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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

JULY 1, 2016 and OCTOBER 20, 2016

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCXCIV

PEGGY POLACEK
OFFICIAL REPORTER

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TABLE OF CONTENTS
For this Volume

Members of the Appellate Courts v

Judicial Districts and District Judges vi

Judicial Districts and County Judges viii

Separate Juvenile Courts and Judges x

Workers' Compensation Court and Judges x

Attorneys Admitted xi

Table of Cases Reported xv

List of Cases Disposed of by Filed Memorandum Opinion xix

List of Cases Disposed of Without Opinion xxi

List of Cases on Petition for Further Review xxiii

Cases Reported 1

Headnotes Contained in this Volume 1023

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

Michael G. Heavican, Chief Justice
John F. Wright, Associate Justice
William M. Connolly, Associate Justice[1]
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice
Stephanie F. Stacy, Associate Justice
Max Kelch, Associate Justice
Jeffrey J. Funke, Associate Justice[2]

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

[1]Until July 31, 2016
[2]As of August 2, 2016

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*
Daniel E. Bryan, Jr.	Auburn
Vicky L. Johnson	Wilber
Ricky A. Schreiner	Beatrice

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*
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
Kevin R. McManaman	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

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TABLE OF CASES REPORTED

Aguallo; State v. 177
Alan L., In re Interest of 261
Alec S., In re Interest of 784

Benavides; State v. 902
Bixenmann v. Dickinson Land Surveyors 407
Boche; State v. 912
Bol; State v. 248
Burnett v. Maddocks 152

Carr; State v. 185
Cisneros v. Graham 83
City of Omaha; Malone v. 516
City of Papillion; City of Springfield v. 604
City of Springfield v. City of Papillion 604
Continental Cas. Co.; Drake-Williams Steel v. 386
Cornwell; State v. 799
Counsel for Dis., State ex rel. v. Martin 805
Counsel for Dis., State ex rel. v. Moore 283
Counsel for Dis., State ex rel. v. Weinberg 289
Countrywide Truck Ins. Agency; State of Florida v. 400

Dickinson Land Surveyors; Bixenmann v. 407
Donut Holdings v. Risberg 861
Drake-Williams Steel; Employers Mut. Cas. Co. v. 386
Drake-Williams Steel v. Continental Cas. Co. 386
Dubray; State v. 937
Duncan; State v 162

Edwards; State v. 1
Edwards v. Hy-Vee 237
Employers Mut. Cas. Co. v. Drake-Williams Steel 386

Fairway Bldg. Prods.; Nichols v. 657
Florida, State of v. Countrywide Truck Ins. Agency 400
Frakes; Meyer v. 668
Funk v. Lincoln-Lancaster Cty. Crime Stoppers 715

Gale; Hargesheimer v. 123
Gonzales; State v. 627
Graham; Cisneros v. 83

TABLE OF CASES REPORTED

Hands, Inc.; Weitz Co. v. 215
Hargesheimer v. Gale 123
Harris; State v. 766
Hartley v. Metropolitan Util. Dist. 870
Hood; State v. 747
Hopkins v. Hopkins 417
Huntington v. Pedersen 294
Hy-Vee; Edwards v. 237

In re Interest of Alan L. 261
In re Interest of Alec S. 784
Interiano-Lopez v. Tyson Fresh Meats 586

Jacob v. Nebraska Dept. of Corr. Servs. 735
Jeanette; Stanosheck v. 138
Jenkins; State v. 475
Jenkins; State v. 684

Kantaras; State v. 960
Klein v. Oakland/Red Oak Holdings 535

Lincoln-Lancaster Cty. Crime Stoppers; Funk v. 715
Lingenfelter v. Lower Elkhorn NRD 46
Lorenzen v. Lorenzen 204
Lower Elkhorn NRD; Lingenfelter v. 46

Maddocks; Burnett v. 152
Malone v. City of Omaha 516
Martin; State ex rel. Counsel for Dis. v. 805
Martin v. Martin 106
Metropolitan Util. Dist.; Hartley v. 870
Meyer v. Frakes 668
Midwest Renewable Energy; RM Campbell Indus. v. 326
Milos; State v. 375
Mitchell; State v. 832
Moore; State ex rel. Counsel for Dis. v. 283

Nebraska Dept. of Corr. Servs.; Jacob v. 735
Nebraska Dept. of Rev.; Stewart v. 1010
Nebraska State Patrol; Steckelberg v. 842
Nichols v. Fairway Bldg. Prods. 657

Oakland/Red Oak Holdings; Klein v. 535
Olbricht; State v. 974
Omaha, City of; Malone v. 516

Papillion, City of; City of Springfield v. 604
Parnell; State v. 551
Pedersen; Huntington v. 294
Pester; State v. 995

TABLE OF CASES REPORTED

RM Campbell Indus. v. Midwest Renewable Energy 326
Raatz; State v. 852
Rask; State v. 612
Risberg; Donut Holdings v. 861
Robertson; State v. 29
Rothenberger; State v. 810

Saylor; State v. 492
Schlake v. Schlake 755
Sellers v. Sellers 346
Smith; State v. 311
Springfield, City of v. City of Papillion 604
Stanosheck v. Jeanette 138
Starks; State v. 361
State ex rel. Counsel for Dis. v. Martin 805
State ex rel. Counsel for Dis. v. Moore 283
State ex rel. Counsel for Dis. v. Weinberg 289
State of Florida v. Countrywide Truck Ins. Agency 400
State v. Aguallo 177
State v. Benavides 902
State v. Boche 912
State v. Bol 248
State v. Carr 185
State v. Cornwell 799
State v. Dubray 937
State v. Duncan 162
State v. Edwards 1
State v. Gonzales 627
State v. Harris 766
State v. Hood 747
State v. Jenkins 475
State v. Jenkins 684
State v. Kantaras 960
State v. Milos 375
State v. Mitchell 832
State v. Olbricht 974
State v. Parnell 551
State v. Pester 995
State v. Raatz 852
State v. Rask 612
State v. Robertson 29
State v. Rothenberger 810
State v. Saylor 492
State v. Smith 311
State v. Starks 361
State v. Thompson 197
Steckelberg v. Nebraska State Patrol 842
Stewart v. Nebraska Dept. of Rev. 1010

Thompson; State v. 197
Tyson Fresh Meats; Interiano-Lopez v. 586

TABLE OF CASES REPORTED

Weinberg; State ex rel. Counsel for Dis. v. 289
Weitz Co. v. Hands, Inc. 215

LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-14-782: **State v. Ortega**. Affirmed. Connolly, J.

No. S-15-421: **Fire Ridge Estates Homeowners Assn. v. Marsh**. Affirmed. Stacy, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-15-826: **Jacob v. Nebraska Dept. of Corr. Servs**. Motion of appellant for rehearing sustained. Appeal reinstated.

No. S-15-1137: **In re Interest of Sloane O**. Stipulation allowed; appeal dismissed.

No. S-15-1144: **State v. Gydesen**. Stipulation allowed; appeal dismissed.

No. S-15-1235: **Jacobitz v. Aurora Co-op**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-16-093: **State v. Newman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-16-094: **State v. Stricklin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-16-246: **State v. Fernando-Granados**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-16-386: **Castonguay v. Retelsdorf**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Castellar Partners v. AMP Limited*, 291 Neb. 163, 864 N.W.2d 391 (2015); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. S-16-413: **In re Application of Windle**. Upon the recommendation of the Nebraska State Bar Commission that applicant be admitted to the practice of law in Nebraska, the application for admission is granted. See § 3-119(A).

No. S-16-533: **State v. Mason**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-16-574: **State v. Ray**. Stipulation allowed; appeal dismissed.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-14-583: **State v. Davis**, 23 Neb. App. 536 (2016). Petition of appellant for further review denied on June 29, 2016.

No. A-14-750: **State v. Meints**. Petition of appellant for further review denied on July 13, 2016.

No. A-15-051: **Shriner v. Friedman Law Offices**, 23 Neb. App. 869 (2016). Petition of appellees for further review denied on September 29, 2016.

No. A-15-097: **State v. Cruz**, 23 Neb. App. 814 (2016). Petition of appellant for further review denied on August 8, 2016.

No. A-15-138: **Hillyer v. Midwest Gastrointestinal Assocs.**, 24 Neb. App. 75 (2016). Petition of appellant for further review denied on August 24, 2016.

No. A-15-201: **State v. Robertson**. Petition of appellant for further review denied on July 18, 2016.

No. A-15-201: **State v. Robertson**. Petition of appellant pro se for further review denied on July 18, 2016.

No. A-15-230: **State v. Moss**. Petition of appellant for further review denied on August 16, 2016.

No. A-15-318: **Stehlik v. Rakosnik**, 24 Neb. App. 34 (2016). Petition of appellants for further review denied on August 2, 2016.

No. S-15-322: **Douglas County v. Archie**. Petition of appellee for further review sustained on September 21, 2016.

No. A-15-335: **Sharp v. Nared**. Petition of appellant for further review denied on September 7, 2016.

No. A-15-337: **State v. Smith**. Petition of appellant for further review denied on July 19, 2016.

No. A-15-394: **Stonerook v. Green**. Petition of appellant for further review denied on August 8, 2016.

No. A-15-399: **Wilson-Demel v. Demel**. Petition of appellant for further review denied on July 6, 2016, as untimely. See § 2-102(F)(1).

No. A-15-426: **Spady v. Spady**. Petition of appellant for further review denied on September 1, 2016.

Nos. A-15-433, A-15-1228: **Cole v. Morello**. Petitions of appellant for further review denied on September 7, 2016.

No. A-15-459: **Miller v. Farmers & Merchants Bank**. Petition of appellants for further review denied on August 5, 2016.

PETITIONS FOR FURTHER REVIEW

No. A-15-480: **State v. Pineda**. Petition of appellant pro se for further review denied on August 5, 2016, for lack of jurisdiction.

No. A-15-483: **State v. Yanga**. Petition of appellant for further review denied on August 16, 2016.

No. A-15-518: **In re Estate of Barger**. Petition of appellant for further review denied on July 26, 2016.

No. A-15-527: **State v. Alford**, 24 Neb. App. 213 (2016). Petition of appellant for further review denied on September 14, 2016.

No. A-15-548: **State v. Hall**. Petition of appellant for further review denied on July 29, 2016, as untimely. See § 2-102(F)(1).

No. A-15-575: **In re Estate of Liebig**. Petition of appellant for further review denied on July 19, 2016.

No. A-15-646: **Heimes v. Cedar County**. Petition of appellant for further review denied on August 19, 2016.

No. A-15-650: **Heimes v. Arens**. Petition of appellant for further review denied on August 19, 2016.

No. A-15-653: **Dahlgren v. Dahlgren**. Petition of appellee for further review denied on June 29, 2016.

No. A-15-665: **State v. Frazier**. Petition of appellant for further review denied on July 19, 2016.

No. A-15-666: **State v. Goodwin**. Petition of appellant for further review denied on August 2, 2016.

No. A-15-673: **State v. Potter**. Petition of appellant for further review denied on June 29, 2016.

No. A-15-698: **State on behalf of Gaige R. v. James M**. Petition of appellee for further review denied on September 12, 2016, as premature. See § 2-102(F)(1).

No. A-15-704: **State v. Palma-Solano**. Petition of appellant for further review denied on August 5, 2016, for failure to comply with § 2-102(F)(1).

No. A-15-754: **State v. Schmidt**. Petition of appellant for further review denied on August 8, 2016.

No. A-15-799: **Puls v. Knoblauch**. Petition of appellant for further review denied on October 12, 2016.

No. A-15-833: **Floerchinger v. Floerchinger**, 24 Neb. App. 120 (2016). Petition of appellant for further review denied on August 24, 2016.

No. A-15-916: **In re Interest of Moctavin D. et al**. Petition of appellant for further review denied on July 19, 2016.

No. A-15-935: **State v. Kirchhoff**. Petition of appellant for further review denied on September 1, 2016.

PETITIONS FOR FURTHER REVIEW

No. A-15-947: **State v. Romero**. Petition of appellant for further review denied on August 12, 2016.

No. A-15-949: **Ewert v. Arabi**. Petition of appellant for further review denied on August 29, 2016, as untimely. See § 2-102(F)(1).

No. A-15-961: **Kelly H. v. Luke M**. Petition of appellant for further review denied on August 12, 2016.

No. A-15-962: **Kelly H. on behalf of Dominique M. v. Luke M**. Petition of appellant for further review denied on August 12, 2016.

No. A-15-964: **Kelly H. on behalf of Dominique M. v. Ashley H**. Petition of appellant for further review denied on August 12, 2016.

No. A-15-985: **State v. Ostrum**. Petition of appellant for further review denied on July 26, 2016.

No. A-15-1003: **State v. Crowl**. Petition of appellant for further review denied on September 1, 2016.

Nos. A-15-1042, A-15-1043: **In re Interest of Hunter P. et al**. Petitions of appellant for further review denied on August 18, 2016.

No. A-15-1048: **In re Interest of Ravin L**. Petition of appellant for further review denied on September 8, 2016.

No. A-15-1076: **State v. McDermott**. Petition of appellant for further review denied on August 30, 2016.

No. A-15-1136: **In re Interest of Tresdon N**. Petition of appellant pro se for further review denied on July 26, 2016.

No. A-15-1149: **Ryan Family L.L.C. v. Ryan**. Petition of appellee Stacy Ryan for further review denied on July 19, 2016.

No. A-15-1185: **State v. Yanga**. Petition of appellant for further review denied on July 13, 2016.

No. A-15-1236: **In re Interest of Hannah R**. Petition of appellant for further review denied on September 20, 2016.

No. A-15-1237: **Castonguay v. Frakes**. Petition of appellant for further review denied on August 2, 2016.

No. A-15-1242: **In re Interest of Landyn M**. Petition of appellant for further review denied on August 2, 2016.

No. A-15-1243: **In re Interest of Kaidyn M**. Petition of appellant for further review denied on August 2, 2016.

No. A-16-068: **State v. Templeman**. Petition of appellant for further review denied on July 19, 2016.

No. A-16-134: **State v. McClease**. Petition of appellant for further review denied on October 12, 2016.

Nos. A-16-165, A-16-168, A-16-169: **State v. Holliman**. Petitions of appellant for further review denied on July 26, 2016.

No. A-16-187: **In re Interest of Jaymon M**. Petition of appellant for further review denied on October 12, 2016.

PETITIONS FOR FURTHER REVIEW

No. A-16-197: **In re Interest of Treton A**. Petition of appellant for further review denied on August 18, 2016.

No. A-16-213: **State v. Sundquist**. Petition of appellant for further review denied on September 22, 2016.

No. A-16-245: **State v. Castillo-Zamora**. Petition of appellant for further review denied on August 11, 2016, as untimely. See § 2-102(F)(1).

No. A-16-270: **Rosberg v. Rosberg**. Petition of appellant for further review denied on August 11, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-271: **Rosberg v. Riesberg**. Petition of appellant for further review denied on September 1, 2016.

No. A-16-290: **State v. Pickel**. Petition of appellant for further review denied on August 30, 2016.

No. A-16-374: **Koch v. City of Sargent**. Petition of appellant for further review denied on July 13, 2016.

No. A-16-385: **State v. Swift**. Petition of appellant for further review denied on July 19, 2016.

No. A-16-390: **Rosberg v. Rosberg**. Petition of appellant for further review denied on August 5, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-391: **Rosberg v. Rosberg**. Petition of appellant for further review denied on August 5, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-392: **Rosberg v. Sand**. Petition of appellant for further review denied on August 5, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-394: **Koch v. Clark**. Petition of appellant for further review denied on August 12, 2016.

No. A-16-396: **Rosberg v. Johnson**. Petition of appellant for further review denied on August 5, 2016, for failure to comply with § 2-102(F)(1).

No. A-16-443: **Village of Mead v. Gonzales**. Petition of appellants for further review denied on August 18, 2016.

No. A-16-481: **Clark v. Ladwig**. Petition of appellants for further review denied on October 5, 2016.

No. A-16-556: **Holloway v. Lancaster County**. Petition of appellant pro se for further review denied on August 11, 2016, for failure to comply with § 2-102(F)(1).

294 Nebraska Reports
STATE v. EDWARDS
Cite as 294 Neb. 1

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

State of Nebraska, appellee, v. Christopher A. Edwards, appellant.

880 N.W.2d 642

Filed July 1, 2016. No. S-15-139.

1. **Pleadings: Appeal and Error.** An appellate court reviews a refusal to grant leave to amend for abuse of discretion.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Criminal Law: Words and Phrases.** Modus operandi is a characteristic method employed by a defendant in the performance of repeated criminal acts, and means, literally, "method of working," and refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.

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

Brian Munnelly and Jerry L. Soucie for appellant.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

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

Wright, J.

I. NATURE OF CASE

In March 2007, a jury convicted Christopher A. Edwards of the crimes of second degree murder and use of a deadly weapon to commit a felony in connection with the disappearance of Jessica O'Grady. In this appeal, Edwards maintains that some of the evidence presented against him at trial was fabricated by David Kofoed, a former supervisor of the Douglas County Crime Scene Investigation Division (CSI) who was discovered to have fabricated and planted evidence in two different murder cases.[1] Edwards also contends that his former attorney, Steven Lefler, acted under a conflict of interest during his trial and during the pendency of his direct appeal.

II. BACKGROUND

This is Edwards' third appeal to this court. We affirmed Edwards' convictions on direct appeal in *State v. Edwards* (*Edwards I*).[2] Edwards then filed a motion for postconviction relief, which the district court denied without an evidentiary hearing. In his second appeal in *State v. Edwards* (*Edwards II*),[3] we affirmed the district court's order on all but two of Edwards' claims. With respect to those claims, we remanded the cause for an evidentiary hearing on two issues:

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[1] See, *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015); *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012). See, also, *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[2] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[3] *State v. Edwards, supra* note 1.

(1) whether Edwards was denied due process by the State's knowing use of fabricated evidence to obtain his convictions and (2) whether Edwards' trial counsel labored under an actual conflict of interest. After the remand but before the evidentiary hearing, Edwards filed in this case a "Motion for Leave to File Second Verified Motion for Postconviction Relief," which motion the district court denied. An evidentiary hearing was held, and the district court denied Edwards' motion for postconviction relief. Edwards appeals for a third time, challenging the district court's refusal to grant leave to amend his original motion for postconviction relief and the district court's denial of postconviction relief.

1. *Edwards I*

In June 2006, Edwards was charged by information with the crimes of second degree murder and use of a deadly weapon to commit a felony in connection with the disappearance of O'Grady. O'Grady was last seen on May 10, 2006, leaving her apartment on her way to Edwards' residence.

Omaha police interviewed Edwards and obtained permission to search his bedroom at his aunt's house. A short sword was found in the closet, and blood was found on the sword. Other evidence found in Edwards' bedroom was set forth in *Edwards I* as follows:

> Spattered blood was found on the nightstand, headboard, clock radio, and ceiling above the bed. Edwards was asked to explain the bloodstains on the headboard and clock, and replied that "he had cut his wrist." A small bloodstain was located on the top of the mattress. Edwards was asked about the bloodstain and replied that "he had intercourse with a girlfriend who was menstruating." But on further investigation, a very large, damp bloodstain was found on the underside of the mattress, covering most of the bottom side of the mattress. Bloodstains were later found on the bedding, a chair in the room, a bookcase, and laundry baskets. Luminol, a chemical used to locate where blood has been cleaned up, was applied to the

walls of the room. The Luminol suggested blood on large areas of the south and west walls. Stains that appeared to be blood were found on the ceiling, covered up by white paint.[4]

A search of Edwards' car and the garage was also conducted: A shovel and a pair of garden shears were found in Edwards' vehicle. A bloodstain was found on the handle of the garden shears. More bloodstains were found on the trunk gasket of the car and on the underside of the trunk lid. A black, plastic trash bag was found in the garage next to the vehicle. The bag contained two bloodstained towels and a receipt from a drugstore in west Omaha. Edwards had been videotaped purchasing poster paint, white shoe polish, and correction fluid at that drugstore on May 11, 2006, at 7:41 p.m. The poster paint was chemically identical to that found on Edwards' ceiling.[5]

The DNA profiles recovered from the blood on the above items were all consistent with O'Grady's DNA profile. The chances of another unrelated Caucasian person having the same DNA profile as the DNA profile recovered from those items differed depending on the item, but the chances ranged from 1 in 15.6 billion to 1 in 26.6 quintillion.[6]

Edwards was convicted of both crimes for which he was charged, and he appealed both convictions, arguing, among other things, that the evidence was insufficient to prove that O'Grady had been murdered, because her body had not been found. We affirmed Edwards' convictions in *Edwards I*.

2. *Edwards II*

In July 2010, Edwards filed a motion for postconviction relief. We summarized the claims set forth in that motion in *Edwards II*:

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[4] *Edwards I, supra* note 2, 278 Neb. at 62, 767 N.W.2d at 793-94.

[5] *Id.* at 62-63, 767 N.W.2d at 794.

[6] *Id.*

Edwards claimed that the State violated his due process rights by presenting fabricated evidence during his trial. Edwards alleged that while investigating O'Grady's murder, . . . Kofoed, a supervisor of [CSI], planted blood evidence to be used against Edwards. Edwards' allegations and attachments set out a history of Kofoed's unlawful conduct during other murder investigations. Edwards alleged that the State's introduction of forensic evidence at his trial that had been falsified by law enforcement officials constituted outrageous government conduct that violated his right to due process.

In addition to his due process claim, Edwards alleged claims of ineffective assistance of counsel. Edwards was represented by the same three attorneys at trial and on appeal. First, he alleged that although his lead attorney, . . . Lefler, should have known that Kofoed was suspected of planting evidence during the 2006 murder investigation, Lefler did not investigate this information or effectively impeach Kofoed at trial. Edwards alleged that Lefler was ineffective because he was a friend of Kofoed.

Edwards also claimed that his trial counsel was ineffective in failing to retain a DNA expert to testify at trial. He alleged that an expert could have testified that the blood on his mattress came from two contributors—neither of which was Edwards. He claimed that such testimony would have supported his theory that O'Grady had experienced a miscarriage, which would have explained the blood on his mattress. He also claimed that his counsel should have obtained additional DNA testing after learning that mixed DNA samples had been found. He alleged that this evidence could have opened the door to other possible theories about the blood on the mattress. Finally, Edwards alleged that his trial counsel failed to effectively investigate (1) calls made to O'Grady's aunt after O'Grady's disappearance, concerning the

location of O'Grady's car; (2) whether O'Grady had contacted an online travel agency around the time of her disappearance; and (3) whether an "'alternate suspect'" existed.

Regarding his direct appeal, Edwards alleged that his appellate counsel was ineffective in failing to raise (1) the trial court's denial of his motion to change venue, (2) the due process violation related to his claim of falsified evidence, and (3) his other claims of his trial counsel's ineffective assistance.[7]

In August 2011, the district court sustained the State's motion to dismiss Edwards' motion for postconviction relief without an evidentiary hearing. Edwards appealed.

In September 2012, in *Edwards II*, we concluded that only two issues raised in Edwards' motion for postconviction relief warranted an evidentiary hearing: (1) whether Edwards was denied due process by the State's knowing use of fabricated evidence to obtain his convictions and (2) whether Edwards' trial counsel labored under an actual conflict of interest. As to Edwards' other claims, we determined that the district court properly denied Edwards postconviction relief.

3. Edwards' Motion for Leave to Amend

After the remand in *Edwards II*, but before the evidentiary hearing on the two claims described above, Edwards filed in this case his motion for leave to file a second motion for postconviction relief. In support of his motion, Edwards attached a document titled "Second Verified Motion for Postconviction Relief." That document set forth five claims: (1) Edwards' due process rights were violated because his convictions were based on fabricated evidence; (2) Edwards' due process rights were violated because the State failed to disclose material exculpatory evidence; (3) Edwards' attorney did not provide

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[7] *Edwards II, supra* note 1, 284 Neb. at 387-88, 821 N.W.2d at 689-90.

conflict-free representation, as required by the 6th and 14th Amendments to the U.S. Constitution; (4) the step instruction on the lesser-included offense of manslaughter failed to distinguish between the intent to kill associated with second degree murder and the intent to kill resulting from a "sudden quarrel"; and (5) cumulative error deprived Edwards of his right to substantive due process under the 14th Amendment.

