inculpatory. It is not character evidence."

(ii) Trial Court Erred in Admitting Exhibit 264 and the Majority's Alternative Reasoning Is Incorrect

The court's admission of exhibit 264 to show that Oldson was hiding something was even more improper under rule 403 than its admission of exhibit 263—because inferring Oldson's meaning in exhibit 264 was even more speculative. This statement could only be probative of a fact of consequence if it showed that Oldson was hiding his guilty knowledge about murdering Beard. But it was equally plausible that Oldson was musing about a fantasy that he did not want to reveal. Or that he was musing about his desire to kill a cellmate, his regret of a previous bad act, *or* the facts of murdering Beard. But short of using a Ouija board, no fact finder could divine what Oldson was writing about.

The majority's conclusion that exhibit 264 was admissible to show Oldson's consciousness of guilt through his cryptic references to Beard is similarly wrong. Under its reasoning—regardless of content—Oldson's obvious references to Beard, *and* his silence, show a pattern of trying to conceal his guilty knowledge. This is circular reasoning. The majority finds a reference to Beard in exhibit 264 only by proceeding from an assumption that a pattern of concealment exists. But the absence of actual evidence showing a pattern can never lead to a reliable conclusion that he was attempting to conceal his statements. I conclude that exhibit 264 fails to show a pattern of oblique references or encryption. And it does not support an inference of guilty knowledge.

(c) Exhibit 265 Did Not Show Consciousness of Guilt

(i) Trial Court's Ruling

In exhibit 265, the court admitted the following redacted statement: "Well, it looks as if this foolishness about the

missing doo-doo has reached a point where the end is in sight. That's good. I like it - perhaps now I can ease my mind." In its order, the court stated, "This is not character evidence. These are statements made by [Oldson] that are directly related to this charge. The jury is allowed to make whatever inferences they choose about this statement."

(ii) Trial Court Erred in Admitting Exhibit 265 and the Majority's Alternative Reasoning Is Incorrect

The trial court incorrectly reasoned that exhibit 265 was admissible because Oldson's statement directly related to the charged crime. I assume that the reference to the "missing doo-doo" was another reference to Beard. As stated, however, other evidence established that Oldson knew he was a suspect. So it was not incriminating for Oldson to express relief that the investigation was almost over. An innocent person could have expressed that sentiment, and Oldson's characterization of the investigation as "foolishness" strengthens an innocent interpretation of the statement. But that interpretation was irrelevant to a fact of consequence.

The trial court may have alternatively reasoned that Oldson's statement was directly related to the charged crime by interpreting it to mean that he was relieved to be getting away with murdering Beard. But again, Oldson's actual meaning required guesswork. The exculpatory and inculpatory interpretations of his statement are both speculative. And because a fact finder could only find that the evidence was relevant to a fact of consequence through speculation, the court's admission of exhibit 265 for any purpose at all virtually ensured that the jurors would speculate about Oldson's meaning. So under rule 403, the court erred in allowing the jurors to speculate that Oldson had guilty knowledge of Beard's murder.

Furthermore, the alternative reasoning in the majority opinion does not cure the problem under rule 404(2). As a reminder, the majority concludes that exhibit 265 was also admissible to

show Oldson's consciousness of guilt through his cryptic references to Beard or evidence related to her disappearance. But Oldson's reference to Beard here as the "'missing doo-doo'" fails to show that this was a term he used to conceal his writings about Beard. Knowing that he was a suspect in Beard's disappearance, this label was no more secretive than his reference to the "'missing one'" in exhibit 263. Additionally, he specifically referred to other people in his journal as "doo-doos." And he used worse derogatory labels for others throughout his journal. So in context, his use of labels illustrates only his insensitivity to others, not an encryption. Finally, as noted, Oldson directly referred to "Beard" and mused about an unidentified "Cathie" in other entries. So when his journal is viewed as a whole, this entry also fails to show that he was trying to conceal or use encryption for his references to Beard. And because the meaning of Oldson's statement requires guesswork to conclude that it shows his consciousness of guilt about Beard's murder, it obviously did not provide a sufficient factual foundation to reasonably support that inference.

(d) Exhibit 267 Did Not Show That Oldson Secretively Referred to Beard in Other Exhibits

As I explain later, I agree that exhibit 267 was probative of Oldson's consciousness of guilt for Beard's murder. In that exhibit, Oldson stated that his first priority upon his release was to get rid of something that linked him to an unnamed person or thing. But that single statement cannot show a pattern that proves Oldson was secretly writing about Beard in other excerpts to conceal his guilty knowledge of the crime. It is the content of exhibit 267 that evidences Oldson's consciousness of guilt, not proof of a pattern that shows he used secret references for Beard. Even if the court considered exhibit 267 with the other exhibits offered to show Oldson's attempt to conceal his references to Beard, it failed to show a pattern. There is no nonspeculative pattern in these exhibits. So the

majority incorrectly fails to consider each excerpt separately to determine whether it was properly admitted to show Oldson's consciousness of guilt.

4. Trial Court Erred in Admitting Exhibit 266

(a) Parties' Arguments and Trial Court's Ruling

The journal entry that the court admitted as exhibit 266 originally read as follows:

> I have determined that I am not going to be physically bullied by anyone, any longer. . . . I have acquired a great deal of confidence. I can see it in the people around me that they respect that confidence. This is good. I can now be what I want to be with no fear of any man. Of course, emotional fear of women may still be there - I don't know. I haven[']t had any interaction w/girls lately - obviously.
>
> Of course, I see little reason to fear any longer. I know pain, I know loss, I know hardship - nothing that can happen can be as bad as what I have already been "stricked" (or stricken) with. Besides, as much as I like being with girls, and as much as I want a relationship, I would think that it's in my best interest to plunge right in with no fear. Show off my best side, etc. Maybe the problem has been my making girls too high a priority - and having real problems with accepting rejection. Which may be how all this got started. "Get it any way you can" (?) Doesn't sound like a good attitude. It got me in trouble.

The State redacted all but the last three sentences of this entry "[j]ust to be as cautious as possible." So exhibit 266, as presented to the jury, provided the following: "Maybe the problem has been my making girls too high a priority - and having real problems with accepting rejection. Which may be how all this got started. 'Get it any way you can' (?) Doesn't sound like a good attitude. It got me in trouble."

The State argued that exhibit 266 was admissible to show Oldson's state of mind when he interacted with Beard outside the bar on May 31, 1989, because he was writing about that specific event. It additionally argued that exhibit 266 was relevant to show Oldson's motive for the charged crime: his refusal to accept rejection.

Oldson's attorney argued that exhibit 266 was too speculative to show that he was writing about Beard. She reminded the court that Oldson wrote that this "may be how all this got started" when he was in custody for an "incident involving a woman, involving rejection at Burwell." The court had previously received evidence showing that in July 1989, officers arrested Oldson for an assault against a woman in Burwell. The assault involved his forcibly touching her stomach and then fleeing. But at trial, the court did not seem to know what the Burwell incident referred to. So Oldson's attorney briefly explained that the State had convicted Oldson of an assault there. She argued that his journal entry was likely about the unrelated assault because it was similar to "the sexual proclivities that are described in the diary" and the woman had resisted in some manner.

The court admitted Oldson's statements that he had problems accepting rejection and that his "'[g]et it any way you can'" attitude had got him into trouble to show his motive and consciousness of guilt for Beard's murder:

> This is not evidence of a prior act under 27-404(2). The State is not offering this to prove [Oldson] has a character trait (problem with accepting rejection) that causes him or has caused him to murder other women. The evidence does not indicate or imply that [Oldson] kills women who reject him. This is proper to offer as evidence of motive and consciousness of guilt as to this charge. Further, this is relevant to statements [Oldson] made to others that Cathy Beard rejected him.

Despite this ruling, just before the State published exhibit 266 to the jury, the trial court changed course. It instructed the

jurors that exhibit 266 was being admitted "to help you decide motive . . . . You must consider this evidence only for this limited purpose." So the court admitted exhibit 266 to show only motive, not consciousness of guilt.

(b) The Majority's Reasoning

The majority agrees that exhibit 266 was logically relevant to show Oldson's reason for killing Beard. But to reach that conclusion, it first reasons that the evidence shows Oldson's consciousness of guilt. It states that the court "[i]n essence . . . found that the jury could reasonably infer from exhibit 266 that Oldson was acknowledging he had gotten himself into 'trouble' because he attempted to '[g]et it any way you can' when Beard rejected him on the night of her disappearance." Citing *Huddleston v. United States*,[47] the majority concludes that court's only duty in its gatekeeping role was limited to determining whether the jury could reasonably find by a preponderance of the evidence the conditioning fact necessary to make exhibit 266 relevant: i.e., that Oldson was writing about getting himself in trouble with Beard on the night she disappeared because he attempted to "'[g]et it any way you can'" and Beard rejected him.

The majority concludes that the court was required to consider other evidence, "especially the other journal excerpts." It concludes that the jury could reasonably draw the inference that Oldson was writing about Beard because his other journal entries independently supported an inference that he referred to Beard in a purposefully vague way. It finds nothing in Oldson's journal excerpts to undermine this conclusion. So it concludes that the "jury could reasonably infer from exhibit 266 that Oldson was reflecting upon the fact that he had killed Beard because she rejected him."

On appeal, Oldson argues that the court should have excluded exhibit 266 because he could not rebut the motive

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[47] *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988).

inference without opening the door to extrinsic evidence that he was in custody for an unrelated assault. Although Oldson ties his argument to rule 403 in his brief,[48] the majority mischaracterizes it. It treats the argument as a rule 404 issue and concludes that presenting the extrinsic evidence on cross-examination would have been free of propensity reasoning. The majority opinion cites cases in which a court upheld the admission of flight or escape evidence to show a defendant's consciousness of guilt even though the defendant was sought or being held for more than one crime. From this, it concludes that Oldson's tough choice whether to present evidence that would damn him in the jury's eyes was not a reason to exclude the evidence.

Finally, the majority concludes that exhibit 266 did not present a rule 403 problem. It implicitly reasons that the exhibit did not create a propensity inference because Oldson was writing about killing Beard. But it alternatively reasons that because there is no character trait involved in having a problem with rejection, he could not have been prejudiced by improper propensity reasoning. As the final nail in the coffin, the majority states that only rarely, and only under "'extraordinarily compelling circumstances,'" will this court reverse a trial court's rule 403 determination.

To summarize, the majority's confusing analysis concludes that when read in context with his other cryptic statements, Oldson's statement in exhibit 266 was direct evidence of his motive: He was explaining why he killed Beard. Because he was writing about Beard's murder, it was not evidence of his character. Through this reasoning, it dodges Oldson's argument that exhibit 266 was character evidence. Worse yet, the majority concludes that because exhibit 266 showed that Oldson's motive for killing Beard was rejection, exhibit 266 was properly admitted under rule 404 even if it was character evidence. It reasons that the court's admission of Oldson's statement

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[48] See brief for appellant at 62-65.

is not nearly as bad as statements that courts have admitted in some other cases. And the danger of unfair prejudice did not outweigh the exhibit's probative value under the majority's new standard of rarely questioning a court's ruling under rule 403. Finally, requiring Oldson to produce evidence of an unrelated assault to rebut a motive inference was not unfairly prejudicial because he could have cross-examined the State's witness about the extrinsic evidence without relying on propensity inferences about his character.

(c) The Majority Opinion Wrongly Upholds the Admission of Exhibit 266

The court's admission of exhibit 266 to show Oldson's motive for murdering Beard was wrong for three reasons. It required speculative reasoning when offered as direct evidence of Oldson's motive. It required propensity reasoning when offered as circumstantial evidence of Oldson's motive. Finally, the jurors were highly likely to have engaged in speculative or propensity reasoning because they did not know that Oldson was probably writing about the extrinsic Burwell incident. And Oldson could not have presented the extrinsic evidence without painting himself as a person who was likely to have committed the charged crime.

The majority ignores much of our precedent to uphold the admission of this single exhibit in a single case. I disagree with its reasoning, and I particularly disagree with its suggestion that we should abdicate our role to uphold our evidentiary standards and give blanket deference to a trial court's rulings under rule 403.

(i) Exhibit 266 Was Too Speculative to Show Oldson Was Writing About Killing Beard

The circumstances known to the court showed that Oldson was likely writing about his incarceration for assaulting a woman in Burwell. That offense was the closest in time to his

journal entry and the only crime that had actually "got [him] in trouble." So he was more likely to have been writing about that crime. And because the court knew these circumstances, it knew that the jurors would be speculating to conclude that Oldson was writing about why he murdered Beard. For that reason alone, rule 403 should have precluded its admission. The unfair prejudice from drawing a speculative—and thus unreasonable—inference about Oldson's motive outweighed any probative value.

Although the majority states that the court was required to consider other evidence when considering whether to admit exhibit 266, it apparently does not include in that mandate the court's knowledge that when Oldson wrote this, he was serving a sentence for assaulting another woman. Instead, the only evidence that the majority thinks the trial court should have considered are Oldson's other journal entries.

But Oldson's other journal entries fail to show that he was writing about why he murdered Beard in exhibit 266. His labels and silence in the other exhibits are too inconsistent to show that he used a pattern of cryptic references for Beard or that he omitted her name whenever he wrote about her. And most of them are simply not incriminating. So they do not show that Oldson was secretly writing about why he murdered Beard in exhibit 266. It is only because the majority ignores the speculation problem in detecting a pattern in Oldson's references to Beard that it can avoid the speculation problem in reasoning that Oldson was writing about Beard in exhibit 266. Equally important, Oldson's full statement in exhibit 266 showed that he was ruminating about his problems with women generally. Only by extracting the three selected sentences from their context could the State convincingly argue that Oldson was writing about why he murdered Beard.

So I disagree with the majority's reasoning that there is no support in Oldson's journal to show that the admission of exhibit 266 was misleading and unfairly prejudicial. And if these statements are unambiguously direct evidence of the

reason that Oldson killed Beard, a reader must wonder why the State waited so long to prosecute him when they were aware of his statements soon after he wrote each journal entry.

(ii) If Jurors Did Not Speculate That Oldson Was Writing About Beard, They Relied on Propensity Inferences to Find Exhibit 266 Relevant to Prove Motive

As a reminder, exhibit 266 comprised this statement: "Maybe the problem has been my making girls too high a priority - and having real problems with accepting rejection. Which may be how all this got started. 'Get it any way you can.'"

The majority incorrectly states that the probative value of this statement depended upon a finding that Oldson was writing about Beard. Remember, the court instructed the jurors only that exhibit 266 was admissible to help them decide Oldson's motive for killing Beard. It did not condition their consideration of the evidence on a finding that Oldson was writing about why he killed Beard, and Oldson never referred to Beard in the statement. Because it was not direct evidence of Oldson's guilt, its admission allowed the jury to find it relevant to prove Oldson's propensity to commit assaults against women who rejected him. So even if the jurors did not speculatively infer that the statement was direct evidence of why Oldson killed Beard, they would have considered it for the State's original purpose in offering it at a pretrial hearing: to show that Oldson was upset by a woman's rejection, which coincided with its theory that Oldson murdered Beard when she rejected his sexual advances.

Other than speculating that exhibit 266 was direct evidence of Oldson's motive for killing Beard, the jurors could have only considered it to be proof of his motive by reasoning that he was probably acting in conformity with a character trait. That trait was Oldson's propensity to "'[g]et it any way you can'" if he was rejected. But this theory of logical relevance conflicted with rule 404(1)'s forbidden propensity reasoning.

Apart from exceptions that do not apply, rule 404(1) provides that "[e]vidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion . . . ."

The majority rebukes Oldson for extracting the meaning of his statement "from any context that it referred to Oldson's actions with Beard on the night of her disappearance and his motive for those actions." But it is the majority that has extracted the statement from its context, both from the context of his full statement in exhibit 266 and from the circumstances known to the trial court. The majority, with a surgeon's scalpel, even attempts to extract his statement that he had problems accepting rejection—which it declares is not a character trait—from his statement that his attitude of "'[g]et it any way you can'" got him into trouble. Nonetheless, the jury would have got the point that the two traits were connected. The prosecutor specifically argued in closing that exhibit 266 provided a glimpse of Oldson's mindset and showed that he was unable to accept Beard's rejection of him. And the State argues on appeal that Oldson's journal writings "reflect that Oldson got in trouble because he [could] not handle being rejected."[49]

The majority apparently recognizes the propensity problem in the State's argument because it resorts to again undermining our rule 404 jurisprudence. It states, "If character evidence is admitted for a proper purpose, then, ipso facto, it is not admitted for the purpose of showing propensity" and rule 404(1) does not apply. But regardless of whether subsection (1) or (2) of rule 404 governs Oldson's statement, it was not independently relevant as circumstantial evidence of his motive. Under that theory of relevance, the primary purpose of presenting the evidence was to establish Oldson's propensity to do whatever it takes to get sex if rejected—his character trait.

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[49] Brief for appellee at 18.

Only by establishing this inference could the State use the statement to show his motive for the charged crime. And we have previously held the State cannot rely on propensity reasoning to show motive.[50]

In sum, the jurors could only conclude that Oldson was writing about why he killed Beard through an inference resting on speculation. Alternatively, they could only conclude that his writing was circumstantial evidence of his motive through a propensity inference about his character. Either inference was unreasonable. Because the inferences were unreasonable, the evidence's potential for unfair prejudice outweighed its probative value. So exhibit 266 was inadmissible under both rules 404 and 403. And it was inadmissible for the additional reason that Oldson could not rebut the inference without presenting evidence of his extrinsic misconduct with similarities to the charged crime.

(iii) A Defendant Should Not Have to Rebut an Unreasonable Inference by Presenting Damning Evidence

The majority dismisses Oldson's argument that he could not rebut the inference created by the admission of exhibit 266 as a tough strategical choice. It cites cases in which a court upheld the admission of flight or escape evidence to show a defendant's consciousness of guilt even though the defendant was sought or being held for more than one crime. But these cases primarily show that even when the defendant has committed multiple crimes, the circumstantial evidence is admissible if it reasonably supports one of two inferences: (1) the defendant was primarily attempting to evade capture or escape custody for the charged crime[51] or (2) the defendant

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[50] See, *State v. Payne-McCoy*, 284 Neb. 302, 818 N.W.2d 608 (2012); *Sanchez, supra* note 4.

[51] See, e.g., *United States v. Kalish*, 690 F.2d 1144 (5th Cir. 1982); *United States v. Boyle*, 675 F.2d 430 (1st Cir. 1982); *State v. Hughes*, 596 S.W.2d 723 (Mo. 1980); *Fentis v. State*, 582 S.W.2d 779 (Tex. Crim. App. 1976).

was attempting to evade capture or escape custody for all of his crimes.[52]

Some of the cases that the majority relies on are older and arguably inconsistent with the majority of cases that require courts to be cautious in admitting evidence of a defendant's alleged flight or evasive conduct. But to the extent they are inconsistent, they should be interpreted to mean that a trial court must be sensitive to the facts of the case.[53] To the extent they broadly authorize the admission of circumstantial evidence even if it allows jurors to speculate that the evidence shows a defendant's guilt, the cited cases are contrary to our own case law. Here, the State has not met the reasonable inference requirement.

Similarly, in rejecting Oldson's argument that exhibit 266 was character evidence, the majority relies on hate crime cases or cases in which a defendant expressed a desire to kill or harm a random member of a group.[54] Those cases are also distinguishable. It is true that courts have sometimes admitted evidence showing a defendant's hatred of a distinct group or desire to harm a random member of a group to show the defendant's motive or intent for a seemingly random act of violence. But these fact patterns are distinguishable and courts should analyze them on a case-by-case basis.[55] Unlike the facts in *People v. Greenlee*,[56] Oldson's journal entries did not show a

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[52] See, e.g., *United States v. De Parias*, 805 F.2d 1447 (11th Cir. 1986), *overruled on other grounds, U.S. v. Kaplan*, 171 F.3d 1351 (11th Cir. 1999); *Boyle, supra* note 51; *People v. Remiro*, 89 Cal. App. 3d 809, 153 Cal. Rptr. 89 (1979); *Fulford v. State*, 221 Ga. 257, 144 S.E.2d 370 (1965).

[53] See *Escobar, supra* note 42.

[54] See, *People v. Griffin*, 224 P.3d 292 (Colo. App. 2009); *Masters, supra* note 19; *People v. Hoffman*, 225 Mich. App. 103, 570 N.W.2d 146 (1997); *State v. Crumb*, 277 N.J. Super. 311, 649 A.2d 879 (1994).

[55] Compare *Masters, supra* note 19, with *Kaufman v. People*, 202 P.3d 542 (Colo. 2009).

[56] *People v. Greenlee*, 200 P.3d 363 (Colo. 2009).

desire to randomly kill a woman. Nor did they show his hatred of women as a group. So the majority's discussion of such cases amounts to a distraction.

What matters here is that inferring motive from exhibit 266 required an unreasonable inference. And the majority recognizes that Oldson could not rebut that inference without presenting evidence of his extrinsic misconduct with similarities to the State's theory of his conduct in committing the charged crime. So the unfair rebuttal issue was an additional reason to conclude that the exhibit's potential for unfair prejudice outweighed any probative value.

The rebuttal dilemma underlies the requirement that the evidence used to show a defendant's consciousness of guilt must reasonably support each necessary inference in the chain of logic for that proof. The Fourth Circuit discussed this problem in a flight case where the defendant left the jurisdiction immediately after an investigator left a note at his residence for him to contact the investigator. In *United States v. Beahm*,[57] the court held that a trial court may not instruct the jury on flight as evidence of guilt when the evidence fails to show the defendant knew the government was investigating him for the charged crime:

> *Otherwise, defendant would bear an unconscionable burden of offering not only an innocent explanation for his departure but guilty ones as well in order to dispel the inference to which the government would apparently be entitled* that an investigation calling upon defendant could have but one purpose, namely, his apprehension for the crime for which he is ultimately charged. If the government wishes to offer evidence of flight to demonstrate guilt, it must ensure that each link in the chain of inferences leading to that conclusion is sturdily supported.[58]

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[57] *United States v. Beahm*, 664 F.2d 414 (4th Cir. 1981).

[58] *Id.* at 420 (emphasis supplied).

Other courts have similarly reasoned that the introduction of propensity evidence can unfairly put a defendant in a position of explaining extrinsic misconduct or a character trait.[59] That concern should surely apply when the trial court knew, or should have known, that the State's evidence only supported a fact of consequence through an unreasonable inference. Here, requiring Oldson to prove that the inference was unreasonable would have only strengthened the propensity inference in the jury's eyes. This is not a tough strategical choice; it is an unfair burden. I conclude the trial court erred in admitting exhibit 266.

5. Court Improperly Admitted Exhibits 268, 269, and 271

(a) Oldson's Meaning in Exhibit 268 Was Speculative

(i) Trial Court's Ruling

Twenty-seven days before he was released from jail in 1990, Oldson again ruminated about the Beard investigation: "Well, there it is. What's next, I wonder? It's gettin' closer - and G.J. and the Fried Eggplant gang aren't movin' - although they still could, conceivably. How, I don't know - in fact, [illegible] wonder if there is any way he could even manufacture something? I doubt it."

In this statement, I accept that the initials "G.J." are reasonably interpreted as a reference to the Valley County Attorney at that time and that the "Fried Eggplant gang" was a derogatory label for the investigators. The court ruled that exhibit 268 was admissible to show Oldson's knowledge that he was a suspect and to show why he might have wanted to get rid of evidence "as can be inferred from [exhibit 267]."

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[59] See, *Kaufman, supra* note 55; *State v. Loebach*, 310 N.W.2d 58 (Minn. 1981).

(ii) Trial Court Erred in Admitting Exhibit 268 and the Majority Wrongly Upholds the Ruling

The court erred in admitting exhibit 268 to show Oldson's knowledge that he was a suspect and to show why he needed to get rid of something. Oldson only needed to dispose of evidence connected to Beard's murder if he was guilty of committing that crime. But exhibit 268 did not reasonably support an inference that Oldson had guilty knowledge of Beard's murder. Oldson only wondered if the Valley County Attorney might still charge him with a crime and if investigators would manufacture evidence for that purpose. An innocent man might also wonder if investigators would manufacture evidence against him when he knew he was a suspect. And the majority concedes that Oldson's statement in exhibit 268 was "largely exculpatory." Nonetheless, it concludes that the court did not abuse its discretion in admitting exhibit 268 under rule 403. Not so.

The majority's statement that exhibit 268 was largely exculpatory shows that an innocent interpretation was the most probable interpretation and, minimally, an equally speculative interpretation. Nor does the majority point to any fact of consequence or intermediate inference for which exhibit 268 was probative. Oldson's meaning in exhibit 268 was too speculative to prove a fact of consequence. So the court erred in admitting evidence that allowed the jurors to speculate that the exhibit showed Oldson's guilt of murdering Beard.

(b) Oldson's Meaning in Exhibit 269 Was Speculative

(i) Trial Court's Ruling

In this excerpt, Oldson disparaged the investigators for not investigating whether anyone else was involved in Beard's disappearance and stated that he was going to "get away":

> Fried Eggplant gang ain't makin' it - they're gonna slip and fall and just generally fu-- up! That's nice . . .

> I'm gonna get away and I'll bet it breaks their yellow hearts - they're so dead-set that I did this and they're not gonna look any farther unless they are forced to. Well; now, they'd best look elsewhere, 'cuz I refuse to be a part of this charade any longer. I'm well fed up with this tom-foolery - they can stick it in their asses. So there.

The court ruled that exhibit 269 was admissible for the same reason as exhibit 268: to show Oldson's knowledge that he was a suspect and to show why he might have wanted to get rid of evidence "as can be inferred from [exhibit 267]."

(ii) Trial Court Erred in Admitting Exhibit 269 and the Majority's Reasoning Is Incorrect

As with exhibit 268, the majority seems to agree with Oldson that exhibit 269 was largely exculpatory: "Oldson opines in exhibits 268 and 269 that the only way law enforcement could bring charges against him is if it manufactured evidence." Nonetheless, it concludes that exhibit 269 is probative of Oldson's guilt. It reasons that a fact finder could infer from exhibit 269 that Oldson thought he would "'get away,' because law enforcement was going to make mistakes." So the majority implicitly reasons that exhibit 269 could show his consciousness of guilt by interpreting the statement to mean that Oldson believed he would "'get away'" with murder. It concludes that the court did not abuse its discretion in admitting the evidence under rule 403.

The problem with the majority's reasoning is that the trial court knew that Oldson was in jail for the unrelated crime in Burwell when he wrote this. Oldson made this statement on August 14, 1990, 23 days before the State released him from jail. The day before making the statement in exhibit 269, Oldson wrote this entry:

> Every sound I hear that I cannot directly identify, and every time anything questionable happens with Woody or some other law . . . person, makes me suspect that they are talking about me, or plotting some way to keep me

> here forever. I have to imagine that G.J. is working feverishly to prevent my slipping out of here. I bet he can't stand the idea that I'm going to "get away". Too bad - and he better leave me the f--- alone. Death is no stranger to me, Army and all.

When viewed in the context of Oldson's journal entry on the preceding day, his statement that "I'm gonna get away" is reasonably interpreted to mean that he was going to "get out of jail," instead of going to "get away with murder." Even without the context of his previous day's entry, the majority concedes the statement was largely exculpatory.

But because the jurors did not know that Oldson was in jail for another crime when he wrote this statement, they were highly likely to draw the conclusion that he had guilty knowledge of the charged crime. Remember, the jurors only knew that Woodgate was sheriff of Valley County in 1989 when Beard disappeared and that he had obtained Oldson's writings between December 1989 and September 1990. Because the context of the writings was unknown to the jurors, the danger was high they would speculate that Woodgate had obtained them through a search during the investigation of Beard's murder. Disconnected from the context of Oldson's incarceration for unrelated crime, the excerpt supported a damning inference that Oldson was writing about getting away with murder. But the trial court knew the actual context and should have excluded exhibit 268 because it would allow the jurors to speculate that Oldson believed he would get away with murdering Beard. Had they known the context, they could have just as easily speculated that he thought he would get out of jail before investigators manufactured evidence against him.

(c) Oldson's Meaning in Exhibit 271 Was Speculative

(i) Trial Court's Ruling

Sixteen days before he was released, Oldson wrote the following journal entry:

> Ha, Ha! [The Valley County Attorney] is a stupid slut! He will never find anything no matter how hard he looks because their [sic] is nothing to find. And he's too stupid to manufacture anything. He's just doo-fah and he'll always be scum. I've beaten him! Of course, there was never any doubt in anyone's . . . mind that I would . . . if he ever turned it into this kind of thing. So, hah!!

The court ruled that the statement was relevant to show Oldson's knowledge that he was a suspect and to show why he might have wanted to get rid of evidence "as can be inferred from [exhibit 267]."

(ii) The Majority Incorrectly Affirms Court's Ruling

As with Oldson's other journal excerpts, exhibit 271 could only show why Oldson would need to dispose of evidence if it supported a reasonable inference that he had killed Beard. The majority states that Oldson's statement is probative of his guilt because a fact finder could infer that "law enforcement would not find any incriminating evidence, because Oldson had particular knowledge about the evidence." The majority implicitly reasons that he meant investigators would not find any evidence because he has destroyed it or hid it so investigators could not find it. That interpretation, however, conflicts with the trial court's ruling that it was admissible to show why he needed to dispose of something when he got out of jail.

It is true that the statement could have meant that Oldson was confident investigators would not find the evidence that he had destroyed or hid. But it could have meant that investigators would not find incriminating evidence because he was innocent. And in holding that exhibit 271 was admissible to show Oldson's consciousness of guilt, the majority again ignores the absolute speculation required to draw either conclusion. Because it did not support a reasonable inference of guilt, the court should have excluded it under rule 403.

6. Trial Court Erred in Admitting Exhibit 270

(a) Trial Court's Ruling

In exhibit 270, Oldson expressed his attraction to the stomach of listed persons with whom he had had "experience":

> Love that gut, tummy, belly, abdomen, stomach, midriff, middle, torso, etc. Extensive experience comes with Sandy, Dondie, C.B., and Linda. Other mediocre experiences with Robin, Cathie, Shirley,(o) Shawna, Alyce, K.P.,([illegible]) Donna H., Irma S., Allison, Ronda (from G.I. 1980), Mary Jane, Teresa, 2116; resident upstairs; 1980, Salinas 1987, Lincoln 48th/Leighton(1989), Darlene, Connie, Pam, Tammy S., Cami G, Bonnie M, Carolyn D, et. al. List remains incomplete. Will add more as more comes available. For now, must rate C.B. as most gratifying, Sandy as most comfortable, Teresa as prettiest, maybe Darlene. Just don't know - they[']re all so nice. YUH! Go on and gitcha some!

In its written order, the court admitted exhibit 270 for the following reason:

> State is offering this excerpt as inculpatory evidence that contradicts exculpatory statements by [Oldson] regarding his relationship with Cathy Beard and his prior sexual experience with women. Further, this is not character evidence. The State is not offering this to prove he had a sexual relationship with these women and then murdered them, or even that [Oldson] actually had sexual contacts with these women. They are statements by [Oldson] offered to disprove an exculpatory statement made by [Oldson] that he did not have sex until he was married and/or that he did not have sex with . . . Beard.

The court overruled Oldson's objections. It implicitly agreed with the State that a limiting instruction could cure any prejudicial effect from the admission of exhibit 270. But contrary to the court's ruling in its order, before the State published exhibit 270, the court gave this limiting instruction:

> Jurors, you are now seeing evidence that is being submitted to you for a specific limited purpose. This evidence is being offered for the limited purpose to help you decide what if any knowledge [Oldson] had of Cathy Beard, the nature and extent of any relationship he and Cathy Beard may have had, and for the purpose of evaluating [Oldson's] credibility with respect to any other statements that he made. You must consider this evidence only for this limited purpose.

Under this limiting instruction, the court admitted exhibit 270 only as proof that Oldson was lying about not having a sexual relationship with Beard. The instruction precluded the jurors from considering the statement as proof that he had lied when he said he was a virgin until he got married.

The majority incorrectly states that the court did not give this limiting instruction specifically for exhibit 270. The prosecutor had already published exhibits 263 through 269, and the court gave this instruction immediately after the prosecutor asked for leave to publish exhibit 270 to the jury. Right after the court gave the instruction, the prosecutor stated, "And, Judge, just so the record's clear, that instruction pertains to this particular exhibit that's on the screen now, Exhibit 270." The court responded, "It does."