The district court implicitly construed Edwards' motion for leave to file a second motion as a motion for leave to *amend* his original postconviction motion. The court overruled the motion to amend, reasoning that it was without power to affect the rights and duties outside the scope of this court's remand in *Edwards II*. Edwards accepts the court's characterization of his motion (as a motion to amend) but appeals the court's decision overruling the motion, arguing that he should have been allowed to amend. Because both Edwards and the district court treat Edwards' motion as a motion to amend, and because Edwards filed the motion for leave to file a second motion under the same docket number as the original postconviction motion, we will also treat Edwards' motion as a motion to amend.

4. Evidentiary Hearing on Remand

The evidentiary hearing took place on July 8 and August 14, 2013, and March 13, 14, and April 9, 2014. Below, we set forth the evidence presented at the hearing as it relates to the issues the district court was to address on remand, i.e., (1) whether Edwards was denied due process by the State's knowing use of fabricated evidence to obtain his convictions and (2) whether Edwards' trial counsel labored under an actual conflict of interest. The evidence on these two issues includes not only the testimony presented at the evidentiary hearing, but also deposition testimony and testimony presented at Edwards' original trial, as well as exhibits from both the trial and the postconviction proceedings.

(a) Fabrication of Evidence

For the State to knowingly use fabricated evidence, it is axiomatic that there must first be fabricated evidence. Therefore, before considering any evidence that the State knowingly used fabricated evidence, we first consider the facts relevant to Edwards' claim that Kofoed fabricated evidence against him.

One of Edwards' arguments is that the similarities between the O'Grady investigation and the investigations in which Kofoed was found to have fabricated evidence show that Kofoed fabricated evidence in the O'Grady investigation. Accordingly, we review the facts of those investigations in which Kofoed was found to have fabricated evidence, specifically, the investigation into the murders of Wayne and Sharmon Stock and the investigation into the disappearance and presumed murder of a 4-year-old child.[8] We then review the evidence surrounding the investigation in this case.

(i) Investigation Into Stocks' Murders

In April 2006, the Stocks were found murdered in their rural home outside Murdock, Nebraska. CSI processed the crime scene. After witnesses reported a tan sedan parked 1 mile from the Stocks' home within hours of the murder, law enforcement followed up on any family member, friend, or associate of the Stocks who might have owned a similar vehicle. Family members identified William Sampson, Sharmon Stock's nephew, as a person owning a tan Ford vehicle.

After a thorough search of Sampson's vehicle, investigators failed to find any evidence of blood or other forensic evidence. The vehicle was moved to CSI's impound lot.

One week after the murders, law enforcement obtained a false confession from another family member, Matthew Livers. After over 10 hours of questioning, Livers claimed that he committed the murders, that he used Sampson's vehicle, and

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[8] *State v. Kofoed, supra* note 1.

that his cousin was also involved. Livers recanted his statement the next day.

After Kofoed learned of Livers' confession, Kofoed and another investigator, Clelland Retelsdorf, reexamined Sampson's vehicle. While Retelsdorf was searching the back seat, Kofoed claimed to have collected a positive presumptive test for blood from the front area of the vehicle. Retelsdorf then attempted to collect four or five samples with a cotton swab in that area, but the results were negative for blood. Retelsdorf and Kofoed decided that each would write a report stating what he did, not what the other investigator did. Retelsdorf completed his report that day; it did not reflect that Kofoed was present during the search. Kofoed's report was not completed until 11 days after the search. Kofoed's report reflected that Kofoed had obtained a filter paper swab on the day the report was filled out, rather than 11 days prior; it did not reflect that Retelsdorf swabbed the same area with negative results.

Kofoed's filter paper swab was taken to the University of Nebraska Medical Center's DNA laboratory (UNMC), and the blood was matched to the DNA profile of Wayne Stock. This evidence corroborated Livers' false confession. One month later, Livers and his cousin were exonerated; a couple from Wisconsin confessed to murdering the Stocks.[9] The charges against Livers and his cousin were eventually dismissed.

In 2010, Kofoed was convicted of tampering with evidence during the Stocks' investigation.[10] At the time of Wayne Stock's autopsy, CSI had taken possession of a bloody shirt worn at the time of the murder. It was placed in a bag, sealed, and stored in CSI's biohazard room. The Federal Bureau of Investigation (FBI) later found that the bag containing the shirt had been unsealed, then resealed with Kofoed's initials on the tape.

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[9] See *State v. Fester*, 274 Neb. 786, 743 N.W.2d 380 (2008), and *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

[10] See *State v. Kofoed, supra* note 1.

(ii) Investigation Into Disappearance and Presumed Murder of Brendan Gonzalez

Four-year-old Brendan Gonzalez (Brendan) was reported missing in January 2003. As part of the investigation, CSI was called to process a suspected crime scene—the garage of Brendan's home. Kofoed and Retelsdorf went to the scene. They found several droplets of blood on the floor of the garage and on Brendan's bike and a recliner rocker located in the garage. Most, but not all, of the items suspected of containing biological evidence were submitted to UNMC. The items submitted for DNA testing showed that the blood on several of the items were consistent with the DNA profile of Brendan. Other samples were mixed.

Despite an extensive search, law enforcement officers were unable to locate Brendan's body. But on June 2, 2003, Brendan's father confessed that he killed Brendan and disposed of the body in a Dumpster in Bellevue, Nebraska. Kofoed and Retelsdorf then searched the Dumpster. They collected swabs from the Dumpster and reported a positive presumptive test for blood. They also collected some debris from the Dumpster.

On June 5, 2003, Kofoed filled out a property report listing the items that he and Retelsdorf had collected from the Dumpster. The report reflected that Kofoed had swabbed one of the items with filter paper. All of the items, except the item Kofoed swabbed, were submitted for DNA testing. However, those items were never tested for DNA, because the preliminary screening tests at UNMC were all negative for blood. But Kofoed's filter paper swab and the cotton swabs collected from the Dumpster were tested. The cotton swabs from the Dumpster were badly degraded, with barely reportable alleles. However, Kofoed's filter paper swabs produced a complete DNA profile without any evidence of degradation or contamination. The results were consistent with Brendan's DNA profile, corroborating his father's confession.

The FBI later suspected Kofoed of fabricating evidence in that case. In the FBI's own laboratory, it tested the item that Kofoed claimed to have swabbed and never submitted for DNA testing. It also sent the item to a private laboratory. No analyst from either laboratory found any DNA material. At Kofoed's criminal trial, experts testified that it was practically impossible to have collected Brendan's complete DNA profile from the Dumpster under the environmental factors that were present, i.e., exposure to heat and humidity for 21 weeks (approximately 5 months).

The issue of whether Kofoed planted evidence in Brendan's murder investigation was the subject of an extensive rule 404[11] hearing in *State v. Kofoed*.[12] The district court found that the State had proved by clear and convincing evidence that Kofoed had fabricated evidence in that investigation. We affirmed that finding in *Kofoed*.

(iii) O'Grady Investigation

We turn now to the O'Grady investigation. Because Edwards claims that Kofoed fabricated blood evidence on the shovel, garden shears, trunk gasket, and trunk roof, all of which were located in Edwards' car, we focus on the search of Edwards' car. Edwards also claims that the blood evidence on the sword was fabricated, so we review the discovery and the processing of the sword as well.

a. Search of Edwards' Car

For the evidence collected from Edwards' car, Kofoed served as the State's primary foundational witness at Edwards' trial in March 2007. He testified that Edwards' car was to be searched twice. Joshua Connelly, a forensic scientist for the Douglas County sheriff's office, was to perform the first search, and then William Kaufhold, another CSI investigator, was to do a second, more detailed search later.

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[11] Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014).

[12] See *State v. Kofoed, supra* note 1.

Kofoed testified that he had a chance to look at the vehicle before it was transported to the "sally port" where Connelly performed his search. Kofoed testified that he documented the contents, that the processing of the vehicle was photographed, and that the photographs "fairly and accurately depicted as [he] recalled them to be at the time that [he] observed that vehicle and processed that vehicle." Those photographs included photographs of the front and back seats of Edwards' car, a photograph of the garden shears removed from the car, and a photograph of the trunk.

Connelly and Kaufhold provided deposition testimony in lieu of testifying at the evidentiary hearing. Connelly confirmed that he conducted a preliminary search on May 17, 2006, and testified that he conducted the search by himself. Kaufhold testified that he and Kofoed conducted a search of the trunk area of the car on May 18, in which blood evidence was found on the trunk gasket and metal piece of the roof of the trunk. Kaufhold also testified that he conducted a third search of the car involving only the interior on May 19. Kaufhold testified that he conducted the third search by himself.

i. Connelly's Preliminary Search

Connelly testified that he was called around midnight on May 17, 2006, and was told that his services were needed at the Edwards' residence. Sometime after Connelly arrived at the scene, Edwards' car was transported from the garage of the residence to a sally port for examination. Connelly went to the sally port and took photographs of the exterior and interior of the car.

Connelly testified that he believed he was the first person to examine Edwards' car; however, Edwards argues that Christine Gabig's testimony and her photographs suggest otherwise. Gabig, another forensic scientist for the Douglas County sheriff's office, testified that she was the first CSI investigator who was called about the O'Grady investigation. When she showed up at the scene, Omaha Police Department detectives were

already at work. Gabig took a series of photographs of the scene, separate from Connelly's photographs of the car. One of Gabig's photographs showed the open trunk of Edwards' car while it was parked in the garage. Gabig testified that she did not open the trunk and that she did not know who did; it was open when she began documenting the scene. Another of Gabig's photographs showed a shovel leaning against a pole or pillar in the garage. Gabig stated that she had no personal knowledge of where the shovel had been before it appeared in the photograph, but that she was told that Omaha police detectives had removed it from Edwards' car.

Connelly had also taken a photograph of the shovel. The photograph showed the shovel in the back seat of the car with a paper bag over the "business end." Connelly testified that when the shovel was first observed, it was not in the car and did not have a paper bag over it. He stated that the shovel had been propped up against a pillar inside the garage and that someone had put a bag over it and put it in the back of the car. When asked if he had seen any red stains on the shovel, Connelly testified that he could not recall. He testified that if he would have seen any red stains, he would have documented them, but Connelly did not document any stains on the shovel.

Gabig later examined the shovel, but did not report seeing any blood evidence. At Edwards' trial, Kofoed testified that he transported a swab of the shovel, which was collected by another CSI investigator at Kofoed's direction, to UNMC on May 30, 2006. The item tested positive for DNA and was consistent with that of O'Grady's.

In addition to the passenger compartment of the car, Connelly also searched the trunk. He documented how the trunk appeared when he first opened the lid. He then began to remove items in "layers," documenting the scene before and after he removed each item. When Connelly came across the garden shears, he photographed them and bagged them separately from other evidence.

One handle of the garden shears had a red mark on it, and Connelly documented the red mark in a photograph. Connelly testified that he did not attempt to swab the garden shears or determine whether the red mark was blood, because he thought it would be better to send the entire item to UNMC rather than consume the small sample by conducting a presumptive test. Kofoed took the garden shears to UNMC for DNA testing on May 22, 2006. The garden shears tested positive for DNA and were consistent with that of O'Grady's.

When Connelly was asked if he recalled finding any blood evidence at any point during his search, Connelly stated that he did not find any blood, but that he could not recall if he was specifically looking for blood. His task was "to document the vehicle, document the contents of the vehicle, and collect anything that could be of evidentiary value. It wasn't to look for trace evidence. It wasn't to look specifically for blood."

ii. Kaufhold and Kofoed's Search of Trunk

The next day, May 18, 2006, Kaufhold and Kofoed conducted the second search of the car. Kaufhold's report reflects that Kofoed advised him to concentrate on the trunk and rear exterior of Edwards' car. This search led to the discovery of bloodstains on the roof of the trunk and on the rubber gasket. A portion of the roof was then cut out of the car with a jigsaw, and the rubber gasket was removed. Kaufhold testified that he was the first to report finding what appeared to be a potential bloodstain in the trunk and that the first discovery was on the gasket. Kofoed transported the gasket and metal plate to UNMC for testing. Both items tested positive for DNA and were consistent with that of O'Grady's.

b. Sword

Investigators found swords and knives in Edwards' closet. Those items were stored in CSI's biohazard room from May 17 to 31, 2006. On May 31, Kofoed directed Gabig to process

the swords and knives for any blood or trace evidence. Gabig testified that the tip of one of the swords produced a positive presumptive blood test. However, the presumptive test done on the sheath of the sword came back negative. A deputy then transported the sword to UNMC for DNA testing. The sword tested positive for DNA and was consistent with that of O'Grady's.

The district court found that there was "little to no evidence" Kofoed fabricated any evidence in this case and that even assuming arguendo that there existed some possibility that some of the evidence was fabricated, Edwards failed to offer any evidence that the State knowingly used fabricated evidence.

(b) State's Knowing Use of Fabricated Evidence

Although there were at least three prosecutors involved in Edwards' trial, Edwards chose to present the testimony of only one at the evidentiary hearing, who testified that he did not suspect Kofoed of fabricating evidence in Edwards' case and was not aware at the time of Edwards' trial that Kofoed was suspected of fabricating evidence in the Stock case. Edwards did not offer any evidence to rebut the prosecutor's testimony. The district court found that Edwards did not establish that the State knowingly used false evidence to secure Edwards' convictions.

On appeal, Edwards argues that he was not required to prove that the prosecutor knew about Kofoed's fabricating evidence, because the prosecutor is not the only agent of the State. Instead, Edwards asserts that it was sufficient that he proved Kofoed, acting as a state agent, fabricated blood evidence and provided the foundation for that evidence as a witness at Edwards' trial. In support of his argument, Edwards cites *Edwards II*, wherein we stated, "At an evidentiary hearing, it is Edwards' burden to establish that state officers involved in the investigation or prosecution knowingly used

false evidence to secure his conviction[s].”[13] Relevant to this appeal, Edwards claims that Kofoed fabricated the blood evidence on the items recovered during the search of Edwards' car: the shovel, garden shears, trunk gasket, and trunk roof. Edwards also claims that Kofoed planted blood evidence on the sword while it was stored in CSI's biohazard room. Edwards does not claim and has never claimed that Kofoed fabricated any of the evidence collected from his bedroom, with the exception of the sword.

(c) Conflict of Interest

We turn now to the evidence relevant to the issue of whether Edwards' trial counsel operated under a conflict of interest. Although we do not consider whether Edwards' *appellate* counsel labored under a conflict of interest, we recite the facts surrounding Lefler's subsequent representation of Kofoed, because it could be argued that such facts are relevant to the determination of whether Lefler had a conflict of interest at the time of trial.

In *Edwards II*, we explained Edwards' allegations concerning the purported conflict of interest as they were set forth in Edwards' original postconviction motion, as well as some of the evidence supporting those allegations:

> Edwards alleged that by September 2006, it was clear that Kofoed had planted blood evidence while investigating the Stocks' murders. He alleged that a reasonably diligent defense attorney would have known Kofoed was suspected of planting evidence while investigating the Stocks' murders. And he alleged that Lefler knew of these allegations because of his friendship with Kofoed. He claimed that Lefler repeatedly cited his friendship with Kofoed during his representation of Kofoed in the federal and state trials.

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[13] *Edwards II, supra* note 1, 284 Neb. at 403, 821 N.W.2d at 699.

> In fact, this record supports Edwards' contention that Lefler had a personal relationship with Kofoed. Before trial, Edwards moved to exclude Kofoed's testimony because of his televised demonstration of blood splatters. In arguing for the motion, Lefler referred to his friendship with Kofoed:
> "I'm going to ask the Court to prevent Dave Kofoed, who's a friend of mine and I like him a ton . . . I'm going to ask you to prevent him from testifying in this particular case as a consequence of the TV demonstration that he gave. . . .
> . . . .
> ". . . [W]hat we are worried about for . . . Edwards is that there's going to be some juror who halfway through the trial is going to remember seeing this TV clip.
> "And Dave Kofoed's a great—a nice man, smart guy. And so I'm just worried that halfway through the trial it clicks in some juror's mind."[14]

Other evidence in support of Edwards' contention included statements made by Lefler to Kofoed in a deposition which took place in October 2006, prior to Edwards' trial, including:

> Dave, I always feel awkward interviewing you, cross-examining you, because we've become friends. I've used you, I'm a special prosecutor, but we both have a job to do and I'm sure you understand that.
> . . . .
> . . . And I'm embarrassed to ask this question because we are friends, but this is a murder investigation: Have you before been reprimanded by either the [Omaha Police Department] or the sheriff's department while you've been in their employ?"

Sometime after the remand, Edwards learned that Lefler began to represent Kofoed in June 2008 while still representing Edwards on direct appeal. Although the district court

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[14] *Id*. at 407-08, 821 N.W.2d at 702.

refused to consider whether Edwards' appellate counsel labored under a conflict of interest in its order denying postconviction relief, it allowed Edwards to "make his record" at the evidentiary hearing.

Lefler was the only witness called at the evidentiary hearing to testify about the alleged conflict of interest. Lefler testified that at the time of Edwards' trial, he knew who Kofoed was, but adamantly denied any friendship with him. Lefler knew of Kofoed, because Kofoed had testified in a few cases in which Lefler had represented other individuals. Kofoed had also testified for Lefler in a case where Lefler served as a special prosecutor. But Lefler explained that he and Kofoed never went out for dinner or drinks together or did any other kind of "friend-related activity."

As for Lefler's statements during Kofoed's deposition and during the trial that tended to indicate a friendship between Lefler and Kofoed, Lefler explained that this was a trial strategy that he had used throughout his career with witnesses other than Kofoed. He explained:

> [I]f I'm nice to a cop, the cop's going to tell me something he or she might not ordinarily tell me, and that's a benefit to my client. And so what I should have said, you know, now that I have been — now that my feet has [sic] been held to the fire, the Supreme Court saying that I was a jerk because I was friends with Dave Kofoed, I should have said at that time he was a professional acquaintance of mine.

Lefler also adamantly denied having any knowledge of others' suspicions that Kofoed was planting evidence at the time he filed Edwards' direct appeal or any time prior. He testified that he did not learn of the allegations against Kofoed until June 2008, when Kofoed called him and requested a visit. Lefler testified that at that time, he had "no clue" why Kofoed called him or wanted to meet. When they met, Kofoed informed Lefler that the FBI had interviewed him about the Stocks' murder investigation and that an agent had told

Kofoed that his story did not "'smell right.'" Lefler agreed to represent Kofoed a couple of days later.

Lefler testified that before he agreed to represent Kofoed, he considered whether that representation would cause a conflict of interest. Lefler testified that he researched the issue and even reached out to the Nebraska State Bar Association. A member of the Counsel for Discipline advised him that "'the film's in the can,'" meaning that Lefler's representation of Kofoed would not affect Edwards' case, even though there were still briefs to be written for Edwards on direct appeal. Lefler also explained that it was mainly his cocounsel who wrote the briefs and that she was the one who argued before this court.

After the evidentiary hearing, the district court determined that Edwards' trial counsel did not operate under a conflict of interest and, therefore, rejected his ineffective assistance of counsel claim.

III. ASSIGNMENTS OF ERROR

Edwards assigns, combined and restated, that the district court erred in (1) refusing to grant leave to amend his original postconviction motion; (2) failing to find that Edwards' counsel had an actual conflict of interest, in violation of the 6th and 14th Amendments to the U.S. Constitution; and (3) failing to find that the State knowingly used fabricated evidence, in violation of Edwards' due process rights.

IV. STANDARD OF REVIEW

[1] An appellate court reviews a refusal to grant leave to amend for abuse of discretion.[15]

[2] A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.[16]

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[15] *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010).

[16] *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004); *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

[3] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[17] an appellate court reviews such legal determinations independently of the lower court's decision.[18]

V. ANALYSIS

[4] The first issue is whether the district court abused its discretion in overruling Edwards' motion to amend his original postconviction motion. An appellate court reviews a refusal to grant leave to amend for abuse of discretion.[19] 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.[20] We need not consider whether the district court's reason for denying the motion for leave to amend here was tenable, because we conclude that the ruling did not deprive Edwards of a substantial right or just result and, therefore, could not have been an abuse of discretion.

We must assume that the substantial right that Edwards claims is his right—if such right exists—to be heard on his "new" claims. But assuming that right exists (i.e., that Edwards did not waive those claims by failing to assert them

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

[18] *State v. Benzel, supra* note 16.

[19] *State v. Mata, supra* note 15.

[20] *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015); *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015); *Richards v. McClure*, 290 Neb. 124, 858 N.W.2d 841 (2015); *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015); *Fox v. Whitbeck*, 286 Neb. 134, 835 N.W.2d 638 (2013).

in a prior appeal in which he had a motive and opportunity to do so[21]), the district court's ruling would not have deprived Edwards of that right. At the time of filing his motion to amend the postconviction proceeding, assuming without deciding that Edwards was not procedurally or time barred, Edwards could have filed a second postconviction proceeding alleging the claims he attempted to raise on remand. We have held that a subsequent postconviction motion is allowed when the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion.[22] Edwards asserts that such is the case here. Accordingly, we conclude that Edwards could have filed a second postconviction proceeding asserting the claims that he alleged he was unable to raise in the first postconviction proceeding. Therefore, the district court did not deprive Edwards of a substantial right or just result and did not abuse its discretion by denying his motion to amend his first postconviction claim. Edwards' first assignment of error is without merit.

The second issue is whether the district court erred in determining that Edwards' trial counsel did not operate under an actual conflict of interest. In *Edwards II*, we set forth the relevant rules for resolving this claim:

> The right to effective assistance of counsel entitles the accused to his or her counsel's undivided loyalties, free from conflicting interests. But a defendant who raised no objection at trial must show that an actual conflict of interest existed and that the conflict adversely affected his lawyer's performance. If the defendant satisfies this requirement, the defendant is not required to show that the Sixth Amendment violation had a probable effect on the outcome of the trial to obtain relief.

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[21] See *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008).

[22] See *State v. Newton*, 202 Neb. 361, 275 N.W.2d 297 (1979).

> In 2002, in *Mickens v. Taylor*, [535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002),] the U.S. Supreme Court stated that the "actual conflict" inquiry is not separate from a performance inquiry: "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." Thus, we have stated that when an actual conflict exists, there is no need to show that the conflict resulted in actual prejudice to the defendant (meaning no need to show the outcome of the proceeding was affected). But the substantive analysis is the same. If the defendant shows that his or her defense counsel faced a situation in which conflicting loyalties pointed in opposite directions and that his or her counsel acted for the other client's interests and against the defendant's interests, prejudice is presumed.[23]

But the district court found that Lefler did not have an actual conflict of interest at the time he served as Edwards' trial counsel. It reasoned that "[t]here is no evidence that any relationship existed between Kofoed and Lefler before June, 2008." Because there was *some* evidence of a relationship, we agree with Edwards that this latter statement by the district court was an overstatement. However, we find that Edwards failed to prove by a preponderance of the evidence that his trial counsel operated under a conflict of interest.

The record simply does not support a finding that Lefler had such a loyalty to Kofoed that would have tempted him at trial to act against Edwards' interests. Although Lefler's statements at the deposition and Edwards' trial suggested some sort of relationship between Lefler and Kofoed, Lefler clarified at the evidentiary hearing that this relationship was strictly professional. Lefler testified that he and Kofoed never went out to dinner or out for drinks or any other kind of activity typically done with friends. No evidence was presented

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[23] *Edwards II, supra* note 1, 284 Neb. at 406-07, 821 N.W.2d at 701.

at the evidentiary hearing to rebut Lefler's testimony, except that Edwards offered depositions and trial testimony wherein Lefler and Kofoed made statements suggesting that they were "friends," a term which has lost meaning in the age of "Facebook" and other social networking sites. Even assuming that Lefler had any loyalty to Kofoed, Edwards fails to point to any situation during or prior to his trial in which Lefler acted in Kofoed's interest and against Edwards' interest. We therefore conclude that the district court did not err in finding that Edwards' trial counsel did not operate under a conflict of interest. Edwards' second assignment of error is without merit.

The third and final issue in this case concerns whether the State knowingly used fabricated evidence in violation of Edwards' due process rights. Because Edwards had the burden to prove by a preponderance of the evidence that Kofoed fabricated evidence in his case,[24] we interpret the district court's statement that there was "little to no evidence that Kofoed fabricated evidence in this case" as a finding that Kofoed did not fabricate evidence in this case. The district court also found that there was no evidence that the State knowingly used false evidence to secure Edwards' convictions. We review each of these factual findings for clear error.[25]

The district court did not commit clear error in finding that Kofoed did not fabricate evidence in Edwards' case. Edwards does not offer any direct evidence supporting his allegations, and the circumstantial evidence is limited. Edwards relies heavily on the fact that Kofoed has been found to have fabricated evidence in two other investigations—the Stocks' and Brendan's murder investigations. He claims that the similarities between those investigations and the investigation here show that Kofoed also fabricated evidence here. But contrary

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[24] See, *State v. Wagner*, 271 Neb. 253, 710 N.W.2d 627 (2006); *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

[25] *Edwards II, supra* note 1.

to Edwards' argument, we interpret the evidence in those investigations as evidence that Kofoed did *not* fabricate evidence here.

[5] We consider Kofoed's modus operandi. Modus operandi is a characteristic method used in the performance of repeated criminal acts.[26] "*Modus operandi* means, literally, 'method of working,' and refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer."[27] In the Stocks' and Brendan's murder investigations, Kofoed's modus operandi was not to plant the victim's blood on the physical evidence; rather, Kofoed's modus operandi had been to swab blood known to be the victim's and then submit it for DNA testing, falsely claiming to have swabbed physical evidence connected to the defendant, whom Kofoed believed committed the crime. With respect to the blood evidence on the sword, trunk gasket, and trunk roof, Kofoed did not claim to take swabs of those items and submit them to UNMC; instead, those items were taken directly to UNMC for the DNA analyst to swab. The shovel was swabbed by another CSI investigator and transported to UNMC by Kofoed. But there is no evidence that the shovel was later tested and found to have no DNA evidence on it. Thus, we find that Edwards' argument concerning the similarities in the three investigations is misplaced.

The only relevance of the Stocks' and Brendan's murder investigations is that they show Kofoed's propensity to fabricate evidence. But a person's propensity to commit an act is insufficient by itself to prove that the person committed the act in the instant case. In other words, Kofoed may have fabricated evidence in those cases, but it does not mean he fabricated evidence here.

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[26] See *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

[27] *Id.* at 77, 361 N.W.2d at 213 (quoting *People v. Barbour*, 106 Ill. App. 3d 993, 436 N.E.2d 667, 62 Ill. Dec. 641 (1982)).

Edwards also suggests that Kofoed's testimony at the trial shows that he had the opportunity to plant the evidence. But, as the district court correctly noted, although Kofoed testified that he had the chance to look at Edwards' car before it was transported to the sally port, there was no evidence that Kofoed had access to the car without the observation of others. To the contrary, Gabig testified that when she arrived shortly after CSI's team, Omaha police and Douglas County sheriff's office personnel were already at work there.

Besides lack of opportunity, we also note a lack of motive to fabricate evidence in this case. In the Stocks' and Brendan's murder investigations, there was little more than a confession connecting the crime to the person that Kofoed believed committed it. Here, O'Grady's blood was all over Edwards' bedroom. More than half of the bottom of Edwards' mattress was covered in O'Grady's blood. There was blood on the bedding, headboard, nightstand, and clock radio. There was blood on the bookcase, laundry baskets, and a chair in the room. There was also blood on the towels in a trash bag in the garage. Edwards' explanation as to how the blood happened to be present in all those places was implausible. With such an overwhelming amount of evidence, we see no reason for Kofoed to be motivated to fabricate evidence in this case.

Nevertheless, Edwards suggests to this court that Kofoed transferred blood from Edwards' mattress to the sword, shovel, garden shears, trunk gasket, and trunk roof. Edwards' theory rests solely on Connelly's testimony that this kind of transfer is hypothetically possible. But there was no evidence that such transfer was actually done in this case. Edwards notes that the blood spatter expert who testified at Edwards' trial was "never asked whether . . . the sample might have been diluted, or [about] the period of time the stain had been on the metal plate before removal."[28] This statement incorrectly assumes that it is the State's burden to prove that Kofoed did not fabricate

[28] Brief for appellant at 32.

evidence; to the contrary, it is Edwards' burden to prove that he did.[29]

We conclude that the district court did not err when it determined that Kofoed did not fabricate evidence in this case.

In order for the State to knowingly use fabricated evidence, there must be fabricated evidence. Because we affirm the district court's finding that Kofoed did not fabricate evidence in this case, and because there is no evidence that anyone else fabricated evidence in this case, we conclude that the district court did not err in finding that Edwards failed to prove that the State knowingly used fabricated evidence in order to obtain his convictions.

VI. CONCLUSION

The district court did not deprive Edwards of a substantial right or just result when it overruled his motion to amend his original postconviction motion. Edwards could have filed a second postconviction motion alleging the same claims. Therefore, the district court did not abuse its discretion in overruling Edwards' motion to amend. We also conclude that the district court did not err in finding that Edwards' trial counsel did not operate under a conflict of interest. It did not err in finding that Kofoed did not fabricate evidence in this case and that the State did not knowingly use false evidence to obtain Edwards' convictions. We therefore affirm the district court's denial of Edwards' motion for postconviction relief.

Affirmed.

Kelch, J., not participating.

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[29] See *Edwards II, supra* note 1.

Stacy, J., concurring.

I concur, and write separately not to express disagreement with this court's analysis, but to suggest another basis for the correct conclusion that the district court did not err in denying Edwards' request to amend his postconviction motion after

remand. In my opinion, the district court did not err, because Nebraska's postconviction statutes do not allow a prisoner to amend his or her postconviction motion after the district court has entered an order denying postconviction relief without an evidentiary hearing.[1]

As the majority opinion notes, in *State v. Edwards* (*Edwards II*),[2] we concluded that only two of the many issues raised in Edwards' postconviction motion warranted an evidentiary hearing. As to Edwards' other postconviction claims, we affirmed the district court's order denying postconviction relief. We remanded the cause for an evidentiary hearing on only two of the postconviction claims. After the mandate was spread on remand, Edwards sought leave to amend his postconviction motion to assert additional grounds for relief. The district court denied the motion to amend, and Edwards assigns error to this ruling.

In *State v. Robertson*,[3] we observed that postconviction relief under Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2014) is a very narrow category of relief,[4] subject to specific statutory pleading requirements.[5] And we held that nothing in Nebraska's postconviction statutes authorizes a prisoner to amend a postconviction pleading after the court has determined it is insufficient to warrant an evidentiary hearing.[6] We concluded that Nebraska's postconviction statutes simply do not contemplate the opportunity to amend a pleading after the court determines the pleading is insufficient to necessitate an evidentiary hearing.[7]

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[1] *State v. Robertson, post* p. 29, 881 N.W.2d 864 (2016).

[2] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[3] *Robertson, supra* note 1.

[4] *State v. Payne*, 289 Neb. 467, 855 N.W.2d 783 (2014).

[5] *Robertson, supra* note 1.

[6] *Id.*

[7] *Id.*

Edwards did not seek leave to amend his postconviction motion until after the court had denied an evidentiary hearing on his postconviction claims, after he had appealed from that final order,[8] and after the matter had been remanded to the district court with directions to conduct an evidentiary hearing on only two of the claims. Given that procedural posture, it was not error for the district court to deny Edwards' motion to amend.

Cassel, J., joins in this concurrence.

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[8] *State v. Banks*, 289 Neb. 600, 856 N.W.2d 305 (2014) (order denying evidentiary hearing on postconviction is final, appealable order).

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

State of Nebraska, appellee, v. Keenon A. Robertson, appellant.

881 N.W.2d 864

Filed July 1, 2016. No. S-15-443.

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: Right to Counsel: Appeal and Error.** Failure to appoint counsel in a postconviction action is not error in the absence of an abuse of discretion.
3. **Pleadings: Appeal and Error.** A denial of a motion to alter or amend the judgment is reviewed for an abuse of discretion.
4. **Postconviction: Constitutional Law: Proof.** A defendant seeking relief under the Nebraska Postconviction Act must show that his or her conviction was obtained in violation of his or her constitutional rights.
5. **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.
6. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.
7. **Postconviction: Effectiveness of Counsel: Proof.** If the petitioner for postconviction relief has not alleged facts which would support a claim

of ineffective assistance of counsel or if the files and records affirmatively show he or she is entitled to no relief, then no evidentiary hearing is necessary.

8. **Speedy Trial: Indictments and Informations.** Every person indicted or informed against for any offense must be brought to trial within 6 months.
9. ____: ____. When a felony is involved, the 6-month speedy trial period commences to run from the date the indictment is returned or the information is filed.
10. **Speedy Trial.** Certain periods of delay are excluded from the speedy trial calculation, including the time between the defendant's assertion of pretrial motions and their final disposition and the period of delay resulting from a continuance granted at the request of the prosecuting attorney if the grounds for the continuance fit under the relevant statutory language.
11. ____. To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded to determine the last day the defendant can be tried.
12. **Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
13. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.
14. **Postconviction: Effectiveness of Counsel: Right to Counsel: Appeal and Error.** An attorney's failure to petition for further review on an issue cannot be grounds for postconviction relief, in that the right to counsel does not extend to discretionary appeals to a state's highest court.
15. **Postconviction.** Nothing in the postconviction statutes prevents a district court from asking the State to respond to a postconviction motion prior to deciding whether an evidentiary hearing is warranted.
16. **Rules of the Supreme Court: Postconviction.** Postconviction proceedings are not governed by the Nebraska Court Rules of Pleading in Civil Cases.
17. **Actions: Rules of the Supreme Court: Postconviction.** Although a postconviction proceeding is civil in nature, it is not an ordinary civil action in the context of either Neb. Ct. R. Pldg. § 6-1101 or Neb. Rev. Stat. § 25-801.01 (Reissue 2008).

18. **Postconviction: Collateral Attack.** Postconviction relief is a special statutory proceeding that permits a collateral attack upon a criminal judgment.
19. **Actions: Pleadings.** Civil actions are controlled by a liberal pleading regime. A party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.
20. ____: ____. The rationale for liberal pleading rules in civil actions is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage.
21. **Postconviction: Pleadings.** Postconviction proceedings have their own pleading requirements.
22. ____: ____. Nebraska's postconviction relief statutes simply do not contemplate the opportunity to amend a pleading after the court determines the pleading is insufficient to necessitate an evidentiary hearing.
23. **Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error.** When the assigned errors in a postconviction motion before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Gerald L. Soucie for appellant.

Keenon A. Robertson, pro se.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Stacy, J.

Keenon A. Robertson appeals from the district court's denial of his motion for postconviction relief without an evidentiary hearing and the subsequent denial of his motion to alter or amend the judgment. We affirm.

I. FACTS

After a jury trial, Robertson was convicted of one count of discharging a firearm at an inhabited house, occupied building, or occupied vehicle and one count of use of a weapon to commit a felony. He was sentenced to a total of 25 to 60 years' imprisonment.

Robertson filed a direct appeal and was appointed different counsel. The Nebraska Court of Appeals affirmed his convictions and sentences.[1] Robertson then filed a verified motion for postconviction relief. In it, he alleged his appellate counsel was ineffective for (1) failing to convince the Court of Appeals that the trial court's failure to give a defense of others instruction was prejudicial, (2) not alleging his trial counsel was ineffective for failing to timely appeal the denial of his pretrial motion for discharge, and (3) not filing a petition for further review after the Court of Appeals concluded his ineffective assistance of trial counsel claim related to juror misconduct was not reviewable on direct appeal.

After directing the State to respond to Robertson's motion, the district court denied postconviction relief without conducting an evidentiary hearing. Robertson then filed a motion to alter or amend the judgment, which the district court ultimately denied. Robertson timely filed this appeal.

II. ASSIGNMENTS OF ERROR

Robertson assigns, restated and summarized, that (1) his appellate counsel was ineffective for not convincing the Court of Appeals that Robertson was prejudiced by the trial court's failure to give a defense of others instruction, (2) his appellate counsel was ineffective for failing to raise on direct appeal that trial counsel was ineffective for failing to timely appeal from the denial of his motion for absolute discharge, (3) his trial counsel was ineffective for failing to move for a mistrial

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[1] *State v. Robertson*, No. A-12-204, 2013 WL 599895 (Neb. App. Feb. 19, 2013) (selected for posting to court Web site).

after a juror disclosed he had visited the scene of the crime, (4) the district court erred in denying postconviction relief without giving him an opportunity to amend the pleadings, (5) the district court erred in denying his motion to alter or amend the judgment after denying postconviction relief, and (6) the district court erred in failing to appoint him postconviction counsel.

III. 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.[2]

[2] Failure to appoint counsel in a postconviction action is not error in the absence of an abuse of discretion.[3]

[3] A denial of a motion to alter or amend the judgment is reviewed for an abuse of discretion.[4]

IV. ANALYSIS

1. Denial of Evidentiary Hearing

[4-7] A defendant seeking relief under the Nebraska Postconviction Act[5] must show that his or her conviction was obtained in violation of his or her constitutional rights.[6] 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

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[2] *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015); *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013).

[3] *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015).

[4] *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

[5] Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014).

[6] See *Cook, supra* note 2.

voidable.[7] When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.[8] If the petitioner has not alleged facts which would support a claim of ineffective assistance of counsel or if the files and records affirmatively show he or she is entitled to no relief, then no evidentiary hearing is necessary.[9]

(a) Lack of Defense of Others Instruction

When this case was on direct appeal, Robertson's counsel assigned and argued that the trial court erred in failing to give a defense of others jury instruction. The Court of Appeals agreed. It reasoned, however, that because the jury rejected Robertson's self-defense claim, the jury necessarily would have rejected a defense of others claim, so the Court of Appeals concluded Robertson could not show he was prejudiced by the failure to give the instruction. In his postconviction motion, Robertson alleged his appellate counsel was ineffective because he failed to "demonstrate the requisite level of outcome-changing prejudice" to the Court of Appeals.

Liberally construed, Robertson's postconviction motion alleges that had appellate counsel made different legal arguments, the Court of Appeals would have reached a different result. We conclude the files and records affirmatively show that the Court of Appeals correctly resolved the legal issue, so no legal argument posited by appellate counsel could have resulted in a different outcome. The district court properly concluded that Robertson is not entitled to an evidentiary

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[7] *Id.*

[8] *Id.*

[9] See *id.*

hearing on this issue, because the files and records affirmatively show the claim is without merit.

(b) Motion for Discharge

Prior to trial, Robertson filed a motion for absolute discharge, contending his statutory right to a speedy trial had been violated. The district court denied the motion for discharge, and no appeal was taken.

Later, on direct appeal, Robertson's counsel alleged the district court erred in granting the State's motion to continue just prior to the date trial was scheduled to commence. The Court of Appeals construed this as an attempt by Robertson to argue that the motion for discharge should have been granted. It declined to address the issue on direct appeal because the denial of the motion for discharge was a final order from which no timely appeal had been taken.

In his postconviction motion, Robertson presents a layered claim of ineffective assistance of counsel. He alleges his appellate counsel was ineffective for failing to assign as error on direct appeal that his trial counsel was ineffective in failing to timely appeal from the denial of the motion to discharge. He alleges this failure prevented the Court of Appeals from considering the issue of whether granting the continuance violated his right to a speedy trial. In its order denying postconviction relief without an evidentiary hearing, the district court found that the record showed the continuance was supported by good cause and concluded that the speedy trial clock was tolled during the time period of the continuance.

[8-11] We agree with the district court that the files and records affirmatively disprove this layered ineffective assistance of counsel claim. According to Neb. Rev. Stat. § 29-1207 (Reissue 2008), every person indicted or informed against for any offense must be brought to trial within 6 months. When a felony is involved, the 6-month speedy trial period commences to run from the date the indictment is returned or the

information is filed.[10] Certain periods of delay, however, are excluded from the speedy trial computation, including the time between the defendant's assertion of pretrial motions and their final disposition and the period of delay resulting from a continuance granted at the request of the prosecuting attorney if the grounds for the continuance fit under the relevant statutory language.[11] To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried.[12]

Here, the State filed the information on May 19, 2010, so, without any excluded time, Robertson had to be brought to trial by November 19. The record shows Robertson filed a motion for discovery depositions on August 5, and the motion was granted on September 30. This period of 56 days was excludable under § 29-1207(4)(a) as a period of delay resulting from the filing of a pretrial motion by Robertson.

The record also shows the State moved for a continuance on December 10, 2010, which the district court granted; trial was rescheduled for April 11, 2011. This continuance resulted in a delay of 122 days. The period of delay resulting from a continuance granted at the request of the State is excludable if it is granted to allow additional time to prepare a case and "additional time is justified because of the exceptional circumstances of the case."[13] A period of delay can also be excludable if it is not specifically enumerated in the statute but a court finds there is "good cause" for the delay.[14]

The record shows the State asked for the continuance because the original prosecutor was on maternity leave, the

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[10] See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

[11] See § 29-1207(4)(a) and (c).

[12] *Williams, supra* note 10.

[13] § 29-1207(4)(c)(ii).

[14] § 29-1207(4)(f).

case was set for trial with 11 days' notice, and it faced significant practical and logistical issues in assembling relevant evidence. The record further shows the information charged Robertson with eight separate counts, including four counts of attempted murder and four counts of using a deadly weapon to commit a felony. The district court noted that it did not recall ever continuing a trial for good cause on the State's motion, but found the unique circumstances presented amounted to good cause and granted the motion to continue.

[12] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.[15] Here, the trial court's finding of good cause for the continuance was not clearly erroneous, so the 122 days related to the continuance was properly excluded from the speedy trial calculation. Adding all the time excluded to November 19, 2010, shows that Robertson had to be brought to trial by May 16, 2011. Because trial occurred on April 11, the files and records affirmatively show Robertson was entitled to no relief on his claim that trial counsel was ineffective in failing to appeal the denial of Robertson's motion for discharge.

(c) Motion for Mistrial

On direct appeal, Robertson assigned and argued that his trial counsel was ineffective for failing to move for a mistrial after discovering juror misconduct. The Court of Appeals found the record was insufficient to resolve the claim on direct appeal.

[13] In his postconviction brief, Robertson assigns and argues he was entitled to an evidentiary hearing on this issue. But our review of the record demonstrates he did not assert such a claim in his motion for postconviction relief. An appellate court will not consider as an assignment of error

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[15] *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014).

a question not presented to the district court for disposition through a defendant's motion for postconviction relief.[16]

In his motion for postconviction relief, Robertson did not allege his trial counsel was ineffective for failing to move for a mistrial. Instead, he alleged his appellate counsel was ineffective for not filing a petition for further review after the Court of Appeals declined to address this issue on direct appeal. The district court considered this claim and found Robertson's postconviction motion failed to allege facts sufficient to show a violation of his constitutional rights.

[14] We agree. An attorney's failure to petition for further review on an issue cannot be grounds for postconviction relief, in that the right to counsel does not extend to discretionary appeals to a state's highest court.[17] Robertson failed to allege facts sufficient to entitle him to an evidentiary hearing on this issue.

2. Opportunity to Amend

Robertson assigns that the district court erred in denying his postconviction motion without giving him an opportunity to amend his pleading. The record demonstrates that Robertson did not request leave to amend his postconviction motion at any point prior to the time the district court denied postconviction relief. Robertson acknowledges this, but argues he did not ask leave to amend, because the procedure used by the court was improper and misled him into thinking his motion was sufficiently pled.

Robertson's argument is based on a misreading of the language of § 29-3001(2), which provides:

> Unless the [postconviction] motion and the files and records of the case show . . . that the prisoner is entitled to no relief, the court shall cause notice [of the motion] to

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[16] *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

[17] *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015).

> be served on the county attorney, grant a prompt hearing thereon, and determine the issues and make findings of fact and conclusions of law with respect thereto.

Robertson argues that after he filed his postconviction motion, the district court asked the State to respond. He contends the request for a response led him to believe, based on his reading of § 29-3001(2), that he did not need to amend his pleadings, because the court had determined he was entitled to an evidentiary hearing.

[15] We find this argument lacks merit. Nothing in the postconviction statutes prevents a district court from asking the State to respond to a postconviction motion prior to deciding whether an evidentiary hearing is warranted. This court has approved similar procedures in other cases.[18] In addition, the order issued here specifically informed Robertson that after "the filing of a response by the State, the Court will determine whether a hearing should be scheduled."

The process used by the district court was not improper and did not deny Robertson an opportunity to timely request leave to amend his postconviction motion. This assignment of error is meritless.

3. Motion to Alter or Amend

After his motion for postconviction relief was denied without an evidentiary hearing, Robertson filed a motion to alter or amend the judgment, which the district court denied. In his motion asking to amend the judgment, Robertson raised essentially the same ineffective assistance of counsel claims he now urges on appeal. For the same reasons discussed above in concluding Robertson's ineffective assistance of counsel claims are meritless, we conclude the district court did not abuse its discretion in denying Robertson's motion to alter or amend the judgment.

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[18] See, *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

For the sake of completeness, we observe that within his motion to alter or amend, Robertson also argued he should be given leave to amend his postconviction motion pursuant to Neb. Ct. R. Pldg. § 6-1115(a). Though not formally denominated as a motion to amend, we liberally construe this as a request to amend his postconviction motion after the court had ruled on the motion. And because Robertson complains on appeal that he was not allowed to amend his postconviction motion, we proceed to consider whether the district court erred in that regard.

Robertson sought leave to amend his motion only after the district court had ruled on the postconviction motion, concluding it did not warrant an evidentiary hearing and denying postconviction relief. We have held that an order denying an evidentiary hearing on a postconviction motion is a final, appealable order.[19] So Robertson's motion to alter or amend was not made until after a final order had been entered.

In *State v. Mata*,[20] we considered whether it was an abuse of discretion to deny a request to amend a postconviction action made before the court had ruled on the postconviction motion. In doing so, we stated the prisoner's ability to amend his postconviction motion was "governed by . . . § 6-1115(a)."[21] We then concluded the district court abused its discretion in denying leave to amend, because § 6-1115(a) provides that leave to amend shall be freely given when justice so requires.

[16] While we adhere to our ultimate holding in *Mata* that it was an abuse of discretion to deny the prisoner's request to amend his postconviction motion, we take this opportunity to distinguish *Mata* and clarify that postconviction proceedings are not "governed" by the Nebraska Court Rules of Pleading in Civil Cases.

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[19] *State v. Banks*, 289 Neb. 600, 856 N.W.2d 305 (2014).

[20] *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010).

[21] *Id.* at 854, 790 N.W.2d at 719.

[17,18] The rules of civil pleading apply to "civil actions."[22] Although a postconviction proceeding is civil in nature,[23] it is not an ordinary civil action in the context of either Neb. Ct. R. Pldg. § 6-1101 or § 25-801.01.[24] Nowhere does the postconviction statute characterize the proceeding as an "action"; rather, the postconviction statute authorizes filing a "verified motion" in the criminal case.[25] In contrast to a civil action, which typically results in a judgment or decree,[26] postconviction relief is a special statutory proceeding that permits collateral attack upon a criminal judgment[27] and results in an order either sustaining or overruling the motion.[28] This collateral proceeding is "cumulative" and "not intended to be concurrent with any other remedy existing in the courts of this state."[29] It normally is invoked only after the prisoner has failed to secure relief through a direct appeal of his or her conviction.[30]

[19,20] Civil actions are controlled by a liberal pleading regime. A party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.[31] The party is not required to plead legal theories or cite

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[22] Neb. Rev. Stat. § 25-801.01 (Reissue 2008).

[23] See § 29-3001(2).

[24] See Neb. Rev. Stat. § 25-101 (Reissue 2008) (abolishing distinction between actions at law and equity actions, and in their place recognizing one form of action, "which shall be called a civil action").

[25] § 29-3001(1).

[26] See Black's Law Dictionary 35 (10th ed. 2014).

[27] See *State v. Smith*, 288 Neb. 797, 800, 851 N.W.2d 665, 668 (2014) ("Nebraska Postconviction Act is the primary procedure for bringing collateral attacks on final judgments in criminal cases based upon constitutional principles").

[28] § 29-3002.

[29] § 29-3003.

[30] See *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993).

[31] *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

appropriate statutes so long as the pleading gives fair notice of the claims asserted.[32] The rationale for this liberal notice pleading standard is that when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage.[33] The directive in § 6-1115 that leave of court to amend a party's pleading "shall be freely given when justice so requires" is consistent with the liberal pleading philosophy in civil actions.

But the liberal pleading rules that govern civil actions are inconsistent with postconviction proceedings. And grafting the civil pleading rules onto postconviction proceedings is problematic for several reasons.

[21] First, postconviction proceedings have their own pleading requirements,[34] and extending civil pleading rules to postconviction proceedings is unnecessary. According to § 29-3001(1), a prisoner claiming a right to be released due to a constitutional violation may file a verified motion "stating the grounds relied upon and asking the court to vacate or set aside the sentence." The court shall grant a prompt hearing on the motion "[u]nless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief."[35] And there is a 1-year period of limitation applicable to the filing of a motion for postconviction relief.[36]

Second, the statutory pleading requirements for postconviction motions under § 29-3001 are entirely inconsistent with the pleading rules for civil actions. The manner in which postconviction motions and civil pleadings are filed and served is different,[37] the types of pleadings permitted

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[32] *Id.*

[33] *Id.*

[34] See *State v. Manning*, 18 Neb. App. 545, 789 N.W.2d 54 (2010).