(b) The Majority's Reasoning

The majority states that the court implicitly determined that exhibit 270 was logically relevant to show that Oldson had sexual contact with Beard on the night that she disappeared. It rejects Oldson's argument that exhibit 270 could simply be a reference to his sexual fantasies. It states that false exculpatory statements of fact which are sufficient to justify an inference of guilt are admissible even if they could be explained another way. It concludes that exhibit 270 was sufficient to support an inference that Oldson made false exculpatory statements of fact when he said that "he was a virgin, Oldson and Beard had apparently not had a sexual relationship prior to

her disappearance, and . . . Beard rejected Oldson's sexual advances on the night of her disappearance." It also concludes that exhibit 270 did not present a rule 404 problem because Oldson's statement proved conduct that was intrinsic to the charged crime:

> Rather, it concerns an act intrinsic to the crime. The State's theory of the case was that Oldson killed Beard in the course of a sexual assault. That the jury did not convict on that concurrent assault charge does not retrospectively change the nature of the evidence to be of "other acts."

In short, the majority concludes that the statement shows *both* that Oldson had a sexual relationship with Beard before she disappeared *and* that he sexually assaulted her on the night that she disappeared.

Although Oldson referred to other people with whom he had had "stomach" experiences, the majority states that the other names in exhibit 270 were relevant only to show that the sole person Oldson referred to by initials was "C.B." The majority concludes that Oldson was not prejudiced by evidence suggesting that he had similar sexual experiences with other people: "While promiscuity or even sexual fantasies might be considered by some people to be reflective of a bad character trait, it is hardly the kind of character trait that would compel a jury by improper propensity reasoning to convict a defendant of murder."

So for the other listed names, Oldson's stated experience with them could be real or imagined. There was no deviant sexual propensity suggested in the excerpt because his reference to a "female body part simply clarified the sexual nature of the other sentences. This illustrated that the 'experiences' Oldson referred to throughout the excerpt were sexual experiences, *either* real or imagined." (Emphasis supplied.) But for "C.B.," Oldson's implied sexual experience was with Beard, it was real, and it happened on the night that Beard disappeared.

(c) The Majority's Reasoning Is Wrong

The majority's reasoning is contrary to the court's ruling and internally inconsistent. The court did not allow the jury to consider the evidence as proof that Oldson had lied when he said he was a virgin until he married. Nor did it admit this evidence as a confession, i.e., to show that Oldson sexually assaulted Beard on the night that she disappeared or on any other night. And nothing in his excerpt refers to an assault or to sexual contact with Beard on the night she disappeared. Under the court's limiting instruction, the jury's consideration of exhibit 270 was limited to determining whether Oldson lied when he told others that he had never had a sexual relationship with Beard. The court did not implicitly determine that exhibit 270 was relevant to show that Oldson had sexual contact with Beard on the night that she disappeared. It explicitly instructed the jurors to consider exhibit 270 *only* for deciding "what if any knowledge [Oldson] had of . . . Beard, the nature and extent of any relationship he and . . . Beard may have had, and for the purpose of evaluating [Oldson's] credibility with respect to any other statements that he made." So the jury was not asked to decide whether exhibit 270 showed Oldson had sexual contact with Beard on the night she disappeared.

Even if the court had given such an instruction, exhibit 270 is completely speculative to prove Oldson had sexual contact with Beard on the night she disappeared. To begin with, it is too speculative to determine that Oldson was even writing about Beard. In this regard, the majority incorrectly states that Oldson only referred to "C.B." by initials. He also referred to a "K.P." by initials. The word in the superscripted parenthetical beside the initials "K.P." is illegible and its meaning unclear. But other names in this excerpt also have superscripted parentheticals with no comprehensible common meaning. So to the extent that the majority has interpreted the superscript beside the initials "K.P." to be a last name, it

is speculating. Additionally, as Oldson's attorney argued at trial, Oldson also referred to "Cathie" in this excerpt. He also referred to "Cathie" in two additional excerpts and directly referred to "Beard" in another excerpt.

So the trial court knew, or should have known, that allowing the jurors to determine that "C.B." referred to Beard would be a speculative inference. The other listed names did not cure that speculation. And because it was speculative to conclude that "C.B." was a reference to Beard, the inference that Oldson was writing about his sexual experiences with her was unreasonable under rule 403.

The majority implausibly doubles down on this speculation. Even if Oldson's statement in exhibit 270 had been sufficient to show that he had a sexual relationship with Beard, it would have been too speculative to show that he had sexually assaulted her on the night she disappeared. The trial court at least recognized the speculative inferences required for that conclusion because it did not instruct the jury to consider it for that purpose. Even the majority recognizes that some of Oldson's listed experiences could have been fantasies. But it denies that Oldson's experience with "C.B." could have been a fantasy: "[I]t would not follow that because Oldson's sexual 'experiences' with the other women listed were fantasies, the 'most gratifying' 'experience' with 'C.B.' was also a fantasy."

Actually, it does follow. There was no logical reason to conclude that Oldson's gratifying experience with "C.B." was different in kind from his "comfortable" experience with Sandy. And by conceding that some of these "experiences" could have been fantasies, the majority undermines its own reasoning that Oldson's experience with "C.B." was real—even more so its reasoning that Oldson was writing about sexually assaulting Beard on the night she disappeared.

And exhibit 270 was inadmissible character evidence under rule 404. To prove that Oldson was lying, the State needed to show that Oldson had a sexual relationship with Beard some

time before her disappearance. Contrary to the majority's statement, the court did not explicitly inform the jurors that they could not consider whether Oldson had sexual contact with any of the other women listed. It instructed them that they could consider exhibit 270 only to determine whether Oldson had a sexual relationship with Beard and to evaluate his credibility on other statements. Nor did the court instruct the jurors to consider the other listed names only to determine whether Oldson's reference to "C.B." was a reference to Beard. So the majority incorrectly reasons that the other names were only relevant to show that "C.B." was a reference to Beard and that this relevance did not depend upon whether Oldson's experiences with the other listed people were real or fantasies.

The only way that the jurors could have concluded from exhibit 270 that Oldson had a sexual relationship with Beard before she disappeared was by reasoning that he had actual sexual experiences with all of the people whom he listed in exhibit 270. Exhibit 270 is either too speculative to prove that his "experiences" with any of the listed people were real sexual experiences or it proves that they all were. So exhibit 270 put before the jurors Oldson's sexual experiences with many people, accompanied by the strong suggestion that he rated those experiences based on his unusual sexual preference for stomachs.

Finally, both the court's written order and limiting instruction show that it considered exhibit 270 relevant to prove Oldson's extrinsic sexual acts with Beard to prove his consciousness of guilt: i.e., that he was lying when he said that he had never had a sexual relationship with Beard. So under rule 404(3), before admitting the statement, the court had to find by clear and convincing evidence that the State had proved the extrinsic sexual act(s). It did not. This fatal procedural defect is apparently why the majority unconvincingly opines that exhibit 270 was sufficient to prove that Oldson sexually assaulted Beard on the night she disappeared. Only by claiming that the

alleged sexual contact was intrinsic to the murder charge—i.e., Oldson was writing about sexually assaulting Beard on the night he murdered her—can the majority avoid the procedural requirement under rule 404(3).

But even if that procedural defect did not exist, the majority opinion is unpersuasive. The question is not whether the State's evidence can support any inference supporting the proof for which the evidence was offered. The question is whether it can support a *reasonable* inference that does not rest on speculation or propensity reasoning.

In sum, I conclude that the court erred in admitting exhibit 270 to show that Oldson had lied when he said he never had a sexual relationship with Beard. Concluding that Oldson was writing about Beard in this excerpt required speculation. Even if exhibit 270 could show that he was writing about Beard, it could not show that he had sexually assaulted her on the night she disappeared. And concluding that Oldson was writing about a sexual experience with Beard rested on the inference that Oldson was writing about his sexual experiences with all of the people he listed in exhibit 270. The inference that he had listed his sexual experiences could not be separated from his first statement, showing an unusual sexual preference for the stomach. In context, exhibit 270 listed his sexual experiences that coincided with his stomach fetish. The potential for jurors to reason that he acted in accordance with a deviant sexual trait outweighed any probative value of speculative evidence.

V. TRIAL COURT'S IMPROPER ADMISSION OF JOURNAL EXCERPTS WAS HARMLESS ERROR

In summary, I conclude that the court erred in admitting eight of the nine redacted excerpts from Oldson's journal. In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the error was

harmless beyond a reasonable doubt.[60] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered was surely unattributable to the error.[61] If the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.[62]

I believe that the court improperly admitted exhibit 266 to show Oldson's motive for killing Beard: he sexually assaulted her when she rejected him and then killed her. It improperly admitted the remaining seven journal excerpts to show his consciousness of guilt.

But one journal excerpt did show that Oldson had guilty knowledge of Beard's murder. The court properly admitted exhibit 267 for that purpose.

In exhibit 267, the court admitted this redacted statement:

> I really have no idea about what to do or where to go. My first priority is to get rid of something A.S.A.P.! That is, if I can still find them. The only . . . link left between me and . . .
>
> But after that, I imagine I'll stay in the Midwest and try something. Maybe stick around here to work for Pop. He no doubt needs the help. And I could use the $ . . . .

From the bench, the court stated that Oldson's statement about the "only . . . link left" was more likely to be a reference to the Beard investigation than any other bad act Oldson had committed. The court ruled that exhibit 267 was admissible to show his consciousness of guilt, i.e., that he needed

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[60] *State v. Grant, ante* p. 163, 876 N.W.2d 639 (2016).

[61] *State v. Lavalleur*, 289 Neb. 102, 116, 853 N.W.2d 203, 215 (2014), *disapproved in part on other grounds* 292 Neb. 424, 873 N.W.2d 155 (2016).

[62] See *Grant, supra* note 60.

to destroy evidence, which the jury could infer related to his charge.

I agree with the court that a fact finder could reasonably infer from exhibit 267 that Oldson was concerned about destroying evidence related to the Beard investigation. He wrote this when he was serving a sentence for committing an assault in Burwell, so he would not have been worried about evidence connected to that crime. Beard's murder was the only active investigation against him, and he knew he was a suspect. Moreover, in Oldson's other journal entries, he was not reticent about expounding on his moral failings, sexual fantasies, or sexual behaviors that he needed to control or abandon. So his attorney's argument that in exhibit 267, he could have been writing about a character flaw or pornography that he needed to "get rid of" was not persuasive. The court correctly determined that the statement supported a reasonable inference of his guilty knowledge.

Additionally, the State presented other, stronger evidence of his consciousness of guilt. In January 2012, after officers arrested Oldson, they recorded his conversations with his wife. These conversations showed that he was concerned that investigators might have found evidence linking him to Beard's murder.

In the 2012 conversations, Oldson was generally trying to explain why officers had arrested him for murder and speculating that new DNA testing techniques might have shown his DNA was mixed with Beard's DNA on some item or on an area of his father's pickup. To rationalize how investigators might find a mixed DNA sample in his father's pickup, Oldson admitted that he had struggled with Beard and tried to pull her into the pickup with him:

> [Oldson:] Well, we don't know that they found nothing, they probably found plenty and they just probably never told anybody what they found [be]cause they couldn't attach . . . they couldn't do anything with it at the time.

> But see now with the techniques and they think ooh-ooh, no, we've got something. I don't know.
>
> [Wife:] But how could they have found anything? If there was nothing to find Johnny? If you didn't do it.
>
> [Oldson:] That's the thing, see, ... All they have to do is find a spot, any one spot, anywhere, where your DNA and the victim's DNA are in the same place. That's all they've got to find. They don't have to prove anything else anymore.
>
> [Wife:] Are you saying that's true?
>
> [Oldson:] [inaudible] I tried, I wrestled around with Cathy Lee Beard, I tried to pull her into the pickup, saying, "Come on, let's go do it." "No, I don't like you that way." And she may have bumped the side of the pickup, she may have put her hand down on the seat, she may have, you know, may have whatever—may have fallen down on the floor. I don't know.

In another excerpt, Oldson speculated about where investigators might find a mixed DNA sample from Beard and himself:

> You know, what could it be? . . . I'm a brick layer, alright? What if they say with tests we found her DNA on your brick hammer? Or we found DNA on the bumper of your truck. You hit her with it—you killed her that way. Or you—we found DNA on a gas can—you torched her and set her on fire, you know. Or you know—who knows—I have no idea what, I have no idea what they are going to find. Because, and here's the thing, it's not gonna worry me—I've [sic] never was denying that we mingled. That our DNA would have mingled somewhere or another because I grabbed her by the arm and I tried to pull her into the truck and she struggled back—and so I had ahold of her and she was pushing against me—I think she put her hand down on the seat once to balance herself as she tried to pull away so her DNA was in the truck, her DNA was on me—sure.

But in 1989, Oldson gave a different version of his physical interactions with Beard. On June 2, Oldson told local officers only that he had tried to get Beard to come with him and that she had refused. He got into the pickup after she refused and, in the the rearview mirror, saw her leave with someone else. A retired investigator for the Nebraska State Patrol testified that on June 5, Oldson said that while he was standing outside of the open passenger door of his father's pickup, he asked Beard again if she wanted to do something and she again declined. Oldson admitted that he grabbed her by the wrists and was going to pull her inside the pickup, but he said that she pulled away. The investigator's testimony was consistent with his report. Oldson did not say that he was inside the pickup when he grabbed Beard's wrists or that he had struggled with her inside the pickup.

From these conversations, a juror could have reasonably inferred that Oldson changed his story because he was concerned that new DNA testing procedures would reveal incriminating evidence that Beard had been inside the pickup, contrary to what he had stated in 1989. And Beard's DNA on his hammer or the pickup's bumper would have been consistent with the blunt force injuries that Beard sustained. In sum, Oldson's attempt to explain why investigators might find such evidence strongly supported an inference of his guilty knowledge that such evidence existed. And his concern in 2012 that a mixed DNA sample might be found on his hammer or other items sufficient to have caused Beard's death is strikingly similar to the concern expressed in exhibit 267 that he had to get rid of the "only . . . link left between me and . . . ."

This evidence was before the jurors. The State played the excerpts from the telephone conversations. And the prosecutor specifically argued in closing that Oldson had changed his story in his telephone conversations with his wife and said for the first time that he had wrestled with Beard and tried to pull her into the pickup with him. So there was strong cumulative evidence of Oldson's consciousness of guilt to offset the

court's erroneous admission of speculative evidence for that proof. Because the evidence reasonably supported a consciousness of guilt inference, the jurors could properly rely on it to find Oldson guilty of murder. And because he admitted to trying to pull Beard into the pickup with him when she rejected him, the jurors could have reasonably inferred from the 2012 conversations that he had a motive for murder: forcing sexual contact upon Beard or covering up that crime.

To sum up, the speculative evidence that the court erroneously admitted was cumulative to evidence that the court properly admitted for the same purpose. Because I agree with the majority that other sufficient competent evidence supported Oldson's conviction, I conclude he was not prejudiced by the erroneous admissions of his journal excerpts.

Miller-Lerman, J., joins in this concurrence.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Trey T. Carpenter, appellant.

880 N.W.2d 630

Filed June 10, 2016. No. S-15-697.

1. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
2. **Trial: Evidence: Appeal and Error.** A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of an abuse of discretion.
3. **Convictions: Evidence: Appeal and Error.** In reviewing a claim that the evidence was insufficient to support a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
5. **Trial: Evidence: Words and Phrases.** The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection. These two aspects of "opening the door" may be referred to as "specific contradiction" and "curative admissibility," respectively.
6. **Evidence: Witnesses.** Neb. Rev. Stat. § 27-608(2) (Reissue 2008) does not affect the admissibility of evidence that has become relevant and admissible under the specific contradiction doctrine.

7. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Buffalo County: John P. Icenogle, Judge. Affirmed.

Thomas S. Stewart, Deputy Buffalo County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Miller-Lerman, J.

NATURE OF CASE

Trey T. Carpenter was convicted in the district court for Buffalo County of possession of methamphetamine with intent to deliver. The court sentenced Carpenter to imprisonment for 5 to 15 years. Carpenter appeals his conviction and sentence. He claims that the court improperly allowed the State to present on rebuttal extrinsic evidence of a prior incident in order to impeach his testimony which he presented in his own defense. He also claims that there was insufficient evidence to support his conviction and that the court imposed an excessive sentence. We affirm Carpenter's conviction and sentence.

STATEMENT OF FACTS

On the evening of November 20, 2014, Officer Paul Jon Loebig of the Kearney Police Department was parked in his patrol vehicle observing activity at a nearby apartment building. A car approached and parked across the street. Loebig, who was familiar with both Carpenter and his brother Eli Carpenter (Eli), recognized the car as one belonging to Eli.

Loebig saw an unidentified person leave the back seat of the car and go to an apartment. Loebig then saw Eli get out of the driver's side of the car while Carpenter got out of the passenger side. As he watched the two getting out of the car, Loebig heard what he thought sounded like a glass pipe landing on concrete.

As Carpenter and Eli walked away, Loebig pulled up to the car and shined a light underneath it. He observed a glass pipe on the ground on the passenger side. Loebig got out of his patrol vehicle and, after putting on gloves, picked up the glass pipe. He determined that it was the type of pipe used to smoke methamphetamine, and he observed inside the pipe some white residue which he believed to be methamphetamine. Loebig called for a K-9 unit to be brought to the scene, and as he was waiting for it to arrive, Carpenter and Eli returned to the car.

Loebig asked Carpenter to come to his patrol vehicle to talk with him while another police officer talked with Eli. Loebig told Carpenter that he had found the pipe, and Carpenter admitted that the pipe had fallen out of his pocket. Carpenter consented to a pat-down search, and Loebig placed Carpenter into the back seat of his patrol vehicle.

After the K-9 unit arrived, the dog sniffed around Eli's car. The dog sniff indicated that there were controlled substances inside the car. Loebig and another officer then searched the car. Loebig opened the passenger-side door and noted a strong odor of marijuana. In the center console, he found a Tupperware container which held a small baggie of marijuana, a small baggie that contained some small blue pills, and two larger bags of a white crystalline substance, which a field test indicated was methamphetamine. The officers found various other items of drug paraphernalia inside the car, including small measuring cups. Loebig also observed a black backpack on the floor on the passenger side of the front seat. Inside the backpack, Loebig found Carpenter's state identification card and a baggie that contained a small amount of a white crystalline

substance that field-tested positive for methamphetamine. After the search, Loebig arrested Carpenter and brought him to the jail. Loebig asked Carpenter whether he would speak with the police department's drug investigator, and Carpenter replied that "he would talk to him just to tell him that everything in the car belonged to him."

The State charged Carpenter with two counts: (1) possession of a controlled substance, methamphetamine, with intent to deliver (at least 28 grams but less than 140 grams) and (2) possession of a controlled substance, morphine. The charge of possession of morphine was dismissed at trial after the State failed to adduce evidence that the blue pills found in the car were morphine.

Loebig testified at trial regarding the events of November 20, 2014, as set forth above. The State also presented the testimony of a drug analyst from the Nebraska State Patrol crime laboratory who testified that she had tested the white crystalline substance that was found in the search of the car, that the substance was found to be methamphetamine, and that its weight was 32.46 grams. Another witness called by the State was Gabe Kowalek, a narcotics investigator with the Kearney Police Department. Kowalek testified regarding his training and experience as a narcotics investigator, and he testified that he had assisted Loebig in processing the evidence after Carpenter's arrest. Kowalek opined that the amount of methamphetamine found in the search of the car was considered to be "typical of distribution weight" and that other items found in the search were indicative of distribution.

In his defense, Carpenter presented testimony by his mother. She testified that on the evening of November 19, 2014, she had seen a Tupperware container in the sole possession of her other son, Eli, and that it was the same container that was found in the November 20 search of Eli's car. She also stated that she was testifying in this case "[b]ecause [Carpenter] sat in jail for like five months for something I knew wasn't his . . . ."

Carpenter also testified in his own defense. He admitted that the backpack and the small amount of methamphetamine inside it were his, but he testified that he did not know about the 32.46 grams of methamphetamine in the Tupperware container in Eli's car. Carpenter admitted that he was addicted to methamphetamine. But what is important for our purposes on appeal is his direct testimony that he did not "deal, sell, [or] give away methamphetamine" and that he was not "working in concert with [Eli] for the sale of methamphetamine." He testified to the same effect on cross-examination. Carpenter further testified that when he told Loebig that everything in the car was his, he was referring only to the small amount of methamphetamine inside his backpack and he was not aware of the larger amount of methamphetamine in the Tupperware container.

For its rebuttal, the State made an offer of proof of the proposed testimony by Kowalek and by a drug investigator for the Buffalo County sheriff's office. The two officers would testify to the jury that in September 2014, they were told by a confidential informant that he could buy methamphetamine from Carpenter. The officers then set up a controlled purchase and listened in on a transaction in which the confidential informant bought methamphetamine from Carpenter. A warrant for Carpenter's arrest was issued as a result of the September incident, and charges against Carpenter related to the September incident were pending at the time of trial in this case.

Following the State's offer of proof, the district court ruled that it would allow the State to present the officers' testimony on rebuttal. The officers thereafter testified to the jury regarding the September 2014 controlled purchase from Carpenter. After the officers testified, the court admonished the jury that the "evidence was received only for the limited purpose of [its] evaluation of the testimony of [Carpenter]" and that the jury "must consider that evidence for that limited purpose and for no other." When it submitted the case to the jury, the

court gave an instruction in which it referred to the officers' testimony in the State's rebuttal and stated that the evidence "was received only for the limited purpose of your evaluation of the testimony of [Carpenter], and not whether he acted in conformity in this matter with his alleged acts in September of 2014."

The jury found Carpenter guilty of possession of methamphetamine with intent to deliver, and it found that the amount of methamphetamine possessed by Carpenter was 32.46 grams. The court entered judgment on the verdict. The court thereafter sentenced Carpenter to imprisonment for "a mandatory minimum of 5 years and no more than 15 years."

Carpenter appeals his conviction and sentence.

ASSIGNMENTS OF ERROR

Carpenter claims that the district court erred when it allowed the State to rebut his testimony by presenting the testimony of the officers regarding the September 2014 incident. He also claims that there was insufficient evidence to support his conviction and that the court imposed an excessive sentence.

STANDARDS OF REVIEW

[1,2] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion. *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757, (2015). A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of an abuse of discretion. *State v. Oliveira-Coutinho*, 291 Neb. 294, 865 N.W.2d 740 (2015).

[3] In reviewing a claim that the evidence was insufficient to support a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support

the conviction. *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

[4] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Russell*, 292 Neb. 501, 874 N.W.2d 8 (2016).

ANALYSIS

Court Did Not Err When It Allowed the State to Present Rebuttal Evidence to Specifically Contradict Carpenter's Direct Testimony.

Carpenter claims that the district court erred when it allowed the State to present rebuttal evidence consisting of the officers' testimony regarding Carpenter's sale of methamphetamine during the September 2014 controlled purchase to contradict Carpenter's direct testimony given in his defense. We determine that the officers' testimony was admissible to specifically contradict Carpenter's direct testimony to the effect that he did not distribute methamphetamine. Therefore, the court did not abuse its discretion when it admitted the officers' testimony.

Carpenter contends that the purpose of the officers' testimony regarding the September 2014 incident was to impeach his testimony which he presented in his defense and that such rebuttal evidence could not be used for that purpose under Neb. Rev. Stat. § 27-608 (Reissue 2008). Section 27-608(1) generally provides that, subject to certain limitations, reputation or opinion evidence may be used to attack a witness' credibility. However, § 27-608(2) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, . . . may not be proved by extrinsic evidence." Nevertheless, § 27-608(2) provides that if such instances of conduct are determined to be probative of the witness' truthfulness or untruthfulness, they may be inquired into only on cross-examination of the witness.

Carpenter argues that the officers' testimony was extrinsic evidence of specific instances of conduct and that under

§ 27-608(2), such extrinsic evidence could not be used to impeach his testimony. Carpenter notes that under § 27-608(2), such specific instances of conduct may be "inquired into on cross-examination of the witness," but that the State in this case made no effort to cross-examine him on his claim he did not sell methamphetamine and that it instead offered only extrinsic evidence of the incident in its rebuttal.

The State argues in response that § 27-608(2) "does not apply where the defendant takes the stand and lies." Brief for appellee at 5. The State contends that Carpenter could not falsely testify that he did not deal drugs and then claim that the State was powerless to rebut Carpenter's untruths. We understand that the State further suggests that because the charge against Carpenter was possession of methamphetamine with intent to deliver, the issue of "intent to deliver" was a fact question about which the September 2014 incident was highly relevant to the fact finder's consideration.

The State relies on a line of federal cases beginning with *Walder v. United States*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954), which is generally regarded as the source of the "specific contradiction doctrine." In *Walder*, the U.S. Supreme Court affirmed a conviction in a case where the defendant had testified on direct examination in his own defense that "he had never dealt in or possessed any narcotics." 347 U.S. at 65. The trial court in *Walder* allowed the prosecution to present evidence of a prior incident wherein the defendant had been in possession of heroin. The U.S. Supreme Court stated in *Walder* that "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." 347 U.S. at 65.

The specific contradiction doctrine is said to apply when one party has introduced admissible evidence that creates a misleading advantage and the opponent is then allowed to introduce previously suppressed or otherwise inadmissible evidence to counter the misleading advantage. *State v. Wamala*,

158 N.H. 583, 972 A.2d 1071 (2009). It is not enough that the opponent's contradictory proffered evidence is merely relevant; the initial evidence must have reasonably misled the fact finder in some way. *Id*. Summarizing the case law, commentators generally agree that although the rules of evidence do not explicitly recognize the admissibility of contradiction evidence, admissibility can be inferred from the relevance rules, Neb. Rev. Stat. §§ 27-401 and 27-402 (Reissue 2008), defining relevance and presuming admissibility, respectively. See 27 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6096 (2d ed. 2007).

In their consideration of the specific contradiction doctrine, other state and federal courts have concluded that rules of evidence similar to § 27-608 do not prohibit the admission of evidence that has the purpose of specifically contradicting a fact asserted in direct testimony by the defendant in a criminal case. In *People v. Thomas*, 345 P.3d 959, 966 (Co. App. 2014), the court concluded that "evidence may be introduced that specifically contradicts a defendant's direct testimony" and that "CRE 608(b) [the Colorado equivalent of § 27-608(2)] is no impediment to the introduction of such evidence." In addition to finding that the specific contradiction doctrine was consistent with the rules of evidence, the Colorado court referred to federal cases explaining and applying the specific contradiction doctrine and further concluded that the specific contradiction doctrine was consistent with Colorado precedent "involving a defendant's opening the door to rebuttal evidence." *People v. Thomas*, 345 P.3d at 968.

Nebraska jurisprudence also recognizes the concept that a party may "open the door" to evidence that otherwise would have been irrelevant. See *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010), and *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). It has been noted that courts often use the concept of "opening the door" to describe two different evidentiary concepts—specific contradiction and curative admissibility. See Francis A.

Gilligan & Edward J. Imwinkelried, *Bringing the "Opening the Door" Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 Santa Clara L. Rev. 807 (2001) (arguing that those two concepts differ and that courts should not treat them as single concept at risk of confusing them). See, also, *State v. Wamala*, 158 N.H. at 589, 972 A.2d at 1076 (stating that "[t]he opening the door doctrine comprises two doctrines, the 'curative admissibility' and 'specific contradiction' doctrines").

[5] We have described "opening the door" as a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection. *Huber v. Rohrig, supra*; *Sturzenegger v. Father Flanagan's Boys' Home, supra*. Thus, we have used "opening the door" to describe both specific contradiction, i.e., responding to "admissible evidence which generates an issue," and curative admissibility, i.e., responding to "inadmissible evidence admitted by the court over objection." Although we have not referred to the "specific contradiction doctrine" in our discussion of "opening the door," our cases illustrate our acceptance of the concept and we apply it in this case.

In the present case, the parties do not contend that Carpenter's testimony was inadmissible evidence. Given the rules of evidence and our case law, we analyze the admissibility of the State's challenged rebuttal testimony under the specific contradiction doctrine, which relates to evidence offered to respond to admissible evidence presented by the other party which generates an issue which calls for a response. The question then is whether the evidence presented by Carpenter, consisting of his direct testimony that he did not distribute methamphetamine and that he did not work in concert with Eli to do so, generated an issue to which the State needed to respond and, if so, whether the State was properly allowed to present evidence that was not

previously relevant or perhaps not previously admissible. As we explain below, we conclude that the State's offer of rebuttal evidence of the September 2014 controlled purchase of methamphetamine was warranted as relevant and not otherwise inadmissible.

Carpenter asserts that the State's challenged rebuttal evidence was offered to impeach Carpenter and that admission of this evidence violated § 27-608(2). Carpenter frames his argument under § 27-608(2), and we do likewise. We reject Carpenter's argument that § 27-608(2) prohibits admission of extrinsic evidence of his specific conduct in September 2014. Instead, we agree with the reasoning in *People v. Thomas*, 345 P.3d 959 (Co. App. 2014), and the federal criminal cases cited therein, which have concluded that where the evidence is not offered for the sole purpose of proving a witness' character for truthfulness, evidence rules similar to § 27-608(2) do not prohibit the admission of evidence that is intended to specifically contradict a criminal defendant's direct testimony. It was stated in 27 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 6096 at 665-66 (2d ed. 2007):

> Testimony on direct by a defendant in a criminal case can open the door to admission of extrinsic evidence to contradict even though the contradictory evidence is otherwise inadmissible and, thus, collateral. For example, if defendant on direct denies committing prior bad acts, the defendant may be contradicted with extrinsic evidence of such acts even though that evidence would be inadmissible to prove conduct under Rule 404 or character for truthfulness under Rule 608(b). This open-door approach has been justified on the ground that the defendant should not be permitted to engage in perjury, mislead the trier of fact, and then shield herself from impeachment by asserting the collateral matter doctrine.

Accord *Thomas, supra*. We note particularly that in this case, as in *Thomas*, the testimony sought to be contradicted by

the State's rebuttal evidence was the defendant's direct testimony rather than testimony elicited by the State on cross-examination. Whether the specific contradiction doctrine may be applied to testimony that the State elicits from the defendant on cross-examination is not at issue in this case.

Section § 27-608(2), upon which Carpenter relies, excludes evidence offered "for the purpose of attacking or supporting [the witness'] credibility." Thus, by its terms, § 27-608(2) concerns itself with evidence the sole purpose of which is to attack the witness' credibility by proving instances in which the witness was shown to be dishonest or untruthful. In this respect, we note that in *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 347, 754 N.W.2d 406, 426 (2008), where appellant challenged the admission of evidence under both § 27-608(2) and Neb. Rev. Stat. § 27-404(2) (Reissue 1995), we stated that § 27-608(2)

> applies when extrinsic evidence is offered to impeach a witness, to show the character of the witness for untruthfulness—in other words, where the only theory of relevance is impeachment by prior misconduct. [Section 27-608(2)] affects only evidence of prior instances of conduct when properly relevant solely for the purpose of attacking or supporting a witness' credibility . . . .

In our consideration of the challenge under § 27-404(2), in *Sturzenegger*, we continued and observed that § 27-608(2) "in no way affects the admission of evidence of such prior acts for other purposes under [§ 27-]404(2)." 276 Neb. at 347, 754 N.W.2d at 426. Under the reasoning in *Sturzenegger*, § 27-608(2) does not prevent the admission of the challenged evidence where such challenged evidence is admissible under another rule or, by extension, a doctrine derived from the rules.

[6] Similarly to *Sturzenegger*, we determine that § 27-608(2) does not affect the admissibility of evidence that has become relevant and admissible under the specific contradiction doctrine. When evidence is admissible pursuant to the specific

contradiction doctrine, the purpose of the evidence is limited to disproving a specific fact to which the witness testified rather than generally attacking the witness' credibility. In other words, § 27-608(2) applies to evidence that is intended to show that the witness is generally untruthful and therefore that the witness' testimony is not credible, whereas the specific contradiction doctrine applies to evidence that is intended to disprove a specific fact to which the witness testified. Thus, where the evidence has been made relevant for the purpose of responding to a purported fact contained in the witness' testimony and the evidence was not offered solely for the purpose of attacking the witness' credibility, the evidence becomes admissible under the specific contradiction doctrine.

In the present case, Carpenter testified on direct that he did not "deal, sell, [or] give away methamphetamine." In response, the State offered evidence in rebuttal that in September 2014, Carpenter had sold methamphetamine to a confidential informant. The State's offered evidence became relevant under the specific contradiction doctrine in order for the State to respond to the issue of fact, generated by Carpenter's testimony, regarding whether or not Carpenter distributed methamphetamine. The evidence was not offered for the purpose of generally attacking Carpenter's credibility, a concern of § 27-608, but instead to contradict specific testimony regarding a factual matter.

We note that the court's instruction to the jury in this case was consistent with the purpose for which the evidence of the September 2014 controlled purchase was admitted, i.e., to specifically contradict a statement by Carpenter. The court instructed the jury that it was to use the evidence for "evaluation of the testimony of [Carpenter], and not whether he acted in conformity in this matter with his alleged acts in September of 2014." This instruction was carefully crafted. The instruction limited the jury's use of the State's rebuttal evidence to the purpose for which it was received, i.e., to evaluate Carpenter's specific testimony that he did not distribute methamphetamine, and also admonished the jury that the

evidence was not to be used to show Carpenter's character or propensity to act in a certain way.

We conclude that under the specific contradiction doctrine, § 27-608(2) did not prohibit the admission of the State's relevant rebuttal evidence regarding the September 2014 incident offered for the purpose of specifically contradicting Carpenter's direct testimony that he did not "deal, sell, [or] give away methamphetamine." The district court therefore did not abuse its discretion when it allowed the State on rebuttal to present the officers' testimony regarding the September 2014 incident.

There Was Sufficient Evidence to Support Carpenter's Conviction.

Carpenter next claims that there was not sufficient evidence to support his conviction. We reject this claim.

The jury found Carpenter guilty of possession of methamphetamine with intent to deliver, a violation of Neb. Rev. Stat. § 28-416 (Cum. Supp. 2014), and it found that the amount of methamphetamine possessed by Carpenter was 32.46 grams. The evidence presented by the State, as set forth in the statement of facts above, was sufficient for the jury to find that the white crystalline substance found in the car was methamphetamine and that the quantity was 32.46 grams. The jury also could have found from the evidence that the methamphetamine was in Carpenter's possession and that he possessed it with the intent to deliver.

Carpenter argues that the State's evidence was insufficient because he presented evidence which indicated that the methamphetamine belonged to his brother Eli. Carpenter testified in his defense that he was merely a passenger in the car and that he did not know the two large bags of methamphetamine were in the car. Carpenter testified that Eli possessed the methamphetamine without Carpenter's knowledge. In addition to his own testimony, Carpenter notes his mother's testimony that she saw Eli with the Tupperware container of methamphetamine

on the day prior to the arrest and that she was told he intended to sell it.

In reviewing for sufficiency of the evidence, we do not resolve conflicts in the evidence or pass on the credibility of witnesses, because such matters are for the finder of fact. See *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015). By its verdict, the jury as fact finder determined, based on all the evidence, that the crime charged had been committed. The jury evidently found the State's evidence to be more credible than the evidence Carpenter presented in his defense. We do not question the jury's determinations of credibility on appeal; instead, we determine that the evidence admitted at trial, viewed and construed most favorably to the State, was sufficient to support Carpenter's conviction for possession of methamphetamine with intent to deliver. We reject Carpenter's claim that the evidence was not sufficient to support his conviction.

Court Did Not Impose an Excessive Sentence.

Carpenter finally claims that the sentence of imprisonment for 5 to 15 years imposed by the district court was excessive. We conclude that the sentencing was within statutory guidelines and that the court did not abuse its discretion.

Carpenter was convicted of possession of methamphetamine with intent to deliver, and the jury found that the amount of methamphetamine possessed by Carpenter was 32.46 grams. Therefore, the offense was a Class IC felony under § 28-416(10)(b). The penalty range for a Class IC felony was imprisonment for a mandatory minimum of 5 years and a maximum of 50 years. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014). Therefore, Carpenter's sentence of imprisonment for 5 to 15 years is within statutory limits.

[7] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion

in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015). With regard to the relevant factors that must be considered and applied, we have stated that when imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id.*

Carpenter argues generally that the district court "did not seriously consider all the mitigating factors" set forth above. Brief for appellant at 11. However, Carpenter recognizes that the district court had no choice but to impose the mandatory minimum sentence of imprisonment for 5 years. He argues instead that by imposing the mandatory minimum rather than a higher minimum, the court showed that it had "doubts" as to his guilt but was "handcuffed" by the mandatory minimum sentence. *Id.*

Carpenter makes only a general argument that the court did not consider the mitigating factors, and he does not specify any particular factors that were not given adequate consideration. As he acknowledges, the court's discretion was limited by the mandatory minimum set forth by statute. The court imposed a sentence that was at the lower end of the statutory range and that would allow Carpenter to be eligible for parole after serving the mandatory minimum of 5 years. We conclude that Carpenter has failed to show that the district court abused its discretion or imposed an excessive sentence.

CONCLUSION

Having rejected Carpenter's assignments of error, we affirm his conviction for possession of methamphetamine with intent to deliver and the sentence of imprisonment for 5 to 15 years.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Byron Wilkinson, Jr., appellant.

881 N.W.2d 850

Filed June 17, 2016. No. S-15-1002.

1. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Pleas: Appeal and Error.** A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.
3. **Indictments and Informations: Appeal and Error.** An information that was unchallenged in the trial court must be held sufficient on appeal unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted.
4. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits unless the trial court abused its discretion.
5. **Pleas.** A plea of no contest is equivalent to a plea of guilty.
6. ____. To support a plea of guilty or no contest, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
7. **Pleas: Effectiveness of Counsel.** When a court accepts a defendant's plea of guilty or no contest, the defendant is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.
8. **Pleas.** A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily.
9. **Criminal Law: Intent: Public Officers and Employees.** The mens rea of obstructing government operations is an intent to frustrate a public servant in the performance of a specific function.
10. **Indictments and Informations: Complaints: Waiver: Pleas: Jurisdiction.** A defect in the manner of charging an offense is waived

if, upon being arraigned, the defendant pleads not guilty and proceeds to trial, provided the information or complaint contains no jurisdictional defect and is sufficient to charge an offense under the law.

11. **Indictments and Informations.** The function of an information is twofold: With reasonable certainty, an information must inform the accused of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.
12. **Indictments and Informations: Due Process.** Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is normally sufficient. However, when the charging of a crime in the language of the statute leaves the information insufficient to reasonably inform the defendant as to the nature of the crime charged, additional averments must be included to meet the requirements of due process.
13. **Indictments and Informations.** It is a general rule of criminal procedure that, when under a statute an offense may be committed by several methods, the indictment or information may charge that it was committed by any or all such methods as are not inconsistent with, or repugnant to, each other.
14. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense as well as (7) the nature of the offense and (8) the violence involved in the commission of the crime.

Appeal from the District Court for Cheyenne County, Travis P. O'Gorman, Judge, on appeal thereto from the County Court for Cheyenne County, Paul G. Wess, Judge. Judgment of District Court affirmed.

Thomas M. Sonntag, of Sonntag, Goodwin & Leef, P.C., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, and Kelch, JJ.

Heavican, C.J.

NATURE OF CASE

Byron Wilkinson, Jr., appeals from the district court's order affirming his conviction and sentence for obstructing government operations in violation of Neb. Rev. Stat. § 28-901 (Reissue 2008). The State alleges that Wilkinson interfered with the prosecution of a city employee in order to prevent that employee from being fired. Wilkinson pleaded no contest, and the county court sentenced him to 30 days in jail, plus court costs. Wilkinson appealed, and the district court affirmed. Wilkinson appealed again, and we moved the case pursuant to our power to regulate our docket and that of the Nebraska Court of Appeals. We now affirm Wilkinson's conviction and sentence.

BACKGROUND

According to the factual basis provided by the State below, on January 29, 2014, police in Sidney, Nebraska, received a telephone call from a woman complaining that a man had been standing outside her bedroom window observing her as she wore only underwear. She believed the man was her ex-boyfriend, John Hehnke, the public works director for Sidney. Officer Tim Craig responded to the call and found partial shoeprints outside the window. Craig went to Hehnke's residence, where, after questioning, Hehnke admitted to looking into the woman's window. Craig issued Hehnke a citation for disturbing the peace, which Hehnke signed.

Under Neb. Rev. Stat. § 29-424 (Reissue 2008), "[a]s soon as practicable, the copy [of a citation that is] signed by the person cited shall be delivered to the prosecuting attorney." But before Hehnke's citation could be delivered to the Cheyenne County Attorney, Wilkinson, who was the chief of the Sidney

Police Department, pulled it from the packet of citations to be delivered.

When Craig asked about the missing citation, Wilkinson replied with the following e-mail:

> "There is no secret that the major [sic] and I became actively involved in that for a number of reasons. The most significant of these are political and perhaps my least favorite issues to become entangled with. There is no clear solution that will keep everyone happy and satisfy all the interests in play. [Hehnke] is a key player in the administration of the city. His presence and ability will be critical to what we are about to undertake and many projects will be compromised if he were out of action. There is a very good chance that if [Hehnke] was formally charged in this incident, thus making formal charges public, he would be relieved of duty and terminated from employment. Against my better judgment and knowing that knowing [sic] would have ramifications, I pulled the paperwork in the best interests of the health of the city long-term, and documented the conversations and what ramifications a violation on [Hehnke's] part would be."

The record contains no indication of what type of administrative repercussions Hehnke may have faced in lieu of formal prosecution. The State filed its initial complaint on April 13, 2015, more than 14 months after the citation against Hehnke was first issued. Wilkinson had apparently retained possession of the citation until that time.

Before the county court, Wilkinson stated that Hehnke "was in charge of several million dollars' worth of street improvement projects. . . . The concern was that if this matter came to the light of day, involving . . . Hehnke, that . . . Hehnke would lose his job and those infrastructure projects would all be placed in jeopardy." Wilkinson had previously stated in an interview with law enforcement that he viewed the citation as "'a misdemeanor, chicken-shit disturbing the peace ticket that

[Wilkinson] helped keep it from becoming exposed to someone who was after him.'"

Wilkinson initially pleaded not guilty, but then changed his plea to no contest. Wilkinson never moved to quash the amended complaint, which mostly mirrored the language of § 28-901. The county court found Wilkinson guilty, sentenced him to 30 days in county jail, and ordered him to pay $55.48 in court costs. Wilkinson appealed, and the district court affirmed. He appealed again, and we moved the case pursuant to our power to regulate our docket and that of the Court of Appeals.

ASSIGNMENTS OF ERROR

Wilkinson assigns that the district court erred by (1) affirming the county court's finding that there was a sufficient factual basis to support the conviction, (2) finding that the amended complaint was adequate, and (3) finding that the sentence imposed was not excessive.

STANDARD OF REVIEW

[1] When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[1]

[2] A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion.[2]

[3] An information that was unchallenged in the trial court must be held sufficient on appeal unless it is so defective that by no construction can it be said to charge the offense for which the accused was convicted.[3]

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[1] *State v. Landera*, 285 Neb. 243, 826 N.W.2d 570 (2013).

[2] *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004).

[3] *State v. Golgert*, 223 Neb. 950, 395 N.W.2d 520 (1986).

[4] An appellate court will not disturb a sentence imposed within the statutory limits unless the trial court abused its discretion.[4]

ANALYSIS

Factual Basis for Plea.

In Wilkinson's first assignment of error, he argues that the county court erred by accepting his no contest plea, because it was not supported by a sufficient factual basis. Wilkinson asks the court to rule that the power of "immediate superintendence of the police," conferred upon a chief of police by Neb. Rev. Stat. § 16-323 (Reissue 2012), authorized him to choose, for political reasons, not to forward citations to the county attorney's office. We do not find that a chief of police has such authority under the facts of this case.

[5-8] A plea of no contest is equivalent to a plea of guilty.[5] To support a plea of guilty or no contest, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.[6] When a court accepts a defendant's plea of guilty or no contest, the defendant is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.[7] A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily.[8] Therefore, Wilkinson has not waived his challenge to the factual basis.

To ascertain whether the State's factual basis was sufficient, we must identify the elements of the statute under

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[4] *State v. Duncan*, 291 Neb. 1003, 870 N.W.2d 422 (2015).

[5] *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

[6] See *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

[7] *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

[8] See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

which Wilkinson was convicted and determine whether the factual basis meets those elements.[9] Under § 28-901(1), which Wilkinson was convicted of violating,

> [a] person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

Therefore, as relevant to the State's amended complaint, we must determine whether Wilkinson's act of removing Hehnke's citation was (1) an intentional act (2) obstructing, impairing, or perverting the administration of law or governmental function (3) by either physical force or obstacle, breach of an official duty, or any other unlawful act. Wilkinson appears to take issue with each of these three elements on appeal.

We first take up Wilkinson's argument as to the third element—the manner of act required—because his appeal focuses primarily on this point. The State asserts that Wilkinson breached an official duty by preventing the delivery of Hehnke's citation to the county attorney as required by § 29-424. Section 29-424, which sets forth procedures for issuing citations, states in relevant part, "As soon as practicable, the copy [of a citation that is] signed by the person cited shall be delivered to the prosecuting attorney."

Wilkinson asserts that his act was not a breach of § 29-424, because, as chief of police, he had broad discretion over all

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[9] See, e.g., *State v. Kennedy*, 251 Neb. 337, 557 N.W.2d 33 (1996); *State v. Johnson*, 242 Neb. 924, 497 N.W.2d 28 (1993); *State v. Glover*, 236 Neb. 402, 461 N.W.2d 410 (1990).

operations of the Sidney Police Department. He essentially argues that because police have a duty to "'preserve the public peace and to protect the lives and property of the citizens of the public in general,'"[10] the term "as soon as practicable" permits the chief of police to halt the delivery of any citation for any reason. But he cites only § 16-323 for this proposition, which statute does not authorize a chief of police to do so. Reading "immediate superintendence" in this manner is simply untenable. When questioned during oral arguments about from whence this power stems, Wilkinson was unable to identify any other source in law. Wilkinson asserts that a chief of police must have the discretion to prevent delivery of citations in order to guard citizens from abuses by officers who issue those citations.

On these facts, we disagree. We note that nothing in the record suggests that Craig was harassing or abusing Hehnke. To the contrary, Hehnke admitted committing the violation and was eventually prosecuted. Further, to the extent that a chief of police may have some discretion over the issuing of citations—a matter we decline to decide—we are certain that the facts of this case do not fall within the scope of that theoretical discretion. According to the factual basis provided by the State, which Wilkinson does not dispute, Wilkinson was motivated to prevent prosecution of Hehnke so that Hehnke could continue working as Sidney's public works director. Try as he may to paint this motive as benevolent, nothing can mask the politically driven, unethical nature of Wilkinson's behavior. Wilkinson's duty to preserve the public peace does not endow him with the unilateral power to determine that persons in political power should be immune from prosecution by mere fact of their office.

Therefore, we find that Wilkinson's actions were not justified by his position as chief of police. The factual basis

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[10] See *State v. Wilen*, 4 Neb. App. 132, 141-42, 539 N.W.2d 650, 658 (1995).

establishes that Wilkinson breached his official duty under § 29-424.

With the third element of obstruction of government operations established, we now turn to the second element: obstruction, impairment, or perversion of the administration of law or governmental function.

Wilkinson argues that he did not obstruct or impair any governmental function or the administration of law, because no public servant was engaged in a governmental function concerning the citation; Craig had completed his investigation, and the county attorney had not yet obtained the citation for prosecution. Therefore, Wilkinson claims, the citation remained under his control and no governmental function was obstructed, impaired, or perverted.

We disagree. As noted, § 29-424 required delivery of the citation to the county attorney "as soon as practicable." The plain meaning of "practicable" is "capable of being put into practice or of being done or accomplished" or "feasible."[11] Thus, the Sidney Police Department was entitled to control the citation only until it was feasible to deliver the citation to the county attorney. As discussed above, the facts of this case do not justify the delay Wilkinson caused to that delivery. By interfering with the delivery of the citation, Wilkinson impaired the county attorney's prosecutorial functions.

Wilkinson also argues that the second element of obstructing governmental functions was not met, because Hehnke was eventually prosecuted. Wilkinson reasons that he did not obstruct or impair any functions, because there was a period of almost 4 months remaining of the statute of limitations to prosecute Hehnke's citation at the time the amended complaint was filed against Wilkinson. In other words, in light of the fact that Wilkinson was caught violating the law and his wrong corrected, Wilkinson urges us to take a "no harm, no foul" view of his behavior.

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[11] Merriam-Webster's Collegiate Dictionary 912 (10th ed. 2001).

There is no doubt that Wilkinson actually obstructed, impaired, or perverted the governmental function of prosecuting Hehnke's citation. Wilkinson acknowledges that at the time he removed the citation from the package to be delivered, he did not intend to ever deliver the citation. Instead, he claims that he sought "administrative sanctions"—which he has not defined, has not cited authority for, and has not shown in the record. We will not retroactively declare that his actions, which he intended to have a permanent obstructing effect, were innocent merely because his obstruction was discovered in time to pursue charges against Hehnke.

[9] Finally, Wilkinson implies that the first element of obstruction, intent, was not met. He asserts that his intent was not to impair the administration of justice, but only to serve the community. But we have held that "'"[t]he mens rea of this crime is an intent to frustrate a public servant in the performance of a specific function."'"[12] Wilkinson's alleged ultimate goal of helping the city of Sidney is irrelevant; he intentionally interfered with the delivery of the citation. Therefore, the State showed a factual basis for the first element of obstructing government operations.

For these reasons, we agree with the district court that there was sufficient factual basis to support Wilkinson's conviction. Wilkinson's first assignment of error is without merit.

Adequacy of Amended Complaint.

In Wilkinson's second assignment of error, he challenges the adequacy of the amended complaint to inform him of the crimes with which he was charged. We find that the complaint was sufficient to charge the crime for which Wilkinson was convicted.

The only count contained in the amended complaint read, "[O]n or about the 30th day of January, 2014, [Wilkinson] did intentionally obstruct, impair, or pervert the administration of

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[12] *State v. Stolen*, 276 Neb. 548, 557, 755 N.W.2d 596, 603 (2008).

law or other governmental functions by physical interference or obstacle, breach of official duty or any other unlawful act."

[10] The State asserts that Wilkinson has waived this argument. The State argues that because Wilkinson first pleaded not guilty, he waived any objection that might have been raised in a motion to quash the amended complaint. However, the State's argument fails. The State correctly argues that "[a] defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads not guilty and proceeds to trial, *provided the information or complaint* contains no jurisdictional defect and *is sufficient to charge an offense under the law*."[13] But Wilkinson now contends that the complaint was not sufficient, an argument which, under the statement of law cited by the State, is not waived. Therefore, we will consider the merits of Wilkinson's second assignment of error.

[11,12] The function of an information is twofold: With reasonable certainty, an information must inform the accused of the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.[14] Where an information alleges the commission of a crime using language of the statute defining that crime or terms equivalent to such statutory definition, the charge is normally sufficient. However, when the charging of a crime in the language of the statute leaves the information insufficient to reasonably inform the defendant as to the nature of the crime charged, additional averments must be included to meet the requirements of due process.[15]

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[13] See *State v. Smith*, 269 Neb. 773, 786, 696 N.W.2d 871, 884 (2005) (emphasis supplied).

[14] *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004).

[15] See *id.*

The language of the amended complaint essentially follows the language of § 28-901. But Wilkinson asserts that it was nonetheless insufficient. Because the statute lists three underlying actions that might trigger a violation—"force, violence, physical interference or obstacle[;] breach of official duty[;] or any other unlawful act"—Wilkinson argues that the State was required to specify the action of which Wilkinson stood accused.

[13] This case is analogous to *State v. Bowen*.[16] In *Bowen*, we considered the adequacy of an information charging a defendant with first degree murder committed either intentionally or while in the course of a felony. Though the State presented evidence only of the felony murder theory, we held that the information did not violate the defendant's right to notice. "'It is a general rule of criminal procedure,'" we noted, "'that, when under a statute an offense may be committed by several methods, the indictment or information may charge that it was committed by any or all such methods as are not inconsistent with, or repugnant to, each other.'"[17]

Thus, as in *Bowen*, the amended complaint against Wilkinson was sufficient to give him notice of the crime charged. Though § 28-901 contains three methods by which a person might obstruct government operations, including all three methods in a charging instrument does not render notice to the defendant insufficient. Our decision is also supported by our standard of review in this matter, which requires us to hold the complaint sufficient unless it is so defective that by no construction can it be said to charge the offense for which Wilkinson was convicted.[18] Wilkinson's second assignment of error is without merit.

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[16] *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993).

[17] *Id.* at 210, 505 N.W.2d at 687 (quoting *Brown v. State*, 107 Neb. 120, 185 N.W. 344 (1921)).

[18] See *Golgert, supra* note 3.

Excessiveness of Sentence.

Finally, in Wilkinson's third assignment of error, he argues that the district court erred by finding that Wilkinson's sentence was not excessive. We affirm the district court's finding.

[14] An appellate court will not disturb a sentence imposed within the statutory limits unless the trial court abused its discretion.[19] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the crime.[20]

Wilkinson essentially argues that the district court, in reviewing the county court's sentence, did not give sufficient weight to mitigating factors. He argues that he is entitled to a reduced sentence because of his relationship with his daughter, his military service record, his history of public service in law enforcement, and his allegedly benevolent motive for obstructing government operations.

However, the county court did consider these facts. During the plea and sentencing proceeding, Wilkinson raised each of these facts before the county court. The county court then ruled from the bench and listed its reasons for imposing a 30-day sentence plus court costs:

> The difficulty with a sentencing in this sort of case is there is absolutely no question about your lack of criminal history. Your service history is commendable.
>
> . . . .
>
> . . . Which makes a sentence of probation for you to really be like no consequence at all. Because I'm

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[19] *Duncan, supra* note 4.

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

> convinced you'll be a law-abiding citizen from here on out . . . .
>
> . . . .
>
> . . . And I think the imposition of a fine would be inappropriate and promote disrespect for the law. . . . [G]iven your prior service history, lack of any prior criminal history, I think that a 30-day sentence is appropriate. But I think any other sentence, given your position of trust, would promote disrespect for the law.

Under these circumstances, and considering that the statutory maximum sentence of 1 year's imprisonment[21] is well above the 30 days imposed, we find that the district court correctly held that the county court did not abuse its discretion. It properly considered factors relevant to sentencing and made its decision based upon sound reasoning.

Wilkinson's third assignment of error is without merit.

CONCLUSION

We affirm the decision of the district court, affirming Wilkinson's conviction and sentence.

Affirmed.

Stacy, J., participating on briefs.

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[21] Neb. Rev. Stat. § 28-106 (Cum. Supp. 2014).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Sybille Pierce, appellee, v. Landmark Management Group, Inc., et al., appellants.

880 N.W.2d 885

Filed June 24, 2016. No. S-14-867.

1. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
2. **Trial: Appeal and Error.** A general assignment that the court erroneously overruled objections, without supporting argument as to why the rulings were erroneous or how they resulted in prejudice, is insufficient to preserve the issue for appellate review.
3. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
4. ____: ____. Rulings of the trial court which do not appear in the record are not considered on appeal.
5. **Motions for New Trial: Damages: Appeal and Error.** A motion for new trial is a prerequisite to obtaining appellate review of the issue of excessive damages.
6. **Employer and Employee: Federal Acts.** Employers are covered by the Family and Medical Leave Act of 1993 when they employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.
7. ____: ____. Separate entities are deemed to be a single employer for purposes of the Family and Medical Leave Act of 1993 if they meet the integrated employer test.
8. ____: ____. When the integrated employer test is met, the employees of all entities making up the integrated employer are counted to determine employer coverage under the Family and Medical Leave Act of 1993.
9. **Administrative Law: Employer and Employee: Federal Acts.** The regulations promulgated by the U.S. Department of Labor interpreting

the Family and Medical Leave Act of 1993 establish the test for determining whether legally distinct companies may be considered so interrelated that they constitute a single employer for purposes of the act.

10. **Employer and Employee.** The integrated employer test involves consideration of four factors: (1) common management, (2) interrelation between operations, (3) centralized control of labor operations, and (4) degree of common ownership/financial control.
11. ____. Under the integrated employer test, whether separate entities are sufficiently integrated is not determined by any single factor, but, rather, the entire relationship between the entities is to be reviewed in its totality.
12. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
13. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
14. **Trial: Juries: Evidence.** Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.
15. **Summary Judgment: Evidence: Proof.** A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. The burden of producing evidence then shifts to the party opposing the motion, who must present evidence showing the existence of a material fact that prevents summary judgment as a matter of law.
16. **Summary Judgment.** If the movant for summary judgment establishes a material fact, and that fact is not contradicted by the adverse party, the court will determine that there is no issue as to that fact.
17. ____. Mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent an award of summary judgment.
18. **Summary Judgment: Affidavits.** A party may not create an issue of fact at the summary judgment stage by submitting an affidavit that contradicts his or her earlier testimony.
19. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial

discretion is involved only when the rules make discretion a factor in determining admissibility.

20. **Rules of Evidence: Appeal and Error.** When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
21. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
22. **Employment Security.** Under Nebraska law, unemployment compensation benefits are not a collateral source, because they are funded by employer contributions. Generally, such benefits should be deducted from a backpay award in employment cases.
23. **Appeal and Error.** A lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
24. **Rules of Evidence: Witnesses: Other Acts.** The trial court has discretion, pursuant to Neb. Evid. R. 608(2)(a), Neb. Rev. Stat. § 27-608(2)(a) (Reissue 2008), to admit evidence of prior conduct to impeach a witness' credibility, so long as the evidence is probative of the witness' character for truthfulness.
25. **Rules of Evidence: Taxes.** Where evidence of omissions or inaccuracies on tax returns does not necessarily suggest dishonesty, such evidence is generally too tenuous to be probative of truthfulness or untruthfulness.
26. ____: ____. Evidence that a witness did not report certain income on his or her tax returns, without more, is not sufficiently probative of character for truthfulness or untruthfulness to be admissible under Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 2008).
27. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
28. **Trial: Evidence: Witnesses: Juries: Appeal and Error.** All conflicts in the evidence, expert or lay, and the credibility of the witnesses are for the jury and not for the appellate court.
29. **Federal Acts: Attorney Fees.** Under the Family and Medical Leave Act of 1993 and the ADA Amendments Act of 2008, the prevailing party is entitled to an award of reasonable attorney fees.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

Molly Adair-Pearson, of Adair Pearson Law, for appellants.

Craig F. Martin, Sarah F. Macdissi, and Sarah M. Smith, of Lamson, Dugan & Murray, L.L.P., for appellee.

Heavican, C.J., Wright, Connolly, McCormack, Miller-Lerman, Cassel, and Stacy, JJ.

Stacy, J.

I. NATURE OF CASE

Sybille Pierce sued her former employers claiming she was terminated in violation of the Family and Medical Leave Act of 1993 (FMLA)[1] and the ADA Amendments Act of 2008 (ADAAA).[2] The trial court granted partial summary judgment in favor of Pierce on the issue of whether the employers were "integrated" and met the threshold number of employees to be covered by the FMLA. The case was then tried to a jury, which returned a verdict for Pierce on both the FMLA and the ADAAA claims. The employers timely appealed. Finding no reversible error, we affirm.

II. FACTS

1. Pierce Work History

From 2004 through 2011, Pierce worked for two companies, both of which were owned by David Paladino. From 2004 through 2008, Pierce was the operations manager for Landmark Management Group, Inc. (Landmark), a property management business. From 2008 to 2009, Pierce managed a storage facility for Cornhusker Road LLC, doing business as Dino's Storage (Dino's Storage). While managing the storage facility, Pierce also rented moving trucks to customers, but it is unclear from the record whether the truck rental business was operated at the time through Dino's Storage or through another of Paladino's companies, Dodge Street, LLC. From 2009 until February 22,

[1] 29 U.S.C. § 2601 et seq. (2012).

[2] 42 U.S.C. § 12101 et seq. (2012).

2011, Pierce worked as a legal assistant for Landmark and also continued renting moving trucks. During this period, she was paid by Landmark for her work as a legal assistant and was paid by Dino's Storage for her work renting trucks.

In 2010, Pierce was diagnosed with "Idiopathic Thrombocytopenic Purpura," which is a blood disorder that causes abnormally low platelet counts and predisposes patients to a high risk of spontaneous bleeding. Pierce's treatment included steroid injections, intravenous immunoglobin infusions, and eventually a splenectomy surgery in November 2010, for which she took paid vacation time. After recovering from surgery, Pierce returned to work at Landmark and Dino's Storage.

In January 2011, Pierce's condition worsened and her doctor recommended 4 weeks of infusion treatment using a chemotherapy drug. After her first chemotherapy treatment, Pierce sent her supervisor, Mary Anderson, an e-mail describing her reaction to the treatment. In the e-mail, Pierce advised Anderson she was going to talk with her doctor about whether she should take "medical leave" while undergoing the treatment. In reply to Pierce's e-mail, Anderson wrote: "We would like you to come back when you are able to be here every day and give 100% and not miss any days in the foreseeable future." To this, Pierce replied: "[O]k. I just want to make sure I understand correctly. You want me to take off from now until this treatment is over, which would be sometime in February. And you would hold my position for me until then." Anderson responded: "Yes, we want you to take the time off and when you are able to come back at 100% you will have a job." The following morning, Anderson sent an e-mail to a group of Landmark and Dino's Storage recipients advising, "FYI, [Pierce] is taking a medical leave until sometime in February."

By mid-February 2011, Pierce had finished her treatment and her blood disorder was in remission. On February 21, Pierce called Anderson and advised she was ready to return to

work. The next day, Pierce had a meeting with Paladino and Anderson. The parties do not dispute that during this meeting, Pierce was told her former position had been filled. However, the parties disagree about whether Pierce was offered another position during the meeting. They also disagree about whether Pierce quit her employment or was terminated.

According to Pierce, during the meeting, they discussed other possible jobs within the companies Paladino owned, but Paladino wanted assurances that Pierce's condition would not result in significant absences. Pierce testified the meeting ended without any job offer; Paladino and Anderson told Pierce they wanted to talk things over and would call her later. According to Pierce, Anderson called her later the same evening to advise, "[Paladino] and I talked it over and we're going to let you go." The next day, Pierce's immediate supervisor at Dino's Storage sent an e-mail to other Dino's employees which read: "I'm going to keep this short so I don't say something I will regret. [Paladino] fired [Pierce] yesterday because she and her doctors couldn't guarantee that her treatment will keep her permanently healthy."

Paladino and Anderson denied terminating Pierce's employment. According to both Paladino and Anderson, Pierce was offered two different positions during the meeting. Pierce told them she wanted to go home and speak with her husband about the job offers. Anderson testified that when she telephoned later that evening to follow up, Pierce turned down both job offers.

Pierce sued Landmark, Dino's Storage, and Dodge Street, claiming she had been unlawfully terminated. We refer to these entities collectively as "the employers."

2. The Employers

Landmark is a third-party management company. It is owned by Paladino, and it manages various storage facilities, many of which are also owned by Paladino. Landmark has separate management agreements with each of the storage facilities. Maintenance employees of Landmark generally report

to Landmark's main office at 2702 Douglas Street in Omaha, Nebraska, and from there, they are dispatched to the various storage facilities. The parties stipulated that at all relevant times, Landmark had 38 employees.

Dino's Storage operates a storage facility in Omaha. Dino's Storage is a trade name used by the storage facility; the actual entity is Cornhusker Road, and Paladino is the controlling shareholder. Dino's Storage operates out of the same space as does Landmark—2702 Douglas Street in Omaha. The parties stipulated that Dino's Storage had 17 employees at all relevant times.

Dodge Street owns the property at 2702 Douglas Street out of which Landmark and Dino's Storage operate. Paladino is also a shareholder of Dodge Street. According to Paladino, "[t]he primary role of Dodge Street, LLC, is [to] own and operate [the] storage facility." The parties stipulated that Dodge Street had no employees during the relevant time period. The role of Dodge Street in Pierce's claims is not entirely clear from the record, but no party suggests any error associated with its inclusion in this lawsuit.

3. Procedural History

(a) Lawsuit

Pierce filed an employment discrimination suit in the district court for Douglas County, alleging violations of the FMLA, the ADAAA, and the Nebraska Fair Employment Practice Act.[3] Only the FMLA and the ADAAA claims proceeded to trial.

In connection with the FMLA claim, Pierce claimed the employers were "integrated" for purposes of meeting the FMLA employee numerosity requirement,[4] alleging:

> [T]he [employers] share a common owner, . . . Paladino; [the employers] operate out of shared office space located at 2702 Douglas Street, Omaha, NE 68131; all billing

[3] Neb. Rev. Stat. § 48-1101 et seq. (Reissue 2010).