[35] § 29-3001(2).

[36] See § 29-3001(4).

[37] Compare § 29-3001(4) and Neb. Ct. R. Pldg. § 6-1105 (rev. 2016).

are different,[38] and the particulars of stating claims for relief are different.[39]

Finally, applying rules of civil pleading and procedure to postconviction motions has the practical effect of expanding the scope of a statutory proceeding that the Legislature intended to be limited in scope and summary in nature. Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.[40] As this court stated shortly after the postconviction procedure was adopted, it is "intended to provide relief in those cases where a miscarriage of justice may have occurred, and not to be a procedure to secure a routine review for any defendant dissatisfied with his sentence."[41] This court added that "[t]o hold otherwise will be to permit defendants to misuse and abuse a remedy intended to provide relief for those exceptional cases where the rights of a defendant have been ignored or abused."[42] And this court quickly recognized that the postconviction statute was a "comprehensive . . . measure embracing both federal and state constitutional claims. Its procedures were intended to be swift, simple, and easily invoked."[43] This court also quickly rejected postconviction motions pleading "mere conclusions evidently designed to bring the defendant within the scope of [court] decisions . . . without alleging the specific facts which are alleged as violative of the constitutional rights of the defendant."[44]

Because extending civil pleading rules to postconviction proceedings is unwise and unnecessary, we now clarify that

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[38] Compare § 29-3001(4) and Neb. Ct. R. Pldg. § 6-1107.

[39] Compare § 29-3001(4) and Neb. Ct. R. Pldg. § 6-1108.

[40] *State v. Payne*, 289 Neb. 467, 855 N.W.2d 783 (2014).

[41] *State v. Clingerman*, 180 Neb. 344, 351, 142 N.W.2d 765, 770 (1966).

[42] *Id.*

[43] *State v. Losieau*, 180 Neb. 696, 698, 144 N.W.2d 435, 436 (1966).

[44] *State v. Erving*, 180 Neb. 680, 684-85, 144 N.W.2d 424, 428 (1966).

civil pleading rules do not apply to postconviction proceedings, and we expressly disapprove of language in *Mata* suggesting otherwise.

[22] The Court of Appeals addressed a factual situation similar to the one before us in *State v. Manning*.[45] There, a prisoner requested leave to amend his postconviction motion after the court had determined the motion was insufficient to grant a hearing and postconviction relief had been denied. The motion to amend was denied, and the prisoner appealed, claiming the court abused its discretion in not freely granting leave to amend. In contrasting postconviction proceedings from regular civil proceedings, the Court of Appeals observed that postconviction relief under § 29-3001 is a very narrow category of relief, subject to specific statutory pleading requirements. The Court of Appeals correctly observed that Nebraska's postconviction relief statutes do not authorize a prisoner to amend a pleading after the court has determined it is insufficient to warrant an evidentiary hearing. To the contrary, the postconviction statutes provide that when no showing of a constitutional violation is made in the pleading, the request for a hearing should be denied.[46] As such, Nebraska's postconviction relief statutes simply do not contemplate the opportunity to amend a pleading after the court determines the pleading is insufficient to necessitate an evidentiary hearing.

An order denying an evidentiary hearing on a postconviction motion is a final, appealable order,[47] and allowing a prisoner to amend a postconviction motion after a final order has been entered runs contrary to the policy of encouraging finality in litigation and expeditious resolution of claims. Given that Robertson did not request leave to amend his postconviction motion until after the court had denied postconviction relief, the district court did not err in denying leave to amend.

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[45] *State v. Manning*, 18 Neb. App. 545, 789 N.W.2d 54 (2010).

[46] *Id.*

[47] *State v. Banks*, 289 Neb. 600, 856 N.W.2d 305 (2014).

4. Failure to Appoint Counsel

[23] Finally, Robertson assigns that the district court erred in failing to appoint counsel to represent him in his postconviction action. When the assigned errors in a postconviction motion before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[48] Because we conclude Robertson's motion did not contain justiciable issues of law or fact, we likewise conclude the district court did not abuse its discretion in declining to appoint postconviction counsel.

V. CONCLUSION

The district court properly denied Robertson's motion for postconviction relief, because the files and records affirmatively show he is not entitled to relief on the claims he asserts. There was no error in the procedure utilized by the district court or in its failure to allow Robertson to amend his pleadings postjudgment. We affirm the district court's denial of postconviction relief without an evidentiary hearing.

Affirmed.

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[48] *Armendariz, supra* note 3.

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

Burton P. Lingenfelter, appellant, v. Lower Elkhorn Natural Resources District, appellee.

881 N.W.2d 892

Filed July 8, 2016. No. S-14-1112.

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 neither arbitrary, capricious, nor unreasonable.
2. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. ____: ____. 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.
4. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented which an appellate court decides independently of the decision made by the court below.
5. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
6. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute presents a question of law, which an appellate court independently reviews.

7. **Constitutional Law: Administrative Law: Natural Resources Districts: Appeal and Error.** The constitutionality of a rule adopted by a natural resources district presents a question of law, which an appellate court independently reviews.
8. **Administrative Law: Appeal and Error.** A district court, in applying a de novo standard of review, can consider and may give weight to the fact that the hearing officer observed the witnesses and accepted one version of the facts rather than another.
9. **Estoppel.** The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to one's detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.
10. **Administrative Law: Natural Resources Districts: Words and Phrases.** A natural resource district is not an agency within the meaning of the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 2014).
11. **Constitutional Law: Due Process.** Substantive due process requires a determination whether a right in which the plaintiff has a legitimate property interest is at issue and, if it is, whether that right was unconstitutionally taken from the plaintiff.
12. **Due Process: Property: Public Health and Welfare.** To establish a substantive due process violation, the government's land-use regulation must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.
13. **Constitutional Law: Equal Protection.** The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.
14. **Equal Protection.** The Equal Protection Clause requires the government to treat similarly situated people alike.
15. ____. The Equal Protection Clause does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.
16. **Legislature: Equal Protection.** If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the classification with strict scrutiny.
17. **Equal Protection: Words and Phrases.** A suspect class is one that has been saddled with such disabilities or subjected to such a history of purposeful unequal treatment as to command extraordinary protection from the majoritarian political process.
18. **Equal Protection.** When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because

of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.

19. **Equal Protection: Proof.** Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.
20. **Equal Protection.** Under the rational basis test, the Equal Protection Clause is satisfied as long as (1) there is a plausible policy reason for the classification, (2) the legislative facts on which the classification is based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed.

Stephen D. Mossman, Joshua E. Dethlefsen, and Ryan K. McIntosh, of Mattson Ricketts Law Firm, for appellant.

David A. Dudley and Colin A. Mues, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

Cassel, J.

I. INTRODUCTION

A natural resources district ordered a farmer to stop irrigating Dunaway Farm, because the district's rules prohibited use of ground water for new irrigated acres within the district's management area without a variance. The farmer took the matter to the district court in two ways: an appeal using the Administrative Procedure Act (APA)[1] and a declaratory judgment action challenging the constitutionality of several of the district's rules. The farmer lost on both claims and now

[1] Neb. Rev. Stat. § 84-901 et seq. (Reissue 2014).

appeals to this court. On the APA appeal, we find no errors on the record. And because the rules are constitutional, summary judgment denying declaratory relief was correct. We affirm the district court's judgment.

II. BACKGROUND

Burton P. Lingenfelter farms in Pierce County, Nebraska. He owns and operates Dunaway Farm and three other parcels of land in its immediate vicinity, one of which is called Rehfeld Farm. Dunaway Farm and Rehfeld Farm are located within the jurisdiction of the Lower Elkhorn Natural Resources District (District).

The District's rules contain restrictions on ground water irrigation. Within the district, land may not be irrigated unless it qualifies as a "Historically Irrigated Acre" or it has been granted a variance. Historically Irrigated Acres include those classified as irrigated by the county assessor between 1999 and 2008.

Before 2010, Dunaway Farm was not irrigated or classified as irrigated. Beginning in 2010, Lingenfelter used the well on Rehfeld Farm to irrigate Dunaway Farm. In 2013, the District sent Lingenfelter a letter notifying him that Dunaway Farm did not constitute Historically Irrigated Acres and that it would issue him a cease-and-desist letter if he continued to irrigate it. After a hearing, the District ordered Lingenfelter to cease and desist irrigating Dunaway Farm.

Lingenfelter appealed to the district court, seeking judicial review of the District's decision and filing a declaratory judgment action challenging the constitutionality of several of the District's rules related to irrigation. The district court affirmed the District's decision and sustained the District's motion for summary judgment in the declaratory judgment action. Lingenfelter filed the instant appeal. We moved the case to our docket.[2]

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

1. Statutory Background

This appeal involves challenges to the District's rules and the actions it took pursuant to those rules. We first review the legislation that authorized the District to adopt its rules.

(a) Natural Resources Districts

In 1969, the Nebraska Legislature created the State's natural resources districts (NRDs).[3] The Legislature has declared that NRDs are political subdivisions of the State,[4] and it has set out 12 "purposes of natural resources districts."[5] The sixth purpose, "development, management, utilization, and conservation of ground water and surface water," is the most relevant in the instant case.[6]

(b) Nebraska Ground Water Management and Protection Act

In 1975, The Legislature provided NRDs with authority to manage and conserve ground water through the Nebraska Ground Water Management and Protection Act (Act).[7] In the Act's "Declaration of intent and purpose" provision,[8] which has been amended over time, the Legislature emphasized the importance of ground water to the welfare of Nebraskans and the NRDs' role in protecting it. The Legislature stated that "ground water is one of the most valuable natural resources in the state, and that an adequate supply of ground water is

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[3] Neb. Rev. Stat. § 2-3201 (Reissue 2012).

[4] Neb. Rev. Stat. § 2-3213 (Reissue 2012).

[5] Neb. Rev. Stat. § 2-3229 (Reissue 2012).

[6] *Id.*

[7] Neb. Rev. Stat. §§ 46-701 to 46-756 (Reissue 2010 & Cum. Supp. 2014). See Carl A.P. Fricke & Darryll T. Pederson, *Ground-Water Resource Management in Nebraska*, 17 Ground Water 544 (1979) (brief overview of development of ground water irrigation in Nebraska and Act's original provisions).

[8] § 46-702.

essential to the general welfare of the citizens of this state and to the present and future development of agriculture in the state."[9] It also found that "the management, protection, and conservation of ground water and the reasonable and beneficial use thereof are essential to the economic prosperity and future well-being of the state," and it found that "the public interest demands procedures for the implementation of management practices to conserve and protect ground water supplies and to prevent the contamination or inefficient or improper use thereof."[10]

The Act grants NRDs certain powers "to administer and enforce the [Act] and to effectuate the policy of the state to conserve ground water resources."[11] One section authorizes NRDs to take certain steps in any area within their jurisdiction. Relevant to this appeal, it provides that whether or not any portion of a district has been designated as a "management area," an NRD may:

> (b) Require such reports from ground water users as may be necessary;
>
> (c) Require the reporting of water uses and irrigated acres by landowners and others with control over the water uses and irrigated acres for the purpose of certification by the district;
>
> . . . .
>
> (h) Issue cease and desist orders, following three days' notice to the person affected stating the contemplated action and in general the grounds for the action and following reasonable opportunity to be heard, to enforce any of the provisions of the act or of orders or permits issued pursuant to the act, to initiate suits to enforce the provisions of orders issued pursuant to

[9] *Id.*

[10] *Id.*

[11] § 46-707(1).

> the act, and to restrain the construction of illegal water wells or the withdrawal or use of water from illegal water wells.[12]

Another provision authorizes NRDs to take additional steps in what were once designated "control areas," "special protection areas," and "management areas," and are now called simply, management areas.

Originally, the Legislature contemplated only the establishment of control areas. In the first version of the Act, the Director of Water Resources, who is now called the Director of Natural Resources (Director), played a large role in establishing control areas. NRDs began the process of designation by requesting that the Director hold a hearing on the matter.[13] After the hearing, the Director could declare an area to be a control area if he or she determined that there was "an inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply."[14]

If a control area was established, the NRD would hold another public hearing to determine which controls to implement within the area.[15] The NRD could choose from a list of authorized controls:

> (a) It may determine the permissible total withdrawal of ground water in the designated control area for each day, month, or year, and allocate such withdrawal among the ground water users within the area;
>
> (b) It may adopt and enforce a system of rotation for use of ground water in the control area;
>
> (c) It may adopt well-spacing requirements more restrictive than those found in Chapter 46, article 6; and

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[12] *Id.*

[13] Neb. Rev. Stat. § 46-658(2) (Reissue 1978).

[14] § 46-658(1).

[15] Neb. Rev. Stat. § 46-664 (Reissue 1978).

> (d) It may adopt such other reasonable regulations as are necessary to carry out the intent of [the Act].[16]

The controls chosen by the NRD were subject to the approval of the Director.[17]

In the early 1980's, the Legislature amended the Act and gave NRDs the authority to establish management areas within their jurisdictions. Under these new provisions, establishing a management area began when an NRD prepared a "management plan." Every NRD was required to prepare a management plan that included recommended ground water management objectives and controls and identified a variety of considerations within its jurisdiction, including available ground water supplies, recharge rates, precipitation rates, and crop water needs.[18]

NRDs had to request public comments during their preparations of the plans and submit the plans to the Director for review.[19] But whether or not the Director approved the plan, the NRD could hold a public hearing to propose establishing a management area pursuant to the plan.[20] All interested persons could present testimony at the hearing, and then the NRD decided whether or not a management area should be established.[21] If an NRD established a management area, it was then required to "adopt one or more controls to be utilized within the area in order to achieve the ground water reservoir life goal specified in the plan."[22] The controls authorized were essentially the same as those controls authorized in control areas.[23]

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[16] Neb. Rev. Stat. § 46-666(1) (Reissue 1978).

[17] *Id.*

[18] Neb. Rev. Stat. § 46-673.01 (Reissue 1984).

[19] Neb. Rev. Stat. §§ 46-673.02 and 46-673.03 (Reissue 1984).

[20] Neb. Rev. Stat. § 46-673.04 (Reissue 1984).

[21] Neb. Rev. Stat. § 46-673.05 (Reissue 1984).

[22] Neb. Rev. Stat. § 46-673.06 (Reissue 1984).

[23] § 46-666 and Neb. Rev. Stat. § 46-673.09 (Reissue 1984).

In 1986, the Legislature amended the Act again, this time protecting ground water quality by authorizing special protection areas within NRDs.[24] The Legislature originally gave the Department of Environmental Control the power to establish these areas.[25] If it did so, then the NRDs within the boundaries of the area were required to prepare action plans "designed to stabilize and reduce the level [of contaminants] and prevent the increase or spread of ground water contamination."[26] The Department of Environmental Control would then approve or deny the plan.[27] The Act authorized NRDs to adopt protective measures within these areas, including requiring educational programs and best management practices.[28]

In 1996, the Legislature undertook a major revision of the Act. For the first time, the Act recognized that ground water and surface water may be hydrologically connected and that hydrologically connected ground water and surface water may need to be managed differently from other water.[29]

The 1996 amendments also combined control areas, management areas, and special protection areas under the single category of management area.[30] NRDs still had the power to establish management areas and adopt controls within those areas, after holding public hearings.[31] And the authority previously given to NRDs in either control areas, special protection areas, or management areas, was consolidated

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[24] 1986 Neb. Laws, L.B. 894.

[25] Neb. Rev. Stat. § 46-674.07 (Cum. Supp. 1986).

[26] Neb. Rev. Stat. § 46-674.08(1) (Cum. Supp. 1986).

[27] Neb. Rev. Stat. § 46-674.10 (Cum. Supp. 1986).

[28] Neb. Rev. Stat. § 46-674.09 (Cum. Supp. 1986).

[29] Neb. Rev. Stat. § 46-656.05(1) and (2) (Reissue 1998).

[30] See Neb. Rev. Stat. § 46-656.12 (Reissue 1998) ("[i]f a control area, management area, or special ground water quality protection area has been designated in a district prior to July 19, 1996, the area shall be designated a management area . . . .").

[31] Neb. Rev. Stat. §§ 46-656.14, 46-656.19, and 46-656.20 (Reissue 1998).

into one provision.[32] Within management areas, NRDs now had the power to allocate total ground water withdrawal, adopt a system for the rotation of the use of ground water, require well-spacing, require installation of devices for measuring ground water withdrawals, adopt a system requiring the reduction of irrigated acres, require best management practices, require analysis of water and deep soils, require mandatory educational requirements, and require water quality monitoring.[33]

The process for establishing management areas and the consolidated authority granted to NRDs within those areas remain in the Act today. The current version of the Act empowers NRDs to establish management areas to accomplish one or more of the following objectives: "(a) Protection of ground water quantity; (b) protection of ground water quality; or (c) prevention or resolution of conflicts between users of ground water and appropriators of surface water, which ground water and surface water are hydrologically connected."[34]

The Legislature has continued to amend the Act to provide NRDs additional authority within management areas. One relevant addition occurred in 2001, when the Legislature gave NRDs the power to "limit or prevent the expansion of irrigated acres."[35] After further amendments, this provision now provides that an NRD may "limit or prevent the expansion of irrigated acres or otherwise limit or prevent increases in the consumptive use of ground water withdrawals from water wells used for irrigation or other beneficial purposes."[36]

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[32] Neb. Rev. Stat. § 46-656.25 (Reissue 1998).

[33] *Id.*

[34] § 46-712(1).

[35] 2001 Neb. Laws, L.B. 135.

[36] § 46-739(1)(f).

2. District's Rules

Pursuant to its authority under the Act, the District has established a management area that encompasses the entire area of the District, and it has adopted a scheme of rules to manage and conserve ground water within its boundaries. Lingenfelter challenges the District's rule 14. To provide context for our analysis of rule 14, we also explain two of the District's definitions and its rules 13 and 15.

The District's rules separate irrigated land into two categories: Historically Irrigated Acres and "New Groundwater Irrigated Acres." The District defines a Historically Irrigated Acre as

> any acre of land watered for the purposes of agricultural irrigation purposes from a legal well or a Nebraska Department of Natural Resources permitted surface water source that: (1) was classified as irrigated land for any one year between January 1, 1999 and December 31, 2008 by the local County Assessor; or (2) is currently enrolled in a federal, state, or local conservation program and was classified as irrigated land by the local County Assessor within one year prior to being enrolled in such program; and (3) [additional rule not relevant here].

It defines a New Groundwater Irrigated Acre as "any groundwater irrigated acre that does not qualify as a Historically Irrigated Acre," with two exceptions not relevant here. In some of the District's communications with Lingenfelter, it used "New Irrigated Acre," rather than "New Groundwater Irrigated Acre." "New Irrigated Acre" is not defined in the District's rules, and it appears that the District has used the term interchangeably with "New Groundwater Irrigated Acre."

The distinction between Historically Irrigated Acres and New Groundwater Irrigated Acres is essential to the District's rules 13 and 15. Rules 13 and 15 prohibit the creation of any New Groundwater Irrigated Acres anywhere within the District—i.e., they permit irrigation of only Historically Irrigated Acres.

Rule 13 appears to have been adopted in 2009, and it applies to the District's "Hydrologically Connected Area." Rule 13.3 states: "New Groundwater Irrigated Acre Limitation. Effective immediately, there shall be no New Groundwater Irrigated Acres within the Hydrologically Connected Area without a variance. Such activity is strictly prohibited, either from an existing well or a new well, unless approved by the District pursuant to this RULE 13."

Rule 15 applies a similar limitation in the District's "Non-10/50 Area," which the rule defines as the area outside the boundaries of the District's Hydrologically Connected Area. It provides: "New Groundwater Irrigated Acre Limitation. Effective immediately, there shall be no New Groundwater Irrigated Acres within the Non-10/50 Area without a variance. Such activity is strictly prohibited, either from an existing well or a new well, unless approved by the District pursuant to this RULE 15." It is not clear from the provisions of rule 15 when it was adopted.

Rule 14 became effective in 2012 and governs the process of "certify[ing] the number and location of irrigated acres in the District." One of its provisions explains its purpose: "One of the primary goals for the certification of acres is, upon completion of the certification process, to allow irrigation of agricultural lands with ground water only on acres classified as Certified Irrigated Acres within the District."

Rule 14 provides that the District will begin the certification process by "collect[ing] and organiz[ing] data to identify those acres actually irrigated for agricultural purposes within the District, including Historically Irrigated Acres and any other irrigated tract of two acres or more, regardless of the source of water." The District must then use this data "to make a preliminary finding of those acres qualifying as Certified Irrigated Acres." A tract can be certified as irrigated acres if it

> (1) has been actually irrigated any one out of ten years from 1999 to 2008, (2) is currently enrolled in a federal,

> state, or local conservation program and was classified as irrigated land by the local County Assessor within one year prior to being enrolled in such program, (3) has otherwise been allowed to develop under . . . an approval granted by the Board since 2007, (4) has otherwise been allowed to develop under an approval granted by the Department since 2007, or (5) is irrigated from a lagoon constructed in compliance with a Clean Water Act permit.

After the preliminary finding process is complete, the District's board of directors (Board) must hold one public hearing to receive testimony and evidence on its "proposed final determination." After that hearing, the Board must "certify those acres deemed to qualify as Certified Irrigated Acres within the District." At the time of the cease-and-desist hearing at issue in the instant case (cease-and-desist hearing), final certification in the district had not yet occurred.

With this statutory and regulatory framework in mind, we now review the relevant factual background.

3. Relevant Parcels

Lingenfelter owns Dunaway Farm and Rehfeld Farm, and two other parcels nearby. Dunaway Farm, the property subject to the cease-and-desist order at issue, is located in the Hydrologically Connected Area of the District. It has no irrigation well because the land "has very poor formations for wells." Rehfeld Farm is situated immediately diagonally opposite Dunaway Farm. It has a well registered with the Nebraska Department of Natural Resources (Department) to irrigate 125 acres. One of the other two parcels also contains two wells. Lingenfelter and his mother purchased Rehfeld Farm in 2008 for the purpose of using its well to irrigate his three other parcels in the area. He began using the Rehfeld Farm well to irrigate Dunaway Farm in 2010.

In September 2013, the District sent Lingenfelter a letter notifying him that it would order him to cease and desist

irrigating Dunaway Farm because the tract constituted "New Irrigated Acres." The notification letter explained that in 2008, the District imposed a stay on the irrigation of any New Irrigated Acres without a variance and that "a variance was required before developing New Irrigated Acres under either a new or an existing well." It stated that the District's records indicated that Lingenfelter was not granted a variance and that Dunaway Farm did not constitute Historically Irrigated Acres under District rules. Thus, irrigation of Dunaway Farm was prohibited.

The letter informed Lingenfelter that he could request a hearing on the matter before the Board. Lingenfelter requested the cease-and-desist hearing.

The letter also included a copy of the District's rule 14 to "explain the [District's] process for certifying irrigated acres." It did not state that the District was applying rule 14 to Lingenfelter's acres.

4. District's Actions

(a) Rule 14 Preliminary Finding

After Lingenfelter received the cease-and-desist notification letter, he submitted to the District an application to certify Dunaway Farm under rule 14. He requested that the Board consider certifying Dunaway Farm under rule 14 at his cease-and-desist hearing. Counsel for the District responded and stated that he would forward the certification application to the District. But he clarified that the District was not completing the certification process on a piecemeal basis. He explained that pursuant to rule 14, the District would complete a preliminary determination and later certify the eligible parcels within the entire District.

About 1 week before the cease-and-desist hearing, the District issued Lingenfelter a letter explaining its rule 14 preliminary finding for Dunaway Farm. It stated, in relevant part:

> After reviewing information available to us, we have made a preliminary finding that the above referenced parcel of land was not irrigated anytime between 1999 and 2008. This means that no portion of this parcel qualifies as Historically Irrigated Acres as the term is defined under the District's Groundwater Management Rules and Regulations; that this parcel will not be included in the staff recommendation for Certified Irrigated Acres pursuant to Rule 14.4; and that the parcel cannot be irrigated without you first obtaining a variance from the [District].
>
> We considered information from the Pierce County Assessor's Office and our own information of District approved variances to make our preliminary finding of no Historically Irrigated Acres for this land.

(b) Cease-and-Desist Hearing

Lingenfelter's testimony at the cease-and-desist hearing focused on two main topics: (1) whether Dunaway Farm was irrigated between 1999 and 2008 and (2) his efforts to irrigate Dunaway Farm after 2008.

(i) Irrigation Between 1999 and 2008

Lingenfelter was questioned about whether irrigation occurred on Dunaway Farm between 1999 and 2008 and therefore qualified the land as historically irrigated. When the District's attorney directly asked Lingenfelter whether he irrigated Dunaway Farm in those years, he answered, "Yes." He explained that he used sprinklers with a livestock well and that he used sprinklers when he planted forage crops on the tract. He said, "I did not do an effective job watering at all, but, yes, there was water there." However, when pressed about how much irrigation actually took place, Lingenfelter was vague. He said that he was unsure about how many acres he actually irrigated, and when asked for a rough idea, he

said, "I'm not going there." When asked whether he had any documentation to substantiate the irrigation, he responded that he had witnesses, but that "[t]his [was] not the direction I want[ed] to go."

Later, while being questioned by members of the Board, Lingenfelter admitted that prior to 2010, Dunaway Farm was not irrigated.

(ii) Irrigation After 2008

Lingenfelter testified that it was his understanding that after purchasing Rehfeld Farm, he could use its well as he pleased. He said that he believed that he had the ability to do so because "there hadn't been any indication that [he] couldn't prior to that." He explained that he "had developed well projects," "piped water," and "used crossroads" in the past.

Lingenfelter described a 2009 meeting with a District staff member where he discussed his plan to use the Rehfeld Farm well to irrigate Dunaway Farm. At this meeting, Lingenfelter and the staff member added up the acres available under the well registrations for the three wells and noted that they totaled 385 acres. Lingenfelter testified that because he planned to irrigate only 285 acres, he "felt that this project was not an issue." He therefore proceeded with his preparations to use Rehfeld Farm well to irrigate the surrounding parcels.

Because Lingenfelter claims that he received preapproval to irrigate Dunaway Farm in this meeting, we set out his testimony below:

> A[.] And so when I purchased [Rehfeld Farm], I implemented a plan of I started with Hauptman Construction in preparing the property to run the pipe across and get the property ready to go. So the first thing I did was determine that the well was in good standing and capable, and it was. And in 2009, the spring of 2009 — well, they came out with a moratorium later that year in '08. We had a discussion in December. And I had purchased

some other property. I came to the office here, in that room over there. I was discussing additional property. I felt that I should have the ability to continue on that. And I mentioned this project. The staff member handed me the registrations and did the math. We calculated that there was 385 acres registered under these three wells and my project would not need that many. So at that point in time, I deemed this wasn't an issue. I kept in contact with the staff, looking for a variance for a different property. But because of developing these other properties, I did not have the financial means to apply for the other variance because I didn't think I could get it done and financially get it done in the time. So I was in contact with staff the whole time. I did not know, since I was not filing for a well permit and had plenty of acres, I was not — did not think I had a problem.

So I connected these wells together and I utilized all three wells irrigating [Dunaway Farm].

. . . .

Q[.] So then when you — you said you went to the [District] staff in early 2009, is that right?

A[.] Correct.

Q[.] And who did you meet with?

A[.] I'm not exactly sure so I'm not going to say.

Q[.] And what — with respect to these parcels, what did you discuss?

A[.] I discussed this project that I was doing and I had not — and we looked up the registrations on the three wells, used a calculator, added up the acres that was [sic] available under the registrations and came up to 385. I knew that I was not going to irrigate that many acres of ground, and at that point I felt that this project was not an issue. I had another property I was looking for a well permit and that was the main title of discussion. It was what to do for an extra permit and there were no answers at that time.

> Q[.] If you would add the Rehfeld [Farm], [third parcel], [fourth parcel], and Dunaway [Farm] together, how many acres do you come up with?
>
> A[.] Around 285 irrigated.
>
> Q[.] And that includes the 41.89 acres that you're seeking to irrigate in the Dunaway [Farm]?
>
> A[.] Correct.
>
> Q[.] So after receiving those assurances from the [District] staff in early 2009, what did you do after that?
>
> A[.] I proceeded with the dirt work and the preparation for the project.

Lingenfelter eventually completed the project connecting the Rehfeld Farm well to Dunaway Farm in 2010. He testified that he used the tied wells to irrigate Dunaway Farm in 2010 through 2013.

(c) Cease-and-Desist Order

At the conclusion of the hearing, counsel for the District emphasized that "the sole determination for the Board tonight is in determining whether or not the subject matter property qualifies as [H]istorically [I]rrigated [A]cres. That is all the Board really needs to determine." He also stated that the District has issued cease-and-desist orders in similar circumstances. He said: "There have been, in just the past couple months, I don't know, the last — I should say six to nine months, I believe two to three issues where a cease and desist order was necessary for purposes of individuals irrigating ground that didn't qualify as [H]istorically [I]rrigated [A]cres."

The Board voted nine to one, with two abstaining, to order Lingenfelter to cease and desist irrigating Dunaway Farm. The order noted that Lingenfelter was irrigating Dunaway Farm and explained that the District "prohibits the use of groundwater for new irrigated acres within the [D]istrict's ground water management area without an approved variance from" the District. It did not mention certification of acres or rule 14.

5. District Court

(a) Lingenfelter's Claims

Following the issuance of the cease-and-desist order, Lingenfelter filed a petition in the district court. His petition included two causes of action.

In his first cause of action, Lingenfelter requested judicial review of the District's decision to issue the cease-and-desist order. His petition argued that the issuance of the cease-and-desist order was contrary to the law and facts introduced at the hearing. He apparently made several arguments to support this assertion in his brief to the district court, which is not in our record. Our review of the district court's order reveals that Lingenfelter argued that (1) he received preapproval from District staff to irrigate Dunaway Farm and that the District should be estopped from taking a position contrary to its staff's approval, (2) the District "'misapplied' its own rules in 'determining that [his] land was not considered "irrigated" acres'" under the District's rules, and (3) the provision in rule 14 that allows a tract irrigated between 1999 and 2008 to be certified (look-back provision) is arbitrary and capricious.

In the second cause of action, Lingenfelter requested a declaratory judgment that the District's rule 14 and its rule defining Historically Irrigated Acres violate his due process and equal protection rights under the Nebraska Constitution and that they exceed the District's statutory authority.

(b) Disposition of Claim for Judicial Review

First, the district court rejected Lingenfelter's estoppel claim. It concluded that the evidence was insufficient to conclude that Lingenfelter received preapproval to irrigate from District staff. Rather, Lingenfelter's testimony showed that "he thought that the Dunaway Farm could be irrigated with the other wells based on his own subjective feelings about how this [2009] conversation [with the District staff member] went."

Second, the district court rejected Lingenfelter's claim that the Board "'misapplied' its own rules in 'determining that [his] land was not considered "irrigated" acres.'" The District's rule 2.1.31 defines "Irrigated [A]cre" to mean "any acre that is certified as such pursuant to Rules and Regulations of the District and that is actually capable of being supplied with water through irrigation works, mechanisms, or facilities." Apparently, Lingenfelter argued that (1) the District applied its Irrigated Acres definition to him and (2) because the final rule 14 certification has not taken place, the district court should disregard the first portion of the Irrigated Acre definition and conclude that Dunaway Farm constitutes Irrigated Acres because it is capable of being supplied with water.

The district court concluded that the Board never determined whether Dunaway Farm constituted Irrigated Acres. Rather, the District issued the cease-and-desist order because Dunaway Farm did not constitute Historically Irrigated Acres and because Lingenfelter had not requested a variance. Thus, Lingenfelter's argument could not "be applied to the Board's actual basis for the issuance of the Cease and Desist Order."

Third, the district court rejected Lingenfelter's argument that rule 14's look-back provision is arbitrary and capricious. It first observed that "[t]his argument is convoluted and misplaced." It then concluded that Lingenfelter was not arguing that the 10-year timespan itself was unconstitutional; rather, he was challenging the Board's decision "to promulgate, vote upon, and incorporate Rule 14 into its regulations." The court concluded that the record before it was insufficient "to review the process by which Rule 14 of the [District's] rules and regulations [came] into existence."

Having disposed of all of Lingenfelter's arguments, the district court concluded that the Board's decision to issue the cease-and-desist order was supported by the facts and evidence in the record, and it affirmed the Board's decision in its entirety.

(c) Disposition of Declaratory Judgment Action

In this cause of action, Lingenfelter claimed that his rights to due process and equal protection were violated by rule 14. The parties filed cross-motions for summary judgment, and neither party presented additional evidence outside of the District's record.

Lingenfelter claimed that rule 14's look-back provision, which allows land that was "actually irrigated any one out of ten years from 1999 to 2008" to be certified as irrigated, violates his right to due process. The court disagreed and concluded that "[b]ased on the effects of recent periods of drought on the availability of ground water for irrigation," the look-back provision is not arbitrary and capricious. It did not provide a citation to the record indicating where it found information relating to "the effects of recent periods of drought." The court also rejected Lingenfelter's arguments regarding equal protection. It overruled Lingenfelter's motion for summary judgment and sustained the District's motion for summary judgment.

III. ASSIGNMENTS OF ERROR

Lingenfelter assigns 11 errors, but he combines several of them for argument in his brief. He claims, restated and consolidated, that the district court erred in (1) finding that the evidence was insufficient to conclude that he received prior approval from District staff to irrigate Dunaway Farm, (2) failing to estop the District from issuing a cease-and-desist order, (3) finding that Dunaway Farm was not irrigated under the District's rules and regulations, (4) finding that the cease-and-desist order did not equate to a determination that Dunaway Farm had no Historically Irrigated Acres, (5) finding that rule 14 does not violate his due process and equal protection rights, (6) finding that the District's decision to issue the cease-and-desist order did not violate his right to equal protection, (7) relying on evidence not in the record,

and (8) misunderstanding his argument that rule 14 is arbitrary and capricious.

IV. STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[37] 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 neither arbitrary, capricious, nor unreasonable.[38] An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.[39]

[3,4] Whether a decision conforms to law[40] and questions regarding the meaning and interpretation of statutes and regulations[41] are questions of law, which an appellate court independently reviews.

[5-7] The constitutionality of an ordinance passed by a political subdivision[42] and the constitutionality of a statute[43] present questions of law, which an appellate court independently reviews. It follows that the constitutionality of a rule adopted by a natural resources district presents a question of law, which an appellate court independently reviews.

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[37] *Aline Bae Tanning v. Nebraska Dept. of Rev.*, 293 Neb. 623, 880 N.W.2d 61 (2016).

[38] *Id.*

[39] *Reiter v. Wimes*, 263 Neb. 277, 640 N.W.2d 19 (2002).

[40] *Shaffer v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 740, 857 N.W.2d 313 (2014).

[41] *Melanie M. v. Winterer*, 290 Neb. 764, 862 N.W.2d 76 (2015).

[42] *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

[43] *J.M. v. Hobbs*, 288 Neb. 546, 849 N.W.2d 480 (2014).

V. ANALYSIS

1. Judicial Review of District

(a) Estoppel

In this section, we combine Lingenfelter's first two assignments of error. Lingenfelter claims that the district court should have found he received preapproval to irrigate Dunaway Farm and that it should have estopped the District from issuing the cease-and-desist order.

Lingenfelter argues that the district court should have found that he received preapproval to irrigate, because his testimony regarding his conversation with a District staff member was "'uncontroverted'" and because he was entitled to inferences in his favor on summary judgment. To support his "uncontroverted" argument, he cites a statement we made in 1922, in the case of *Morris v. Equitable Life Assurance Society*.[44] We said: "One thing is true, uncontradicted evidence which bears the semblance of truth is entitled to be believed, and courts, as a rule, under these circumstances take this kind of evidence for the truth . . . ."[45]

First, we note that this language taken from *Morris* refers to "evidence which bears the semblance of truth." It is the duty of the trier of fact to weigh the evidence and decide whether it is trustworthy. We have stated that "[e]vidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence."[46] Thus, *Morris* does not reach as far as Lingenfelter argues.

Second, Lingenfelter's reliance on *Morris* is misplaced. The district court did not indicate that it disbelieved Lingenfelter's

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[44] *Morris v. Equitable Life Assurance Society*, 109 Neb. 348, 191 N.W. 190 (1922).

[45] *Id.* at 351, 191 N.W. at 191.

[46] *Teresi v. Filley*, 146 Neb. 797, 804, 21 N.W.2d 699, 702 (1946).

testimony. Rather, the court found that his testimony was insufficient to establish that he received preapproval to irrigate Dunaway Farm. As the court observed, Lingenfelter testified that he and the staff member used a calculator and added up the acres available under his well registrations. He did not testify that anyone from the District told him that he could irrigate Dunaway Farm. Rather, he stated that after the conversation, he "deemed this wasn't an issue" and he "did not think [he] had a problem."

[8] Lingenfelter argues that his testimony was sufficient and that the district court erred because it "did not give Lingenfelter the benefit of any reasonable inferences" as summary judgment requires.[47] But Lingenfelter is applying the wrong standard to his APA appeal. His petition for judicial review was not before the court on his motion for summary judgment. The motion for summary judgment applied only to his claim for a declaratory judgment. Lingenfelter filed a petition for judicial review pursuant to the APA. Pursuant to the APA, the district court must review the District's order de novo on the record.[48] A district court, in applying a de novo standard of review, can consider and may give weight to the fact that the hearing officer observed the witnesses and accepted one version of the facts rather than another.[49] Thus, on the APA appeal, the district court was not required to give Lingenfelter the benefit of favorable inferences.

[9] Upon our review for errors on the record, we conclude that Lingenfelter's testimony supports the district court's conclusion that Lingenfelter relied upon his own subjective belief regarding the conversation, rather than any statement made by a District staff member. And because the court properly

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[47] Brief for appellant at 18.

[48] § 84-917(5)(a).

[49] *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997), *disapproved on other grounds, Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

reached this conclusion, it did not err by declining to address Lingenfelter's estoppel argument. The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to one's detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.[50] Lingenfelter did not rely upon conduct of the District, and he cannot not rely upon equitable estoppel.

(b) Irrigated Acres

Lingenfelter next contends that "[i]n determining that the Dunaway Farm was not 'Irrigated Acres', the [d]istrict [c]ourt affirmed the Board's misapplication of its Rules."[51] He claims that "the issuance of the Cease and Desist Order to Lingenfelter used the incorrect definition of 'Irrigated Acre' apparently requiring Lingenfelter to actually have had his irrigated acres 'certified'."[52]

First, we note that Lingenfelter mischaracterizes the district court's finding. The district court did not find that "Dunaway Farm was not 'Irrigated Acres.'" Rather, it found that the District "never made a determination that the Dunaway Farm did or did not constitute Irrigated Acres." It concluded that the District issued the cease-and-desist order because Dunaway Farm did not constitute Historically Irrigated Acres and Lingenfelter had not obtained a variance. Based on this finding, the district court concluded that "Lingenfelter's [Irrigated Acres] argument cannot be applied to the Board's actual basis for the issuance of the Cease and Desist Order."

Second, we conclude that the district court's finding is supported by competent evidence. Neither the notification letter nor the ultimate cease-and-desist order states that the District applied the Irrigated Acres definition to Dunaway

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[50] *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997).

[51] Brief for appellant at 22.

[52] *Id.* at 24-25.

Farm or even uses the term "Irrigated Acres." Rather, as the district court found, the notification letter appears to apply the District's rules relating to New Irrigated Acres, Historically Irrigated Acres, and variances. Similarly, the ultimate cease-and-desist order states that the District "prohibits the use of groundwater for new irrigated acres within the [D]istrict's ground water management area without an approved variance." It does not mention "Irrigated Acres."

Thus, because we uphold the district court's finding that the District did not apply the Irrigated Acres definition to Dunaway Farm, Lingenfelter's arguments on this point fail.

(c) Historically Irrigated Acres

Next, Lingenfelter makes another claim regarding the Irrigated Acres rule. He claims that the district court "erred in failing to consider [his] argument that the Board misapplied the [District's] Rules" regarding Irrigated Acres.[53] He says that "the Board constructively determined that there were no 'Irrigated Acres' or 'Historically Irrigated Acres' on the Dunaway Farm" when it issued the cease-and-desist order.[54] And he says that the court "specifically noted" that the Board did not find that Dunaway Farm contained no Historically Irrigated Acres.[55]

As we explained above, the district court considered and rejected Lingenfelter's argument that the Board misapplied the Irrigated Acres rule. The court found that the Board issued the cease-and-desist order because Dunaway Farm contained no Historically Irrigated Acres. And it found that the Board never made a determination regarding Irrigated Acres. These findings were supported by the record. This argument is meritless.

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[53] *Id.* at 26.

[54] *Id.*

[55] *Id.*

2. Declaratory Judgment

(a) APA Does Not Apply

At the outset, we note that Lingenfelter purported to file his declaratory judgment petition pursuant to both the APA provision authorizing declaratory judgments[56] and the Uniform Declaratory Judgments Act.[57] We take this opportunity to clarify that the APA does not govern this declaratory judgment action.

The APA provision authorizing declaratory judgment actions applies only if the District is an agency under the APA. The APA provides that "[t]he validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County . . . ."[58] And, with certain exceptions not relevant here, it defines rule or regulation as "any rule, regulation, or standard issued by an *agency*."[59]

[10] NRDs are not agencies for the purposes of the APA. The legislation authorizing the creation of the NRDs provides that they are political subdivisions of the State of Nebraska.[60] Political subdivisions do not fall within the APA's definition of "Agency," which provides that "Agency shall mean each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules and regulations," with certain exceptions not relevant to this analysis.[61] In the context of the State Tort Claims Act, we have said that "state agencies are thought of as the alter egos of the state itself, viz., 'departments, agencies,

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[56] § 84-911.

[57] Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2008 & Cum. Supp. 2014).

[58] § 84-911(1).

[59] § 84-901(2) (emphasis supplied).

[60] See § 2-3213.

[61] § 84-901(1).

boards, bureaus, and commissions of the State of Nebraska, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska.'"[62] By contrast, we have stated that a political subdivision is a body which contemplates geographical area and boundaries, public elections, taxing power, and a general purpose or benefit.[63] NRDs are units of local government with defined geographical boundaries, rather than alter egos of the state. As such, they are not agencies under the APA.

Furthermore, although the Act directs that appeals from NRD *orders* are taken pursuant to the APA,[64] it contains no such provision relating to declaratory judgment actions challenging NRD rules. Therefore, the provision in the APA relating to declaratory judgments does not apply.

(b) Facial Challenge

Lingenfelter claims that the district court erred in granting the District's motion for summary judgment as to his constitutional claims, because "[o]n their face, the [District's] Rules are arbitrary and capricious and the 'look back' provision of Rule 14 violates due process."[65] He also argues that they violate his right to equal protection.

(i) Due Process

Lingenfelter argues that rule 14's look-back provision, which allows acres that have "been actually irrigated any one out of ten years from 1999 to 2008" to be certified, violates his right to substantive due process because it is arbitrary and capricious. We disagree.

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[62] *Catania v. The University of Nebraska*, 204 Neb. 304, 309, 282 N.W.2d 27, 30 (1979) (quoting Neb. Rev. Stat. § 81-8,210 (Reissue 1976)), *overruled on other grounds, Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988).

[63] *Parriott v. Drainage Dist. No. 6*, 226 Neb. 123, 410 N.W.2d 97 (1987).

[64] See § 46-750.

[65] Brief for appellant at 26.

[11] Lingenfelter raises a substantive due process claim. Under Neb. Const. art. I, § 3, the State cannot deprive any person of life, liberty, or property without due process of law. Substantive due process requires a determination whether a right in which the plaintiff has a legitimate property interest is at issue and, if it is, whether that right was unconstitutionally taken from the plaintiff.[66]

[12] To establish a substantive due process violation, the government's land-use regulation must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[67]

We begin with Lingenfelter's property interest. He claims that he has a legitimate property interest in using the ground water under his property. He also claims that he has a constitutionally protected interest in conducting his occupation, which he says includes "farm[ing] with the modern practice of irrigation so critical to raising a crop."[68] For the purposes of this analysis, we assume that Lingenfelter has a legitimate property interest at issue.

Second, we must determine whether the look-back provision is arbitrary and unreasonable, having no substantial relation to the general welfare. Lingenfelter argues that "[t]here is no clear basis for the 10 year period of 1999-2008. This rule, adopted in 2012, excluded anyone who began irrigation after 2008, but before the adoption of the rule, including Lingenfelter."[69]

Lingenfelter relies on our decision in *Whitehead Oil Co. v. City of Lincoln*.[70] There, a city delayed acting upon a landowner's use permit application until the city could change

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[66] *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998).

[67] *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008).

[68] Brief for appellant at 30.

[69] *Id.* at 29.

[70] *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994), *disapproved on other grounds, Scofield v. State, supra* note 67.

the zoning designation such as to preclude issuance of the permit. We relied upon the Eighth Circuit's articulation that "'[w]hether government action is arbitrary or capricious within the meaning of the Constitution turns on whether it is so "egregious" and "irrational" that the action exceeds standards of inadvertence and mere errors of law.'"[71] Both Lingenfelter and the District accept this definition, as do we. But we disagree with Lingenfelter's characterization of the look-back provision.

The look-back provision has a substantial relation to the general welfare. Regarding the general welfare, the Legislature stated in the Act that "an adequate supply of ground water is essential to the general welfare of the citizens of this state and to the present and future development of agriculture in the state."[72] It also found that "the management, protection, and conservation of ground water and the reasonable and beneficial use thereof are essential to the economic prosperity and future well-being of the state."[73]

The look-back provision allows the District to ensure that there is an adequate supply of ground water. It establishes a baseline number of acres historically irrigated within the District, which is necessary in order to limit the expansion of irrigated acres and ensure an adequate supply of ground water. And the Act authorizes this limitation. It provides that within a management area, an NRD may "limit or prevent the expansion of irrigated acres or otherwise limit or prevent increases in the consumptive use of ground water withdrawals from water wells used for irrigation or other beneficial purposes."[74]

And when evaluated in the context of the District's other rules, the look-back provision's 1999-to-2008 window is not

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[71] *Id.* at 693, 515 N.W.2d at 410 (quoting *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990)).

[72] § 46-702.

[73] *Id.*

[74] § 46-739(1)(f).

arbitrary. It appears reasonable for the window to end in 2008, because after 2008, there were limitations in place on New Groundwater Irrigated Acres in the District. The District's cease-and-desist notification letter stated that the District imposed a stay on New Irrigated Acres in 2008. Lingenfelter appeared to allude to this 2008 stay in his testimony regarding his 2009 meeting with a District employee. He said, "[W]ell, they came out with a moratorium later that year in '08." Although we have not found any other information in the record regarding that 2008 stay, the record does reflect other limitations. The District's rule 13, which forbids New Groundwater Irrigated Acres in the Hydrologically Connected Area without a variance, appears to have been adopted in 2009. And rule 15 also prohibits New Groundwater Irrigated Acres, although we cannot determine when that rule was adopted.

Furthermore, rule 14 does not necessarily exclude those who began irrigating after 2008. It allows certification of acres that were developed after 2007, pursuant to approval granted by either the Board or the Department. It appears that the "approval" referenced in this provision refers to a variance or some other form of permission to irrigate. Therefore, rule 14 excludes only those who did so without permission, in violation of limitations apparently already in place.

We cannot say that the look-back provision is so egregious and irrational that it exceeds standards of inadvertence and mere errors of law. To the contrary, it appears to be a reasonable means of conserving ground water, a resource essential to the general welfare. Because the look-back provision is not arbitrary or capricious in the constitutional sense, the district court did not err in rejecting Lingenfelter's due process challenge.

(ii) Equal Protection

Lingenfelter claims that the look-back provision violates his right to equal protection because it divides landowners

"into winners and losers based upon an arbitrary calendar date."[75] He concedes that he is not "'entitled to unlimited and unfettered use'" of his wells.[76] Rather, he argues that "[t]his is a suspect classification not rationally related to a legitimate governmental purpose."[77]

[13-15] The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.[78] The Equal Protection Clause requires the government to treat similarly situated people alike.[79] It does not forbid classifications; it simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.[80]

[16-18] If a legislative classification involves either a suspect class or a fundamental right, courts will analyze the classification with strict scrutiny.[81] A suspect class is one that has been saddled with such disabilities or subjected to such a history of purposeful unequal treatment as to command extraordinary protection from the majoritarian political process.[82] Lingenfelter complains of a suspect *classification*, but he does not contend that he is a member of a suspect class. When a classification created by state action does not jeopardize the exercise of a fundamental right or categorize because of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.[83]

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[75] Brief for appellant at 30.