[4] See 29 U.S.C § 2611(4)(A)(i).

> and accounting for the [employers] is run out of the same office space located at 2702 Douglas Street; and [the employers] share common employees, including common maintenance, information technology, and bookkeeping employees. In addition . . . Pierce was employed by both Landmark and Dino's.

In their answer, the employers generally denied the allegations in Pierce's complaint and raised the affirmative defense that Pierce failed to mitigate her damages.

(b) Summary Judgment

Pierce moved for partial summary judgment, asking the court to find as a matter of law that the employers were integrated for purposes of the FMLA. The district court granted summary judgment in favor of Pierce, finding "there is no genuine issue of material fact as to the [employers'] being integrated . . . for purposes of the [FMLA]."

(c) Motions in Limine

Before trial, Pierce filed three motions in limine. The first motion sought to exclude evidence that Pierce had received unemployment compensation benefits after leaving Landmark's employ. The second motion sought to exclude evidence that Pierce did not report, on her state and federal tax returns, income she earned working as a nanny. The third motion sought to exclude an undated, unsigned, handwritten note the employers planned to offer in support of their claim that Pierce was offered, and refused, alternative positions with the employers. The trial court sustained all three of Pierce's motions in limine, over the employers' objection. At trial, the employers were not permitted to offer the excluded evidence, but made detailed offers of proof outside the jury's presence.

(d) Jury Trial and Posttrial Motions

Following a 3-day trial, the jury returned a verdict for Pierce and awarded damages on both the FMLA and the ADAAA claims. Pierce then filed a motion seeking liquidated damages

under the FMLA in an amount equal to the amount of compensatory damages awarded by the jury.[5] The district court granted Pierce's motion and entered judgment for Pierce on the FMLA claim in the amount of $19,281.36 in backpay, $19,281.36 in liquidated damages, and prejudgment interest at the statutory rate. On the ADAAA claim, judgment was entered for Pierce in the amount of $2,500 in "Other" damages and $28,537.63 in punitive damages.

Pierce then moved for an award of attorney fees and costs under both the FMLA and the ADAAA.[6] The court awarded her $67,979.70 in attorney fees and $2,054.95 in costs.

Thereafter, the employers apparently filed a motion for new trial which included a request that the trial judge recuse himself. The record shows a hearing was held on the motion, but neither the employers' motion nor the court's order ruling on it appear in the record.

The employers filed this appeal, and we moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[7]

III. ASSIGNMENTS OF ERROR

The employers assign, rephrased, that the trial court erred in (1) granting partial summary judgment on the integrated employer issue, (2) excluding evidence that Pierce received unemployment benefits, (3) excluding evidence that Pierce did not report nanny income on her tax returns, (4) excluding the unsigned handwritten note, (5) admitting testimony and exhibits which lacked foundation and contained hearsay, (6) refusing to give certain jury instructions requested by the employers, (7) entering judgment on a verdict which was not supported by sufficient evidence, (8) entering judgment on a verdict which awarded excessive damages, (9) awarding

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[5] See 29 U.S.C. 2617(a)(1)(A)(iii).

[6] See 29 U.S.C. § 2617(a)(3) and 42 U.S.C. § 12205.

[7] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

excessive attorney fees, and (10) overruling the employers' motion for new trial.

IV. ANALYSIS

1. Matters Properly Before Us

[1,2] Four of the employers' assignments of error are not properly presented for appellate review. First, the employers broadly assign that "[t]he trial court erred in overruling [the employers'] objections and allowing testimony and receiving exhibits containing hearsay and lacking in foundation." Their brief identifies 17 separate rulings relating to this assignment of error, but other than referencing the page and line of the rulings, the brief presents no argument. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[8] A general assignment that the court erroneously overruled objections, without supporting argument as to why the rulings were erroneous or how they resulted in prejudice, is insufficient to preserve the issue for appellate review.[9]

[3] The employers also assign that "[t]he trial court erred in refusing to give certain jury instructions requested by [the employers]." Neither the instructions given by the court nor those proposed by the parties were included in the record on appeal. Although the jury instruction conference was included in the bill of exceptions, we cannot glean from the discussion therein the full text of the instructions given or those proposed and rejected. As a general proposition, it is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[10] Here, the

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[8] See *Stekr v. Beecham*, 291 Neb. 883, 869 N.W.2d 347 (2015).

[9] See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[10] *Centurion Stone of Neb. v. Whelan*, 286 Neb. 150, 835 N.W.2d 62 (2013); *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

record is insufficient to support any assigned error regarding the jury instructions.

[4,5] Finally, the employers assign that the trial court erred in overruling their motion for new trial, which included a request to recuse the judge. Our appellate record includes the hearing on the motion but does not contain the motion itself or any order ruling on the same. Argument during the hearing indicates there was a question about the timelines of the motion. Rulings of the trial court which do not appear in the record are not considered on appeal.[11] We conclude the record is insufficient to support the employers' assignment related to the motion for new trial. And because a motion for new trial is a prerequisite to obtaining appellate review of the issue of excessive damages,[12] we likewise conclude the employers' assignment of error relating to excessive damages is not properly before us.

2. Integrated Employer Under FMLA

[6-8] Employers are covered by the FMLA when they employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.[13] Separate entities are deemed to be a single employer for purposes of the FMLA "if they meet the integrated employer test."[14] When the integrated employer test is met, the employees of all entities making up the integrated employer are counted to determine employer coverage under the FMLA.[15]

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[11] *Durkan v. Vaughan*, 259 Neb. 288, 609 N.W.2d 358 (2000).

[12] See Neb. Rev. Stat. § 25-1912.01(2) (Reissue 2008) (stating that "[w]hen an action has been tried before a jury . . . a motion for a new trial shall be a prerequisite to obtaining appellate review of the issue of inadequate or excessive damages").

[13] 29 U.S.C. § 2611(4)(A)(i); 29 C.F.R. § 825.104(a) (2015).

[14] 29 C.F.R. § 825.104(c)(2).

[15] *Id.*

The parties stipulated that during the relevant period, Landmark had 38 qualifying employees, Dino's Storage had 17 qualifying employees, and Dodge Street had no employees. Therefore, the FMLA's numerosity requirement is met only if Landmark and Dino's Storage are deemed to be integrated for purposes of the FMLA.

[9,10] The regulations promulgated by the U.S. Department of Labor interpreting the FMLA establish the test for determining whether legally distinct companies may be considered so interrelated that they constitute a single employer for purposes of the FMLA.[16] This integrated employer test involves consideration of four factors: (1) common management, (2) interrelation between operations, (3) centralized control of labor operations, and (4) degree of common ownership/financial control.[17] This test has been described as appreciating that "small businesses—*i.e.* those with less than 50 employees—are not subject to the FMLA's 'onerous requirement of keeping an unproductive employee on the payroll,' while simultaneously preventing companies from structuring their business to avoid labor laws."[18] The same four-factor test is applied in other types of employment discrimination[19] and labor cases.[20]

[11] The first factor focuses on the degree to which different entities share common management and includes consideration

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[16] *Id.*

[17] *Id.*

[18] *Grace v. USCAR*, 521 F.3d 655, 664 (6th Cir. 2008), quoting *Engelhardt v. S.P. Richards Co., Inc.*, 472 F.3d 1 (1st Cir. 2006).

[19] See, e.g., *Sandoval v. American Bldg. Maintenance Industries*, 578 F.3d 787 (8th Cir. 2009); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977); *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002).

[20] See, e.g., *Hall Cty. Pub. Defenders v. County of Hall*, 253 Neb. 763, 571 N.W.2d 789 (1998), *disapproved on other grounds, Hyannis Ed. Assn. v. Grant Cty. Sch. Dist. No. 38-0011*, 269 Neb. 956, 698 N.W.2d 45 (2005); *American Fed. S., C., & M. Emp., AFL-CIO v. County of Lancaster*, 196 Neb. 89, 241 N.W.2d 523 (1976).

of whether the same individuals manage or supervise the different entities and whether the entities have common officers and boards of directors.[21] The second factor examines the interrelation of operations, including whether the entities share managers or personnel, payroll, insurance programs, office space, or equipment.[22] The third factor, centralized control, examines the extent to which labor decisions involving the entities are centralized, including oversight of personnel and decisions of hiring, firing, and discipline.[23] And the fourth factor, degree of common ownership or financial control, focuses on the extent to which entities share common owners, including whether one entity owns shares of the other.[24] Whether separate entities are sufficiently integrated is not determined by any single factor, but, rather, the entire relationship between the entities is to be reviewed in its totality.[25]

The district court granted Pierce's motion for partial summary judgment and found as a matter of law that the employers were "integrated" for purposes of the employee numerosity requirement of the FMLA. The employers assign this as error and argue there were material issues of fact which precluded summary judgment.

[12-15] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[26] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party

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[21] *Davis v. Ricketts*, 765 F.3d 823 (8th Cir. 2014).

[22] *Id.*

[23] *Id*. See, also, *Frank v. U.S. West, Inc.*, 3 F.3d 1357 (10th Cir. 1993); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389 (8th Cir. 1977).

[24] *Davis, supra* note 21.

[25] 29 C.F.R. § 825.104(c)(2).

[26] *DMK Biodiesel v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015).

against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[27] Where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.[28] A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion,[29] who must present evidence showing the existence of a material fact that prevents summary judgment as a matter of law.[30]

(a) Pierce's Evidence on Summary Judgment

We begin our summary judgment analysis by considering whether Pierce produced enough evidence to make a prima facie case demonstrating she was entitled to judgment on the integrated employer issue if the evidence were uncontroverted at trial. In support of her summary judgment motion, Pierce offered her own affidavit, the deposition testimony of Anderson (the operations manager for Landmark), the deposition testimony of Paladino, and the employers' written discovery responses.

Regarding the common management factor, this evidence showed that Paladino makes the high-level management decisions for both Landmark and Dino's Storage. Paladino explained in his deposition that he has a manager who "handle[s] the Dino's Storage side of the business" and another who "handles

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[27] *Id.*

[28] *Sweem v. American Fidelity Life Assurance Co.*, 274 Neb. 313, 739 N.W.2d 442 (2007).

[29] *Durkan, supra* note 11.

[30] See *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

the Landmark part of the business," but "a lot of it was directed by me [and] implemented by them."

Regarding the interrelation of operations factor, this evidence showed significant interrelation between Landmark and Dino's Storage. The two entities share office space and at least some personnel. According to Paladino's deposition testimony, Landmark's bookkeeper is also responsible for paying the bills, preparing reports, and handling bank deposits and reconciliation for Dino's Storage. The same project manager oversees construction projects for both Landmark and Dino's Storage and reports directly to Paladino. One individual works as the "IT guy" for both Landmark and Dino's Storage. Paladino testified there is a common payroll process under which all Dino's Storage employees report their hours to, and are paid through, Landmark. Paladino explained he uses the combined payroll system as a "way to save money," because when each entity had its own payroll process "it was very, very expensive to do it that way . . . . When you start piling up those different entities, those fees add up." Pursuant to management agreements between Landmark and Dino's Storage, Landmark's maintenance employees report to work at Landmark, and from there they are dispatched to various Dino's Storage facilities to perform work as needed. Finally, this evidence showed Pierce worked simultaneously for Landmark and Dino's Storage.

Regarding the centralized control of labor factor, the evidence contained many examples of centralized staffing and shared work processes between Landmark and Dino's Storage. In addition to the common payroll process, the centralized accounting and bookkeeping process, and the centralized technical support about which Paladino testified, he testified to several examples of moving employees between entities to accommodate overall labor needs. Pursuant to a management agreement, Landmark's maintenance employees are dispatched to perform a wide variety of work, including the maintenance of Dino's Storage facilities. But the evidence of centralized

labor decisions between Landmark and Dino's Storage went beyond the management agreements. For instance, Paladino moved an employee from Landmark (where she made deposits for storage facilities and audited sales files) and "put her in charge of one of the storage facilities," after which he "changed her role" again so "she was doing a little bit of work for Landmark." And Pierce was hired to work initially for Landmark, was then moved to work as a manager for Dino's Storage, and then was moved back to Landmark while simultaneously working part time for Dino's Storage. Paladino's active role in personnel decisions involving Landmark and Dino's Storage is also evidenced by his deposition testimony that he was the one to hire Pierce, the one to move her between Landmark and Dino's Storage, and the one to offer her other positions when she was ready to return to work.

Finally, regarding the common ownership factor, the evidence was undisputed that Paladino owns 100 percent of Landmark and is the primary shareholder of Dino's Storage.

Considering this evidence in its totality, we conclude Pierce made a prima facie case that the employers were integrated under the four-factor test. The evidence Pierce produced was sufficient to demonstrate she would prevail on this issue if the evidence were uncontroverted at trial. The burden to produce evidence showing a genuine issue of fact shifted to the parties opposing the motion,[31] and we now consider the evidence adduced by the employers in response.

(b) The Employers' Evidence on Summary Judgment

At the summary judgment hearing, the employers submitted only the affidavit of Paladino. Paladino averred generally that Landmark, Dino's Storage, and Dodge Street "are all separate entities with different operations and lines of business. Each company has separate bookkeeping, separate employees, and separate policies." We examine these statements to determine

[31] See *Durkan, supra* note 11.

whether they created a genuine issue of material fact. In doing so, we are guided by familiar principles.

[16,17] If the movant for summary judgment establishes a material fact, and that fact is not contradicted by the adverse party, the court will determine that there is no issue as to that fact.[32] Mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent an award of summary judgment.[33]

[18] The affidavit submitted by Paladino did not create any issue of material fact regarding whether the employers were integrated. Paladino's conclusions that Landmark and Dino's Storage had "separate bookkeeping" and "separate employees" were unsupported by any facts in the affidavit and were inconsistent with his earlier deposition testimony about shared bookkeeping and shared employees. A party may not create an issue of fact at the summary judgment stage by submitting an affidavit that contradicts his or her earlier testimony.[34]

As it regarded the material issue of whether the employers were integrated, Paladino's affidavit consisted of little more than conclusions and did not create an issue of fact. As such, the employers failed to meet their burden of presenting evidence showing the existence of a material issue of fact preventing summary judgment.

On this record, we conclude the trial court did not err in granting partial summary judgment and finding as a matter of law that the employers are integrated for purposes of the FMLA. In light of this conclusion, it is unnecessary to address Pierce's alternative argument that the employers are also "joint employers" under the FMLA.[35]

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[32] See *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997).

[33] See *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999).

[34] See *Popoalii v. Correctional Medical Services*, 512 F.3d 488 (8th Cir. 2008).

[35] Brief for appellants at 24, citing 29 C.F.R. § 825.106 (2015).

3. Rulings on Motions in Limine

The employers assign error to the trial court's rulings on Pierce's motions in limine. We address each motion in limine separately, applying the following standards of review.

[19-21] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[36] When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[37] Because the exercise of judicial discretion is implicit in determinations of admissibility under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), the trial court's decision will not be reversed absent an abuse of discretion.[38] In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.[39]

(a) Unemployment Benefits

Pierce filed a motion in limine seeking to "exclude at trial any mention of or reference to the fact that [she] may have received unemployment benefits." In support of excluding the evidence, Pierce primarily argued that evidence of unemployment benefits should be excluded under the collateral source rule, which provides generally that benefits received by a plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise

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[36] See *Griffith v. Drew's LLC*, 290 Neb. 508, 860 N.W.2d 749 (2015).

[37] *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706, 798 N.W.2d 121 (2011).

[38] *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015).

[39] See, *id.*; *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

recoverable from the wrongdoer.[40] Pierce also argued the evidence, even if relevant, should be excluded under § 27-403, because any probative value was substantially outweighed by the danger of unfair prejudice. After a hearing, the trial court granted the motion in limine without elaboration. During trial, the employers were not allowed to offer evidence of the amount of unemployment benefits Pierce received, but made an offer of proof indicating she had been paid a total of $7,615.30.

On appeal, the employers assign error only to the district court's decision to prohibit the jury from hearing evidence of unemployment benefits. The employers argue that unemployment benefits are not a collateral source under Nebraska law and further argue that they were prejudiced by the exclusion of such evidence, because "the unemployment benefits received should have been deducted from the damages award."[41]

[22] The employers are correct that under Nebraska law, unemployment compensation benefits are not considered a collateral source for purposes of damages in employment cases. In *Airport Inn v. Nebraska Equal Opp. Comm.*,[42] we held that unemployment compensation benefits are not a collateral source, because they are funded by employer contributions, and we concluded the district court was correct to deduct unemployment benefits from a backpay award under the Nebraska Fair Employment Practice Act. Several years later, in *IBP, inc. v. Sands*,[43] we reiterated and strengthened our holding in *Airport Inn*, stating broadly that "unemployment compensation awards should be deducted from any backpay award."

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[40] *Strasburg v. Union Pacific RR. Co.*, 286 Neb. 743, 839 N.W.2d 273 (2013).

[41] Brief for appellants at 30.

[42] *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984).

[43] *IBP, inc. v. Sands*, 252 Neb. 573, 582, 563 N.W.2d 353, 359 (1997).

Pierce directs us to cases from other jurisdictions which hold that unemployment benefits *are* a collateral source.[44] She urges us to revisit our holdings in *Airport Inn* and *IBP, inc.* and either adopt the rationale of those courts which prohibit such deductions altogether[45] or, alternatively, adopt the rationale of those courts which conclude the deduction of unemployment benefits from backpay awards is a matter properly left to the sound discretion of the trial court.[46] While we acknowledge the split of authority on this issue, we see no principled reason in the present case to revisit our holdings in *Airport Inn* and *IBP, inc*. And because the issue is not presented on this record, we leave for another day consideration of whether deductions from backpay awards under our holdings in *Airport Inn* and *IBP, inc.* are mandatory or discretionary.

In this appeal, the employers assign that the district court erred in prohibiting them from presenting evidence to the jury that Pierce received unemployment benefits. The employers generally equate this evidentiary ruling to a legal finding that they were not entitled to an offset from any backpay award due to Pierce's receipt of unemployment benefits.

[23] But this is incorrect. The district court's decision not to permit the jury to hear evidence of Pierce's unemployment benefits did not determine whether the employers were entitled to an offset of those benefits under our holdings in *Airport Inn* and *IBP, inc*. Nor did the court's evidentiary ruling

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[44] See, *Thurman v. Yellow Freight Systems, Inc*., 90 F.3d 1160 (6th Cir. 1996), *amended on denial of rehearing* 97 F.3d 833; *Gaworski v. ITT Commercial Finance Corp*., 17 F.3d 1104 (8th Cir. 1994); *Craig v. Y & Y Snacks, Inc*., 721 F.2d 77 (3d Cir. 1983).

[45] See, e.g., *Thurman, supra* note 44; *Gaworski, supra* note 44; *Craig, supra* note 44; *Brown v. A.J. Gerrard Mfg. Co.*, 715 F.2d 1549 (11th Cir. 1983); *Kauffman v. Sidereal Corp.*, 695 F.2d 343 (9th Cir. 1982).

[46] See, e.g., *Dailey v. Societe Generale*, 108 F.3d 451 (2d Cir. 1997); *Lussier v. Runyon*, 50 F.3d 1103 (1st Cir. 1995); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417 (7th Cir. 1986).

preclude the employers from seeking such a deduction. To the contrary, once the jury awarded backpay, the employers could have asked the trial court to deduct as a matter of law the unemployment benefits Pierce received.[47] Several postaward motions were filed in this case, including Pierce's motion for liquidated damages in an amount equal to the jury's award of compensatory damages under the FMLA. Yet, there is nothing in the record or the briefing which suggests the employers presented a posttrial motion of any sort asking the trial court to apply our holdings in *Airport Inn* and *IBP, inc.* and deduct Pierce's unemployment compensation benefits from the jury's backpay award. A lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.[48] We conclude the assignment of error relating to whether the jury should have been permitted to hear evidence of unemployment benefits did not properly preserve the issue the employers attempt to raise on appeal—the issue of whether a deduction from the jury's award of backpay was legally appropriate.

To the extent the employers' briefing can fairly be construed to suggest the trial court should have reduced the jury's backpay award because it was excessive, the issue of excessive damages is not before us. As discussed previously, a motion for new trial is a prerequisite for a claim of excessive damages.[49] Because no motion for new trial is properly before us, the prerequisite for obtaining appellate review of an excessive damages issue has not been met. This assignment of error does not require reversal.

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[47] See, e.g., *Dailey, supra* note 46 (after jury award of backpay, employer filed posttrial motion to deduct unemployment compensation benefits from backpay award).

[48] See *In re Interest of Zanaya W. et al.*, 291 Neb. 20, 863 N.W.2d 803 (2015).

[49] See § 25-1912.01(2).

(b) Nanny Income

Pierce filed a motion in limine seeking to exclude evidence that she did not include, on her state or federal income tax returns, earnings received from working as a nanny. In support of her motion, Pierce argued such evidence was not relevant and was more prejudicial than probative. The court sustained the motion and excluded the evidence. The employers assign this as error, arguing the evidence was probative of Pierce's character for truthfulness or untruthfulness and should have been received pursuant to Neb. Evid. R. 608(2)(a), Neb. Rev. Stat. § 27-608(2)(a) (Reissue 2008).

Preliminarily, we note the jury heard considerable evidence regarding the money Pierce earned working as a nanny for various families. Evidence of these earnings was relevant to Pierce's claim for backpay. Testimony was offered regarding the time periods during which Pierce worked as a nanny and the amount of money she was paid by each family, but the employers were not allowed to elicit testimony on cross-examination that Pierce had not reported the "nannying" income on her tax returns. During trial, the employers renewed their objection to the court's ruling on the motion in limine and made an offer of proof that, if permitted to question Pierce on the issue, she would testify she "did not report any of the income she earned from working as a nanny on her state and federal income taxes." On appeal, the employers argue it was prejudicial error to exclude such evidence because it was probative of Pierce's character for truthfulness or untruthfulness.

[24] The trial court has discretion, pursuant to § 27-608(2)(a), to admit evidence of prior conduct to impeach a witness' credibility, so long as the evidence is probative of the witness' character for truthfulness. Section 27-608(2) provides in relevant part:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by extrinsic evidence. They may, however, in

> the discretion of the court, if probative of truthfulness or untruthfulness be inquired into on cross-examination of the witness . . . .

The central question regarding this assignment of error, and one which we have not previously considered, is whether evidence that a witness did not report certain income on her tax returns is probative of her character for truthfulness or untruthfulness. Courts in other jurisdictions have reached different conclusions, depending on the facts.

[25] Generally, evidence that a witness has knowingly provided false information on tax filings is considered probative of the witness' character for truthfulness or untruthfulness.[50] Similarly, evidence that a witness intentionally failed to pay taxes at all, particularly for multiple years, is often considered probative of the witness' character for truthfulness.[51] But where evidence of omissions or inaccuracies on tax returns does not necessarily suggest dishonesty, such evidence is generally too tenuous to be probative of truthfulness or untruthfulness.[52] As the Eighth Circuit has observed, not every civil tax problem is indicative of a lack of truthfulness.[53]

[26] While there undoubtedly are circumstances under which the failure to report certain income, or reporting false income, on tax returns reflects on the taxpayer's character for truthfulness, the record here does not support such a conclusion. Pierce's tax returns were not offered, and there is nothing in the record, or in the employers' offer of proof, which permits a reasonable inference regarding Pierce's character for truthfulness or untruthfulness. An admission from Pierce that

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[50] E.g., *United States v. Sullivan*, 803 F.2d 87 (3d Cir. 1986); *United States v. Zandi*, 769 F.2d 229 (4th Cir. 1985); *United States v. Lynch*, 699 F.2d 839 (7th Cir. 1982).

[51] *U.S. v. Hatchett*, 918 F.2d 631 (6th Cir. 1990); *Leaf v. Beihoffer*, 338 P.3d 1136 (Colo. App. 2014).

[52] *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980); *Shafer v. American Emp. Ins. Co.*, 535 F. Supp. 1067 (W.D. Ark. 1982).

[53] *Dennis, supra* note 52.

she did not report nanny earnings on her tax returns, without more, is not sufficiently probative of her character for truthfulness or untruthfulness to be admissible under § 27-608(2), and any slight probative value is outweighed by the danger of unfair prejudice. On this record, we cannot conclude the trial court abused its discretion in granting Pierce's motion in limine to exclude such evidence.

(c) Handwritten Note

The trial judge sustained Pierce's motion in limine to exclude an unsigned, undated handwritten note. The employers sought to offer the note as evidence that Pierce had been offered other positions during the meeting with Paladino and Anderson. The note read, in pertinent part: "Initially, [Pierce] took a medical leave because she was not able to perform her daily duties. When her medical issues were under control—Landmark Mgmt offered her 2 different job positions and she turned them both down."

The employers concede the handwritten note is an out-of-court statement which they sought to offer for its truth, and its admissibility is therefore governed by the hearsay rules. The employers suggest the note was admissible as a business record under Neb. Evid. R. 803(5), Neb. Rev. Stat. § 27-803(5) (Reissue 2008). But there is no evidence the note was made in the course of a regularly conducted activity of the employers, nor was there evidence the note was prepared at or near the time of the meeting it purports to record. In fact, the employers' offer of proof indicates the note was created 5 months after the meeting by someone who did not attend the meeting and, furthermore, was prepared under circumstances which indicate a lack of trustworthiness. The offer of proof indicates Paladino directed one of his employees to prepare the undated, unsigned note after "giving her appropriate information to fill it out." Under these circumstances, we do not find the trial court abused its discretion in granting Pierce's motion in limine regarding the unsigned note.

4. Sufficient Evidence to Support Verdict

[27] The employers assign that the jury's verdict was not supported by sufficient evidence. A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.[54] In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.[55]

For the most part, in arguing that the evidence was insufficient to support the verdict, the employers simply reiterate their contention that they were not covered by the FMLA because they were not integrated employers. For the same reasons we rejected this assignment of error previously, we reject it reframed as an assignment of insufficient evidence.

[28] The employers also argue there was insufficient evidence showing that Pierce suffered an adverse employment decision. In support of this argument, the employers point to the testimony of Paladino and Anderson, both of whom testified that they offered Pierce two equivalent positions with Paladino's companies and that Pierce rejected them both, choosing instead to quit. The evidence, however, was in conflict on this issue. Pierce testified the meeting with Paladino and Anderson ended without any job offers, and when Anderson telephoned Pierce later that evening, Anderson told her "we're going to let you go." The jury resolved this conflict in the evidence in Pierce's favor. All conflicts in the evidence, expert or lay, and the credibility of the witnesses are for the jury and not for the appellate court.[56]

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[54] *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

[55] *Id.*

[56] See *Kniesche v. Thos*, 203 Neb. 852, 280 N.W.2d 907 (1979).

Based on our review of the record, we conclude the evidence was sufficient to support the jury's verdict.

5. Attorney Fees

At the hearing on Pierce's motion for attorney fees and costs, her counsel submitted an affidavit which included a detailed billing statement describing counsel's legal work and averments as to reasonableness. Using the lodestar method, Pierce's counsel calculated fees totaling $77,483. The court awarded $67,979.70 in attorney fees.

[29] The employers concede that, as the prevailing party, Pierce is entitled under the FMLA and the ADAAA to an award of reasonable attorney fees. Here, the employers do not contest the reasonableness of the hourly rates submitted, but argue the fee award was unreasonable for two reasons. First, they argue the number of hours claimed was excessive. Second, they argue the fee award should have been capped by the contingent fee agreement between Pierce and her attorneys.

Regarding their claim that the number of hours worked on the case was excessive, the employers suggest the itemized statement submitted by Pierce's lawyer contained duplicative entries, included charges for basic research when Pierce's counsel held themselves out as experienced attorneys in employment discrimination matters, and reflected too much time spent on pleadings, discovery, briefing, and correspondence. The employers' brief suggests a fee reduction of 68 percent would be appropriate to account for what they describe as excessive billing.

We have reviewed the affidavit and conclude the request for attorney fees and expenses is reasonable. On this record, we find no abuse of discretion in the court's conclusion that the fees were reasonable.

Alternatively, the employers argue that any fee award should not be based on the lodestar method, but instead should be based on, and capped by, the contingent fee agreement between Pierce and her attorneys. Pierce's counsel concedes

the existence of a contingency fee arrangement with Pierce, but the record on appeal does not include any fee agreement between Pierce and her counsel, nor does it indicate fully the terms of any such agreement.

As a general proposition, it is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[57] Without the subject fee agreement or its terms in the record, the record does not support this assignment of error and we decline to consider it.

V. CONCLUSION

Having considered the assignments properly before us for review and finding no reversible error, the judgment of the trial court is affirmed.

Affirmed.

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[57] *Centurion Stone of Neb., supra* note 10; *InterCall, Inc., supra* note 10.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Adoption of Jaelyn B., a minor child. Jesse B., appellant, v. Tylee H., appellee.

883 N.W.2d 22

Filed June 24, 2016. Nos. S-15-096, S-15-228.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Statutes.** The meaning and interpretation of a statute present questions of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
4. **Jurisdiction: Appeal and Error.** Before deciding the merits of an appeal, an appellate court must determine if it has jurisdiction.
5. ____: ____. If the court from which a party appeals lacked jurisdiction, then the appellate court acquires no jurisdiction.
6. ____: ____. An appellate court has the power to determine whether it has jurisdiction over an appeal and to correct jurisdictional issues even if it does not have jurisdiction to reach the merits.
7. **Constitutional Law: Courts: Jurisdiction: Child Custody: Habeas Corpus: Adoption: Declaratory Judgments.** District courts have inherent equity jurisdiction to resolve custody disputes. And they have jurisdiction over habeas proceedings challenging adoption proceedings. Accordingly, district courts have jurisdiction over a related declaratory judgment action challenging the constitutionality of Nebraska adoption statutes.
8. **Foreign Judgments: Jurisdiction: States.** A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment.
9. **Constitutional Law: States: Statutes: Public Policy.** Nebraska is not constitutionally required to give effect to a sister state's statutes that are contrary to the public policy of this state.

10. **Paternity: Child Custody: Time.** In Nebraska, a paternity acknowledgment operates as a legal finding of paternity after the rescission period has expired. And a father whose paternity is established by a final, voluntary acknowledgment has the same right to seek custody as the child's biological mother, even if genetic testing shows he is not the biological father.
11. **Paternity.** Under Neb. Rev. Stat. § 43-1402 (Reissue 2008), establishment of paternity by acknowledgment is the equivalent of establishment of paternity by a judicial proceeding.
12. **Constitutional Law: Foreign Judgments: States.** The Full Faith and Credit Clause requires states to give the same effect to a judgment in the forum state that it has in the state where the court rendered the judgment.
13. **Constitutional Law: Foreign Judgments: States: Paternity.** Neb. Rev. Stat. § 43-1406(1) (Reissue 2008) extends the full faith and credit requirement for judgments to a sister state's paternity determination established through a voluntary acknowledgment.
14. **Foreign Judgments: States: Paternity: Adoption.** Whether a paternity acknowledgment in a sister state gives an acknowledged father the right to block an adoption in Nebraska depends upon whether the acknowledgment confers that right in the state where it was made.
15. **Interventions.** Under Neb. Rev. Stat. § 25-328 (Reissue 2008), to be entitled to intervene in an action, an intervenor must have a direct and legal interest. The intervenor must lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action.
16. **Foreign Judgments: States: Paternity: Adoption: Parental Rights.** When the law of a sister state legally determines that an acknowledged father has the full rights of a natural father who can withhold consent to an adoption, that father is not a "man" within the meaning of Neb. Rev. Stat. § 43-104.22(11) (Reissue 2008).
17. **Judgments: Collateral Attack: Paternity.** The collateral attack rules that apply to a judgment also apply to a voluntary acknowledgment of paternity that has the same effect as a judgment.
18. **Constitutional Law: Appeal and Error.** An appellate court will generally not decide a constitutional issue that was not presented to the trial court.

Appeals from the County Court for Douglas County: Marcena M. Hendrix, Judge. Reversed and remanded with directions to vacate.

George T. Babcock, of Law Offices of Evelyn N. Babcock, and Jennifer Gaughan, of Legal Aid of Nebraska, for appellant.

Shawn D. Renner and Susan K. Sapp, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, and Cassel, JJ., and Pirtle and Riedmann, Judges.

Connolly, J.