[76] *Id.*

[77] *Id.*

[78] *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 739 N.W.2d 742 (2007).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[19,20] Under the rational basis test, whether an equal protection claim challenges a statute or some other government act or decision, the burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification.[84] Under this most relaxed and tolerant form of judicial scrutiny of equal protection claims, the Equal Protection Clause is satisfied as long as (1) there is a plausible policy reason for the classification, (2) the legislative facts on which the classification is based may rationally have been considered to be true by the governmental decisionmaker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.[85]

Here, the class of irrigators who began irrigating after 2008 is not a suspect class. There is no evidence that the class of irrigators has been saddled with disabilities or otherwise subjected to a history of purposeful unequal treatment. Therefore, the rational basis applies. And Lingenfelter concedes as much, arguing that the classification of the look-back provision is "the essence of an action not rationally related to a governmental interest."[86]

The rational basis test is satisfied here. Applying the three-part analysis set out above, we first consider the policy reason for the classification. It appears that the policy reason for the look-back provision is to establish a baseline of acres historically irrigated within the District, in order to conserve ground water. Conserving ground water is a plausible policy reason for the classification.

Next, we consider whether the legislative facts on which the classification is based may rationally have been considered to be true. Because the record does not contain information

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[84] *Id.*

[85] *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

[86] Brief for appellant at 30-31.

regarding the adoption of the look-back provision, we cannot recite the specific legislative facts relied upon by the District. But it seems clear the underlying legislative fact is that there is a need to conserve ground water to ensure an adequate supply. The District could have rationally considered this to be true when it adopted the look-back provision.

Finally, we must consider whether the relationship of the classification to its goal is so attenuated as to render the distinction arbitrary or irrational. It is not. In order to conserve ground water, the District needed to establish a baseline number of acres irrigated. The look-back provision is rationally related to the goal of conserving ground water. Thus, the district court correctly determined that rule 14's look-back provision does not violate Lingenfelter's right to equal protection.

(c) As-Applied Challenge

In this section, Lingenfelter claims that the District's decision to issue the cease-and-desist order was unconstitutional. He argues that he did not receive equal protection of the law, "because he was issued the Cease and Desist Order because the Dunaway [F]arm did not contain 'certified' acres or '[H]istorically [I]rrigated [A]cres' when meanwhile, the certification process had not even begun and there were not any acres that had been 'certified' in the entire district."[87] He also argues that the District's "self-perceived authority to make whatever rules they so choose is fundamentally unfair."[88]

We first address Lingenfelter's equal protection claim. To the extent that it rests on his claim that the District issued the cease-and-desist order because he had not yet certified his acres, it fails. We have already determined that the district court correctly concluded that the District issued the order because Dunaway Farm did not constitute Historically Irrigated Acres and Lingenfelter had not obtained a variance.

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[87] *Id.* at 34.

[88] *Id.*

And to the extent it rests on the fact that the District issued the order because Dunaway Farm did not contain Historically Irrigated Acres, it fails to state a claim. The Equal Protection Clause requires the government to treat similarly situated people alike. Lingenfelter does not allege that he was treated differently from any other person or class of persons with New Groundwater Irrigated Acres. And at the hearing, counsel for the District testified that the District has issued cease-and-desist orders two or three times in similar circumstances. Without such an allegation, Lingenfelter's equal protection argument fails.

Lingenfelter's claim that the District lacked authority to adopt its rules limiting the expansion of irrigated acres also clearly fails. The Act authorizes NRDs to establish management areas within their jurisdictions. The District established one that covers the entire area of the District, a decision Lingenfelter does not challenge. And the Act requires districts to take specific steps to conserve ground water within management areas—§ 46-739(1) says that the NRD "shall by order adopt one or more" of the authorized controls. One of the authorized controls provides that a district "may limit or prevent the expansion of irrigated acres or otherwise limit or prevent increases in the consumptive use of ground water withdrawals from water wells used for irrigation or other beneficial purposes."[89] Clearly, the District had the authority to prevent Lingenfelter from expanding irrigated acres on Dunaway Farm.

(d) Evidence Not in Record

Next, Lingenfelter complains that the district court relied upon evidence not in the record when it determined that the look-back provision is constitutional. He points to one sentence from the district court's order, where it stated: "Based on the effects of recent periods of drought on the availability

[89] § 46-739(1)(f).

of ground water for irrigation, the Court concludes that using a ten-year 'look back' period is not arbitrary and capricious." Lingenfelter argues that "there is simply no evidence from the public hearing regarding either: (1) recent periods of drought or (2) impact of drought on the availability of groundwater for irrigation in the [District]."[90] He argues that we should reverse the district court because of this "harmful error."[91]

First, we note that although we have not found any explicit discussion about recent periods of drought in the record from the hearing, it does contain ample references to the limited availability of ground water in Nebraska. For instance, the record contains a document labeled "Staff recommendations" from the "Information, Planning and Programs Subcommittee" which recommends that the Board "[a]llow no new groundwater irrigated acres" in 2014 because of concerns about overpumping and its "cumulative effect on groundwater declines." That document also states: "The problems we experienced last year are likely more widespread than our information shows. We received calls from domestic well owners with well interference problems, but irrigators and well drillers have indicated to us that more areas experienced groundwater declines than were reported to the District." And the District's rules 13 and 15 prohibit the creation of any New Groundwater Irrigated Acres without a variance. The clear tenor of these rules is that there is a serious need to conserve water within the District because ground water is declining. We also note that the Act itself specifically references "the impact of extended drought on areas of the state" in its "Declaration of intent and purpose" provision.[92]

Second, assuming, without deciding, that the district court erred by referencing periods of drought not explicitly discussed

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[90] Brief for appellant at 33.

[91] *Id.*

[92] § 46-702.

in the record, the error was harmless. We review constitutional questions de novo on the record, and we have independently concluded that the look-back provision is constitutional. Error that does not prejudice the party does not provide grounds for relief on appeal.[93] There is no reversible error here.

(e) Adoption of Rule 14

Finally, Lingenfelter points out that he challenges the look-back provision itself, not the process by which it was adopted, and he complains that "the District Court misunderstood this argument as being aimed at 'the [District's] actual adoption of Rule 14.'"[94] He argues that "the District Court erred in finding that there was no record to challenge the adoption of Rule 14, and must be reversed on this point."[95]

There are no grounds for reversal here. Even if the district court did misunderstand Lingenfelter's argument, it went on to address his constitutional challenges to rule 14. Lingenfelter does not explain how this supposed error prejudiced him. This argument fails.

VI. CONCLUSION

We find no errors on the record in the district court's judicial review of the District's order. And the district court did not err in granting the District's motion for summary judgment as to Lingenfelter's request for a declaratory judgment. Accordingly, we affirm the decision of the district court.

Affirmed.

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[93] *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

[94] Brief for appellant at 36.

[95] *Id.*

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

Elaine Cisneros, appellee and cross-appellant, v. Gregory G. Graham, appellant and cross-appellee.

881 N.W.2d 878

Filed July 8, 2016. No. S-15-392.

1. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.
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. ____: ____. 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. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
5. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
6. **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.
7. ____. 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.
8. **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.

9. ____: ____. 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.
10. **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.
11. ____: ____. 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.
12. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
13. **Ratification.** Whether there has been a ratification is ultimately and ordinarily a question of fact.
14. **Ratification: Proof.** Because ratification is an affirmative defense, the burden of proving ratification rests on the party asserting it.
15. **Ratification: Agents.** Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence or inaction.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed.

Norman Denenberg for appellant.

Edward W. Hasenjager for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

In this case, we must determine the propriety of the actions of an agent whose power of attorney is subject to the Nebraska Uniform Power of Attorney Act, Neb. Rev. Stat. § 30-4001

et seq. (Cum. Supp. 2014) (Nebraska UPOAA). On summary judgment, the district court for Douglas County found that the agent, Gregory G. Graham (Graham), whose principal was his aunt Hilda Graham (Hilda), committed constructive fraud. The district court entered judgment in favor of Elaine Cisneros in an amount she would have received as beneficiary under a certain certificate of deposit and granted other relief. The district court later denied Graham's motion to alter or amend the judgment. We affirm.

STATEMENT OF FACTS

In June 2013, Hilda was diagnosed with terminal pancreatic cancer and "was given only a few months to live." Hilda was the owner of a certificate of deposit (CD) in the amount of $59,665.27 which she opened on December 22, 2008. From the time Hilda opened the CD until it was cashed out, Hilda changed the payable-on-death beneficiary a number of times. On July 25, 2013, Hilda changed the beneficiary to Cisneros, and Cisneros was the named beneficiary when the CD was subsequently cashed, as explained below.

On July 16, 2013, Hilda appointed Graham as her power of attorney. Graham was the nephew of Hilda's deceased husband. The power of attorney provided:

> A. POWER OF ATTO[R]NEY FOR HANDLING PRINCIPAL'S BUSINESS AFFAIRS AND MANAGING PRINCIPAL'S ASSETS: Without in any way limiting or restricting the generality of the foregoing, but in furtherance thereof, and in partial enumeration only, of the powers thereby vested in my said Attorney-in-Fact, I hereby give and grant unto my said Attorney-in-Fact full power and authority, from time to time, for me and in my name, place and stead, and for my use, and in my said Attorney-in-Fact's sole discretion:
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> . . . .
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> 4. To deposit or withdraw any money or credits in any bank or savings and loan company or any depository

> or investment or financial business of any kind, and to sign, endorse, execute or renew any checks, withdrawals, deposits, promissory notes, bonds, bills of exchange or evidences of indebtedness and to waive notice of demand and protest and to transact and perform any and all other banking or financial business and affairs of any kind whatsoever; including the power to change the beneficiaries of any financial investments.
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> . . . .
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> 6. To purchase, sell, transfer, assign, hypothecate, redeem, exchange, waive priority, or deal in any way with any notes, mortgages, stocks, bonds or securities or investments of any kind or nature whatsoever, and to receive and receipt for any and all income or dividends therefrom and to vote or to execute proxies for voting any and all stock.

While she was alive, Hilda had a checking account, and on August 12, 2013, Graham and Hilda signed an account agreement which designated Graham as the co-owner of that account with a right of survivorship. On August 19, the checking account had a balance of $20,858.95. On August 22, Graham used the power of attorney to cash the CD and deposit the proceeds into the checking account. On August 22, the checking account had a balance of $80,524.22. Cisneros was the named beneficiary of the CD when it was cashed. On September 5, Hilda died at home. When Hilda died, the balance in the checking account became Graham's by operation of law.

On January 15, 2014, Cisneros filed her complaint alleging that Graham's actions of cashing the CD and depositing the proceeds into the checking account "were unlawful" and that he "converted the proceeds of the CD to his own use and benefit causing damage to [Cisneros] in the amount of $60,000.00 with interest payable under the CD." Cisneros sought damages, interest, attorney fees, and costs. On July 8, Cisneros filed a motion for summary judgment. A hearing was held

at which evidence was received. The parties proceeded on a theory of constructive fraud.

Graham testified in his deposition that Hilda had orally instructed him to cash the CD and deposit the proceeds into the joint checking account in case more money was needed to pay for her care outside the home. The evidence showed that Hilda's hospice care was paid for by Medicare or supplemental insurance. A home care business began caring for Hilda at her home in the latter part of August 2013 for the several last days of Hilda's life. The services provided by the home care business were not paid for by Medicare, but instead had to be paid for by Hilda. On September 15, Graham paid $1,464 from the checking account to the home care business. None of the proceeds from the CD were needed to pay Hilda's bills.

In an affidavit that was received into evidence, Graham stated that on the same day that he deposited the proceeds of the CD into the joint checking account, Graham went to Hilda's house, told her about the transaction, and gave her the receipt for the transaction. Graham's affidavit stated that "[a]fter Hilda . . . knew the transaction was completed, she was more calm, and less frustrated and agitated." Graham's affidavit further stated that the deposit of the proceeds of the CD was recorded in Hilda's check register in Hilda's handwriting. Although Graham offered the check register as an exhibit, it was not received into evidence at the hearing on the motion for summary judgment.

On January 29, 2015, the district court filed an order in which it granted Cisneros' motion for summary judgment. The court noted that the Nebraska UPOAA became effective on January 1, 2013, and that because the power of attorney was executed on July 16, the Nebraska UPOAA applied to this case. The court determined that relevant pre-2013 case law, such as *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008), and *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003), was still good law because their principles were consistent with the Nebraska UPOAA.

The district court determined that § 30-4024(2) applied. Section 30-4024(2) provides:

> Notwithstanding a grant of authority to do an act described in subsection (1) of this section, unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or issue of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

The court stated that because Graham was the nephew or stepnephew of Hilda, he was not an "'ancestor, spouse, or issue'" of Hilda, and that therefore, pursuant to § 30-4024(2), Graham was required to have express authority under the power of attorney to give himself an interest in Hilda's property. The court determined that the power of attorney did not contain such express authority. Accordingly, the court determined that Graham's actions were fraudulent under a theory of constructive fraud, and it granted Cisneros' motion for summary judgment. The court awarded Cisneros $59,665.27, prejudgment interest, and costs, but it denied Cisneros' request for attorney fees.

On February 2, 2015, Graham filed a "Motion for New Trial," which the district court treated as a motion to alter or amend judgment. Finding no error in its summary judgment ruling, the court denied Graham's motion on April 8.

Graham appeals. Cisneros cross-appeals.

ASSIGNMENTS OF ERROR

Graham generally claims, restated, that the district court erred when it granted summary judgment in favor of Cisneros and denied his motion to alter or amend the judgment. Graham specifically claims that the court erred when it (1) failed to determine that Graham had express authority granted in the power of attorney to cash the CD and deposit the proceeds

into the checking account he co-owned with Hilda, (2) failed to determine that § 30-4014(4) allowed a benefit to himself as agent, and (3) failed to determine that his actions were ratified by Hilda, which ratification made the deposit transaction legal and binding.

On cross-appeal, Cisneros claims that the district court erred when it did not award attorney fees to her under § 30-4017.

STANDARDS OF REVIEW

[1] An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion. *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014).

[2,3] 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*, 293 Neb. 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*.

[4] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court. *In re Interest of Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016).

[5] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (2013).

ANALYSIS

Graham appeals from the district court's ruling denying his motion to alter or amend the judgment. Because our

decision ultimately depends on the correctness of the district court's grant of the underlying summary judgment, we discuss the case based on legal standards applicable to summary judgment.

Appeal: Graham Lacked Authority to Deposit the Proceeds From the CD Into the Checking Account He Co-Owned With Hilda.

Graham generally contends that the district court erred when it granted Cisneros' motion for summary judgment based upon its determination that Graham committed constructive fraud when he cashed the CD and deposited the proceeds into the checking account with right of survivorship that he co-owned with Hilda. Graham specifically argues that he did not commit constructive fraud because pursuant the power of attorney, he had the authority to cash the CD and to deposit the proceeds into the checking account. We find no merit to Graham's contentions.

[6,7] 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*.

[8,9] 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*.

With respect to constructive fraud, prior to the enactment of the Nebraska UPOAA, we stated:

> Constructive fraud generally arises from a breach of duty arising out of a fiduciary or confidential relationship. . . . Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud-feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. . . . Constructive fraud is implied by law from the nature of the transaction itself. . . . The existence or nonexistence of an actual purpose to defraud does not enter as an essential factor in determining the question; the law regards the transaction as fraudulent per se. . . . Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud.

Crosby v. Luehrs, 266 Neb. 827, 835-36, 669 N.W.2d 635, 644-45 (2003) (citations omitted).

With respect to fraud in the context of a power of attorney, we have held:

> "[A] prima facie case of fraud is established if the plaintiff shows that the defendant held the principal's power of attorney and that the defendant, using the power of attorney, made a gift to himself or herself. . . . The burden of going forward under such circumstances falls upon the defendant to establish by clear and convincing evidence that the transaction was made pursuant to power expressly granted in the power of attorney document and made pursuant to the clear intent of the donor."

Litherland v. Jurgens, 291 Neb. 775, 782-83, 869 N.W.2d 92, 97 (2015), quoting *Crosby v. Luehrs, supra*.

In this case, the undisputed evidence shows that Graham was made Hilda's attorney in fact by a power of attorney dated July 16, 2013. The evidence also shows that on August 22, Graham purportedly using the power of attorney cashed the CD and deposited the proceeds into a checking account with right of survivorship that he co-owned with Hilda. By depositing the proceeds in this checking account, Graham created in himself an interest in Hilda's property.

In order to determine whether Graham had the authority as Hilda's attorney in fact to create in himself an interest in Hilda's property, we must look to the applicable law and the language of the power of attorney. With respect to the law that governs the current case, the Legislature recently enacted the Nebraska UPOAA, which was modeled after the Uniform Power of Attorney Act (2006) (Uniform POAA), § 5B-101 et seq., 8 (part III) U.L.A. 290 (2013). The drafters of the Uniform POAA stated that the act "'provides a simple way for people to deal with their property by providing a power of attorney in case of future incapacity. While chiefly a set of default rules, the [Uniform POAA] also contains safeguards for the protection of an incapacitated principal.'" Ronald R. Volkmer, *Nebraska's Real Property Transfer on Death Act and Power of Attorney Act: A New Era Begins*, 46 Creighton L. Rev. 499, 505 (2013).

The Nebraska UPOAA became effective on January 1, 2013, and § 30-4045(1) of the Nebraska UPOAA states that "[t]he act applies to a power of attorney created before, on, or after January 1, 2013." The power of attorney at issue in this case is dated July 16, 2013, and therefore, the Nebraska UPOAA applies to this case. We note Graham contends that any case law regarding powers of attorney which was decided prior to the effective date of the Nebraska UPOAA has been rendered irrelevant by the enactment of the Nebraska UPOAA and that therefore, such case law does not apply to this case. We do

not agree with Graham's complete rejection of prior case law, and instead we determine that to the extent such case law is consistent with the Nebraska UPOAA, prior case law is still relevant and may be considered in our analysis.

Pursuant to the Nebraska UPOAA, "power of attorney" is defined as "a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used." § 30-4002(8). "Principal" is defined as "an individual who grants authority to an agent in a power of attorney." § 30-4002(10). "Agent" is defined in part as "a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney in fact, or otherwise." § 30-4002(1). "Property" is defined as "anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest or right therein." § 30-4002(11).

The law recognizes the "manifold opportunities and temptations for self-dealing that are opened up for persons holding general powers of attorney." *Estate of Casey v. C.I.R.*, 948 F.2d 895, 898 (4th Cir. 1991). Thus, with respect to an agent giving himself or herself an interest in the principal's property and to safeguard the principal, § 30-4024(2) of the Nebraska UPOAA provides in part that

> unless the power of attorney otherwise provides, an agent that is not an ancestor, spouse, or issue of the principal, may not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.

See, also, § 30-4041 (providing form reflecting power of attorney statutes).

[10,11] 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. *In re Estate of Alberts*, 293 Neb. 1, 875 N.W.2d 427 (2016). 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. *Id*.

The plain language of § 30-4024(2) provides that in order for an agent who is not the "ancestor, spouse, or issue of the principal" to use the power of attorney to create in himself or herself an interest in the principal's property, the agent must have express authority from the principal in the power of attorney. If an agent who is not the "ancestor, spouse, or issue of the principal" does not have express authority from the principal in the power of attorney, then, pursuant to § 30-4024(2), such an agent does not have the authority to create in the agent an interest in the principal's property. In other words, § 30-4024(2)

> distinguishes between grants of power to an agent who is an ancestor, the spouse, or issue of the principal versus an agent who is *not* in those categories. Under subsection (2) [of § 30-4024], the agent who is *not* in the category of ancestor, spouse, or issue must be granted explicit authority to create in the agent, or in a person the agent is legally obligated to support, an interest in the principal's property.

Ronald R. Volkmer, *Nebraska's Real Property Transfer on Death Act and Power of Attorney Act: A New Era Begins*, 46 Creighton L. Rev. 499, 554 (2013).

Section 30-4024(2) of the Nebraska UPOAA is almost identical to § 5B-201(b) of the Uniform POAA, with the main difference being that § 5B-201(b) uses the word "descendant" whereas § 30-4024(2) uses the word "issue." The comment to § 5B-201 of the Uniform POAA reinforces that an agent who is not an ancestor, spouse, or descendent may not make a gift to the agent without express authority from the principal in the power of attorney. The comment provides in part:

> [Section 5B-201(b) (equating to § 30-4024(2))] contains an additional safeguard for the principal. It establishes as a default rule that an agent who is not an ancestor, spouse, or descendant of the principal may not exercise authority to create in the agent or in an individual the agent is legally obligated to support, an interest in the principal's property. For example, a non-relative agent with gift making authority could not make a gift to the agent or a dependent of the agent without the principal's express authority in the power of attorney.

Uniform POAA § 5B-201, comment, 8 (part III) U.L.A. at 320 (2013).

In this case, we are only considering the actions of an agent, Graham, who is not the ancestor, spouse, or issue of the principal, Hilda. With respect to agents who are not the ancestor, spouse, or issue of the principal, we believe § 30-4024(2) is in accord with our case law regarding self-dealing decided prior to the effective date of the Nebraska UPOAA. In this regard, in *Archbold v. Reifenrath*, 274 Neb. 894, 901, 744 N.W.2d 701, 707 (2008), we stated that

> no gift may be made by an attorney in fact to himself or herself unless the power to make such a gift is expressly granted in the instrument and there is shown a clear intent on the part of the principal to make such a gift. Thus, absent an express intention, an agent may not use his or her position for the agent's or a third party's benefit in a substantially gratuitous transfer.

See, also, *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003); *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989) (stating that power of attorney instrument must explicitly authorize attorney in fact to make gifts to himself on behalf of principal). See, also, *Townsend v. U.S.*, 889 F. Supp. 369 (D. Neb. 1995). The statement in *Archbold* quoted above to the effect that a gift made by an agent to himself or herself must be expressly authorized in the instrument is consistent with § 30-4024(2) with respect to agents who are

not the ancestor, spouse, or issue of the principal, and we therefore find this case law to be relevant and applicable to this case.

In this case, as stated above, when Graham deposited the proceeds of the CD into the checking account with right of survivorship that he co-owned with Hilda, he created an interest in himself in Hilda's property. It is undisputed that Graham is not the "ancestor, spouse, or issue" of Hilda. See § 30-4024(2). Therefore, pursuant to § 30-4024(2), Graham needed express authority from Hilda in the power of attorney to deposit the proceeds of the CD into the checking account. We find no such express authority.

The potentially relevant portions of the power of attorney provided:

> A. POWER OF ATTO[R]NEY FOR HANDLING PRINCIPAL'S BUSINESS AFFAIRS AND MANAGING PRINCIPAL'S ASSETS: Without in any way limiting or restricting the generality of the foregoing, but in furtherance thereof, and in partial enumeration only, of the powers thereby vested in my said Attorney-in-Fact, I hereby give and grant unto my said Attorney-in-Fact full power and authority, from time to time, for me and in my name, place and stead, and for my use, and in my said Attorney-in-Fact's sole discretion:
>
> . . . .
>
> 4. To deposit or withdraw any money or credits in any bank or savings and loan company or any depository or investment or financial business of any kind, and to sign, endorse, execute or renew any checks, withdrawals, deposits, promissory notes, bonds, bills of exchange or evidences of indebtedness and to waive notice of demand and protest and to transact and perform any and all other banking or financial business and affairs of any kind whatsoever; including the power to change the beneficiaries of any financial investments.
>
> . . . .

> 6. To purchase, sell, transfer, assign, hypothecate, redeem, exchange, waive priority, or deal in any way with any notes, mortgages, stocks, bonds or securities or investments of any kind or nature whatsoever, and to receive and receipt for any and all income or dividends therefrom and to vote or to execute proxies for voting any and all stock.

Powers of attorney are strictly construed. See *Fletcher v. Mathew, supra*. Nothing in these sections of the power of attorney, or in any other portion of the power of attorney, provides Graham with the express authority to give himself an interest in Hilda's property. We determine that because such authority is not contained in the power of attorney, and by application of the plain language of § 30-4024(2), Graham did not have authority to give himself an interest in Hilda's property, and specifically, he did not have the authority to deposit the proceeds of the CD into the checking account with right of survivorship that he co-owned with Hilda.

Graham directs our attention to another provision of the Nebraska UPOAA, contending that under § 30-4014(4) of the Nebraska UPOAA, he cannot be found liable for having deposited the proceeds of the CD into the checking account, and that therefore, he was effectively authorized to do so. We do not agree.

Section 30-4014(4) of the Nebraska UPOAA provides: "An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal."

Section 30-4014(4) of the Nebraska UPOAA is identical to § 5B-114(d) of the Uniform POAA. This broad provision is explained in the comments to the Uniform POAA. According to the comment to § 5B-114 of the Uniform POAA, "[t]his position is a departure from the traditional common law duty of loyalty which required an agent to act solely for the benefit

of the principal." Uniform POAA § 5B-114, comment, 8 (part III) U.L.A. at 306 (2013). The comment notes that certain state statutes have moved away from a "sole interest" test and recognize that "loyalty to the principal can be compatible with an incidental benefit to the agent." *Id*. Thus, it has been observed that it is apparent that the drafters "justified [their] decision to favor a 'best interest' test over a 'sole interest' test on the ground that most agents under powers of attorney are family members 'who have an inherent conflict of interest with the principal.'" Ronald R. Volkmer, *Nebraska's Real Property Transfer on Death Act and Power of Attorney Act: A New Era Begins*, 46 Creighton L. Rev. 499, 547 (2013).

However, it has also been stated that it should be recognized that

> not all self-dealing transactions fit into the same category. . . . [T]he specter of the agent making gifts to himself or herself raises special concerns that [are] highlighted by other sections of the [Nebraska UPOAA]. [For example, t]here is a difference in degree when comparing a situation in which the agent personally benefits in a contract involving self-dealing with a situation in which the agent personally benefits by receiving a gift of the principal's property. It would seem that subsection (4) [of § 30-4014], when considered in the context of other sections of the [Nebraska UPOAA], although referring to an agent "benefitting" from a relationship with the principal, strikes a proper balance between different types of self-dealing transactions under which the agent "benefits."

Volkmer, *supra* at 547.

We agree with the foregoing reading of the Nebraska UPOAA. Graham's action of depositing the proceeds of the CD into a checking account with right of survivorship he co-owned with Hilda is a situation in which Graham personally benefited by receiving a gift of Hilda's property and is the type of self-dealing prohibited by the Nebraska UPOAA and not permitted under the power of attorney in question.

See § 30-4024(2). And, the action taken by Graham is not the type of permitted situation in which an agent would stand to personally benefit only incidentally from an action taken that is in the best interests of the principal. See § 30-4014(4).

[12] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal.*, 290 Neb. 726, 861 N.W.2d 718 (2015). In reading § 30-4014(4) in conjunction with § 30-4024(2), we determine that § 30-4014(4) was not intended to create an exception to the clear language of § 30-4024(2), which provides that an agent who is not the ancestor, spouse, or issue of the principal must have express authority from the principal in the power of attorney in order to create in himself or herself an interest in the principal's property. Graham's argument to the contrary is unavailing.

Because the power of attorney did not provide Graham with express authority to deposit the proceeds of the CD into a checking account with right of survivorship he co-owned with Hilda, we determine that Cisneros demonstrated that she was entitled to judgment as a matter of law, and the burden shifted to Graham to produce evidence preventing judgment.

Appeal: Graham's Actions Were Not Ratified by Hilda.

Graham claims that even if he lacked authority under the power of attorney to deposit the proceeds of the CD into the checking account, Hilda nevertheless later ratified his action, and that thus, the district court erred when it granted Cisneros' motion for summary judgment. Even giving Graham the favorable inferences from the evidence, we find no merit to this assignment of error.

[13,14] Describing the concept of ratification, 1 Restatement (Third) of Agency § 4.01 at 304 (2006) provides in part:

> (1) Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.
>
> (2) A person ratifies an act by
>
> (a) manifesting assent that the act shall affect the person's legal relations, or
>
> (b) conduct that justifies a reasonable assumption that the person so consents.

See, also, *Elting v. Elting*, 288 Neb. 404, 849 N.W.2d 444 (2014). We have stated that whether there has been a ratification is ultimately and ordinarily a question of fact. *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 825 N.W.2d 779 (2013). Because ratification is an affirmative defense, the burden of proving ratification rests on the party asserting it. See *id*.

As an initial matter, we must determine whether ratification is an available defense after adoption of the Nebraska UPOAA against a claim that, under the Nebraska UPOAA and the document at issue, the agent exceeded his or her authority. Generally, "[t]he policy against permitting subversion of the limits on the power of attorney counsels against permitting persons with a power of attorney to invoke other legal principles to exercise powers that are not available under the power of attorney." *Estate of Swanson v. U.S.*, 10 Fed. Appx. 833, 836 (Fed. Cir. 2001). It is for this reason that "'it is assumed that [a document conveying a power of attorney] represents the entire understanding of the parties.'" *Id*., quoting Restatement (Second) of Agency § 34, comment *h*. (1958). Nevertheless, the case law permits ratification of an act beyond the scope of the power of attorney, but, as discussed below, the party asserting ratification must make a strong showing. We see nothing in the Nebraska UPOAA which is inconsistent with the continuation of this principle.

[15] Generally, ratification of an agent's unauthorized acts may be made by overt action or inferred from silence or inaction. See *Brook Valley Ltd. Part. v. Mutual of Omaha*

Bank, supra. However, the Restatement (Third) of Agency, *supra*, § 4.01, comment *e*. at 308, provides in part that "[i]f formalities are required for the authorization of an act, the same formalities are required for ratification. In particular, if written authorization would be necessary to bind the principal to a transaction, a writing is necessary to bind the principal to a ratification." It has been stated that ratification "must be by an act of the character required for [the] original authority." *Judd v. Arnold*, 31 Minn. 430, 432, 18 N.W. 151, 151 (1884). Further, it has been noted that "[a] subsequent ratification is, of course, equivalent to a prior authority. But the rule is that the ratification of an unauthorized act must be of the particular mode or form necessary to confer authority to perform it in the first place." *Dunbar v. Farnum & Wife*, 109 Vt. 313, 319, 196 A. 237, 239 (1937). See, also, *Matter of City & County Bank*, 856 S.W.2d 137 (Tenn. App. 1992); *Fulton Co. Fis. Ct. v. Southern Bell T. & T. Co.*, 289 Ky. 159, 158 S.W.2d 437 (1942); *Stammelman v. Interstate Co.*, 112 N.J.L. 342, 170 A. 595 (1934). And the ratification must demonstrate a deliberate choice to be bound. See *Dunbar v. Farnum & Wife, supra*.

It has been stated that "if a statute requires written authority for a particular transaction, oral ratification will not validate an unauthorized act by the agent." 12 Samuel Williston, A Treatise on the Law of Contracts § 35:23 at 412-13 (Richard A. Lord ed., 4th ed. 2012). The case law recognizes this principle, particularly in matters involving real estate where a statute of frauds requires a writing. See, e.g., *Gresser v. Hotzler*, 604 N.W.2d 379, 385-86 (Minn. App. 2000) (determining that because statute of frauds required written authorization for agent to enter into purchase agreement, plaintiff could not claim ratification through conduct or oral statements, stating that "ratification 'must be by an act of the character required for the original authority'" and that "[w]hen the original authorization must be in writing, the ratification must be in writing as well"); *Turnipseed v. Jaje*, 267 Ga. 320, 324, 477

S.E.2d 101, 104 (1996) (stating that "ratification of a real estate contract which was executed by an unauthorized agent must be in writing" and that "[a]n oral ratification will not suffice"). The principle has been applied to the purchase of a water system appurtenant to real estate. See *Dunbar v. Farnum & Wife, supra*. In this case, pursuant to these principles, since Graham's authority to cash the CD and deposit the proceeds was required under a statute, § 30-4024(2), to be expressly in writing, Hilda's ratification was also required to be in a writing.

At the hearing on Cisneros' motion for summary judgment, Graham offered and the court received Graham's affidavit. In his affidavit, Graham stated that on the day he cashed the CD and deposited the proceeds into the checking account, he went to Hilda's house and gave her the receipt for the transaction. He further stated that after Hilda "knew the transaction was completed, she was more calm, and less frustrated and agitated." Graham's affidavit also stated that the deposit of the proceeds was recorded in the check register in Hilda's handwriting, although the check register was not admitted in evidence. Although there is no suggestion that any other evidence could support a ratification, on appeal, Graham asserts that the summary judgment evidence creates a material issue of fact as to whether Hilda ratified Graham's actions.

Even viewing the evidence in the light most favorable to Graham and giving Graham the benefit of all reasonable inferences deducible from the evidence, as we must in reviewing a summary judgment, see *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016), we determine that Hilda's acts as described by Graham in his affidavit fall short of a sufficient ratification in this circumstance. As stated above, because Graham's authority was required to be in a writing pursuant to § 30-4024(2), a ratification by Hilda was required to be in a writing. Hilda's reaction, as described by Graham in his affidavit, does not show Hilda's express approval of Graham's

actions in a writing. We determine as a matter of law that Graham failed to present evidence of a material issue of fact as to whether Hilda ratified Graham's actions, and thus, we determine that the district court did not err when it granted summary judgment in favor of Cisneros.

Cross-Appeal: The District Court Did Not Err When It Denied an Award of Attorney Fees to Cisneros.

On cross-appeal, Cisneros claims that the district court was required to grant her attorney fees under § 30-4017 of the Nebraska UPOAA and erred when it did not do so. We find no merit to Cisneros' assignment of error on cross-appeal.

Section 30-4017(2) of the Nebraska UPOAA allows the court to award attorney fees "as justice may require." Section 30-4017 states:

> An agent that violates the [Nebraska UPOAA] is liable to the principal or the principal's successors in interest for the amount required to:
>
> (1) Restore the value of the principal's property to what it would have been had the violation not occurred; and
>
> (2) In a judicial proceeding involving the administration of a power of attorney, the court, as justice may require, may award costs and expenses, including reasonable attorney's fees to any party, to be paid by another party.

Section 30-4017(2) of the Nebraska UPOAA "departs from the Uniform POAA by adding" that an agent may be held liable for attorney fees as ordered by the court "'as justice may require.'" Ronald R. Volkmer, *Nebraska's Real Property Transfer on Death Act and Power of Attorney Act: A New Era Begins*, 46 Creighton L. Rev. 499, 550 (2013). We believe this departure is an indication that the Legislature intended that the court have discretion in awarding costs and expenses, including attorney fees under § 30-4017(2).

Failing a mandatory award of attorney fees under § 30-4017, Cisneros next looks to Neb. Rev. Stat. § 25-824(4) (Reissue 2008), which provides that "[t]he court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous . . . ."

Cisneros claims attorney fees under § 25-824. With respect to an award of attorney fees pursuant to § 25-824 and Neb. Rev. Stat. § 25-824.01 (Reissue 2008), we have stated:

> Attorney fees can be awarded when a party brings a frivolous action that is without rational argument based on law and evidence. We have previously explained that the term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous. Attorney fees for a bad faith action under § 25-824 may also be awarded when the action is filed for purposes of delay or harassment. We have also said that relitigating the same issue between the same parties may amount to bad faith. Finally, any doubt whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question.

White v. Kohout, 286 Neb. 700, 709-10, 839 N.W.2d 252, 260-61 (2013). Thus, in *White*, we recognized that the attorney fee provision in § 25-824 is discretionary. Cisneros asserts that Graham's defense in this case is frivolous and that therefore, under § 25-824, the district court abused its discretion when it denied her request for attorney fees.

Because discretion is involved, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. See *White v. Kohout, supra*. This case presented the district court with the necessity to construe the new Nebraska UPOAA, and the position of Graham, although unavailing, was neither unreasonable nor frivolous. The district court did not abuse its discretion when it denied Cisneros' motion for attorney fees.

CONCLUSION

We determine that the district court did not err when it determined that Graham lacked authority under the power of attorney to cash the CD and deposit the proceeds into a checking account with right of survivorship he co-owned with Hilda. We further determine that there was no genuine issue of material fact as to whether Hilda ratified Graham's actions. Accordingly, we determine that the district court did not err when it granted Cisneros' motion for summary judgment and, thereafter, denied Graham's motion to alter or amend the judgment. With respect to Cisneros' cross-appeal, we determine that the district court did not abuse its discretion when it denied an award of attorney fees to Cisneros.

Affirmed.

Stacy, J., participating on briefs.

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

Dean P. Martin, appellee, v. Rhonda J. Martin, now known as Rhonda J. Brown, appellant.

881 N.W.2d 174

Filed July 8, 2016. No. S-15-672.

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 (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is 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: Presumptions: Proof.** Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant 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: Jurisdiction: Divorce: Contempt.** A court's continuing jurisdiction over a dissolution decree includes the power to provide equitable relief in a contempt proceeding.
7. **Courts: Equity.** Where a situation exists that 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. **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.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

Matt Catlett, of Law Office of Matt Catlett, for appellant.

Corey J. Wasserburger, of Johnson, Flodman, Guenzel & Widger, for appellee.

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

Kelch, J.

I. INTRODUCTION

This is an appeal from an order of the district court for Lancaster County that found Rhonda J. Martin, now known as Rhonda J. Brown, in contempt of court for willfully violating the parenting provisions of her marital dissolution decree and imposed sanctions. For the reasons set forth below, we affirm.

II. BACKGROUND

Rhonda and Dean P. Martin were divorced in 2002. They share legal custody of their two minor children, Taylor and Ethan Martin. Initially, Rhonda and Dean shared equal physical custody of the boys; but in 2008, the decree was modified to the effect that Rhonda now has physical custody of the boys and Dean has rights of visitation. Dean's visitation rights were modified by a parenting plan entered into by the parties; the plan was approved by the district court in December 2011.

Pursuant to the 2011 parenting plan, Dean was to have the boys every other weekend from 5 p.m. on Friday to 7 p.m. on Sunday, for 6 weeks during the summer, and on certain holidays. In 2014, it was Dean's year to have the boys for

Christmas and his parenting time was to begin at 6 p.m. on December 19 and end at 12 p.m. on December 27.

As for transportation, Dean was to pick up the boys at the start of his parenting time from Rhonda's home in Prague, Nebraska, and Rhonda was to pick them up from Dean's home in Lincoln, Nebraska, at the conclusion of Dean's parenting time. Previously, Rhonda had taken the boys to Dean's home and he had returned them to Rhonda's home; however, Dean requested the new arrangement because Taylor's involvement in sports required Taylor to be in Prague on Friday nights and Rhonda had taken the position that she was not responsible for transporting Taylor to Dean if his sporting events went past 5 p.m. On such occasions, Rhonda would sometimes deliver Ethan to Dean at 5 p.m. and Dean would drive to Prague to retrieve Taylor after his sporting events.

On April 3, 2015, Dean filed a motion for an order for Rhonda to show cause why she should not be held in contempt for her alleged failure to allow Dean to exercise parenting time on the following days: (a) during the weekend of December 12, 2014; (b) from December 19 to 24; (c) on January 9, 2015 (with Ethan); (d) on January 23; (e) on March 6; and (f) on March 20 and 21. At the time Dean filed the motion, the boys, Taylor and Ethan, were 16 and 15 years old, respectively.

1. June 11, 2015, Hearing

A hearing on Dean's motion was held on June 11, 2015. Both Rhonda and Dean testified, and various exhibits were offered and received. Much of the evidence in this case is in the form of text messages sent back and forth between the parties and their children. We reproduce the messages in their original form.

(a) Weekend of December 12, 2014

Under the parenting plan, Dean was to have the boys on the weekend of December 12, 2014. Taylor had a basketball

game that Saturday and sent Dean several text messages on December 12 expressing his desire to travel with his team the next day.

Dean arrived at Rhonda's house at 5 p.m. that night to retrieve the boys. The boys went outside with their bags and approached Dean's vehicle. Taylor got into Dean's vehicle, but Ethan did not. Ethan refused to get in the vehicle and returned to the house. Taylor stayed in the vehicle and talked to Dean for a few minutes before returning to the house. Rhonda testified that Taylor told her that Dean wanted to know whether it was fine if the boys stayed home that weekend. Rhonda testified that she told Ethan that she was "'not gonna shut [her] door'" on them, but that it was up to Dean whether the boys went with him or stayed with her. According to Dean's testimony, Taylor told him that Rhonda said the boys could stay with her and that they did not have to go with Dean. Dean left without the boys.

Dean testified that sometime after he left, he received a telephone call from Ethan and eventually spoke with Rhonda about what had happened. Dean testified that Rhonda asked him, "'Why'd you leave? It's your parenting time. I'm kind of surprised. The boys came back in and I had no idea if there was an issue of any kind.'"

Further, Rhonda testified, "Physically, there [was] no way that I could grab [Ethan] and shove him into the car and force him to go."

(b) December 19 to 24, 2014

Dean was supposed to have the children from 6 p.m. on December 19, 2014, until 12 p.m. on December 27. On December 18, Taylor sent Dean the following text message in the afternoon:

> Hey I got my drivers license today for my 16th birthday. You don't have to come get us this weekend because we would like to stay home until the 24th. I can drive to ur house then, but we would like to come on the 24th by

noon, stay on Christmas, and then go home on the 26th at 3:30. Please Let us know.

4:09 PM

Without responding to Taylor, Dean forwarded the text message to Rhonda and asked whether she was going to tell Taylor and Ethan that they needed to go with him on December 19, 2014. Rhonda responded to Dean, "I've encouraged them to do so, but it sounds like they told you what they want."

Sometime later, Rhonda sent a text message to Dean asking if everything was worked out in terms of his parenting time. Dean replied that it was all worked out and that he would retrieve the boys from their grandparents on December 24, 2014. The boys went to Dean's house on December 24 and stayed until December 26.

(c) January 9, 2015

Dean was supposed to have the boys over the weekend of January 9, 2015. Taylor had a basketball game that Friday, and Dean made arrangements to pick Taylor up after his game. As for Ethan, Dean drove to Rhonda's house to pick him up at 5 p.m. However, Ethan refused to go with Dean.

At that time, Rhonda was in Missouri for a National Guard drill. Dean called Rhonda and told her that Ethan was refusing to get in his vehicle, and he asked Rhonda for help. Rhonda testified that the telephone was put on the speakerphone setting and that on speakerphone, she told Ethan that Dean had been waiting 2 weeks to see him and that he needed to go spend time with Dean. Rhonda testified that Ethan said he did not want to go with Dean to Taylor's game; Dean testified that Ethan wanted to stay at Rhonda's house and play video games.

Rhonda testified that she told Dean she would do whatever he needed her to do, but that she was "almost 200 miles away" and that there was "not a lot" she could do except talk to Ethan. While still on speakerphone, Dean advised Rhonda that she needed to punish Ethan by taking things away from him

or "ground[ing]" him. Rhonda testified that she told Dean that would be a conversation she would have to have with Ethan in the future.

Rhonda ended the conversation with the belief that Dean would continue to talk to Ethan. Before the call ended, she told Dean she would contact him or that he could call her back. Rhonda testified that she called Dean back within 30 minutes and that Dean told her he had left Ethan at home. Rhonda testified that Dean said he was not going to fight with Ethan on the matter and that Ethan needed to be at his home by 10 a.m. the following day. Rhonda's husband transported Ethan to Dean's home the next morning.

Dean testified that he did not force Ethan to go with him that Friday or tell Ethan that he had to go with him. Instead, Dean testified that he expected Rhonda would do that. When asked whether Rhonda told Ethan he should go, Dean agreed that she did, but Dean testified that Rhonda also told Ethan it was up to Ethan and suggested that Rhonda's husband could take him to Dean's home the next day.

(d) January 23, 2015

Dean's next parenting time was to occur over the weekend of January 23, 2015. Taylor had a basketball game in Palmyra, Nebraska, on Friday and another game in Brainard, Nebraska, on Saturday. On January 21, Taylor sent Dean the following text messages:

> Hey dad I'm just going to stay home this weekend. I am going to be busy this weekend and I just want to stay home. I'm going to have some people from the basketball team over after Saturday's game too.
>
> 7:03 PM
>
> Actually can we just go to ur house with you after my game on Saturday[.]
>
> 7:14 PM

Rhonda testified that she communicated with Taylor about whether he and Ethan would go to Dean's house that weekend.

According to Rhonda, she told Taylor that the decision was ultimately up to Dean and that Taylor needed to communicate with Dean about it, because it was Dean's weekend and she did not have any bearing on the decision. Later, Rhonda texted Taylor in relevant part: "Ok. Do not respond. I'm trying to take care of this. Just stand your ground when he approaches you." Rhonda testified that she meant that "Taylor didn't need to get into the middle of what was going on between myself and Dean at the time . . . as far as giving out phone numbers because he didn't have permission."

Rhonda testified that on Friday, the night of the Palmyra game, the boys' belongings were in her vehicle so the boys could go with Dean that evening. She testified that toward the end of the junior varsity game, the boys approached her and told her they did not want to go. Rhonda testified that she told the boys that it was Dean's decision and that she would not get in the middle of it. According to Rhonda, she later learned from the boys that Dean told them it was fine for them not to go with him that evening and that Dean would transport them to his house after the basketball game the next day. The boys did not go with Dean that night, but instead went with Dean after the basketball game on Saturday.

Further, the transcript of text messages that Rhonda prepared and offered at the contempt hearing did not include her message to Taylor encouraging him to "stand his ground" and not respond to Dean.

On January 29, 2015, Dean sent an e-mail to Rhonda, expressing his discontent about not receiving his parenting time:

> Rhonda
>
> I want you to know that I was not ok with the boys not coming AGAIN Friday 1/23/15 to our home for my scheduled parenting time.
>
> Just to let you know I am never ok with Taylor & Ethan not coming on my time frames. I am sending you this email so you know that if the boys say it is ok with

> Dad if we do not come, I AM NOT OK WITH THAT! And also I have NEVER told the boys it is ok not to come on my time frame.
>
> You will need to contact me if they say that and discuss, and not ASSUME it is ok. I want you to contact me and not go through our boys and have them tell me they are not coming my time frames, you are the parent and they are the children. I hope this will stop any confusion with this issue.

(e) March 6, 2015

Under the parenting agreement, Dean was supposed to have the boys on the weekend beginning Friday, March 6, 2015. Rhonda was again out of town for a National Guard drill. Ethan's school had an overnight "lock-in" that Friday, and Ethan wanted to attend. Taylor wanted to stay in Prague to work on his homework at school, because the school had Internet access and Dean did not.

Taylor sent Dean a text message notifying him that Ethan would attend the lock-in and that Taylor would pick Ethan up Saturday morning after the lock-in and proceed to Dean's house. Thereafter, Dean sent Rhonda an e-mail, expressing his frustration about the lack of communication from her regarding the lock-in.

(f) March 20 and 21, 2015

Dean was supposed to have parenting time over the weekend beginning Friday, March 20, 2015. Earlier in the week, Taylor sent Dean several text messages expressing his desire to stay in Prague to attend an alumni basketball game at school that Friday night. The messages also informed Dean about Taylor's new landscaping job in Seward, which began that Saturday, and about his preference to carpool to Seward that day with two other boys. Dean essentially told Taylor that his proposal was not acceptable. Text messages show that Taylor urged Dean to reconsider, but that Dean told Taylor that he would see both boys "Friday at 5." Taylor continued

to plead, but Dean stood firm. Taylor ultimately told Dean via text on Friday at 11:59 a.m. that he would not go with Dean that evening.

Rhonda testified that she became aware of the disagreement between Taylor and Dean when she received a text message from Dean telling her that she should have Taylor read the divorce decree. According to Rhonda, he also told her to remind the boys that he would be picking them up on Friday at 5 p.m. Rhonda testified that she told Ethan and Taylor that Dean had "the parental decision during his parenting time and they really need to work out an arrangement with [him]."

On Friday, Dean drove to Rhonda's home to retrieve the boys, but they did not get in his car. Rhonda testified that the boys' bags were packed and that they took the bags outside with them and talked to Dean for 10 to 15 minutes before returning to the house. Rhonda testified that Dean was "almost all the way down the lane" before the boys even got back to the front door. According to Rhonda, she asked the boys what was going on and they told her that Dean said they could go to the basketball game and that Ethan would need to be in Seward on Saturday when Taylor got off work so that the boys could leave for Dean's house from Seward. In accordance with this plan, the boys went to Dean's house after Taylor was done working in Seward.

2. District Court's Findings

At the conclusion of the evidence on June 11, 2015, the district court ordered Rhonda to appear on June 17, requesting that the two minor children appear at that time as well. On June 17, the parties appeared with Taylor and Ethan, and the district court orally announced its findings and decision. It found Rhonda in contempt of court for willful failure to comply with the district court's order "with regard to parenting time." The district court addressed the boys:

> I want you gentlemen to understand that it is the court's order, not your parents' order that you are going to be

> — or that your parents are abiding by. And the consequence falls on your parents if there is a failure to comply, so I want you to know that while you think you are of an age where you can make these decisions or should be able to make these decisions, you're not yet.