I. SUMMARY

In these consolidated cases, and a companion case,[1] the appellant, Jesse B., challenged the adoption of his daughter, Jaelyn B. These consolidated appeals arise from the adoption proceeding in county court. Jesse attempted to intervene to challenge the court's authority to exercise jurisdiction over the adoption proceeding. Jesse is Jaelyn's legal father under Ohio statutes. Those statutes provide that he has a right to notice of a proceeding to adopt Jaelyn and that his consent is required. Jesse claimed that Nebraska must give full faith and credit to Ohio's determination of his paternity. He also claimed that the court lacked subject matter jurisdiction because he had not consented to Jaelyn's adoption.

Despite Ohio statutes that give Jesse paternity rights, the county court concluded that Nebraska's adoption statutes did not require Jesse's consent to Jaelyn's adoption because genetic testing showed that another man was Jaelyn's biological father. Accordingly, the county court did not allow Jesse to intervene. Later, it issued an adoption decree.

We conclude that Neb. Rev. Stat. 43-1406(1) (Reissue 2008) requires Nebraska to give full faith and credit to Ohio's paternity determination. Giving full faith and credit includes giving effect to Ohio's determination that Jesse must consent to Jaelyn's adoption. Because he did not consent, we conclude that the county court erred in disestablishing his paternity through an adoption decree. We reverse the judgment and remand the cause with directions for the county court to vacate its decree. We deal with the custody issues

[1] See *Jesse B. v. Tylee H., post* p. 973, 883 N.W.2d 1 (2016).

going forward in Jesse's separate habeas corpus appeal from the district court.

II. BACKGROUND

Before setting out the facts and resolving some of the issues under Ohio's statutes, we set out the judicial notice principles that apply here. A court may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding.[2] In interwoven and interdependent cases, we can examine our own records and take judicial notice of the proceedings.[3]

1. Jesse's Voluntary Acknowledgment of Paternity and Jaelyn's Birth Certificate

Jaelyn was born in Ohio in April 2013. The next day, the mother, Heather K., and Jesse signed before a notary an "Acknowledgment of Paternity Affidavit," affirming that Jesse was Jaelyn's father. The instructions provided that both the mother and the father had to sign the acknowledgment and have each signature notarized. The form explained that the purpose of the paternity affidavit "is to acknowledge the legal existence of a father and child relationship through voluntary paternity establishment." The signature certification required each parent to affirm that he or she had read both sides of the affidavit. On the back, the acknowledgment included a notice of the parties' rights and responsibilities. First, the man signing the form assumed the parental duty of support. Second, the notice provided that Ohio statutes limited the signatories' right to rescind it:

> Both parents who sign this paternity affidavit waive any right to bring a court action to establish paternity pursuant to sections 3111.01 to 3111.18 of the Revised Code

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[2] *Bauermeister Deaver Ecol. v. Waste Mgmt. Co.*, 290 Neb. 899, 863 N.W.2d 131 (2015).

[3] *Id.*

> or make a request for an administrative determination of a parent and child relationship pursuant to section 3111.38 of the Revised Code, other than a court action filed for purposes of rescinding the paternity affidavit.

The notice explained that in some circumstances, a signatory could seek an administrative rescission of the acknowledgment within 60 days. A signatory could also file a court action to rescind it for fraud, duress, or mistake of fact. But a signatory had to commence a court action after the 60-day period for requesting an administrative rescission expired and within 1 year after "the paternity affidavit becomes final pursuant to sections 2151.232, 3111.25 or 3111.821" of Ohio's statutes. The form also provided that if the law presumed another man to be the father, the parties could not sign a paternity acknowledgment. The notice defined a presumed father to include a man who had signed an acknowledgment of paternity that was on file with the "Ohio Department of Job & Family Services" but was not yet final. Finally, the notice provided that either parent had the right to request genetic testing at no charge instead of signing the acknowledgment.

Heather and Jesse were later named as Jaelyn's mother and father on her birth certificate. It was recorded in Ohio's office of vital statistics on June 3, 2013.

2. Jesse's Relationship With Heather and Jaelyn

In the Nebraska adoption proceeding, the county court received Jesse's affidavit for deciding whether he could intervene. In the affidavit, Jesse stated some background facts regarding his relationship with Heather and Jaelyn. Jesse met Heather in Omaha in June 2012, and they began living together in July. That month, they learned that Heather was pregnant. Jesse stated that he supported her financially and emotionally throughout the pregnancy. In March 2013, they moved to Ohio to live with Jesse's parents. Jesse was present at Jaelyn's birth and took an active role in caring for her.

According to Jesse, Heather left Jaelyn with Jesse and his parents about the middle of September 2013 to pursue a relationship with a man she met on the Internet. Before she left, she signed the paperwork to give Jesse's mother custody of Jaelyn. But at the end of September, Heather returned and asked to take Jaelyn for a weekend visit. She never returned Jaelyn. Jesse visited Jaelyn once in Cleveland, Ohio, about 2 weeks later, but Heather would not allow Jaelyn to return with him. Later, Jesse learned that Heather had obtained a dismissal of an Ohio case to give custody of Jaelyn to Jesse's mother. Instead, she returned to Nebraska with Jaelyn. She refused to allow Jesse to see Jaelyn, and at some point, she blocked his telephone calls. The last time Jesse communicated with Heather was on Christmas in 2013.

In Jesse's motion to dismiss the adoption proceeding, he attached a copy of a letter from Heather to a judge in the Ohio Court of Common Pleas. In the letter, Heather requested a dismissal of the custody petition for Jaelyn. She stated that she had decided to retain custody of Jaelyn and return to Nebraska. The letter was dated October 7, 2013. Another attachment showed that the Ohio court dismissed the custody case on the same day.

3. Adoption Notification and Commencement of Judicial Proceedings

In January 2014, Jesse received adoption paperwork from Heather's Nebraska attorney, Kelly Tollefsen. The letter stated that Heather had identified Jesse as a possible biological father and intended to relinquish Jaelyn for an adoption. It informed him that if he intended to claim paternity and seek custody, he should obtain his own attorney, or he could sign the enclosed forms for relinquishing Jaelyn and consenting to her adoption. In his affidavit, Jesse stated that he had contacted Tollefsen but that she would not provide him with any information about the adoption. He could not afford an

attorney and did not obtain legal assistance in Nebraska until later that spring.

In June 2014, Jesse filed a complaint in Lancaster County District Court for a writ of habeas corpus and a declaratory judgment. In that action, he challenged the constitutionality of Nebraska's adoption statutes that permitted Jaelyn's adoption without his consent. And he claimed that Nebraska must give full faith and credit to Ohio's paternity determination. On July 22, Jesse sued for custody in the Ohio Court of Common Pleas. On July 30, Jesse filed an objection to the adoption of Jaelyn and a request for notice of any adoption proceeding for Jaelyn in Douglas County Court. In August, Tylee H., the prospective adoptive parent, filed a petition to adopt Jaelyn in Douglas County Court.

4. Ohio Court Proceedings

A March 2015 order from the Ohio Court of Common Pleas shows that in September 2014, Tylee moved to intervene in Jesse's custody action (after she filed a Nebraska petition for adoption in August). Tylee sought a dismissal of Jesse's custody case, but the Ohio court continued the matter and ordered a home study. In October, Tylee moved for a finding that Jesse was not Jaelyn's biological father and asked for a dismissal. The Ohio court again continued the matter and ordered the parties to file briefs. In February 2015, Tylee filed a notice of a final adoption in Nebraska. The Douglas County Court entered the Nebraska adoption decree on January 15, 2015.

The Ohio court stated that Jesse's rights regarding an adoption were established by the acknowledgment of paternity. The court concluded that "[p]aternity is not an issue because [Jesse] is the legal father of Jaelyn . . . . This court is curious as to why this child was adopted in another jurisdiction when this matter has been pending since July 22, 2014." It continued the matter for "pre-trial on the issue of custody." At oral arguments before this court, Jesse's attorney stated that the Ohio custody proceeding was still pending.

5. County Court Proceedings

(a) Parties' Pleadings

In Jesse's objection to the adoption, he alleged that under Ohio law, his acknowledgment was a determination of his paternity as though Jaelyn were born to him during marriage. He believed that a person named "Tylee" or someone else would seek Jaelyn's adoption and would claim that he was a putative father. He objected to any adoption and requested notice of any adoption petition or hearing. He also alleged that he had filed a habeas proceeding in district court to challenge Jaelyn's detention. He requested that the county court hold any adoption petition in abeyance until the district court resolved the claims in his habeas proceeding.

As stated, in August 2014, Tylee filed an adoption petition in Douglas County Court. She alleged that Heather had relinquished Jaelyn in February 2014 and that Jaelyn had lived with Tylee for more than 6 months. Tylee alleged that Jesse was not Jaelyn's biological father. She claimed that she did not need his consent because he had not filed an administrative request for notification of an adoption or an administrative objection to an adoption. She acknowledged that Jesse had filed a custody action in Ohio but claimed that the Ohio court lacked jurisdiction for unstated reasons. She requested that the court order Jesse to submit to genetic testing.

In September 2014, Jesse moved to intervene in the adoption proceeding. He attached a copy of his paternity acknowledgment. He alleged that the U.S. Constitution and Nebraska's § 43-1406 required the county court to give full faith and credit to his paternity determination under Ohio law. Citing this court's decision in *Cesar C. v. Alicia L.*,[4] he alleged that he was also Jaelyn's legal parent under Nebraska law. Finally, he alleged that he had a constitutionally protected relationship with Jaelyn that required his consent to her adoption and that

[4] *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

he had not given it. He cited the case number for his pending custody case in Ohio and again informed the court of the habeas corpus proceeding in district court.

Tylee objected to Jesse's motion to intervene. She alleged that Heather had named two possible biological fathers and that genetic testing had shown that Jaelyn's biological father was Tyler T., who had relinquished his parental rights. And Nebraska's adoption statutes require consent only from a biological father. She alleged that Jesse's paternity acknowledgment created only a rebuttable presumption of paternity and that genetic testing had rebutted the presumption. Because Nebraska's statutes did not require Jesse's consent, she claimed that he did not have sufficient interest to intervene.

Jesse responded with a motion to dismiss the adoption proceeding. He alleged that the court lacked subject matter jurisdiction and could not grant an adoption because he had not consented to it. He alleged that he was a necessary party because of his constitutionally protected relationship with Jaelyn. Additionally, he alleged that under Ohio law, Heather had waived her right to a judicial paternity determination because she signed the paternity acknowledgment and did not seek a rescission. He again alleged that the court must give full faith and credit to Ohio's paternity determination. He claimed that Tylee and her attorney had committed a fraud on the court by characterizing him as a putative father.

(b) Adoption Hearings

At the hearing on Jesse's motion to intervene, the court received Heather's February 2014 relinquishment of Jaelyn specifically for adoption by Tylee. It also admitted evidence that Jesse had filed an action in district court. He argued that the district court therefore had jurisdiction over the matter. Tylee countered that the county court had exclusive jurisdiction over an adoption.

Jesse objected to genetic testing results that showed Tyler was Jaelyn's biological father. He argued that the evidence

lacked foundation and was irrelevant because he was Jaelyn's legal father. He argued that Nebraska's putative father statutes do not apply to a child's legal father and that for such men, an adoption proceeding is a collateral attack on a prior paternity determination.

Tylee argued that neither Jesse's paternity acknowledgment nor Jaelyn's birth certificate gave Jesse standing to block Jaelyn's adoption. She argued that under Nebraska law, he was only a putative father whose consent was not required. Tylee acknowledged that Nebraska law excuses an adjudicated father from the 5-day time limit for filing an administrative objection[5] and that he can still file an objection in county court. But she argued that if genetic testing excludes that man as the biological father, he still has no right to block an adoption. She contended that there was no prior "judgment" to collaterally attack. The court admitted the testing results.

(c) County Court's Orders

In December 2014, the county court denied Jesse's motion to intervene. The court stated that Jesse had never filed an administrative objection, never contested the adoption in county court, and never asked a county court to determine whether his consent was required. It concluded that the genetic testing results were relevant and admissible. It reasoned that Neb. Rev. Stat. §§ 43-104.05(3) and 43-104.22(11) (Reissue 2008) render a man's consent to an adoption unnecessary if a court determines that he is not the child's biological father.

The court reasoned that the putative father statutes, read as a whole, affirmed this conclusion. It noted that under Neb. Rev. Stat. § 43-104.12 (Reissue 2008), the statutory notice of the mother's intent to relinquish custody for an adoption only informs a "biological father or possible biological fathers" of his right to deny paternity or relinquish custody and consent to

[5] See *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006). See, also, Neb. Rev. Stat. §§ 43-104.01(7) and 43-104.25 (Reissue 2008).

an adoption. And the men who must receive this notice include a child's adjudicated father or a man listed on the child's birth certificate as the father.[6] Similarly, the notice only informs the recipient of the rights of a biological father or "possible biological fathers."[7]

The county court correctly recognized that we have held the 5-day time limit for filing an administrative objection does not apply to adjudicated fathers or undisputed biological fathers who have an established familial relationship with their child.[8] But it concluded that § 43-104.22(11) still governed whether a legal father must consent to an adoption. It determined that § 43-104.22(11) made Jesse's consent unnecessary because he was not the biological father. Therefore,

> this Court need not determine whether [Jesse] should be called a putative (possible) or adjudicated ("legal") father, or whether [he] did or did not establish a familial relationship with [Jaelyn] (a fact which is in dispute), because section 43-103.22 applies no matter which word is used to describe [Jesse's] status as to this minor child born out of wedlock.

Accordingly, the county court determined that Jesse lacked standing to block the adoption because he had no interest that entitled him to intervene. In January 2015, the court entered a decree of adoption.

III. ASSIGNMENTS OF ERROR

Jesse assigns that the court erred in: (1) denying Jesse's motion to intervene; (2) failing to give Ohio's paternity determination full faith and credit; (3) concluding that his consent to the adoption was unnecessary; (4) admitting genetic testing results and disestablishing his paternity under §§ 43-104.05(3)

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[6] See § 43-104.12(1) to (3).

[7] See Neb. Rev. Stat. § 43-104.13 (Reissue 2008).

[8] See, *In re Adoption of Corbin J.*, 278 Neb. 1057, 775 N.W.2d 404 (2009); *In re Adoption of Jaden M., supra* note 5.

and 43-104.22(11); (5) excluding evidence of his established familial relationship and jurisdiction; (6) determining that it had jurisdiction over the adoption; and (7) entering a decree of adoption.

Additionally, Jesse assigns (1) that Nebraska's putative and unwed father statutes violate the Due Process and Equal Protection Clauses of the U.S. and Nebraska Constitutions and (2) that these constitutional guarantees require a trial court to appoint counsel for indigent parents who object to the involuntary termination of their parental rights through adoption proceedings.

IV. STANDARD OF REVIEW

[1-3] A jurisdictional issue that does not involve a factual dispute presents a question of law.[9] The meaning and interpretation of a statute present questions of law.[10] When reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[11]

V. ANALYSIS

[4-6] Before deciding the merits of an appeal, an appellate court must determine if it has jurisdiction.[12] If the court from which a party appeals lacked jurisdiction, then the appellate court acquires no jurisdiction.[13] But we have the power to determine whether we have jurisdiction over an appeal and to correct jurisdictional issues even if we do not have jurisdiction to reach the merits.[14]

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[9] *Pearce v. Mutual of Omaha Ins. Co., ante* p. 277, 876 N.W.2d 899 (2016).

[10] See *Adair Asset Mgmt. v. Terry's Legacy, ante* p. 32, 875 N.W.2d 421 (2016).

[11] *Pearce, supra* note 9.

[12] See *In re Interest of Jackson E., ante* p. 84, 875 N.W.2d 863 (2016).

[13] *Shasta Linen Supply v. Applied Underwriters*, 290 Neb. 640, 861 N.W.2d 425 (2015).

[14] See *id.*

1. County Court Incorrectly Ignored or Failed to Properly Resolve Jurisdictional Questions

Jesse's pleadings and attachments in county court should have alerted the county court to possible jurisdictional issues under state and federal law. First, both parties alleged that Jesse had commenced a custody dispute in Ohio that was still pending. These allegations raised a jurisdictional issue under the federal Parental Kidnapping Prevention Act of 1980.[15] In particular, under that federal act, the record fails to show that the court determined whether the Ohio court was properly exercising jurisdiction over a custody dispute involving these parties.

Second, Jesse alleged that he had previously commenced a habeas and declaratory judgment action in district court to challenge Jaelyn's detention. This allegation raised an issue under the jurisdictional priority doctrine.[16]

[7] The county court apparently agreed with Tylee that it had exclusive jurisdiction to decide all matters related to adoption proceedings. It is true that under Neb. Rev. Stat. § 43-102 (Reissue 2008), a county court or juvenile court will ordinarily have jurisdiction over an adoption proceeding. But district courts have inherent equity jurisdiction to resolve custody disputes.[17] And they have jurisdiction over habeas proceedings challenging adoption proceedings.[18] Accordingly, district courts have jurisdiction over a related declaratory

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[15] See 28 U.S.C. § 1738A(g) (2012).

[16] See, *Charleen J. v. Blake O.*, 289 Neb. 454, 855 N.W.2d 587 (2014); *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013).

[17] See *Charleen J., supra* note 16.

[18] See, e.g., *Monty S. & Teresa S. v. Jason W. & Rebecca W.*, 290 Neb. 1048, 863 N.W.2d 484 (2015); *Brett M. v. Vesely*, 276 Neb. 765, 757 N.W.2d 360 (2008); *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992); *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986).

judgment action challenging the constitutionality of Nebraska adoption statutes.[19] In short, the county court's statutory jurisdiction over the adoption petition did not give it exclusive jurisdiction to resolve challenges to Nebraska's adoption statutes that could have foreclosed the adoption. In both courts, Jesse claimed that his relationship with Jaelyn was constitutionally protected and that Nebraska was required to give full faith and credit to Ohio's determination of his paternity. So, the separate proceedings raised the same material issues and involved the same parties. And Jesse filed the action in district court first.

We point out these jurisdictional errors to guide county courts in future adoption cases. But our decision rests on the jurisdictional question that the county court did not address. It failed to determine under § 43-1406 whether it must give full faith and credit to Ohio's determination that Jesse's consent was required. Because § 43-1406 requires Nebraska to recognize Ohio's paternity determination, the court lacked jurisdiction to decree an adoption without his consent.

2. Recognizing Jesse's Parental Rights Is Not Contrary to Nebraska's Public Policy

Section 43-1406(1) requires this state to give full faith and credit to another's state's paternity determination: "A determination of paternity made by any other state, whether established through voluntary acknowledgment, genetic testing, or administrative or judicial processes, shall be given full faith and credit by this state."

Tylee contends that Nebraska should not recognize Jesse's parental rights under Ohio's statutes. She argues that doing so would conflict with the public policy reflected in Nebraska's adoption statutes. She claims that a distinction exists between

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[19] See Neb. Rev. Stat. §§ 25-21,149 (Cum. Supp. 2014) and 25-21,150 (Reissue 2008).

giving effect to another state court's judgment and giving effect to another state's statutes that are contrary to Nebraska's adoption statutes. She contends that the doctrine of comity is inappropriate here because § 43-104.22(11) makes a legal father's consent to an adoption irrelevant if he is not the biological father. And she contends that Jesse's legal status cannot trump the desires of Jaelyn's natural mother and father to permit an adoption.

Leaving aside the irony of Tylee's argument that the rights of an uninvolved and unsupportive biological father are more significant than those of a legal father who has financially supported his child and participated in rearing her, she misstates Nebraska's public policy.

[8] "The Full Faith and Credit Clause of U.S. Const. art. IV, § 1, provides in part that 'Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State.'"[20] A "judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment."[21]

[9] It is true that we have recognized Nebraska is not constitutionally required to give effect to a sister state's statutes that are contrary to the public policy of this state:

> [T]he Full Faith and Credit Clause does not compel a state to substitute the statutes of another state for its own statutes, with regard to "judgments, however, the full faith and credit obligation is exacting." . . . [A] "forum state need not give application to the *statute* of another state where the *statute* is in conflict with the laws or policy of the forum[.]" . . . [W]hile a Nebraska court would not be required to grant an adoption pursuant to California statutes when such adoption would not be permitted under

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[20] *In re Trust Created by Nixon*, 277 Neb. 546, 549-50, 763 N.W.2d 404, 408 (2009).

[21] *Id.* at 550, 763 N.W.2d at 408.

> Nebraska statutes, a Nebraska court may not refuse to recognize the judgment consisting of an adoption decree validly entered by a California court.[22]

Revealingly, however, Tylee never discusses § 43-1406(1) in her brief. And we cannot conclude that recognizing Jesse's parental rights under Ohio law is contrary to Nebraska's public policy when the Legislature, through § 43-1406(1), specifically requires this recognition.

(a) Recognizing a Person's Relationship Status Under a Sister State's Laws Is Not Limited to Judgments

Section 43-1406(1)'s requirement that Nebraska recognize a sister state's paternity determination mirrors Neb. Rev. Stat. § 42-117 (Reissue 2008). That statute requires courts to recognize legal marriages in other states even if they would be invalid in Nebraska: "All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state."

And usually, no judgment exists in a sister state finding a valid common-law marriage. Instead, Nebraska courts have applied the law of the sister state to determine a party's legal marital status.[23] So, our common-law marriage cases illustrate that resolving the full faith and credit issue does not always turn on whether a judgment conferring a legal status exists. This is consistent with recognizing another state's "[p]ublic [a]cts."[24]

Similarly, in a will dispute, we applied the law of a sister state to conclude that a parent-child relationship existed under

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[22] *Id.* at 551, 763 N.W.2d at 409 (citation omitted) (emphasis in original).

[23] See, *Spitz v. T.O. Haas Tire Co.*, 283 Neb. 811, 815 N.W.2d 524 (2012); *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984); *In re Estate of Schenck*, 5 Neb. App. 736, 568 N.W.2d 567 (1997). See, also, *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

[24] See U.S. Const. art. IV, § 1.

a California statute that created that legal status if a man had publicly acknowledged a child as his own and received the child into his family.[25] So, we have previously recognized a man's legal status as a child's father that rested on a statutory paternity determination, not a court's judgment.

And contrary to Tylee's arguments, in *Cesar C. v. Alicia L.*,[26] we recognized that a paternity acknowledgment signed in Nebraska confers legal parental rights the same as a judgment of paternity. We turn to that decision.

(b) An Acknowledged Father in Nebraska Is Also a Child's Legal Father

[10] In Nebraska, as in Ohio, a paternity acknowledgment operates as a legal finding of paternity after the rescission period has expired.[27] At that point, the acknowledged father is the child's legal father, not a presumed father. And under *Cesar C.*, a father whose paternity is established by a final, voluntary acknowledgment has the same right to seek custody as the child's biological mother, even if genetic testing shows he is not the biological father.[28]

There, the mother was arrested on drug charges after she and the acknowledged father signed a paternity acknowledgment; the father retained custody while she was in prison. After she was released, she took the child without his consent. He sought a judgment of paternity and child support from the mother. The mother countered by filing a separate action in which she obtained an order for genetic testing, which excluded him as the biological father. She then sought summary judgment in the acknowledged father's paternity action. The trial court determined that the mother had a superior right to custody because

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[25] See *Riddle v. Peters Trust Co.*, 147 Neb. 578, 24 N.W.2d 434 (1946).

[26] *Cesar C., supra* note 4.

[27] See Neb. Rev. Stat. §§ 43-1402 and 43-1409 (Reissue 2008).

[28] See *Cesar C., supra* note 4.

she was not unfit, but awarded the father visitation rights and ordered him to pay child support.

[11] We reversed that judgment. We found plain error because the trial court failed to give the proper legal effect to the paternity acknowledgment. We explained that under § 43-1409, after the rescission period expired, the acknowledgment became a legal finding, and the mother had not challenged that finding for fraud, duress, or material mistake of fact. We noted that the Legislature added the "'legal finding'" provision to comply with a federal mandate as a condition for financial aid.[29] And we explicitly stated that under § 43-1402, "establishment of paternity by acknowledgment is the equivalent of establishment of paternity by a judicial proceeding."[30] We concluded that the genetic testing results were irrelevant and that the court erred in failing to treat the action as a custody and support dispute between two legal parents.

Tylee incorrectly argues that *Cesar C.* is distinguishable because the father filed a paternity action. He was not trying to establish his paternity for the first time in that action. He was asking the court to recognize his statutory legal finding of paternity, return his child, and impose child support obligations on the mother. The important point is that we held the paternity acknowledgment gave him the same right to seek custody of his child as the mother, despite genetic testing showing that he was not the biological father. We did not limit that holding to a custody dispute between the signatories of an acknowledgment. Instead, we relied on § 43-1409's explicit statement that an acknowledgment becomes a legal finding after the rescission period. And under that holding, it would be a strange result if a legal father nonetheless had no right to seek custody if the mother unilaterally decided to relinquish her child for adoption. But we need not decide that issue here.

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[29] *Id.* at 988, 800 N.W.2d at 256.

[30] *Id.* at 986, 800 N.W.2d at 255.

We agree with Jesse that if he had voluntarily acknowledged his paternity in Nebraska, we would recognize his status as Jaelyn's legal father. In *Cesar C.*, the acknowledged father's equal right to seek custody was directly tied to his paternity acknowledgment. To hold that recognizing Jesse's rights under Ohio's statutes is contrary to Nebraska's public policy would directly conflict with our recognition of an acknowledged father's parental rights under Nebraska's statutes.

[12-14] The Full Faith and Credit Clause requires states to give the same effect to a judgment in the forum state that it has in the state where the court rendered the judgment.[31] Section 43-1406(1) extends that requirement for judgments to a sister state's paternity determination established through a voluntary acknowledgment. We note that most states probably have some version of § 43-1406(1) because Congress has mandated that states adopt this provision to obtain grants to provide aid to needy families.[32] The federal statute ensures uniform recognition and enforcement of child support orders based on a foreign state's determination of a man's paternity.[33] Because the Legislature complied with this requirement, it could not have simultaneously intended to give it a restricted meaning that forecloses courts from applying it to adoption proceedings. So whether a paternity acknowledgment in a sister state gives an acknowledged father the right to block an adoption in Nebraska depends upon whether the acknowledgment confers that right in the state where it was made.[34] In Ohio, Jesse has that right.

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[31] *In re Trust Created by Nixon, supra* note 20.

[32] See, 42 U.S.C. § 666(a)(5)(C)(iv) (2012); *Burden v. Burden*, 179 Md. App. 348, 945 A.2d 656 (2008); 23 Am. Jur. 2d *Desertion and Nonsupport* §§ 73 and 74 (2013).

[33] See, e.g., *H.M. v. E.T.*, 14 N.Y.3d 521, 930 N.E.2d 206, 904 N.Y.S.2d 285 (2010).

[34] See *Matter of Gendron*, 157 N.H. 314, 950 A.2d 151 (2008). See, also, *In re Mary G.*, 151 Cal. App. 4th 184, 59 Cal. Rptr. 3d 703 (2007); *Burden, supra* note 32.

3. Ohio Parentage Statutes

Ohio's parentage statutes[35] create a parent-child relationship that does not require a court order. Under § 3111.02(A), the "parent and child relationship between a child and the natural father of the child may be established by an acknowledgment of paternity as provided in sections 3111.20 to 3111.35." Under § 3111.01(A), the term

> "parent and child relationship" means the legal relationship that exists between a child and the child's natural or adoptive parents and upon which [§§ 3111.01 to 3111.85] and any other provision of the Revised Code confer or impose rights, privileges, duties, and obligations. The "parent and child relationship" includes the mother and child relationship and the father and child relationship.

Under § 3111.03, a man is presumed to be a child's natural father when an acknowledgment of paternity has been properly filed but has not yet become final. But under § 3111.25, an

> acknowledgment of paternity is final and enforceable *without ratification by a court* when the acknowledgment has been filed with the office of child support, the information on the acknowledgment has been entered in the birth registry, and the acknowledgment has not been rescinded and is not subject to possible rescission pursuant to section 3111.27 . . . .

(Emphasis supplied.)

And under § 3111.27, either signatory can seek an administrative rescission of the acknowledgment if he or she requests a paternity determination within 60 days of the last signature. Under Ohio's § 3111.26, "[a]fter an acknowledgment of paternity becomes final and enforceable, the child is the child of the man who signed the acknowledgment of paternity, as though born to him in lawful wedlock." Here, neither party asked for an administrative paternity determination within 60 days of

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[35] See Ohio Rev. Code Ann. §§ 3111.01 to 3111.85 (LexisNexis 2008).

signing the acknowledgment on April 16, 2013. Heather acquiesced in the establishment of Jesse's paternity despite her later acknowledgment that another man could have been Jaelyn's father. So after June 16, 2013, neither Heather nor Jesse could seek an administrative rescission under § 3111.27. It was a final paternity determination.

Under Ohio's § 3111.38.1, if neither signatory requested an administrative paternity determination within the 60-day time limit, Ohio's paternity statutes preclude bringing a paternity action, apart from specified exceptions. But these exceptions do not include disestablishing a man's paternity in an adoption proceeding.

To the contrary, Ohio statutes require a legal father's consent to an adoption. Under § 3107.06,

> [u]nless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by all of the following:
>
> (A) The mother of the minor;
>
> (B) The father of the minor, if any of the following apply:
>
> . . . .
>
> (4) He acknowledged paternity of the child and that acknowledgment has become final . . . .[36]

Section 3107.07 lists exceptions to the consent requirement.[37] It excludes a putative father from the consent requirement if he failed to comply with the putative father registration requirements. But for legal parents, the exceptions to the consent requirement are more limited and do not appear to apply here.

Finally, Ohio's § 3111.28 permits a court action to rescind a paternity acknowledgment for "fraud, duress, or material mistake of fact." The action can be brought by either of the

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[36] Ohio Rev. Code Ann. § 3107.06 (LexisNexis Supp. 2009).

[37] Ohio Rev. Code Ann. § 3107.07 (LexisNexis Supp. 2009).

signatories, a man presumed to be the father, or a person who did not sign the acknowledgment, presumably including the actual biological father if he was not a signatory. But a signatory must bring the action within 1 year of the acknowledgment's becoming final. Heather never brought an action to rescind the acknowledgment. So, she has lost that right and Ohio law precludes her from disestablishing Jesse's paternity in an adoption proceeding.

In sum, under Ohio's statutes, Jesse is Jaelyn's father, not her presumed or putative father. And he has the right to give or refuse his consent to her adoption. Under § 43-1406(1), Nebraska courts must extend full faith and credit to Ohio's determination of Jesse's paternity and his accompanying rights to withhold his consent to Jaelyn's adoption. So, Nebraska is not a sanctuary state to avoid the law of the state where the child was born. Permitting this adoption would defeat the purpose of § 43-1406(1), which requires Nebraska to give full faith and credit to Ohio's act. The county court erred in failing to recognize Jesse's legal status and apply Ohio's law to determine his parental rights.

4. Nebraska's Statutes Do Not Permit County Courts to Disestablish a Legal Father's Paternity Through an Adoption Decree

[15] Under the general intervention statute,[38] to be entitled to intervene in an action, an intervenor must have a direct and legal interest. The intervenor must lose or gain by the direct operation and legal effect of the judgment that may be rendered in the action.[39] The county court relied on §§ 43-104.05(3) and 43-104.22(11) to conclude that Jesse's consent to Jaelyn's adoption was not required. But we conclude that these statutes do not authorize a county court to

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[38] Neb. Rev. Stat. § 25-328 (Reissue 2008).

[39] See *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

disestablish an acknowledged father's parental rights under another State's paternity determination.

Section 43-104.05 sets out the requirements for a putative father's petition to establish paternity of his child born out of wedlock. Under this section, a putative father can only file such a petition if he previously filed an administrative objection to a child's adoption within 5 days of the child's birth or receiving notice of the mother's intent to relinquish custody. At that proceeding, if the mother challenges the putative father's paternity, the court can order genetic testing and determine that his consent to an adoption is not required under § 43-104.22(11). Similarly, Neb. Rev. Stat. § 43-104(4) (Reissue 2008) provides that "[c]onsent shall not be required of an adjudicated or putative father who is not required to consent to the adoption pursuant to section 43-104.22." But Jesse is neither an adjudicated father nor a putative father. He is an acknowledged father.

We have stated that "to terminate a father's rights through an adoption procedure, the consent of the adjudicated father of a child born out of wedlock is required for the adoption to proceed unless the Nebraska court having jurisdiction over the custody of the child determines otherwise, pursuant to § 43-104.22."[40] That section sets out 11 circumstances under which consent to an adoption is not required from "an adjudicated biological father or putative biological father of a minor child born out of wedlock." Six subsections in § 43-104.22 refer to a "father," two refer to a "putative father," and one refers to "an adjudicated biological father." Section 43-104.22(6) eliminates the consent requirement if the child "was conceived as a result of a nonconsensual sex act or an incestual act." Only the last one, § 43-104.22(11), refers to a "man": A man's consent to an adoption is not required if "[t]he man is not, in fact, the biological father of the child."

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[40] *Jeremiah J. v. Dakota D.*, 287 Neb. 617, 623, 843 N.W.2d 820, 826 (2014).

[16] But we conclude that Jesse is not a "man" within the meaning of § 43-104.22(11). He is Jaelyn's legal father under Ohio law. To hold otherwise would be inconsistent with the requirement under § 43-1406(1) that Nebraska give full faith and credit to another state's paternity determination. As we have explained, to do that, we must look to the effect of that determination under Ohio law, which gives an acknowledged father the full rights of a natural father who can withhold consent to an adoption. And in Ohio,[41] as in Nebraska,[42] the statutory determination of Jesse's paternity has the effect of a judgment.

[17] For judgments, collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.[43] Only a void judgment is subject to collateral attack.[44] The same rules apply to a voluntary acknowledgment of paternity that has the same effect as a judgment. Tylee has not attacked Jesse's paternity determination for procedural or jurisdictional defects, nor do we see any grounds for such a challenge. We conclude that the court erred in determining that §§ 43-104.05 and 43-104.22 authorized it to forgo Jesse's consent.

Although Jesse urges us to address his due process and equal protection claims, we decline to do so. Jesse concedes that he did not explicitly raise his due process challenges to Nebraska's adoption statutes in the county court, and he did not raise an equal protection challenge at all. But he claims that he was unfairly deprived of an opportunity to raise these issues because the county court did not allow him to intervene.

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[41] See § 3111.13.

[42] See *Cesar C., supra* note 4, citing § 43-1409.

[43] *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

[44] *Id.*

[18] An appellate court will generally not decide a constitutional issue that was not presented to the trial court.[45] We recognize that in Jesse's motion to intervene, he claimed his familial relationship with Jaelyn was constitutionally protected. But because we conclude that § 43-1406 requires Nebraska to give full faith and credit to Ohio's paternity determination, we need not reach Jesse's constitutional claims. And contrary to Jesse's arguments, they will not recur on remand because we have determined that the county court must vacate its decree. Although they may recur in future cases, the Legislature may yet address these issues statutorily, making a constitutional analysis unnecessary.

Similarly, Jesse's claim that he was entitled to appointed counsel in an involuntary adoption proceeding to terminate his parental rights rests on his constitutional claims and was not presented to the trial court. Accordingly, we do not address that issue here.

VI. CONCLUSION

We conclude that the county court erred in failing to give full faith and credit to Ohio's determination of Jesse's paternity. Section 43-1406(1) requires Nebraska to recognize his status, the same as if an Ohio court had entered a judgment of paternity. And full faith and credit means that Nebraska courts must give Jesse's paternity the same effect that it would have in Ohio. Because Jesse's consent is required under Ohio law, the county court could not disestablish his paternity without his consent in Nebraska. Because we conclude that § 43-1406 requires Nebraska to give full faith and credit to Ohio's paternity determination, we do not reach Jesse's constitutional challenges to Nebraska's statutes or his claim that he was entitled to appointed counsel to challenge the adoption.

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[45] See *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013).

We conclude that the adoption decree is invalid, and therefore, we reverse the judgment and remand the cause with directions for the county court to vacate its decree. We are, of course, sympathetic to the heartache that undoing these errors will cause the parties after this much time. But we cannot ignore our duty to uphold Jesse's parental rights under Ohio law.

Because we conclude that the court erred in exercising jurisdiction over this adoption petition, we do not set out instructions here for custody determinations going forward. Instead, we instruct the district court to resolve these issues in the companion case.

Reversed and remanded with directions to vacate.

Stacy, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

The Cattle National Bank & Trust Co., appellee, v. Robert Watson and Shona Watson, appellees, and Bill Watson and Rebecca Watson, appellants.

The Cattle National Bank & Trust Co., appellee, v. Robert Watson, appellant and cross-appellee, Shona Watson, appellee and cross-appellee, and Bill Watson and Rebecca Watson, appellees and cross-appellants.

880 N.W.2d 906

Filed June 24, 2016. Nos. S-15-512, S-15-872.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
4. **Actions: Parties: Judgments: Appeal and Error.** Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) requires, in cases with multiple claims or parties, an explicit adjudication with respect to all claims or parties or, failing such explicit adjudication of all claims or parties, an express determination that there is no just reason for delay of an appeal of an order disposing of less than all claims or parties and an express direction for the entry of judgment as to those adjudicated claims or parties.

5. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
6. ____: ____. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
7. **Contracts: Guaranty: Debtors and Creditors: Words and Phrases.** A guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults.
8. **Contracts: Guaranty.** A guaranty is interpreted using the same general rules as are used for other contracts.
9. **Contracts: Guaranty: Appeal and Error.** To determine the obligations of the guarantor, an appellate court relies on general principles of contract and guaranty law.
10. **Guaranty: Liability.** When the meaning of a guaranty is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.
11. **Actions: Contracts: Guaranty.** A suit on a contractual guaranty presents an action at law.
12. **Actions: Parties.** The purpose of Neb. Rev. Stat. § 25-301 (Reissue 2008) is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause.
13. **Actions: Parties: Standing.** The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
14. ____: ____: ____. The purpose of the real party in interest inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
15. **Declaratory Judgments.** In Nebraska, a party may not simply move the court for a declaratory judgment.
16. **Right to Counsel: Effectiveness of Counsel.** A self-represented litigant will receive the same consideration as if he or she had been represented by an attorney, and, concurrently, that litigant is held to the same standards as one who is represented by counsel.
17. **Judgments: Garnishment: Jurisdiction.** A garnishment in aid of execution issued before judgment is without jurisdiction and void, and not merely irregular.
18. **Judgments: Debtors and Creditors.** An execution issued without a judgment to support it is void.

19. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
20. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
21. **Final Orders: Appeal and Error.** There are three types of final orders that may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 2008): (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
22. **Final Orders: Words and Phrases.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an essential legal right.
23. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order form which an appeal is taken.
24. **Final Orders.** Substantial rights under Neb. Rev. Stat. § 25-1902 (Reissue 2008) include those legal rights that a party is entitled to enforce or defend.
25. **Summary Judgment: Claims: Garnishment.** An interlocutory order granting summary judgment on fewer than all of the claims in an action cannot serve as the judgment required for an execution or garnishment in aid of execution.
26. **Final Orders.** Since Neb. Rev. Stat. 25-1315(1) (Reissue 2008) is substantially similar to Fed. R. Civ. P. 54(b), federal cases construing rule 54(b) may be used for guidance in determining when a decision is a "final judgment" for purposes of § 25-1315(1).
27. **Appeal and Error.** Appellate courts do not generally consider arguments and theories raised for the first time on appeal.
28. **Judgments: Collateral Attack.** A void order may be attacked at any time in any proceeding.

Appeals from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Final orders in No. S-15-512 vacated. Judgment in No. S-15-872 affirmed.

Bill Watson and Rebecca Watson, pro se, in Nos. S-15-512 and S-15-872.

John M. Guthery, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee The Cattle National Bank & Trust Co., in Nos. S-15-512 and S-15-872.

Robert Watson, pro se, in No. S-15-872.

Justin J. Knight, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., and Michael C. Cox, of Koley Jessen, P.C., L.L.O., for appellee The Cattle National Bank & Trust Co., in No. S-15-872.

Heavican, C.J., Wright, Connolly, Cassel, and Kelch, JJ.

Cassel, J.

I. INTRODUCTION

A bank's action against four guarantors on their respective personal guaranties of an entity's debts has generated three appeals by various guarantors. The first appeal was taken after the district court granted the bank's motions for summary judgment but failed to adjudicate a cross-claim. The second appeal was taken from execution and garnishment proceedings that occurred while the first appeal was pending. Because of the undisposed cross-claim, the Nebraska Court of Appeals dismissed the first appeal. One guarantor then moved to vacate the summary judgment order. The district court denied the motion and simultaneously dismissed the pending cross-claim. The third appeal followed. We consider it first.

The third appeal raises three issues. First, were the guarantors bound by the second page of the document? They were, because the first page incorporated the second page and defined "Undersigned" to include them. Second, can a guarantor assert defenses arising from the entity's underlying debt? For various reasons, he cannot. Finally, did the district court err in failing to vacate the summary judgment order? Because the guarantor conflated the order's initial lack of finality with its validity, the court correctly overruled the motion. In the third appeal, we affirm the district court's judgment.

In the second appeal, the guarantors now argue a new ground—that the execution and garnishment proceedings were void because they were commenced prior to judgment. Although the interlocutory order granting summary judgment motions was not void, it was not a "judgment" sufficient to support execution or garnishment in aid of execution. The interlocutory order ultimately became part of a judgment. But this did not validate the void process. We therefore vacate the void execution and garnishments.

II. BACKGROUND

1. Guaranties

The action proceeded against four members of the Watson family—Robert Watson, Shona Watson, Bill Watson, and Rebecca Watson (collectively the Watsons). Robert, Shona, and Rebecca were members of Reserve Design, LLC (Reserve), a construction business. In 2007, the Watsons signed identical personal guaranties for the debts that Reserve owed to The Cattle National Bank & Trust Co. (Bank). The guaranties expressly included Reserve's future indebtedness.

Each of the guaranties consisted of a single sheet of paper with print on both sides. The pages were labeled "page 1 of 2" and "page 2 of 2." The Watsons' signatures appear at the bottom of page 1, and there is no dispute that they signed page 1. Although page 2 included what appear to be lines for initials, none of the Watsons initialed or otherwise signed page 2.

Several provisions on page 1 are relevant. First, a definition stated: "'Undersigned' shall refer to all persons who sign this guaranty, severally and jointly." This definition appeared immediately below the last signature line and within its width. The term "Undersigned," appearing in the same initially capitalized form, was used throughout the document. Second, a provision on the first page stated:

> [T]he Undersigned guarantees to [the Bank] the payment and performance of each and every debt, liability and obligation of every type and description which [Reserve]

> may now or at any time hereafter owe to [the Bank] (whether such debt, liability or obligation now exists or is hereafter created or incurred[)].

Third, the first page provided that the liability of "the Undersigned" was "UNLIMITED." Finally, page 1 stated, in bold type: "This guaranty includes the additional provisions on page 2, all of which are made a part hereof."

Page 2 consisted of eight additional provisions. One pertained to the waiver of defenses. It stated, in relevant part:

> The Undersigned waives any and all defenses, claims and discharges of [Reserve], or any other obligor, pertaining to Indebtedness, except the defense of discharge by payment in full. Without limiting the generality of the foregoing, the Undersigned will not assert, plead or enforce against [the Bank] any defense of . . . fraud . . . which may be available to [Reserve] or any other person liable in respect of any Indebtedness . . . .

Another provided that the Bank could "enter into transactions resulting in the creation or continuance of Indebtedness, without any consent or approval by the Undersigned and without any notice to the Undersigned."

2. Loan

In 2010, 3 years after the guaranties had been given to the Bank, the Bank loaned Reserve $40,000 (loan). Robert signed a loan agreement on behalf of Reserve as "Rob Watson, Manager." And he extended the loan's maturity date on three later occasions, signing each extension as "Rob Watson, Manager." Robert claims that the Bank's loan officer promised him that if he signed the loan on behalf of Reserve, the officer would later rewrite it as a third mortgage for Robert's personal residence. The loan was never rewritten as Robert's personal obligation.

In 2012, Reserve failed to make a required payment on the loan, and the Bank declared default and demanded payment from the Watsons on the guaranties. The Watsons refused to

pay. The Bank filed a complaint for breach of guaranty, naming the Watsons as defendants.

Robert's amended answer included a counterclaim for fraud in the inducement. He claimed that he was fraudulently induced to sign the loan in his capacity as manager of Reserve. He also claimed that he was not bound by the terms on page 2 of the guaranty, because he did not "undersign" it. Bill and Rebecca's answer asserted numerous defenses, but it did not assert the absence of signatures or initials on page 2. Shona's answer included a cross-claim against Robert.

3. Summary Judgment

Robert and the Bank each filed motions for summary judgment as to the breach of guaranty claims and Robert's counterclaim. One of Robert's motions included a motion "for Declaratory Judgment on contractual effect of Personal Guarantees."

The district court sustained the Bank's motions and overruled Robert's motions in an October 17, 2014, order (hereinafter summary judgment order). Regarding the Bank's claims for breach of guaranty, it observed that there was no dispute that the Watsons all signed the guaranties for the debt of Reserve. And it noted that the guaranties provided that the Bank could enter transactions resulting in the creation or continuance of indebtedness without the Watsons' notice or approval.

Regarding Robert's counterclaim for fraud in the inducement, the court first concluded that Robert was not a real party in interest, because Reserve and the Bank were the only two parties to the loan agreement. Therefore, because Reserve was not a party to the action, Robert could not raise a claim for fraud on its behalf. Second, it concluded that even if Reserve was a party to the action, the defense of fraud in the inducement was not available to the Watsons, because it was waived under the terms on page 2. Finally, the court concluded that Robert's motion for a declaratory judgment was improper, because the request was not made in the pleadings.

The court entered "judgment" for the Bank "against the [Watsons] jointly and severally in the amount of $30,000 plus interest of $1,839.45." The summary judgment order did not address Shona's cross-claim against Robert, and it did not direct the entry of final judgment pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008).

Robert, Bill, and Rebecca filed the first appeal. It was docketed in the Court of Appeals as case No. A-14-1028.

4. Execution and Garnishment

While the first appeal was pending, the Bank apparently filed requests for writs of execution and garnishment, but its requests are not in our record. The district court appears to have issued the requested writs, but they, too, are not in our record. In response, Robert and Bill filed objections to garnishment and Bill and Rebecca filed an objection to execution. These filings are also not in our record.

The court overruled the objections in two June 8, 2015, orders, which are in our record. One concluded that the Bank could proceed with the garnishments, because Robert and Bill failed to show that they did not owe the debts in question. And the other concluded that the Bank could proceed with the execution, because Bill and Rebecca made no showing that their property was exempt. According to the bill of exceptions, there was no discussion at the hearing regarding whether the summary judgment order was appealable or whether it was a "judgment" sufficient to support a writ of execution or garnishment.

Bill and Rebecca quickly filed the second appeal. It is docketed in this court as case No. S-15-512. Although the parties argue that an execution sale of a vehicle owned by Bill and Rebecca took place after June 8, 2015, neither the writ of execution nor any return of the writ is included in our record.

To the extent shown in our record, the events that followed are summarized below:

- July 8, 2015: Court of Appeals dismissed the first appeal, concluding that the summary judgment order was not final and appealable, because Shona's cross-claim against Robert was still pending.
- July 17, 2015: Robert filed motion in district court to vacate the summary judgment order.
- August 25, 2015: District court dismissed Shona's cross-claim and overruled Robert's motion to vacate.
- September 17, 2015: Robert filed notice of the third appeal, which was taken from the summary judgment order and the order overruling his motion to vacate. The third appeal is docketed in this court as case No. S-15-872.
- September 18, 2015: Bill and Rebecca filed a notice of appeal from the summary judgment order. Our clerk treated this as a second notice of appeal[1] in the third appeal.

We moved the second and third appeals to our docket,[2] and we consolidated them for argument and disposition.

III. ASSIGNMENTS OF ERROR

1. Second Appeal (No. S-15-512)

Bill and Rebecca assign that the district court erred by "[i]ssuing an order to execute and garnish on the statutorily deficient" summary judgment order.

2. Third Appeal (No. S-15-872)

Robert assigns, restated and consolidated, that the district court erred in (1) finding that there was no genuine issue of material fact regarding whether he is bound by the terms on page 2, (2) failing to consider his defense of fraud, (3) failing to find that the Bank has unclean hands, (4) finding that he was not a real party in interest in his counterclaim, (5) failing to consider his request for a declaratory judgment, and (6) failing to vacate the summary judgment order after the Court

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[1] See Neb. Ct. R. App. P. § 2-101(C) (2014).

[2] Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

of Appeals, in Robert's words, "found the [o]rder was statutorily insufficient and non-final."

On cross-appeal, Bill and Rebecca assign that the district court erred in (1) finding that there was no genuine issue of material fact regarding whether they were bound by the provisions on page 2 of the guaranty, (2) not finding that the Bank was required to give them "notice of further obligation under the personal guaranties," and (3) finding that they are obligated on the loan, even though they were not notified of it.

IV. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[3] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.[4]

[3] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.[5]

V. ANALYSIS

1. Third Appeal (No. S-15-872)

Because the third appeal reaches the merits of the summary judgment order, we address it first. In both Robert's appeal and Bill and Rebecca's cross-appeal, they contend that there

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[3] *Waldron v. Roark*, 292 Neb. 889, 874 N.W.2d 850 (2016).

[4] *Id.*

[5] *Braunger Foods v. Sears*, 286 Neb. 29, 834 N.W.2d 779 (2013).

was a genuine issue of material fact regarding whether they were bound by the provisions on page 2. Robert also attacks the summary judgment order on other grounds and appeals from the denial of his motion to vacate the summary judgment order.

(a) Jurisdiction

We have jurisdiction of the third appeal. Although nearly a year had expired after the entry of the summary judgment order, it did not become final or appealable until the dismissal of Shona's cross-claim.

[4] We have made it clear that § 25-1315(1) requires, in cases with multiple claims or parties, an explicit adjudication with respect to all claims or parties or, failing such explicit adjudication of all claims or parties, an express determination that there is no just reason for delay of an appeal of an order disposing of less than all claims or parties and an express direction for the entry of judgment as to those adjudicated claims or parties.[6]

Despite its terminology, the summary judgment order was not a "judgment," because it failed to adjudicate the cross-claim. And the order clearly does not include the language which might have purported to authorize an immediate appeal.[7] When the district court dismissed Shona's cross-claim, its series of orders formed a judgment—taken together, these orders finally determined the rights of the parties in the action.[8] Only then did the appeal time begin to run on the summary judgment order. And Robert's appeal was clearly timely.

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[6] *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

[7] See § 25-1315(1). See, also, *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007) (power should be used only in infrequent harsh case, based on likelihood of injustice or hardship to parties of delay in entering final judgment as to part of case).

[8] See Neb. Rev. Stat. § 25-1301(1) (Reissue 2008) (judgment is final determination of rights of parties in action).

(b) Summary Judgment

[5,6] A party moving for summary judgment must make a prima facie case by producing evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.[9] Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[10]

(i) Bill and Rebecca

All of Bill and Rebecca's assigned errors and corresponding arguments are based on their contention that because they did not sign page 2, they did not agree to the provisions on that page. Their first assignment argues generally that they did not agree to page 2, and their second and third assignments argue specifically that they are not bound by the waiver of notice provision on page 2.

The Bank argues we cannot address Bill and Rebecca's assigned errors, because they did not raise the issue in their answer. The pleadings frame the issues to be considered on a motion for summary judgment.[11] And an appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[12]

The Bank may be technically correct regarding the effect of Bill and Rebecca's answer, but, for two reasons, it makes no significant difference. First, they did allege that the Bank failed to properly notify them of the loan. That allegation raised the issue of whether the Bank was required to give them notice, which in turn depends upon the enforceability of the waiver of notice on page 2.

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[9] *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008).

[10] *Id.*

[11] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015).

[12] *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 844 N.W.2d 264 (2014).

But more important, Robert argues in his first assignment of error that there is a genuine issue of material fact regarding whether he agreed to page 2. He explicitly raised this issue in his amended answer below. Thus, Robert's first assignment of error squarely presents the issue.

(ii) Terms of Guaranty

Robert, Bill, and Rebecca argue that in order to agree to the provisions on page 2, they had to "undersign" page 2. They rely upon the term's ordinary meaning but ignore the definition of "Undersigned" on page 1. Their argument fails.

[7-9] A guaranty is a contract by which the guarantor promises to make payment if the principal debtor defaults.[13] A guaranty is interpreted using the same general rules as are used for other contracts.[14] To determine the obligations of the guarantor, an appellate court relies on general principles of contract and guaranty law.[15]

[10] But when the meaning of a guaranty is ascertained, or its terms are clearly defined, the liability of the guarantor is controlled absolutely by such meaning and limited to the precise terms.[16] And that is the situation here.

The district court correctly concluded that the provisions on page 2 were part of the guaranty. Robert, Bill, and Rebecca do not dispute that they signed page 1, which provided, in bold type, that "[t]his guaranty includes the additional provisions on page 2, all of which are made a part hereof." This language clearly and absolutely applied to make the terms on page 2 part of the contract.

We have previously rejected similar arguments. In one case, the front of the contract at issue had a place for a signature, and immediately beneath the signature line, the following

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[13] *Braunger Foods v. Sears, supra* note 5.

[14] *Id.*

[15] *Id.*

[16] *Id.*

was printed: "'NOTE: SEE REVERSE SIDE FOR TERMS AND CONDITIONS OF LEASE. ALL WARRANTIES DISCLAIMED.'"[17] We concluded that the defendant was bound by the provisions on the reverse side of the contract. In another case, the defendant signed the front of the contract, which provided that he "'purchase[d], subject to the terms and conditions set forth below and upon the reverse side hereof.'"[18] The defendant "ignor[ed] the import of the words 'and upon the reverse side hereof'" and argued that the terms on the front of the contract controlled.[19] We rejected the defendant's approach and stated that "[o]bviously, the provisions on the reverse side of the contract, except as they may be unenforceable in this state, are a part of the contract and must be so considered."[20] We reached the same conclusion in yet another case.[21] There, the plaintiff signed the front of the contract, which included "a specific and conspicuous reference to the limitation of liability clause on the reverse side of the document."[22] But because of an error in transmission, the plaintiff did not receive the reverse side of the contract that contained the limitation of liability clause until 3 days after it signed the front. We concluded that the plaintiff "was clearly placed on notice that the clause was intended to be included in the contract" and that the clause was therefore part of the agreement.[23]

Applying our prior decisions to the facts of this case, it is clear that the statement on page 1 that "[t]his guaranty

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[17] *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 3, 443 N.W.2d 596, 599 (1989).

[18] *General Motors Acceptance Corp. v. Blanco*, 181 Neb. 562, 564, 149 N.W.2d 516, 518 (1967) (emphasis omitted).

[19] *Id.* at 566, 149 N.W.2d at 519.

[20] *Id.*

[21] *Ray Tucker & Sons v. GTE Directories Sales Corp.*, 253 Neb. 458, 571 N.W.2d 64 (1997).

[22] *Id.* at 464, 571 N.W.2d at 69.

[23] *Id.*

includes the additional provisions on page 2, all of which are made a part hereof" was sufficient to incorporate the provisions on page 2 into the contract. Page 2 was part of the guaranty, and Robert, Bill, and Rebecca are bound by its provisions.

Robert, Bill, and Rebecca's arguments regarding the general meaning of the term "Undersigned" do not change the outcome. They note that the provisions on page 2 refer to "the Undersigned," and they argue that because they did not "undersign" page 2, none of its provisions apply to them. They rely upon general law defining "undersigned" as "[s]omeone whose name is signed on a document, esp. at the end."[24]

Their arguments fail, because the definition of "Undersigned" on page 1 controls. Immediately below the signature lines on page 1 appears the following definition: "'Undersigned' shall refer to all persons who sign this guaranty, severally and jointly." Four signature lines were printed. The second line had the same width as the first and was placed immediately below it. The third and fourth lines followed in like manner. The definition was placed within the width of the last signature line and immediately below it. To any ordinary reader, this content and placement made it plain that by signing on one of the lines on page 1, they were expressly included within the definition of "Undersigned." And on their respective guaranties, that was exactly where Robert, Bill, and Rebecca signed. Throughout pages 1 and 2, the word "Undersigned" always appears in the same initially capitalized form as the definition. This also conveys to an ordinary reader that the same meaning applies to the term throughout the document. Clearly, the meaning of "Undersigned" on both pages is controlled by the definition on page 1. Robert, Bill, and Rebecca all signed the guaranty, and therefore, they constitute "the Undersigned" despite having not signed or initialed page 2.

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[24] Black's Law Dictionary 1758 (10th ed. 2014).

Because page 2 was part of the guaranty, all of Bill and Rebecca's assignments of error lack merit. We turn to the additional issues raised in Robert's appeal.

(iii) Defense of Fraud

In this assignment, Robert asserts that the court failed to consider his affirmative defense that he was fraudulently induced to sign the loan document regarding the Bank's loan to Reserve. And he argues that the court should have found that the loan agreement was unenforceable because of the alleged fraud. At oral argument, he reiterated that he was not asserting any fraud with respect to the guaranty. The court did not specifically address this defense in its order, but it did state that "no issues of material fact exist with reference to any of [the Watsons'] defenses."

Because Robert waived all defenses belonging to Reserve, the court correctly concluded that there is no genuine issue of material fact as to this defense. The guaranty provided, in relevant part: "The Undersigned waives any and all defenses, claims and discharges of [Reserve] . . . . Without limiting the generality of the foregoing, the Undersigned will not assert, plead or enforce against [the Bank] any defense of . . . fraud . . . which may be available to [Reserve] . . . ." The terms of the guaranty are clear, and Robert cannot assert a defense that he expressly waived.[25] This assignment is meritless.

(iv) Unclean Hands

Robert claims that the district court should have concluded that the Bank has unclean hands, because it fraudulently induced him to sign the loan agreement. This formulation also lacks merit.

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[25] See, 38A C.J.S. *Guaranty* § 125 (2008); *Gateway Companies, Inc. v. Vitech America, Inc.* 33 Fed. Appx. 578, 580 (2d Cir. 2002) (observing that "[w]hen guarantors have specifically disclaimed all defenses to the enforcement of their guaranty, they are not allowed thereafter to raise a defense of fraud in the inducement").

Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.[26] The doctrine is specifically predicated upon equitable rights, and is enforceable against a party seeking equitable relief.[27]

[11] But a suit on a contractual guaranty presents an action at law, not in equity.[28] The doctrine of unclean hands has no application here. This assignment is meritless.

(v) Counterclaim

Robert claims that in granting the Bank's motion for summary judgment as to his counterclaim for fraudulent inducement, the district court erred in finding that he was not a real party in interest. We disagree.

[12-14] Nebraska's real party in interest statute provides that "[e]very action shall be prosecuted in the name of the real party in interest . . . ."[29] The purpose of that section is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause.[30] The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.[31] The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.[32]

Robert is not a real party in interest to prosecute the fraudulent inducement claim, because the claim belongs to Reserve.

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[26] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

[27] *Id.*

[28] See *Stauffer v. Benson*, 288 Neb. 683, 850 N.W.2d 759 (2014).

[29] Neb. Rev. Stat. § 25-301 (Reissue 2008).

[30] *Manon v. Orr*, 289 Neb. 484, 856 N.W.2d 106 (2014).

[31] *Id.*

[32] *Id.*

He signed the loan agreement on behalf of Reserve, in his capacity as manager of Reserve. Reserve, not Robert, was obligated under the loan agreement. Robert was not a party to the loan agreement, and he had no legally protectable interest or right in the controversy that would benefit by the relief to be granted.

And for several reasons, Robert cannot prosecute the claim on behalf of Reserve. First, Reserve is not a party in this case. Second, Reserve is a limited liability company, which is an entity distinct from its members.[33] Robert, who is not an attorney, may not represent Reserve in courts of this state.[34] Finally, as we explained earlier, Robert's personal guaranty expressly waived any claim of fraud belonging to Reserve.

Because Robert is not the real party in interest in his counterclaim, there is no genuine issue of material fact, and the Bank was entitled to judgment as a matter of law as to Robert's counterclaim.

(vi) Declaratory Judgment

Robert filed a motion "for Declaratory Judgment on contractual effect of Personal Guarantees," together with a motion for summary judgment as to the Bank's complaint. He assigns that the district court erred in overruling his motion for a declaratory judgment and argues that the court should have considered it to be part of his motion for summary judgment. The district court declined to address the motion, because Robert did not make the request for declaratory judgment in his pleadings.

[15] The district court did not err in declining to address Robert's motion for declaratory judgment. In Nebraska, a party may not simply move the court for a declaratory judgment.[35]

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[33] *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

[34] See *id.*

[35] *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

No such summary proceeding is recognized in Nebraska.[36] The same case makes it clear that an action for declaratory judgment is framed by a pleading,[37] and Robert's counterclaim did not make any attempt to do so.

To the extent that Robert argues the matter was encompassed in his motion for summary judgment, we find no merit to his argument. The court considered and overruled his motion for summary judgment. It therefore resolved Robert's rights under the contract, which was the issue he sought to have determined in his "motion" for declaratory judgment.

The district court did not err in granting the Bank's motion for summary judgment as to its claims for breach of guaranty and as to Robert's counterclaim. It also did not err in overruling Robert's motions for summary judgment and declaratory judgment. Accordingly, we affirm the district court's summary judgment order.

(c) Failure to Vacate

Finally, Robert assigns that the district court erred in overruling his motion to vacate the summary judgment order. He argues that the district court should have vacated the order, because "§ 25-1315(1) . . . requires a non-final order to be written in such a way it can be modified. The . . . order was not written to include or consider the effect of future rulings in the matter and therefore must be vacated."[38]

We digress to note that Robert's motion to vacate addressed only the summary judgment order. Thus, his motion did not address the orders overruling objections to execution or garnishments. Because Robert limited his motion in that way, the district court was not asked to vacate these other orders. An issue not presented to or passed on by the trial court is not

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[36] *Id.*

[37] See *id.*

[38] Brief for appellant in case No. S-15-872 at 39.

appropriate for consideration on appeal.[39] Thus, in considering this assignment of error, we are limited by the scope of Robert's motion.

Robert relies on *Murry Constr. Servs. v. Meco-Henne Contracting*[40] to support his argument. In that case, the Nebraska Court of Appeals stated: "It is our duty to dismiss appeals for lack of jurisdiction and to direct the trial court to expunge from its records actions or orders which are not valid."[41]

Robert's reliance on *Murray Constr. Servs.* is misplaced. The rule in that case applies when an order is invalid under § 25-1301, which requires that a judgment be signed by the court and file stamped and dated by the clerk of the court. Here, the Court of Appeals did not conclude that the summary judgment order was invalid under § 25-1301. Rather, it concluded that it lacked jurisdiction because the summary judgment order did not adjudicate the cross-claim and, thus, did not constitute a final judgment under § 25-1315(1). *Murray Constr. Servs.* does not affect the validity of the summary judgment order.

The summary judgment order was not invalid. Rather, as we explained above, at the time of the first appeal, the summary judgment order simply was not yet part of a judgment and, thus, was not yet appealable. Therefore, we affirm the district court's order overruling Robert's motion to vacate the summary judgment order.

2. Second Appeal (No. S-15-512)

[16] Bill and Rebecca filed this appeal from the district court's orders overruling their objections to execution and garnishments. Although they appeared with counsel before the

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[39] *Aldrich v. Nelson*, 290 Neb. 167, 859 N.W.2d 537 (2015).

[40] *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. 316, 633 N.W.2d 915 (2001).

[41] *Id.* at 318, 633 N.W.2d at 916.

district court, they are self-represented in this court. We have frequently stated that a self-represented litigant will receive the same consideration as if he or she had been represented by an attorney, and, concurrently, that litigant is held to the same standards as one who is represented by counsel.[42]

Bill and Rebecca argue that the district court erred in overruling their objections, because "[a]ny order issued for enforcement of a statutorily deficient non-appealable, non-final order is invalid and void."[43] Their argument lacks some precision. But as we understand it, they argue that because the summary judgment order was not a "judgment" within the meaning of § 25-1315, the execution and garnishments were void. They did not raise this argument below.

(a) General Law on Premature Execution or Garnishment

[17] We have long held that a garnishment in aid of execution issued before judgment is without jurisdiction and void, and not merely irregular.[44] These cases arose under an earlier version of what is now codified as Neb. Rev. Stat. § 25-1056 (Reissue 2008), which governs garnishments after judgment.[45] The garnishment proceeding must be supported by a "judgment *in esse*,"[46] that is, a judgment "[i]n actual existence" or, literally, "in being."[47] Thus, the judgment must be in existence before a garnishment in aid of execution. And even if there is a judgment which is later reversed, the "garnishment becomes

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[42] See, e.g., *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015) (referring to self-represented litigant as "pro se litigant").

[43] Brief for appellants in case No. S-15-512 at 2.

[44] See, *Whitcomb v. Atkins*, 40 Neb. 549, 59 N.W. 86 (1894); *Clough v. Buck*, 6 Neb. 343 (1877).

[45] See *id.*

[46] See *Clough v. Buck, supra* note 44, 6 Neb. at 347 (emphasis in original).

[47] Black's Law Dictionary 895 (10th ed. 2014).

wholly dissolved, for there is nothing left to support either the one or the other."[48]

[18] Although we have not found a Nebraska case directly on point, it appears that the same rule applies to an execution issued without a judgment. The general rule, in the absence of a statutory provision to the contrary, is that an execution issued without a judgment to support it is void.[49] The Arizona Supreme Court stated that "an execution issued without a judgment to support it is void, no authority is conferred upon the officer to whom it is directed, and even if a judgment is subsequently obtained, it will not have a retroactive effect so as to validate the execution."[50] And a Missouri court recited its law that "'[e]nforcement of a judgment by execution supposes that the judgment is not merely interlocutory, but final.'"[51] This rule seems consistent with our statutes.[52] And we have held that a proceeding in aid of a satisfied judgment was a nullity.[53]

It seems clear that before enactment of § 25-1315, the summary judgment order would have been considered a judgment as between the Bank and the Watsons. *Federal Land Bank v. McElhose*[54] is instructive despite its reliance upon

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[48] *Clough v. Buck, supra* note 44, 6 Neb. at 347.

[49] 30 Am. Jur. 2d *Executions* § 55 (2005).

[50] *Jackson v. Sears, Roebuck and Co.*, 83 Ariz. 20, 21-22, 315 P.2d 871, 872 (1957).

[51] *State ex rel. Lumber Mut. Ins. Co. v. Ohmer*, 131 S.W.3d 872, 874 (Mo. App. 2004).

[52] See, § 25-1056 (when judgment has been entered and creditor has filed affidavit, garnishment summons shall issue); Neb. Rev. Stat. § 25-1501.01 (Cum. Supp. 2014) (person having judgment rendered by district court may request clerk of court to issue execution); Neb. Rev. Stat. § 25-1504 (Reissue 2008) (land and tenements in county bound for satisfaction of judgment when entered on judgment record, goods and chattels bound from seizure in execution).

[53] *Yeiser v. Cathers*, 73 Neb. 317, 102 N.W. 612 (1905).

[54] *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986).

obsolete procedures for rendition and entry of judgment. A first pronouncement, followed by a trial docket entry on the same day, "finally determined the rights of the parties and constituted the rendition of a [judgment]."[55] We held that this judgment was final and appealable despite the later entry of another judgment that partially contradicted the first judgment. We observed that the "confusion presented by this case can be avoided if trial courts will, as they should, limit themselves to entering but one final determination of the rights of the parties in a case."[56] And to deal with another aspect of the multiple judgments problem, we later stated that a trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default.[57] And in that case, we overruled two older cases permitting default judgments to stand against one jointly liable defendant while another defendant was adjudged not liable after a trial. The Legislature adopted § 25-1315 at the next session after that case was decided.

(b) Appellate Jurisdiction

[19] But before we can consider whether the adoption of § 25-1315 leads to the conclusion that Bill and Rebecca advance, we must consider whether we have jurisdiction over the second appeal. Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[58] And the question of our jurisdiction is not a simple matter.

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[55] *Id*. at 451, 384 N.W.2d at 297.

[56] *Id*. at 452, 384 N.W.2d at 298.

[57] *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999).

[58] *In re Interest of Isabel P. et al*., 293 Neb. 62, 875 N.W.2d 848 (2016).

[20] For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.[59] Our jurisdiction depends upon the proper classification of the orders overruling objections to execution and garnishment.

We are hampered somewhat by the state of the record. It does not include any praecipes for execution or garnishment, any writs of execution or garnishment, or any returns to any such writs. Thus, all we can discern from the record is that such writs were issued prior to the entry of judgment. At the hearing on the objections, the parties' arguments appear to be premised upon a belief that the summary judgment order was susceptible of execution or garnishment. But that hearing took place before the Court of Appeals dismissed the first appeal.

It is clear that the second appeal was not taken from a final judgment. We have already determined that the district court's series of orders did not form a judgment until it dismissed Shona's cross-claim in August 2015, more than 2 months after Bill and Rebecca filed their notice of appeal in the second appeal. And their notice of appeal did not relate forward to the August entry of judgment.[60] We turn to the other possibility—a final order.

[21] Our jurisdiction depends upon whether the June 8, 2015, orders were "final orders." Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action

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[59] *State v. Jackson*, 291 Neb. 908, 870 N.W.2d 133 (2015).

[60] See *In re Guardianship & Conservatorship of Woltemath*, 268 Neb. 33, 680 N.W.2d 142 (2004).

after a judgment is rendered.[61] For convenience, we refer to these as type "1," "2," or "3" orders. Each type requires that the order affect a substantial right. The difference lies in the type of proceeding or its effect upon the action.

We have not always used this terminology with precision. For example, in one case, we said that an order overruling an objection to a debtor's examination was "made in a special proceeding."[62] But we also said that the order was "made upon a summary application in an action after judgment therein."[63] Thus, we intermingled terminology from types 2 and 3. We perpetuated this confusion in a later case.[64]

One thing is clear—the orders overruling objections to execution and garnishments were not type 1 final orders. To be a type 1 final order, it must dispose of the whole merits of the case and leave nothing for the court's further consideration.[65] These orders did neither. They occurred prior to judgment. And they did not prevent the judgment, which followed upon the dismissal of the cross-claim.

We conclude that we must classify the proceedings before the district court as summary applications in an action after judgment is rendered. Thus, it would necessarily follow that the district court's orders would be type 3 final orders. The anomaly, of course, is that no "judgment" had actually been rendered. Nonetheless, the Bank was pursuing an execution and a garnishment in aid of execution, both of which necessarily follow a judgment.

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[61] *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015).

[62] *Clarke v. Nebraska Nat. Bank*, 49 Neb. 800, 802, 69 N.W. 104, 104 (1896).

[63] *Id.*

[64] *Bourlier v. Keithley*, 141 Neb. 862, 865, 5 N.W.2d 121, 123 (1942) ("[a] proceeding in aid of execution is a special proceeding made upon a summary application in an action after judgment").

[65] See *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[22-24] And the orders affected substantial rights. A substantial right under § 25-1902 is an essential legal right.[66] A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.[67] The orders eliminated the Watsons' objections to the execution and garnishments. Moreover, substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend.[68] The execution and garnishments authorized the seizure of property or money that would otherwise have remained in the Watsons' ownership and control. Thus, the orders affected a substantial right.[69]

Because the second appeal was timely filed after the entry of the orders overruling objections to execution and garnishments, we have jurisdiction of the second appeal.

(c) Validity of Orders on Execution and Garnishments

Having concluded that we have jurisdiction of the second appeal, we turn to the dispositive issue. The execution and garnishments in aid of execution were issued prior to a final judgment under §§ 25-1301 and 25-1315. We conclude that these execution and garnishment proceedings were void.

The key is the second sentence of § 25-1315(1), which states:

> In the absence of such determination [that there is no just reason for delay] and direction [for the entry of

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[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] See *In re Estate of McKillip*, 284 Neb. 367, 375, 820 N.W.2d 868, 876 (2012) (concluding that "the rights of the devisees to retain the real estate in kind is a substantial right that is affected by the order to sell the property").

> judgment], *any order or other form of decision, however designated*, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the *order or other form of decision* is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(Emphasis supplied.) Most of our cases involving § 25-1315 have addressed attempts to invoke the authority granted by the first sentence.[70] Here, we confront a form of decision characterized as a judgment but which failed to dispose of a defendant's cross-claim.

The pending cross-claim prevented the summary judgment order from serving as a final judgment. We have previously written in depth regarding the purpose of the statute with regard to the "'salutary goal of certainty with respect to jurisdiction of appeals.'"[71]

[25] It seems equally fundamental that an interlocutory order granting summary judgment on fewer than all of the claims in an action cannot serve as the judgment required for an execution or garnishment in aid of execution. The plain language of § 25-1315(1) makes it clear that the form of the order cannot control. Here, the summary judgment order stated that "[j]udgment is entered in favor of the [Bank and] against the [Watsons] jointly and severally . . . ." The statute requires explicit adjudication of all of the claims and of all of the rights and liabilities of all of the parties. The summary judgment order did not do so.

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[70] See, e.g., *Castellar Partners v. AMP Limited*, 291 Neb. 163, 864 N.W.2d 391 (2015); *Cerny v. Todco Barricade Co., supra* note 7; *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

[71] *Malolepszy v. State, supra* note 6, 270 Neb. at 106, 699 N.W.2d at 391 (quoting *Federal Sav. & Loan Ins. Corp. v. Huff*, 851 F.2d 316 (10th Cir. 1988)).

The same purpose of providing certainty applies to a judgment which will be sufficient to support the issuance of final process. A writ of execution is recognized as a final process of a court for the enforcement of a judgment.[72] If an interlocutory order remains subject to change, it cannot support the court's final process. The officers required by law to execute a court's process need certainty that the process is supported by a final judgment. And this clarity is equally important to the parties and the general public.

[26] We have not found any federal cases suggesting otherwise. Since § 25-1315(1) is substantially similar to Fed. R. Civ. P. 54(b) (Rule 54(b)), we will look to federal cases construing Rule 54(b) for guidance.[73] In a case from the District of Columbia Circuit, a party was "confronted by a judgment non-final in terms of Rule 54(b) but ostensibly the predicate for an execution."[74] The court observed that "[a]n execution ordinarily may issue only upon a final judgment,"[75] and it said: "We think the role Rule 54(b) plays with reference to the finality of a judgment for purposes of appeal has implications as regards its finality for purposes of execution as well."[76] It noted that the lower court had not made a Rule 54(b) determination, and it stated that "the more likely conclusion upon the merits of the appeal is that unless and until [the Rule 54(b) determination] is done [the appellee] has no judgment upon which an execution may issue prior to adjudication of the case in its entirety."[77] It therefore denied the appellee's motion for

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[72] See *State, ex rel. Warren, v. Raabe*, 140 Neb. 16, 299 N.W. 338 (1941).

[73] *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003).

[74] *Redding & Company v. Russwine Construction Corporation*, 417 F.2d 721, 724 (D.C. Cir. 1969).

[75] *Id.* at 727.

[76] *Id.*

[77] *Id.*

a supersedeas bond as a condition of the stay of execution issued during the pendency of the appeal.[78] In another case, a Second Circuit court noted that "the validity of [an] execution order . . . depends upon the finality of the earlier default judgments which that execution order is intended to satisfy."[79] Because the order was susceptible of two interpretations, one consistent with finality and the other not, the court remanded the matter for entry of a new judgment.[80]

Although we have read the district court's orders together in order to determine the existence of a final judgment, this should not be necessary. Where a series of orders, taken together, would constitute a final judgment, we encourage the trial courts to make the judgment explicit in the last order of the series.

[27,28] Although Bill and Rebecca did not raise this precise argument before the district court, we conclude that we can consider it. Appellate courts do not generally consider arguments and theories raised for the first time on appeal.[81] But it is a longstanding rule in Nebraska that a void order may be attacked at any time in any proceeding.[82] We have already recited the case law making it clear that executions and garnishments in aid of execution issued prior to judgment are void. The district court's orders overruling objections to the void orders are likewise void. The summary judgment order was then only an interlocutory order. At that time, it did not

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[78] See, also, *Gerardi v. Pelullo*, 16 F.3d 1363 n.13 (3d Cir. 1994) (noting that "a judgment that is not otherwise final, *i.e.*, usually meaning final as to all issues and parties, is not subject to execution until the certification under Rule 54(b) is entered").

[79] *International Controls Corp. v. Vesco*, 535 F.2d 742, 745 (2d Cir. 1976).

[80] *International Controls Corp. v. Vesco, supra* note 79.

[81] *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

[82] See, *Kuhlmann v. City of Omaha*, 251 Neb. 176, 556 N.W.2d 15 (1996); *Lammers Land & Cattle Co. v. Hans*, 213 Neb. 243, 328 N.W.2d 759 (1983).

support the issuance of final process, and Bill and Rebecca could raise this issue for the first time on appeal.

Based on the record before us in the second appeal, we determine that the writs of execution and garnishment issued before the entry of a final judgment, and the proceedings had for their enforcement, were void. We therefore vacate the final orders overruling the Watsons' objections to execution and garnishments.

But that is the full extent of the relief we can provide on this record. In our decision regarding the Watsons' third appeal, we have affirmed a judgment sufficient for the issuance of final process. As we have already explained, the later judgment does not have a retroactive effect to validate the void writs of execution and garnishment. We express no opinion regarding any action or process available to the Watsons regarding the void execution and garnishments, or regarding the effect, if any, of the Bank's later judgment on such action or process.

VI. CONCLUSION

For the reasons discussed above, in case No. S-15-872, we affirm the district court's order granting the Bank's motions for summary judgment as to its claims for breach of guaranty and as to Robert's counterclaim. We also affirm the district court's order overruling Robert's motion to vacate. In case No. S-15-512, we vacate the district court's orders overruling the Watsons' objections to execution and garnishments.

Final orders in No. S-15-512 vacated.
Judgment in No. S-15-872 affirmed.

Miller-Lerman and Stacy, JJ., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Jesse B., individually and as Guardian and next friend of Jaelyn B., a minor child, appellant, v. Tylee H. and Douglas J. Peterson, Attorney General of the State of Nebraska, appellees.

883 N.W.2d 1

Filed June 24, 2016. No. S-15-870.

1. **Actions: Judicial Notice.** A court may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding.
2. **Actions: Judicial Notice: Appeal and Error.** In interwoven and interdependent cases, an appellate court may examine its own records and take judicial notice of the proceedings.
3. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
4. **Statutes.** The meaning and interpretation of a statute present questions of law.
5. **Constitutional Law: Statutes.** The constitutionality of a statute is a question of law.
6. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
7. **Jurisdiction: Appeal and Error.** Before deciding the merits of an appeal, an appellate court must determine if it has jurisdiction.
8. ____: ____. If the court from which a party takes an appeal lacks jurisdiction, then the appellate court acquires no jurisdiction.
9. ____: ____. An appellate court has the power to determine whether it has jurisdiction over an appeal and to correct jurisdictional issues even if it does not have jurisdiction to reach the merits.
10. **Habeas Corpus: Parental Rights: Child Custody.** Habeas corpus is an appropriate proceeding to test the legality of custody and best interests of a minor, including the rights of fathers of children born out of wedlock.

11. **Constitutional Law: Habeas Corpus: Child Custody.** Habeas corpus is a civil remedy constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of the person's liberty. It is an appropriate proceeding to test the legality of custody and best interests of a minor, when the party having physical custody of the minor has not acquired custody under a court order or decree.
12. **Habeas Corpus: Jurisdiction.** Because the privilege of the writ of habeas corpus is part of Nebraska's organic law, district courts have general jurisdiction over these proceedings.
13. **Courts: Jurisdiction: Child Custody.** District courts have inherent equity jurisdiction to resolve custody disputes.
14. **Constitutional Law: Legislature: Courts: Jurisdiction.** The Legislature cannot limit or take away the broad and general jurisdiction of the district courts, as conferred by the Nebraska Constitution. But it can give county courts concurrent original jurisdiction over the same subject matter.
15. **Courts: Adoption.** A parent can challenge the legality of an adoption by objecting to the proceeding in county court.
16. **Legislature: Courts: Jurisdiction: Adoption: Habeas Corpus.** Despite the Legislature's grant of exclusive jurisdiction over adoption matters to county or juvenile courts, when a parent claims his or her child is being illegally detained for an adoption, a district court has original overlapping jurisdiction over the matter in a habeas proceeding.
17. **Courts: Jurisdiction.** Where courts have concurrent jurisdiction, the first to assume jurisdiction retains it to the exclusion of the other.
18. **Courts: Jurisdiction: Child Custody: Habeas Corpus.** When a district court acquires jurisdiction over a habeas proceeding involving the permanent custody of a child, no other court can acquire jurisdiction over the matter until after the first court's order is carried out.
19. **Actions: Courts: Jurisdiction.** Where an action is pending in two courts, the court first acquiring jurisdiction will hold jurisdiction to the exclusion of the other.
20. **Actions: Standing: Time.** A court determines standing as it existed when a plaintiff commenced an action.
21. **Paternity: Child Custody: Time.** A paternity acknowledgment in Nebraska operates as a legal finding of paternity after the 60-day rescission period has expired. At that point, the acknowledged father is the child's legal father—not a presumed father. And he has the same right to seek custody as the child's biological mother, even if genetic testing shows he is not the biological father.
22. **Parental Rights: Public Policy: States: Appeal and Error.** It is not contrary to Nebraska's public policy to recognize an acknowledged

father's parental rights under another state's statutes when the Nebraska Supreme Court has recognized an acknowledged father's parental rights under Nebraska's statutes.

23. **Constitutional Law: Foreign Judgments: Jurisdiction: States.** The Full Faith and Credit Clause requires states to give the same effect to a judgment in the forum state that it has in the state where the court rendered the judgment.
24. **Constitutional Law: Foreign Judgments: States: Paternity: Adoption: Parental Rights.** Neb. Rev. Stat. § 43-1406(1) (Reissue 2008) extends the constitutional requirement of giving full faith and credit to a sister state's paternity determination through a voluntary acknowledgment. So whether a paternity acknowledgment made in a sister state requires a legal father's consent to an adoption depends upon whether the laws of the sister state confer that right.
25. **Adoption: Parent and Child.** Adoption terminates the parent-child relationship.
26. **Courts: Jurisdiction: Adoption: Parental Rights.** To terminate a father's rights through an adoption procedure, the consent of the adjudicated father of a child born out of wedlock is required for the adoption to proceed unless the Nebraska court having jurisdiction over the custody of the child determines otherwise, pursuant to Neb. Rev. Stat. § 43-104.22 (Reissue 2008).
27. **Adoption: States: Statutes.** Neb. Rev. Stat. § 43-104.22(11) (Reissue 2008) does not apply to an acknowledged father with the right to consent to an adoption under the laws of a sister state.
28. **Judgments: Collateral Attack: Jurisdiction.** For judgments, collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. Only a void judgment is subject to collateral attack.
29. **Judgments: Collateral Attack: Paternity.** The collateral attack rules that apply to judgments also apply to a voluntary paternity acknowledgement that has the same effect as a judgment.
30. **Adoption.** In a private adoption, the child is relinquished directly into the hands of the prospective adoptive parent or parents without interference by the state or a private agency.
31. **Parental Rights.** A valid relinquishment of parental rights is irrevocable, and a natural parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment.
32. **Parental Rights: Adoption: Appeal and Error.** A natural parent's knowing, intelligent, and voluntary relinquishment of a child for adoption is valid. An appellate court will generally uphold relinquishments absent evidence of threats, coercion, fraud, or duress.

33. **Parental Rights: Adoption.** Under Neb. Rev. Stat. § 43-111 (Reissue 2008), it is the adoption itself which terminates the parental rights, and until the adoption is granted, the parental rights are not terminated. When a parent's relinquishment of his or her child is invalid or void, § 43-111 governs when the parent's rights are terminated.
34. **Parental Rights: Adoption: Child Custody: Habeas Corpus.** A parent's fundamental rights apply in a habeas corpus proceeding to regain custody of his or her child who is the subject of an adoption proceeding if the parent's relinquishment is invalid or void.
35. **Constitutional Law: Parent and Child.** The best interests standard is subject to the overriding recognition that the relationship between parent and child is constitutionally protected.
36. **Child Custody: Parental Rights.** A parent's superior right to custody over a stranger to the parent-child relationship protects both the parent's and the child's fundamental interest in maintaining it.
37. **Constitutional Law: Due Process: Parent and Child.** The Due Process Clause precludes the State from breaking apart a family over a parent's objections absent a powerful countervailing interest.
38. **Parental Rights: Adoption: Child Custody: Habeas Corpus.** The parental preference doctrine applies in a habeas proceeding to obtain custody of a child. A court in a habeas proceeding may not deprive a parent of custody of his or her minor child unless a party affirmatively shows that the parent is unfit or has forfeited the right to perform his or her parental duties. This reasoning applies to a habeas proceeding challenging an adoption when a parent's parental rights remain intact because a court determines that the relinquishment is invalid or is void.

Appeal from the District Court for Lancaster County: Jodi Nelson, Judge. Reversed and remanded for further proceedings.

George T. Babcock, of Law Offices of Evelyn N. Babcock, and Jennifer Gaughan, of Legal Aid of Nebraska, for appellant.

Shawn D. Renner and Susan K. Sapp, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee Tylee H.

Heavican, C.J., Wright, Connolly, Miller-Lerman, and Cassel, JJ., and Pirtle and Riedmann, Judges.

Connolly, J.

I. SUMMARY

This appeal is the companion case to *In re Adoption of Jaelyn B*.[1] In both cases, the appellant, Jesse B., claimed that his child, Jaelyn B., could not be adopted without his consent because he was her legal father. In this appeal, he specifically challenged in the district court the constitutionality of several Nebraska adoption statutes,[2] including statutes that permitted Jaelyn's adoption without his consent. And he claimed that Nebraska must give full faith and credit to Ohio's paternity determination. The district court postponed deciding his claims until after the county court had issued an adoption decree. Afterward, it concluded that it did not have jurisdiction to grant habeas relief. It determined that Jesse lost standing to challenge Jaelyn's adoption after the county court found that he was not her biological father.

We reverse. Without addressing Jesse's constitutional challenges, we conclude that under Neb. Rev. Stat. 43-1406(1) (Reissue 2008), the district court erred in failing to determine that Nebraska had to give full faith and credit to Ohio's determination of Jesse's paternity. Under Ohio law, Jesse has the right to withhold consent to the adoption of Jaelyn. So, the district court erred in failing to determine that the county court could not order an adoption when Jesse had not consented. We reverse the judgment and remand the cause with instructions for further proceedings on issues relevant to Jaelyn's custody.

II. BACKGROUND

[1,2] The facts and procedural history of this appeal are fully set out in *In re Adoption of Jaelyn B*. We summarize them here. In doing so, we apply two judicial notice principles. A court

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[1] *In re Adoption of Jaelyn B., ante* p. 917, 883 N.W.2d 22 (2016).

[2] See, generally, Neb. Rev. Stat. §§ 43-104 to 43-104.25 (Reissue 2008 & Cum. Supp. 2014).

may judicially notice adjudicative facts, which are not subject to reasonable dispute, at any stage of the proceeding.[3] In interwoven and interdependent cases, we may examine our own records and take judicial notice of the proceedings.[4]

In April 2013, Jaelyn was born in Ohio. The next day, the mother, Heather K., and Jesse signed in the presence of a notary an "Acknowledgment of Paternity Affidavit." They affirmed that Jesse was Jaelyn's father. A notice on the form explained that its purpose "is to acknowledge the legal existence of a father and child relationship through voluntary paternity establishment." The notice explained that Ohio statutes limited the signatories' right to rescind an acknowledgment. The signatories could seek an administrative rescission within 60 days. They could also seek a judicial rescission on limited grounds, but only after the 60-day period and within 1 year of the acknowledgment's becoming final under specified Ohio statutes. Alternatively, a potential signatory could ask for genetic testing at no charge. On June 3, Ohio's office of vital statistics recorded Heather and Jesse as Jaelyn's mother and father on her birth certificate.

In January 2014, Jesse received adoption paperwork from Heather's Nebraska attorney, Kelly Tollefsen. The letter stated that Heather had identified Jesse as a possible biological father and that Heather intended to relinquish Jaelyn for an adoption. It informed him that if he intended to claim paternity and seek custody, he should obtain his own attorney, or he could sign the enclosed forms for relinquishing Jaelyn and consenting to her adoption. Jesse could not afford an attorney and did not obtain legal assistance in Nebraska until later that spring.

In June 2014, Jesse filed a complaint in Lancaster County District Court for a writ of habeas corpus and a declaratory

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[3] *Bauermeister Deaver Ecol. v. Waste Mgmt. Co.*, 290 Neb. 899, 863 N.W.2d 131 (2015).

[4] *Id.*

judgment. On July 22, Jesse filed a complaint for custody in the Ohio Court of Common Pleas. Eight days later, on July 30, Jesse filed an objection to Jaelyn's adoption and requested notice of any adoption proceeding for Jaelyn in Douglas County Court. Later, in August 2014, Tylee H., the prospective adoptive parent, filed a petition to adopt Jaelyn in Douglas County Court.

1. Jesse's Complaint

Jesse filed an amended complaint in September 2014 after he discovered that the prospective adoptive parent was Tylee. The named respondents were John Doe, a possible unknown adoptive parent; Tollefsen; Tylee; and Tylee's attorney. He also named the Attorney General as a respondent because he challenged the constitutionality of Nebraska statutes.[5] Jesse alleged that Tollefsen would not disclose where the adoption proceeding would be filed, but that she did disclose the name of the attorney representing Tylee. Tylee's attorney also would not disclose where the adoption proceeding would be filed.

Jesse asked the district court to declare the following statutes unconstitutional because they violated his constitutional due process and equal protection rights: Sections 43-104, 43-104.01 to 43-104.05, 43-104.12, 43-104.13, 43-104.17, 43-104.22, and 43-104.25. Jesse asserted 11 claims, which we condense to four sets of allegations regarding his statutory and constitutional claims.

First, Jesse alleged that under Ohio law, an acknowledgment of paternity is a legal finding of paternity, and that neither he nor Heather had rescinded the acknowledgment. He claimed that the U.S. Constitution and § 43-1406 required Nebraska to give full faith and credit to Ohio's paternity determination.

Second, Jesse claimed that he was Jaelyn's legal father under Nebraska law. He asserted that under the law of both

[5] See Neb. Rev. Stat. § 25-21,159 (Reissue 2008).

states, the respondents—Heather, Tylee, and their separate attorneys—had unlawfully restrained Jaelyn of her liberty and kept her from her rightful custodian.

Third, Jesse claimed that he had an established familial relationship with Jaelyn that was constitutionally protected. He alleged that the respondents knew or should have known of this relationship and that the notice he received for a putative father was insufficient and violated his substantive and procedural due process rights.

Fourth, Jesse alleged two equal protection claims resting on marital status and gender: (1) The notice and protections he would have received if he were married were inferior to those he received as an unmarried legal father; and (2) the notice that he received was inferior to the notice that is required for a legal mother.

2. Court Postpones Deciding Jesse's Claims at Tylee's Request

In September 2014, the district court issued a writ of habeas corpus that ordered the respondents to bring Jaelyn to court and respond to these allegations. The respondents moved to dismiss the complaint for lack of subject matter jurisdiction. In October, at Jesse's request, the court dismissed John Doe and the attorneys as respondents. The respondents had also moved to continue the hearing on their motion to dismiss Jesse's complaint until after the county court decided whether to allow an adoption. They alleged that a continuance would promote judicial efficiency and save them costs. They also alleged that genetic testing had shown that another man, Tyler T., was Jaelyn's biological father and that Tyler had waived his parental rights.

At an October 2014 hearing on the respondents' motions to dismiss or postpone the proceedings, Tylee contended that the district court lacked subject matter jurisdiction over Jesse's habeas proceeding. She argued that Jesse could have commenced a proceeding under § 43-104.05 and alleged that he

was excused from the filing time limits and entitled to have the court determine whether his consent was required under § 43-104.22. But she argued that even if he had done that, his consent to an adoption was not required under § 43-104.22 because he was not Jaelyn's biological father.

Jesse responded that the putative father statutes did not apply to him and that the father of a child born in another state cannot comply with those statutes. He argued that a habeas proceeding was the correct procedure to challenge Jaelyn's unlawful detention and that Nebraska's adoption statutes were unconstitutional facially and as applied to him. He argued that Tylee had no standing to challenge his legal status as Jaelyn's father. He asked for visitation pending the court's determination. The court took the motions under advisement. The record does not contain a ruling on the respondents' continuance motion, but the court did not issue a judgment until almost a year later.

In February 2015, 4 months after the hearing on Tylee's motion to dismiss or continue the proceedings, the court sustained Tylee's motion to present new evidence. That hearing occurred in April. Tylee submitted three documents from the adoption proceeding in county court: (1) genetic testing results showing that Tyler was Jaelyn's biological father; (2) the county court's order denying Jesse's motion to intervene under § 43-104.22 because he was not Jaelyn's biological father; and (3) the county court's January 2015 adoption decree. Jesse argued that those exhibits were irrelevant to whether the court had jurisdiction over his habeas proceeding. He submitted evidence of his paternity acknowledgment, Jaelyn's birth certificate, and an order from the Ohio Court of Common Pleas showing that he had a custody case pending there since July 2014.

In September 2015, the district court entered its judgment. It concluded that it had jurisdiction over Jesse's complaint. But it nonetheless determined that it did not have

jurisdiction to grant habeas relief. It reasoned that under Neb. Rev. Stat. § 43-102 (Reissue 2008), a county court has jurisdiction over adoption proceedings, and that the county court had already found that Jesse was not Jaelyn's biological father. Because the county court had already decreed a legal adoption, the district court concluded that it could not exercise jurisdiction:

> [Jesse] is in essence asking this court to nullify the Douglas County Court's order finding that another man is the biological father of [Jaelyn] and then find that [Jesse's] signing of an acknowledgment of paternity trumps the scientific evidence received by another court. Said another way, [Jesse] is asking this court to find that he is the father of [Jaelyn] when the evidence shows he is not. Under the circumstances of this case, this court finds it does not have jurisdiction to do so.
>
> . . . Because there is a legal adoption that has been decreed by a court of competent jurisdiction, this court cannot find that there has been an illegal detention of [Jaelyn] by [Tylee].

Likewise, the court concluded that the county court's order deprived Jesse of standing to challenge the constitutionality of Nebraska's adoption statutes:

> [Jesse's] standing to complain about the adoption statutes must derive from him being situated as [Jaelyn's] father. That issue was decided by the Douglas County Court based upon the uncontested genetic testing results. . . .
>
> Because he has been determined not to be the father of [Jaelyn], the core that is necessary for him to proceed on his declaratory judgment action, i.e. standing, does not exist.

The court ruled that Jesse could not make curative amendments to his complaint and dismissed it.

III. ASSIGNMENTS OF ERROR

Jesse assigns, restated, that the court erred as follows:

(1) in concluding that Jesse lacked standing to challenge the Nebraska's adoption statutes;

(2) in concluding that the court lacked subject matter jurisdiction over his complaint for a writ of habeas corpus and a declaratory judgment; and

(3) in concluding that the Douglas County Court had jurisdiction over the adoption proceedings.

IV. STANDARD OF REVIEW

[3-6] A jurisdictional issue that does not involve a factual dispute presents a question of law.[6] The meaning and interpretation of a statute present questions of law.[7] The constitutionality of a statute is a question of law.[8] And when reviewing questions of law, we resolve the questions independently of the lower court's conclusions.[9]

V. ANALYSIS

[7-9] Before deciding the merits of an appeal, an appellate court must determine if it has jurisdiction.[10] If the court from which a party takes an appeal lacks jurisdiction, then the appellate court acquires no jurisdiction.[11] But we have the power to determine whether we have jurisdiction over an appeal and to correct jurisdictional issues even if we do not have jurisdiction to reach the merits.[12]

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[6] *Pearce v. Mutual of Omaha Ins. Co., ante* p. 277, 876 N.W.2d 899 (2016).

[7] See *Adair Asset Mgmt. v. Terry's Legacy, ante* p. 32, 875 N.W.2d 421 (2016).

[8] See *Bryan M. v. Anne B.*, 292 Neb. 725, 874 N.W.2d 824 (2016).

[9] *Pearce, supra* note 6.

[10] See *In re Interest of Jackson E., ante* p. 84, 875 N.W.2d 863 (2016).

[11] *Shasta Linen Supply v. Applied Underwriters*, 290 Neb. 640, 861 N.W.2d 425 (2015).

[12] See *id.*

1. District Court Incorrectly Determined That It Lacked Jurisdiction Over Jesse's Habeas Proceeding

(a) Parties' Contentions

The court determined that it lacked subject matter jurisdiction to issue a writ of habeas corpus because the county court had already found that Jesse was not Jaelyn's biological father and had decreed an adoption. Jesse contends that our case law conclusively shows that he had standing to seek a writ of habeas corpus when he filed his complaint and that he filed his complaint before Tylee filed an adoption petition in county court. He contends that the district court delayed deciding the issues raised by his complaint until after the county court decreed an adoption and then relied on that decree to conclude that it lacked jurisdiction to grant relief. He contends that the court's action violated the doctrine of jurisdictional priority and the purpose for allowing a habeas proceeding to challenge an adoption. Similarly, Jesse contends that he had standing to seek a declaratory judgment when he commenced his action and that the county court's orders did not defeat his claim that he had a legal right to custody of Jaelyn.

Tylee argues that under Neb. Rev. Stat. § 24-517(11) (Cum. Supp. 2012), county courts have "[e]xclusive original jurisdiction in matters of adoption, except if a separate juvenile court already has jurisdiction over the child to be adopted, concurrent original jurisdiction with the separate juvenile court." We note that the Legislature first conferred this exclusive jurisdiction on county courts in 1973.[13] Since 1998, however, a county court has concurrent original jurisdiction with a separate juvenile court if the juvenile court already has jurisdiction over the child to be adopted.[14]

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[13] See 1973 Neb. Laws, L.B. 226, § 6.

[14] See *Armour v. L.H.*, 259 Neb. 138, 608 N.W.2d 599 (2000).

Tylee argues that a county court's exclusive jurisdiction over adoption matters does not impinge upon a district court's general jurisdiction because adoption statutes do not have common-law origins. And she points to a case in which we affirmed a district court's dismissal of a man's petition seeking to establish his paternity under § 43-104.05 and obtain custody of his child. In *Armour v. L.H.*,[15] we concluded that a proceeding commenced under § 43-104.05 was an adoption matter, as distinguished from a paternity action commenced under chapter 43, article 13, of the Nebraska Revised Statutes. We reasoned that § 43-104.05 applies only when a biological mother is seeking to relinquish her child for adoption and an unmarried father is trying to establish his paternity under the putative father statutes. "Accordingly, the district courts lack subject matter jurisdiction over a petition to adjudicate paternity brought pursuant to § 43-104.05."[16] But *Armour* does not control here.

(b) District Court Had Exclusive Jurisdiction Over Jesse's Claims for Habeas and Declaratory Relief

[10] Unlike the putative father in *Armour*, Jesse did not claim jurisdiction under § 43-104.05, and he was not a putative father seeking to establish his paternity. He claimed that he was already Jaelyn's legal father and sought her custody. And we have long held that habeas corpus is an appropriate proceeding to test the legality of custody and best interests of a minor, including the rights of fathers of children born out of wedlock.[17]

[11] The Nebraska Constitution provides for the remedy of habeas corpus.[18] We have held that habeas corpus is a civil

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[15] See *id.*

[16] *Id.* at 145, 608 N.W.2d at 604.

[17] See, e.g., *Shoecraft v. Catholic Social Servs. Bureau*, 222 Neb. 574, 385 N.W.2d 448 (1986) (citing 1948 case).

[18] See Neb. Const. art. I, § 8.

remedy *constitutionally available* in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of the person's liberty.[19] And a habeas corpus proceeding is appropriate to test the legality of custody and best interests of a minor, when the party having physical custody of the minor has not acquired custody under a court order or decree.[20]

[12,13] Because the privilege of the writ of habeas corpus is part of Nebraska's organic law, district courts have general jurisdiction over these proceedings. Many of our cases have implicitly recognized district courts' jurisdiction over a habeas proceeding challenging an adoption, despite the Legislature's 1973 grant of exclusive jurisdiction over adoption matters to county courts.[21] We have also held that district courts have inherent equity jurisdiction to resolve custody disputes.[22]

[14] The Legislature cannot limit or take away the broad and general jurisdiction of the district courts, as conferred by the Nebraska Constitution.[23] But it can give county courts concurrent original jurisdiction over the same subject matter.[24]

[15] We have exercised jurisdiction over an appeal from a county court's adoption decree, in which we decided a father's objection to the adoption on constitutional grounds.[25] That case

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[19] See, *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992), citing Neb. Const. art. I, § 8.

[20] See *id.*

[21] See, e.g., *Monty S. & Teresa S. v. Jason W. & Rebecca W.*, 290 Neb. 1048, 863 N.W.2d 484 (2015); *Brett M. v. Vesely*, 276 Neb. 765, 757 N.W.2d 360 (2008); *Flora, supra* note 19; *Uhing, supra* note 19; *Shoecraft, supra* note 17.

[22] See *Charleen J. v. Blake O.*, 289 Neb. 454, 855 N.W.2d 587 (2014).

[23] See *Susan L. v. Steven L.*, 273 Neb. 24, 729 N.W.2d 35 (2007).

[24] See *id.*

[25] See *In re Application of S.R.S. and M.B.S.*, 225 Neb. 759, 408 N.W.2d 272 (1987).

shows that a parent can challenge the legality of an adoption by objecting to the proceeding in county court.

[16] But despite the Legislature's grant of exclusive jurisdiction over adoption matters to county or juvenile courts, when a parent claims his or her child is being illegally detained for an adoption, a district court has original overlapping jurisdiction over the matter in a habeas proceeding. That is, a writ of habeas corpus is an equally available remedy for a claim of a child's illegal detention for adoption. And a habeas proceeding was appropriate here because Jesse knew only the name of Heather's attorney and did not know where the prospective adoptive parent(s) would commence an adoption proceeding. Equally important, when he commenced his action in district court, objecting to an adoption proceeding was not an available remedy.

[17-19] Our common-law jurisprudence recognizes the "'fundamental' proposition that 'where courts have concurrent jurisdiction, the first to assume jurisdiction retains it to the exclusion of the other.'"[26] More than 100 years ago, we held that when a district court acquires jurisdiction over a habeas proceeding involving the permanent custody of a child, no other court can acquire jurisdiction over the matter until after the first court's order is carried out.[27] Relying on that case, we have said that "[w]here an action is pending in two courts, the court first acquiring jurisdiction will hold jurisdiction to the exclusion of the other."[28] These holdings express the doctrine of jurisdictional priority.[29] And under these holdings, the district court erred in failing to recognize that as the first court to exercise jurisdiction over Jesse's claims in the habeas

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[26] *Susan L., supra* note 23, 273 Neb. at 34, 729 N.W.2d at 43, citing *McFarland v. State*, 172 Neb. 251, 109 N.W.2d 397 (1961).

[27] *Terry v. State*, 77 Neb. 612, 110 N.W. 733 (1906).

[28] *Olsen v. Olsen*, 254 Neb. 293, 298, 575 N.W.2d 874, 878 (1998).

[29] See, *Charleen J., supra* note 22; *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013).

proceeding, it was required to retain jurisdiction to the exclusion of the county court.

[20] And because the district court had jurisdiction over Jesse's habeas proceeding, it also had jurisdiction over his related declaratory judgment action challenging Nebraska's adoption statutes.[30] The district court incorrectly avoided Jesse's challenges by determining that he lost standing. Contrary to the court's reasoning, Jesse did not lose standing because genetic testing later showed that he was not Jaelyn's biological father. A court determines standing as it existed when a plaintiff commenced an action.[31]

Neither was the action moot. Jesse's central claim was that his status as Jaelyn's legal father and his established familial relationship was sufficient to show that his consent to her adoption was constitutionally and statutorily required. He did not ask the district court to determine that he was Jaelyn's biological father. And by reasoning that Jesse lacked standing because the evidence showed he was not the biological father, the court effectively relied on the same statutes that Jesse was challenging as being unconstitutional.

In short, the district court erred in its apparent agreement with Tylee that it should delay a decision in this case until after the county court issued a decision. Instead, it should have determined that the county court could not exercise jurisdiction over the adoption petition until it determined whether Jaelyn was being lawfully detained for an adoption. Similarly, the court erred in dismissing Jesse's action for lack of standing. As Jaelyn's legal father, Jesse had a real interest in the subject matter of the controversy.[32] And his claims

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[30] See Neb. Rev. Stat. §§ 25-21,149 (Cum. Supp. 2014) and 25-21,150 (Reissue 2008).

[31] *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[32] See *In re Interest of Jackson E., supra* note 10.

presented a live controversy even if he was not Jaelyn's biological father.[33]

Finally, Tylee's reason for delaying the habeas proceeding—to wait for the county court's findings on Jesse's biological connection to Jaelyn—were irrelevant to Jesse's claim that § 43-1406 requires Nebraska to give full faith and credit to Ohio's paternity determination. Like the county court in the companion case, the district court failed to analyze Jesse's full faith and credit claim. But because we conclude that this claim is dispositive, we do not address Jesse's constitutional challenges to Nebraska's adoption statutes.

2. § 43-1406 Mandates Giving Full Faith and Credit to Another State's Paternity Determination

As we explained in *In re Adoption of Jaelyn B.*,[34] recognizing Jesse's parental rights under Ohio's paternity determination is not contrary to Nebraska's public policy. Section 43-1406 specifically requires Nebraska courts to give full faith and credit to a "determination of paternity made by any other state, whether established through voluntary acknowledgment, genetic testing, or administrative or judicial processes."

[21] We reject Tylee's argument that under Nebraska's statutes, Jesse's acknowledgment can only create a rebuttable presumption of paternity. As we explained in *Cesar C. v. Alicia L.*,[35] a paternity acknowledgment in Nebraska operates as a legal finding of paternity after the 60-day rescission period has expired.[36] At that point, the acknowledged father is the child's legal father—not a presumed father. And he

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[33] See *Nebuda v. Dodge Cty. Sch. Dist. 0062*, 290 Neb. 740, 861 N.W.2d 742 (2015).

[34] *In re Adoption of Jaelyn B., supra* note 1.

[35] See *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

[36] See Neb. Rev. Stat. §§ 43-1402 and 43-1409 (Reissue 2008).

has the same right to seek custody as the child's biological mother, even if genetic testing shows he is not the biological father.[37]

[22] It is not contrary to Nebraska's public policy to recognize an acknowledged father's parental rights under another state's statutes when we have recognized an acknowledged father's parental rights under Nebraska's statutes. Moreover, we have previously recognized a man's legal status as a child's father that rested on a statutory paternity determination instead of a court's judgment.[38]

[23,24] The Full Faith and Credit Clause requires states to give the same effect to a judgment in the forum state that it has in the state where the court rendered the judgment.[39] Section 43-1406(1) extends the constitutional requirement of giving full faith and credit to a sister state's paternity determination through a voluntary acknowledgment. So whether a paternity acknowledgment made in a sister state requires a legal father's consent to an adoption depends upon whether the laws of the sister state confer that right.[40]

And as we explained in *In re Adoption of Jaelyn B.*,[41] Ohio's statutes confer that right. Because Tylee does not dispute Jesse's claim that his consent is required under Ohio law, we do not repeat that full analysis here. In sum, under Ohio's statutes, Jesse's acknowledgment created a "parent and child relationship between a child and the natural father."[42] Jaelyn is his child "as though born to him in lawful wedlock."[43]

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[37] See *Cesar C., supra* note 35.

[38] See *Riddle v. Peters Trust Co.*, 147 Neb. 578, 24 N.W.2d 434 (1946).

[39] *In re Trust Created by Nixon*, 277 Neb. 546, 763 N.W.2d 404 (2009).

[40] See *Matter of Gendron*, 157 N.H. 314, 950 A.2d 151 (2008). See, also, *In re Mary G.*, 151 Cal. App. 4th 184, 59 Cal. Rptr. 3d 703 (2007); *Burden v. Burden*, 179 Md. App. 348, 945 A.2d 656 (2008).

[41] *In re Adoption of Jaelyn B., supra* note 1.

[42] Ohio Rev. Code Ann. § 3111.02(A) (LexisNexis 2008).

[43] Ohio Rev. Code Ann. § 3111.26 (LexisNexis 2008).

And the county court could not permit her adoption without his consent.[44]

3. § 43-1406 Precludes Disestablishing a Legal Father's Paternity Through an Adoption

[25] Adoption terminates the parent-child relationship.[45] We recognize that Nebraska's statutes ostensibly permit an adoption if genetic testing shows that a man is not a child's biological father. For example, § 43-104.05 sets out the requirements for a putative father's petition to establish paternity of his child born out of wedlock. Under this section, a putative father can file such a petition only if he previously filed an administrative objection to a child's adoption within 5 days of the child's birth or receiving notice of the mother's intent to relinquish custody. At that proceeding, § 43-104.05 authorizes a court to order genetic testing to determine whether the putative father's consent to an adoption is required under § 43-104.22(11). Similarly, § 43-104(4) provides that "[c]onsent shall not be required of an adjudicated or putative father who is not required to consent to the adoption pursuant to section 43-104.22."

[26] We have stated that "to terminate a father's rights through an adoption procedure, the consent of the adjudicated father of a child born out of wedlock is required for the adoption to proceed unless the Nebraska court having jurisdiction over the custody of the child determines otherwise, pursuant to § 43-104.22."[46] That section sets out 11 circumstances under which consent to an adoption is not required from an unmarried adjudicated or putative biological father. Tylee claims

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[44] Ohio Rev. Code Ann. §§ 3107.06 and 3107.07 (LexisNexis Supp. 2009).

[45] See, Neb. Rev. Stat. §§ 43-410 (Cum. Supp. 2014) and 43-411 (Reissue 2008); *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002).

[46] *Jeremiah J. v. Dakota D.*, 287 Neb. 617, 623, 843 N.W.2d 820, 826 (2014).

that Jesse's consent is not required under § 43-104.22(11). Under § 43-104.22(11), consent is not required if "[t]he man is not, in fact, the biological father of the child."

[27] We conclude that Jesse is not a "man" within the meaning of subsection (11). By its terms, § 43-104.22 applies only to determine the "parental rights of an adjudicated biological father or putative biological father of a minor child born out of wedlock." But Jesse is neither an adjudicated father nor a putative father. He is an acknowledged father. More important, to hold that subsection (11) applies to Jesse would directly conflict with the requirement under § 43-1406(1) that Nebraska give full faith and credit to another state's paternity determination. As we have explained, to do that we must look to the effect of that determination under Ohio law. And Ohio law gives an acknowledged father the full rights of a biological father whose child was born to him in lawful wedlock, and he has the right to withhold consent to an adoption. Under § 43-1406(1), Ohio's statutory determination of Jesse's paternity has the effect of a judgment.

[28,29] For judgments, collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.[47] Only a void judgment is subject to collateral attack.[48] We conclude the same rules apply to a voluntary paternity acknowledgment that has the same effect as a judgment. Tylee has not attacked Jesse's paternity determination for procedural or jurisdictional defects, nor do we see any grounds for such a challenge. So the district court erred in failing to determine that Nebraska's adoption statutes could not authorize a county court to disestablish Jesse's paternity through an adoption without his consent. That is why we reversed the judgment and remanded the cause in the consolidated appeals from the adoption proceedings with

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[47] *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

[48] *Id.*

directions for the county court to vacate its adoption decree. For the same reason, we reverse the district court's dismissal. We turn to the issues that the district court must resolve on remand in this case.

4. Jaelyn's Custody Going Forward

The primary issues going forward are whether Heather has any right to claim custody of Jaelyn and, if so, how to resolve a custody dispute between Heather and Jesse. Until the district court after remand orders otherwise, Tylee's status is only that of temporary custodian.

[30,31] The record in the companion case, *In re Adoption of Jaelyn B.*,[49] shows that Heather relinquished Jaelyn for adoption by Tylee. In a private adoption, the child is relinquished directly into the hands of the prospective adoptive parent or parents without interference by the state or a private agency.[50] We have held that a valid relinquishment of parental rights is irrevocable and that a natural parent who relinquishes his or her rights to a child by a valid written instrument gives up all rights to the child at the time of the relinquishment.[51] But the invalidity of Heather's specified adoption raises the issue whether her relinquishment was voidable. That is, was Tylee's adoption of Jaelyn a condition precedent for Heather's relinquishment?[52]

[32] The invalidity of the adoption also calls into question the validity of Heather's relinquishment. A natural parent's knowing, intelligent, and voluntary relinquishment of a child for adoption is valid. We will generally uphold relinquishments absent evidence of threats, coercion, fraud,

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[49] *In re Adoption of Jaelyn B., supra* note 1.

[50] See *Monty S. & Teresa S., supra* note 21.

[51] See *id.* See, also, § 43-104(2)(a); *In re Adoption of Corbin J.*, 278 Neb. 1057, 775 N.W.2d 404 (2009).

[52] See, *Matter of Pima Cty. Juv. Action S-2698*, 167 Ariz. 303, 806 P.2d 892 (Ariz. App. 1990); *In re Christopher F*, 260 A.D.2d 97, 701 N.Y.S.2d 171 (1999).

or duress.[53] But in the typical case, a biological mother, alone or together with a biological father, had a change of heart and was seeking the return of a child whom she had validly relinquished for an adoption. This case is distinguishable because Heather appears to have relinquished her child only for adoption by Tylee. That specified adoption is invalid and cannot be completed without Jesse's consent unless an exception applies under Ohio law. The question regarding validity is whether Heather relinquished Jaelyn with the understanding that the planned adoption involved the risk that Jesse might be able to block it and obtain custody.

[33] These questions appear to be issues of first impression in Nebraska. So we do not decide them without giving the parties an opportunity to litigate. But we clarify that the first issue that the district court must resolve on remand is whether Heather's relinquishment was invalid or is void. If it finds that her relinquishment was invalid because it was not knowing and intelligent, or that it is void because a condition precedent was not satisfied, then Heather's parental rights are still intact. Under § 43-111, "[i]t is the adoption itself which terminates the parental rights, and until the adoption is granted the parental rights are not terminated."[54] When a parent's relinquishment of his or her child is invalid or void, § 43-111 governs when the parent's rights are terminated.

[34] Second, we clarify that a parent's fundamental rights apply in a habeas corpus proceeding to regain custody of his or her child who is the subject of an adoption proceeding if the parent's relinquishment is invalid or void. We have recently restated a rule from a 1991 habeas appeal involving an adoption: "Where the relinquishment of rights by a natural parent is found to be invalid for any reason, a best interests hearing is nevertheless held: 'The court shall not simply return the child

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[53] See *Monty S. & Teresa S., supra* note 21.

[54] *In re Guardianship of Sain*, 211 Neb. 508, 516, 319 N.W.2d 100, 105-06 (1982).

to the natural parent upon a finding that the relinquishment was not a valid instrument.'"[55]

This statement comes directly from our decision in *Yopp v. Batt*.[56] In *Yopp*, we affirmed the trial court's finding that the natural mother's relinquishment in a private and closed adoption was valid. "Closed" meant that the identity of the prospective adoptive parents was unknown to the mother. Because the trial court concluded that the relinquishment was valid, it refused to conduct a best interests hearing. The mother assigned error to that ruling also.

We concluded that the Legislature had not treated relinquishments for a private adoption the same as relinquishments for an agency adoption. We explained that under Neb. Rev. Stat. § 43-106.01 (Reissue 1988), a valid written relinquishment for an agency adoption cuts off the parent's parental rights and duties upon the agency's written acceptance of responsibility for the child. But there is not a corresponding statute governing relinquishments for private adoptions. So under § 43-111, the relinquishing parent's parental rights are not extinguished until the adoption decree is entered.

Because the Legislature has not clarified the parties' rights in a private adoption when a parent attempts to revoke a relinquishment, we set out rules to govern their rights. One of these rules requires a best interests hearing even if the parent's relinquishment was invalid:

> When a conflict over custody of the child arises, the court shall take custody of the child and conduct a hearing to determine whether the best interests of the child require the child to remain with the prospective adoptive family or be returned to the natural parent. . . . Physical custody of the child may remain with the prospective adoptive family during the pendency of the proceedings if the

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[55] *Monty S. & Teresa S., supra* note 21, 290 Neb. at 1052, 863 N.W.2d at 489.

[56] *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991).

> court finds the child's situation suitable. *Additionally, if the relinquishment of rights by the natural parent is found to be invalid for any reason, a best interests hearing shall also be held to determine custody of the child. The court shall not simply return the child to the natural parent upon a finding that the relinquishment was not a valid instrument.* By these rules, we have sought to keep the best interests of the child at the forefront of the inquiry.[57]

In *Yopp*, we did not cite any authorities for the italicized rules above. But these statements cannot be interpreted to mean that in a habeas proceeding, a best interests inquiry is sufficient, in itself, to deprive a parent of custody if his or her parental rights remain intact. We explicitly rejected that reasoning 2 years after we decided *Yopp*.

Uhing v. Uhing[58] did not involve an adoption but it did involve a child custody dispute in a habeas proceeding between a mother and maternal grandmother. The unmarried mother had left her child with the grandmother for a time but still provided financial support. After the mother obtained stable employment and housing, the grandmother refused to surrender the child and the mother sought habeas relief. The district court concluded that the child should remain with the grandmother until the mother had a longer track record. We reversed, because the trial court had abused its discretion in relying on its best interests findings, without making any determination regarding the mother's fitness for custody.

[35-37] We acknowledged we had previously stated that "the 'question present in every habeas corpus case is the best interests of the child.'"[59] But despite those statements, "we

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[57] *Id.* at 791-92, 467 N.W.2d at 877-78 (emphasis supplied).

[58] *Uhing, supra* note 19.

[59] *Id.* at 373, 488 N.W.2d at 370, quoting *L.G.P. v. Nebraska Dept. of Soc. Servs.*, 239 Neb. 644, 477 N.W.2d 571 (1991).

cannot overlook or disregard that the 'best interests' standard is subject to the overriding recognition that 'the relationship between parent and child is constitutionally protected.'"[60] We explained that a parent's superior right to custody over a stranger to the parent-child relationship protects both the parent's and the child's fundamental interest in maintaining it.[61] The Due Process Clause precludes the State from breaking apart a family over a parent's objections absent a powerful countervailing interest[62]:

> "Accordingly, a court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child."[63]

This court has recognized the parental preference principle in many contexts involving child custody. And in *Uhing*, we noted that we had recognized this principle in a habeas proceeding very early in Nebraska's history:

> As far back as *Norval v. Zinsmaster*, 57 Neb. 158, 77 N.W. 373 (1898), a habeas corpus proceeding involving child custody, the court expressed what remains the law of Nebraska concerning preeminence of the parental right to custody of a minor. . . . Consequently, . . . [*I*]*n a parent's habeas corpus proceeding directed at child custody*, a court may not deprive a parent of a minor's custody

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[60] *Id.*, quoting *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978), and citing *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982), and *Shoecraft, supra* note 17.

[61] See *Uhing, supra* note 19, citing *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979).

[62] *Id.*, citing *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

[63] *Id*. at 375, 488 N.W.2d at 372, quoting *Stuhr v. Stuhr*, 240 Neb. 239, 481 N.W.2d 212 (1992).

> unless it is affirmatively shown that the parent seeking habeas corpus relief is unfit to perform the parental duties imposed by the parent-child relationship or has legally lost parental rights in the child.[64]

[38] *Uhing* emphatically holds that the parental preference doctrine applies in a habeas proceeding to obtain custody of a child. And under our decision in *Nielsen v. Nielsen*,[65] a court in a habeas proceeding may not deprive a parent of custody of his or her minor child unless a party *affirmatively shows* that the parent is unfit or has forfeited the right to perform his or her parental duties. This reasoning applies to a habeas proceeding challenging an adoption when a parent's parental rights remain intact because a court determines that a relinquishment is invalid or is void. So on remand, if the court determines that Heather's relinquishment was invalid or void, it may not permanently deprive Heather of custody based solely on a finding that Tylee's continued custody of Jaelyn is in the child's best interests. But as stated, Tylee's status is only as Jaelyn's temporary custodian until there is a temporary or final resolution of the custody issues.

In contrast, Jesse did not voluntarily avail himself of Nebraska's adoption laws, relinquish his parental rights, or consent to Jaelyn's adoption. So, Ohio law governs whether any exceptions apply to Ohio's statutory requirement that his consent is required.

Third, if the district court determines that Heather and Jesse both have a right under the parental preference principle to seek Jaelyn's custody, it must determine the appropriate forum to resolve a custody dispute between them: the district court or the Ohio Court of Common Pleas, where Jesse's custody proceeding is apparently still pending.[66]

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[64] *Id.* at 376-77, 488 N.W.2d at 372 (emphasis supplied).

[65] *Nielsen v. Nielsen*, 207 Neb. 141, 296 N.W.2d 483 (1980).

[66] See *In re Adoption of Jaelyn B., supra* note 1.

VI. CONCLUSION

We conclude that the district court erred in failing to conclude that it had exclusive jurisdiction over Jesse's constitutional challenges to Nebraska's adoption statutes under the jurisdictional priority doctrine. Similarly, the court erred in concluding that it lacked subject matter jurisdiction to grant habeas relief to Jesse after the district court found that he was not Jaelyn's biological father. Jesse's challenges to Nebraska's statutes were not limited to whether he was the biological father, and the county court's findings were irrelevant to Jesse's claim that Nebraska must give full faith and credit to Ohio's paternity determination.

We conclude that § 43-1406 requires Nebraska to give full faith and credit to Ohio's paternity determination. Under Ohio's statutes, Jesse is Jaelyn's legal father and must consent to her adoption unless an exception applies.

As we stated in the companion case, we are sympathetic to the heartache that undoing these errors will cause the parties after this much time. This situation is partially the result of Nebraska's statutes that encourage biological mothers to minimize the rights of legal fathers. And Tylee's own delay tactics have arguably lengthened the litigation. But we cannot ignore our duty to uphold Jesse's parental rights under Ohio law. Accordingly, we reverse, and remand for further proceedings consistent with this opinion.

Reversed and remanded for
further proceedings.

Stacy, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. David K. Harrison, appellant.

881 N.W.2d 860

Filed June 24, 2016. No. S-15-1085.

1. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.
2. **Judgments: Appeal and Error.** The findings of the district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless they are clearly erroneous.
3. **Judgments: Evidence: Appeal and Error.** The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition.
4. ____: ____: ____. A writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
5. **Judgments: Appeal and Error.** A writ of error coram nobis is not available to correct errors of law.

Appeal from the District Court for Douglas County: Horacio J. Wheelock, Judge. Affirmed.

David K. Harrison, pro se.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

Heavican, C.J., Wright, Connolly, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Cassel, J.

INTRODUCTION

David K. Harrison appeals from the district court's order overruling his second motion for postconviction relief and denying his request for a writ of error coram nobis. We conclude that Harrison's motion was not timely filed. We also conclude that his request for a writ of error coram nobis was properly denied, because he asserts only errors of law. We therefore affirm the district court's order.

BACKGROUND

In 1985, Harrison was convicted of first degree murder and sentenced to life imprisonment. On direct appeal, we affirmed his conviction and sentence.[1] In 1999, he filed a motion for postconviction relief, alleging that his constitutional rights were violated for various reasons. After an evidentiary hearing, the district court overruled Harrison's motion. We affirmed.[2]

On April 27, 2015, Harrison filed a second postconviction motion "TO VACATE AND SET ASIDE CONVICTION AND SENTENCE AND/OR WRIT OF ERROR CORAM NOBIS," which is the subject of this appeal. He alleged three grounds for relief: (1) judicial misconduct, (2) the record lacks a commitment order, and (3) the jury instructions were erroneous pursuant to *State v. Smith*[3] and *State v. Trice*.[4]

The district court denied Harrison's request for a writ of error coram nobis and overruled his motion for postconviction relief without an evidentiary hearing. It concluded that his motion for postconviction relief was procedurally barred as successive and that it was barred as untimely under Neb.

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[1] *State v. Harrison*, 221 Neb. 521, 378 N.W.2d 199 (1985).

[2] *State v. Harrison*, 264 Neb. 727, 651 N.W.2d 571 (2002).

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

[4] *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013).

Rev. Stat. § 29-3001(4) (Cum. Supp. 2014). It did not separately discuss his request for a writ of error coram nobis. Harrison appeals.

ASSIGNMENTS OF ERROR

Harrison assigns, restated and consolidated, that the district court erred in (1) overruling his motion for postconviction relief without an evidentiary hearing and (2) denying his request for a writ of error coram nobis.

STANDARD OF REVIEW

[1] An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[5] However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.[6]

[2] The findings of the district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless they are clearly erroneous.[7]

ANALYSIS

Postconviction Motion

Harrison claims that the district court erred in overruling his motion for postconviction relief for several reasons. First, he argues that the record shows judicial misconduct at his trial that violated his constitutional rights. Second, he argues that the record lacks a commitment order and that its absence violates his 5th and 14th Amendment rights. And third, he argues that he is entitled to relief pursuant to *Smith* and *Trice*, which he claims announced a new criminal rule applicable to

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[5] *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

[6] *Id.*

[7] *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012).

his case. He also argues that the foregoing errors demonstrate plain error.

Before we can address Harrison's arguments, we must first determine whether the district court correctly concluded that his motion was untimely. The Nebraska Postconviction Act contains a 1-year time limit for filing a verified motion for postconviction relief, which runs from one of four triggering events or August 27, 2011, whichever is later.[8] Briefly summarized, the triggering events are: (a) The date the judgment of conviction became final, (b) the date the factual predicate of the constitutional claim alleged could have been discovered through due diligence, (c) the date an impediment created by state action was removed, or (d) "[t]he date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court . . . ."[9]

Clearly, the first three triggering events do not apply. Subsection (a) does not apply, because Harrison's conviction became final in 1985. Subsection (b) does not apply, because the factual predicates for Harrison's constitutional claims are found in the trial record. And subsection (c) does not apply, because Harrison does not allege that the State created an impediment that prevented him from filing his postconviction motion.

And the fourth triggering event does not apply, although it requires a little more discussion. Under subsection (d), the 1-year period can run from "[t]he date on which a constitutional claim asserted was initially recognized . . . ."[10] Harrison's first two arguments regarding judicial misconduct and the commitment order do not invoke subsection (d), because any constitutional claim they attempt to raise was recognized before August 27, 2011. And Harrison's third argument regarding

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[8] § 29-3001(4).

[9] *Id.*

[10] § 29-3001(4)(d).

Smith and *Trice* does not invoke subsection (d). He argues that *Smith* recognized a new criminal rule that is applicable to his case pursuant to *Trice*, where we applied *Smith* on direct review.

Although *Smith* announced a new rule,[11] it did not recognize a new constitutional claim. In *Smith*, we held that a step instruction which required the jury to convict the defendant of second degree murder if it found an intentional killing, but did not permit the jury to first consider whether the killing was provoked by a sudden quarrel, was an incorrect statement of the law. This conclusion was based upon our interpretation of the statute that defines manslaughter,[12] not on any newly recognized constitutional right. Later, in an unrelated case with the same caption, we applied *Smith* on direct review but clarified that *Smith* "did not announce a new constitutional rule."[13] Because *Smith* did not recognize a new constitutional claim or rule, it is not a triggering event under subsection (d). It follows that the cases applying *Smith* are not triggering events.

Moreover, even if *Smith* or *Trice* had recognized a new constitutional claim, Harrison's motion would still be untimely. The 1-year period runs from the date on which the constitutional claim was initially recognized.[14] It does not run from the release of subsequent cases applying the new constitutional claim retroactively.[15] *Smith* was released in 2011, and *Trice* was released in 2013. Harrison filed the instant motion in April 2015, well after the 1-year period of limitation would have expired if either case had recognized a new constitutional claim.

Because none of Harrison's arguments invoked any triggering event under § 29-3001(4), the 1-year period began to run

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[11] See *State v. Trice, supra* note 4.

[12] Neb. Rev. Stat. § 28-305 (Reissue 2008).

[13] *State v. Smith*, 284 Neb. 636, 655, 822 N.W.2d 401, 416 (2012).

[14] See *State v. Goynes, ante* p. 288, 876 N.W.2d 912 (2016).

[15] *Id.*

on August 27, 2011. It follows that the instant motion, filed on April 27, 2015, was time barred.

Writ of Error Coram Nobis

Harrison combined his motion for postconviction relief with a request for a writ of error coram nobis. He claims that the district court erred in denying the request. We disagree.

[3-5] The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition.[16] The writ reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.[17] The writ is not available to correct errors of law.[18]

Harrison does not allege any errors appropriate for coram nobis relief. He alleges errors related to the jury instructions, judicial misconduct, and the commitment order. These are all purported errors of law, and a writ of error coram nobis is not available to correct errors of law.[19] Thus, the district court did not err in denying Harrison's request.

CONCLUSION

The district court did not err in overruling Harrison's motion for postconviction relief, because it was not timely filed. And the district court did not err in denying Harrison's request for a writ of error coram nobis, because he asserts only errors of law. Accordingly, we affirm the district court's order.

Affirmed.

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[16] *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015).

[17] *Id.*

[18] *Id.*

[19] See, *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014) (misconduct at trial); *State v. Diaz, supra* note 7 (ineffective assistance of trial counsel).

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