The district court's June 17 order stated:

> [Rhonda] is found beyond a reasonable doubt to be in willful contempt of the order of this court regarding parenting time for [Dean]. [Rhonda] is also forcibly and intentionally placing the children of the parties in the middle. Then she is using passive aggressive techniques to abrogate her obligations as the custodial parent. The court finds that modification of the parenting plan is required.

The district court did not cite to any testimony or evidence in support of its findings.

Although neither party applied for a modification, the district court made three modifications to the parenting plan. First, the district court modified the commencement of Dean's parenting time to 6 p.m. Second, the transportation arrangements were modified so that Rhonda was required to deliver the boys to Dean's home and Dean was to return them to Rhonda's home. The order also stated:

> In the event that either child has a sporting event on the Friday evening on which a parenting time is to commence, [Rhonda] shall deliver the children no later than two hours following the conclusion of the event. If [Dean] is in attendance at the sporting event, the exchange may take place at the sporting event. If for any reason either of the children does not go with [Dean] from the sporting event, it shall remain the obligation of [Rhonda] to deliver the children to [Dean's] home within two hours of the completion of the event.

Third, the district court appointed a guardian ad litem for the children and ordered, "No parenting time shall be changed in any way without written consent of the guardian ad litem."

The district court committed Rhonda to jail for 60 days, but suspended the sentence and allowed for her to purge herself of the contempt so long as she (1) complied in full with all the terms of the parenting plan as modified and (2) paid $500 of Dean's attorney fees.

III. ASSIGNMENTS OF ERROR

Rhonda assigns that the district court erred in (1) finding and holding Rhonda in contempt, (2) sanctioning Rhonda, (3) modifying the parenting plan, and (4) requiring the parties to obtain written consent of the guardian ad litem before changing the parenting schedule.

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 (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed is reviewed for abuse of discretion. *In re Interest of Zachary D. & Alexander D.*, 289 Neb. 763, 857 N.W.2d 323 (2015). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000).

V. ANALYSIS

1. Contempt Finding

Rhonda assigns that the district court erred in finding her in contempt "with regard to parenting time," because there was no evidence that she willfully refused to allow Dean to have parenting time. Instead, she claims that Dean voluntarily left

without the children and that she cannot be blamed for his failure to exercise his full allotment of parenting time.

[2-4] 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. See, *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh, supra*. Willful disobedience is an essential element of contempt; "willful" means the violation was committed intentionally, with knowledge that the act violated the court order. *Hossaini v. Vaelizadeh, supra.* Outside of statutory procedures imposing a different standard or an evidentiary presumption, all elements of contempt must be proved by the complainant by clear and convincing evidence. See, *id.*; *Smeal Fire Apparatus Co. v. Kreikemeier, supra*.

Dean filed a motion for an order for Rhonda to show cause why she should not be held in contempt for her alleged failure to allow Dean to exercise parenting time with the parties' minor children during the time periods summarized in the background section above. Rhonda did not dispute that Dean was not able to exercise his court-ordered parenting time, but contended that she was not responsible for Dean's missed parenting time.

In order to show Rhonda was responsible for Dean's lack of parenting time, he cited several instances of Rhonda's transferring her responsibility as a parent to the boys. For example, he testified that on December 12, 2014, the boys initially came out to his vehicle but that Taylor returned to Rhonda's residence and spoke with her. According to Dean, upon returning to Dean's vehicle, Taylor advised him that Rhonda had told Taylor, "'Mom says we can stay.'" Rhonda denied making this statement and claimed surprise that the children did not go with Dean. Dean testified that on December 18, Taylor texted Dean advising that he did not want to see Dean

on December 19, as scheduled. Dean forwarded the text to Rhonda who responded back, "I've encouraged them to do so, but it sounds like they told you what they want."

Dean testified that he was to have parenting time on January 23, 2015, but that prior to the scheduled parenting time, he received a text from Taylor desiring to stay with Rhonda. Dean texted Rhonda for assistance, but she did not respond to Dean. Instead, Rhonda testified she advised Taylor that "he needs to communicate with his dad and let him know because it's his dad's time and his dad has the parental decision making at that point. That I didn't have any bearing on that." On March 20, Dean was to have parenting time, but before the scheduled parenting time, he received text messages from Taylor expressing that he did not want to come with Dean. Rhonda stated, "I told the boys, you know, it's your dad's time, that you need to work out an arrangement with your dad."

After the evidentiary hearing, the district court set forth its finding on the record with both parties present. It did not address each period of time that Dean alleged Rhonda had failed to allow parenting time as ordered. Rather, the district court found that overall, Rhonda had transferred her responsibility as a parent to the boys and had left it up to them to work out parenting time with Dean. This finding by the district court would also be a violation of the parenting plan, which specifically stated that Rhonda and Dean "shall be the parties solely for communicating with each other regarding parenting issues relating to the children."

In finding Rhonda in contempt, the district court chose to give greater weight to the evidence provided by Dean. Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Davidson v. Davidson*, 254 Neb. 357, 576 N.W.2d 779 (1998). Accordingly, we find no clear error in the trial court's factual findings.

As a singular event, Rhonda's allowing the boys to exercise the final decisionmaking authority in regard to Dean's parenting time may have been defensible, but the consistent pattern of her transferring her responsibility to the boys supports the finding of the trial court. Rhonda's continued behavior, coupled with the evidence that Dean was not able to exercise his court-ordered parenting time, leads to the further finding that there was no abuse of discretion by the trial court in determining Rhonda was in willful contempt for not allowing Dean parenting time as ordered.

2. Modification and Sanctions

(a) Modification

[5-7] Rhonda argues that it is was an abuse of discretion to require her to comply with the parenting plan as modified, because the district court had no authority to modify the parenting plan. Contempt proceedings may both compel obedience to orders and administer the remedies to which the court has found the parties to be entitled. See *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010). A court's continuing jurisdiction over a dissolution decree includes the power to provide equitable relief in a contempt proceeding. *Sickler v. Sickler*, 293 Neb. 521, 878 N.W.2d 549 (2016). Where a situation exists that 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. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

Further, Neb. Rev. Stat. § 42-364.15 (Reissue 2008) provides, in part:

> Upon the filing of a motion which is accompanied by an affidavit stating that either parent has unreasonably withheld or interfered with the exercise of the court order *after notice* to the parent and hearing, the court shall enter such orders as are reasonably necessary to enforce rights of either parent *including the modification of previous*

> *court orders* relating to parenting time, visitation, or other access.

(Emphasis supplied.)

In imposing the purge plan in the instant case, the district court stated:

> I find that it is necessary to change and modify the parenting plan in order to facilitate the assurance that is necessary that there is compliance. And, therefore, beginning with the next parenting plan for [Dean], I'm going to change it so that [Rhonda] is responsible for delivering the boys to [Dean] at the beginning of the parenting plan.

The district court's statement when imposing the purge plan was an attempt to correct the situation whereby Rhonda allowed the children to determine Dean's parenting time. For example, the boys would walk out to Dean's vehicle, but refuse to leave with him and then return to Rhonda's residence. The motion to show cause gave Rhonda notice that she could be found in contempt for denying parenting time which also gave notice of a possible modification pursuant to § 42-364.15. Having given notice as required by § 42-364.15, the district court had the equitable authority, within the confines of this contempt proceeding, to modify the parenting plan as it related to issues that caused the finding of contempt. Therefore, the district court did not abuse its discretion in this regard.

(b) Excessive Sentence

[8] Next, Rhonda challenges the imposition of the 60-day jail sentence as excessive. She argues that the sanction is unjust and has no rational relationship to her actions. In civil contempt cases 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. *Sickler v. Sickler, supra*. 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. *Id*. In this instance, the district court's order stayed the execution of the jail sentence and allowed Rhonda to fully purge herself of the contempt order by complying with the purge plan. Accordingly, the jail sentence was coercive rather than punitive, and the district court did not exceed its authority or abuse its discretion by imposing it.

(c) Guardian Ad Litem

Lastly, Rhonda assigns that the district court erred by requiring the parties to obtain written consent of the guardian ad litem before changing the parenting schedule. She cites *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002), to support her position that requiring approval of a guardian ad litem prior to any change in the parenting plan was an unlawful delegation of the district court's duties. In *Deacon*, the appellant claimed that by the terms of the trial court's order, a psychologist had been given "the last word" on whether any visitation would occur. 207 Neb. at 199, 297 N.W.2d at 761. We stated:

> [T]hat portion of the trial court's order placing in a psychologist the authority to effectively determine visitation, and to control the extent and time of such visitation, is not the intent of the law and is an unlawful delegation of the trial court's duty. Such delegation could result in the denial of proper visitation rights of the noncustodial parent.

Id. at 200, 297 N.W.2d at 762. However, *Deacon* is distinguishable, because the order in that case delegated to a third party the authority to determine when and if a parent could exercise parenting time. In the present contempt action, the guardian ad litem may only consent to a change in parenting time; the authority to determine parenting time for either

party remains with the district court. Under the district court's order, the parties may not deviate from the current court-ordered parenting plan without the district court's ultimate approval. This provision by the trial court was within its equitable powers to devise a remedy in a contempt action to address a continuing issue involving the children. See *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). Accordingly, the district court did not err in requiring the parties to obtain written consent of the guardian ad litem before changing the parenting time schedule.

VI. CONCLUSION

We hold that the district court did not commit clear error in its factual findings and did not abuse its discretion in finding Rhonda in contempt or in imposing the 60-day jail sentence. Further, the district court did not abuse its discretion in modifying the parenting plan, within this contempt proceeding, to devise an equitable remedy to address a continuing issue involving the children.

Affirmed.

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

Christy J. Hargesheimer and Richard S. Hargesheimer, appellants, v. John Gale, Secretary of State of the State of Nebraska, et al., appellees.

881 N.W.2d 589

Filed July 8, 2016. No. S-16-107.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Appeal and Error.** When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face.
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. **Initiative and Referendum: Statutes: Words and Phrases.** "Sponsoring the petition" in the context of Neb. Rev. Stat. § 32-1405(1) (Reissue 2008) means assuming responsibility for the initiative or referendum petition process.
6. **Constitutional Law: Initiative and Referendum.** The rights of initiative and referendum constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to their exercise.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Alan E. Peterson, Christopher Eickholt, Jerry Soucie, and Amy Miller for appellants.

Douglas J. Peterson, Attorney General, Ryan S. Post, L. Jay Bartel, and David A. Lopez for appellee John Gale.

L. Steven Grasz and Mark D. Hill, of Husch Blackwell, L.L.P., and J.L. Spray, Stephen D. Mossman, and Ryan K. McIntosh, of Mattson Ricketts Law Firm, for appellees Nebraskans For the Death Penalty, Inc., et al.

Heavican, C.J., Wright, Miller-Lerman, Cassel, and Kelch, JJ., and McCormack, Retired Justice, and Inbody, Judge.

Miller-Lerman, J.

NATURE OF CASE

Christy J. Hargesheimer and Richard S. Hargesheimer appeal the order of the district court for Lancaster County dismissing a complaint in which they challenged a referendum petition. The purpose of the referendum was to overturn the Nebraska Legislature's 2015 repeal of Nebraska's death penalty. The Hargesheimers alleged that the referendum petition filed with the Nebraska Secretary of State was not legally sufficient, because a list of sponsors filed with the petition did not include the name of Nebraska Governor Pete Ricketts, who, the Hargesheimers alleged, engaged in various activities that established that he was a sponsor of the referendum. This case presents the limited question of statutory construction: Who is a "sponsor" under Neb. Rev. Stat. § 32-1405(1) (Reissue 2008)? Because Ricketts' alleged financial and other support of the referendum did not make him a "sponsor" under the relevant statute, the Hargesheimers' complaint failed to state a claim upon which relief could be granted. We affirm the district court's dismissal of the Hargesheimers' complaint.

STATEMENT OF FACTS

The Nebraska Legislature passed 2015 Neb. Laws, L.B. 268, which had the purpose of repealing Nebraska's death penalty. As Nebraska's Governor, Ricketts vetoed L.B. 268, but the Legislature overrode his veto on May 27, 2015.

On June 1, 2015, a referendum petition regarding L.B. 268 was filed with Nebraska Secretary of State John Gale. The purpose of the petition was to refer to the voters in the November 8, 2016, general election the question of whether the death penalty should be reinstated by repealing L.B. 268. A document titled "Sworn List of Sponsors" containing four names was filed with the referendum petition. The document listed as sponsors of the referendum petition the name "Nebraskans For the Death Penalty, Inc.," described as "a Nebraska non-profit public benefit corporation and a ballot committee," and three individuals—Judy Glasburner, Aimee Melton, and Bob Evnen—each of whom was described as a "Board member." Nebraskans For the Death Penalty and the three individuals are hereinafter referred to collectively as the "Named Sponsors." No other names were included in the list of sponsors.

On September 17, 2015, the Hargesheimers filed a complaint against the Secretary of State and the Named Sponsors. The Hargesheimers sought, inter alia, to enjoin the Secretary of State from placing the referendum regarding L.B. 268 on the ballot. Under Neb. Rev. Stat. § 32-1412(2) (Reissue 2008), "the court, on the application of any resident, may enjoin the Secretary of State and all other officers from certifying or printing on the official ballot for the next general election the ballot title and number of such measure." The Hargesheimers alleged that the referendum petition was not legally sufficient, because it failed to comply with § 32-1405(1), which provides as follows:

> Prior to obtaining any signatures on an initiative or referendum petition, a statement of the object of the petition and the text of the measure shall be filed with the

> Secretary of State together with a sworn statement containing the names and street addresses of every person, corporation, or association sponsoring the petition.

In particular, the Hargesheimers alleged that Ricketts was a sponsor and that the list of sponsors filed with the Secretary of State was incomplete because it failed to contain the name and address of Ricketts. They alleged that Ricketts was "in actuality the primary initiating force behind and one of the sponsors" of the referendum petition and that the omission of his name was critical and fatal to the referendum petition because § 32-1405(1) required that the "'sworn statement [contain] the names and street addresses of every person . . . sponsoring the petition.'" (Emphasis in original).

The Hargesheimers alleged that Ricketts had engaged in various specific activities and that such activities established that Ricketts was an undisclosed sponsor of the referendum petition. The alleged activities included the following: (1) Prior to the override of his veto, Ricketts had warned persons involved with L.B. 268 that a referendum would ensue if his veto was overridden; (2) various "close allies" of Ricketts had, "on his request, order or encouragement [taken] on various campaign management, public relations, organizing and publicity roles" on or before the date the referendum petition was filed with the Secretary of State; (3) Ricketts campaigned to raise money for the referendum by sending letters to Nebraskans; (4) Ricketts and his father "became by far the largest financiers and donors" to the referendum after it was filed and even earlier had "almost certainly promised" to provide such financial support; (5) Ricketts, along with his "representatives and agents," "solicited other political, social or business allies" to make financial contributions to the referendum; and (6) Ricketts personally and through advisors and agents "managed, organized and controlled the referendum campaign." They also alleged that one of the Named Sponsors, Melton, had "indicated publicly that she was recruited by someone 'close to the Governor' to put her name in as a leader or sponsor" of the referendum.

The Hargesheimers requested as relief (1) a permanent injunction enjoining the Secretary of State from placing the referendum on the ballot and (2) a declaratory judgment finding that (a) prior to collecting signatures, the leaders and sponsors of the referendum petition failed to file a sworn statement listing every sponsor as required by § 32-1405(1), and (b) the omission of the names and addresses of one or more principal sponsors, specifically Ricketts, was a material and fatal omission and made the referendum petition insufficient and invalid as a matter of law. They also sought costs and other relief the court deemed just.

The Named Sponsors responded by filing a motion to dismiss the complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a claim upon which relief may be granted. They asserted that the sole issue in the complaint was whether Ricketts should have been named as a sponsor in the list filed with the Secretary of State. The Secretary of State filed a separate motion to dismiss pursuant to § 6-1112(b)(6).

The Named Sponsors attached to their motion to dismiss a copy of a document titled "Sworn List of Sponsors" with a certification by the Secretary of State that the document was "a Sworn List of the Sponsors for the Referendum Petition Regarding LB 268 (2015)." The Named Sponsors asserted that the district court could take judicial notice of the document without converting the motion to dismiss into a motion for summary judgment because the document was a matter of public record.

After a hearing, the district court entered an order sustaining the motions to dismiss. The court stated that the sole issue was whether the Hargesheimers had "alleged sufficient facts, accepted as true, to state a plausible claim that the failure to include Governor Ricketts as a listed 'sponsor' on the sworn statement filed with the Nebraska Secretary of State renders the referendum petition on LB 268 legally insufficient." The court determined that a sponsor under § 32-1405(1) is "'one who identifies himself or herself as willing to assume statutory

responsibilities once the initiative process has commenced'" and that the definition of persons "'sponsoring the petition'" does not include every person who strongly advocates for, supports, or financially contributes to a referendum effort. The court determined that by listing their names on the document filed with the Secretary of State, the Named Sponsors had taken responsibility for the referendum petition and were therefore the sponsors under § 32-1405(1). The court concluded that the allegations in the complaint did not show that Ricketts was a person "'sponsoring the petition,'" as that phrase is used in § 32-1405(1), and that the failure to include Ricketts in the list of sponsors did not render the petition legally insufficient. The court determined that the legal basis of the Hargesheimers' complaint was legally defective. The court concluded that "[t]his fatal defect is evident on the face of the Complaint as it is the basis for the only claim asserted therein." The court dismissed the complaint with prejudice.

Although it had concluded that it was clear from the face of the complaint that the Hargesheimers did not state a claim upon which relief could be granted, the court nevertheless continued its analysis by stating that it could take judicial notice of the document that the Named Sponsors had attached to their motion to dismiss. Referring to the document, the court stated that "[b]ecause a sworn statement containing the statutorily required information was filed in this case, the Secretary of State was obligated to proceed with performing his statutory duties" and added that "all the requirements of § 32-1405(1) [had] been met."

The Hargesheimers appeal.

ASSIGNMENTS OF ERROR

The Hargesheimers claim that the district court erred when it sustained the motions to dismiss for failure to state a claim and when it dismissed the complaint with prejudice and without allowing them an opportunity to amend the complaint. The Hargesheimers also claim that the court erred when it

took judicial notice of the document attached to the Named Sponsors' motion to dismiss and relied on the document to determine as a matter of law that the document satisfied the requirements of § 32-1405(1).

STANDARDS OF REVIEW

[1-3] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Rafert v. Meyer*, 290 Neb. 219, 859 N.W.2d 332 (2015). When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions. *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (2013). To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. *Rafert, supra*.

[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. *Shurigar v. Nebraska State Patrol*, 293 Neb. 606, 879 N.W.2d 25 (2016).

ANALYSIS

The Hargesheimers' Complaint Did Not State a Claim Upon Which Relief Could Be Granted, and the District Court Did Not Err When It Sustained the Motions to Dismiss.

The Hargesheimers claim that the district court erred in two respects when it sustained the motions to dismiss for failure to state a claim. First, they claim that the court erred by adopting an incorrect definition of "'sponsor'" under § 32-1405(1). Second, they allege the court indicated that "'substantial compliance'" with the requirement to list every sponsor was sufficient. We reject the latter assignment of error, because

the court did not determine that "substantial compliance" was adequate.

To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts to state a claim for relief that is plausible on its face. *Rafert, supra*. The Hargesheimers alleged that Ricketts was involved in various respects with initiating and promoting the referendum petition process and that such involvement established that he was a sponsor of the referendum petition. They claim that the petition was legally insufficient because Ricketts was not listed as a sponsor. Therefore, whether the Hargesheimers stated a claim under § 32-1412(2) upon which relief could be granted depends on whether, assuming the truth of Ricketts' alleged activities, Ricketts should have been listed as a "person . . . sponsoring the petition" under § 32-1405(1). The answer to this question depends on the meaning of "sponsoring the petition" as the phrase is used in § 32-1405(1).

We note that § 32-1405(1) and related statutes regarding initiative and referendum petitions do not provide a definition for the word "sponsor" or for the phrase "sponsoring the petition" as used in § 32-1405(1). Thus, interpreting the meanings of "sponsor" and "sponsoring the petition" under § 32-1405(1) is a question of law initially for the district court and ultimately for this court to decide.

The district court found Chief Justice Hendry's concurrence in *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003) (Hendry, C.J., concurring in result), "highly persuasive" and adopted that definition. In his concurrence, Chief Justice Hendry addressed the meaning of "sponsor" under § 32-1405(1). Because the term "sponsor" was not defined in § 32-1405(1) or related statutes, he looked to a dictionary definition of "sponsor" as "'one who assumes responsibility for some other person or thing.'" *Loontjer*, 266 Neb. at 916, 670 N.W.2d at 311. Considering this dictionary definition in the context of the initiative statutes, and acknowledging that the exercise of the right of initiative should not be restricted

by strict interpretation of the statutes pertaining to the exercise of such right, the Chief Justice stated that it "seems reasonable to define sponsor as simply one who identifies himself or herself as willing to assume statutory responsibilities once the initiative process has commenced." *Id*. at 916, 670 N.W.2d at 311-12. He then cited various provisions of the initiative and referendum statutes that assigned certain responsibilities to sponsors. For example, § 32-1405(2) requires the Secretary of State to provide the sponsor with changes to the text of the measure proposed by the Revisor of Statutes and states that the sponsor may accept or reject such changes. Also, Neb. Rev. Stat. § 32-1409(3) (Reissue 2008) requires the Secretary of State to notify "the person filing the initiative or referendum petition" of the Secretary of State's determination as to whether sufficient valid signatures have been collected. And § 32-1412(2) requires that the sponsor of record is a "necessary party defendant" in an action commenced to enjoin the Secretary of State from placing a measure on the ballot. The Chief Justice finally stated in his concurrence in *Loontjer* that a person's support of an initiative, financial or otherwise, did not equate to sponsorship, and noted that the statutes recognized a "distinction between one who sponsors a petition initiative and one who financially contributes to that effort." *Loontjer*, 266 Neb. at 917, 670 N.W.2d at 312.

[5] We agree with the definition of the district court in this case and that of Chief Justice Hendry in his concurrence in *Loontjer*, and we interpret "sponsoring the petition" in the context of § 32-1405(1) as meaning "assuming responsibility for the initiative or referendum petition process." In *Loontjer*, the majority of this court stated that the requirement of a sworn list of sponsors under § 32-1405(1) "serves several important purposes," which include the following: (1) to prevent fraud in the petition process, because "sponsors take responsibility for the petition and expose themselves to potential criminal charges [under Neb. Rev. Stat. § 32-1502 (Reissue 2008)]

if information is falsified"; (2) to allow "the public and the media to scrutinize the validity and the completeness of any list of sponsors," because "[k]nowing the petition's sponsor could affect the public's view about an initiative petition"; and (3) to facilitate an action "seeking to enjoin the placement of an initiative on the ballot" by providing a list of the names and addresses of the sponsors who are necessary parties to such an action under § 32-1412(2). *Loontjer v. Robinson*, 266 Neb. 902, 911, 670 N.W.2d 301, 308 (2003). The definition of "sponsoring the petition," which we set forth above, is consistent with these purposes in the referendum process. A list of sponsors, or those who assume responsibility for the initiative or referendum petition process, informs the Secretary of State and the public of who may be held responsible for the petition. As issues arise throughout the referendum process, the sponsors must stand ready to accept responsibility to facilitate the referendum's inclusion on the ballot and stand ready to defend the referendum process if challenged.

In the Hargesheimers' complaint, they allege various types of involvement by Ricketts, including that Ricketts contributed considerable money to the referendum undertaking. They contend that it is important for the public to know of these contributions and that notice to the public can be achieved by listing Ricketts as a sponsor. With respect to financial contributions in particular, we think the disclosure of financial backing is met by other statutes regarding identification of financial contributors to the process. As Chief Justice Hendry noted in his concurrence in *Loontjer*, the predecessor statute to the current § 32-1405(1) required filing a statement with the Secretary of State, containing a list of individuals or entities "'sponsoring said petition *or contributing or pledging contribution of money or other things of value*.'" 266 Neb. at 917, 670 N.W.2d at 312 (Hendry, C.J., concurring in result). The statute therefore made a distinction between those "sponsoring" a petition and those supporting it financially and otherwise making valuable contributions.

The present form of § 32-1405(1) does not require contributors to be included in the filing with the Secretary of State under § 32-1405(1), and, as Chief Justice Hendry noted in *Loontjer*, information regarding persons contributing financially to a petition effort is now disclosed by filing reports with the Nebraska Accountability and Disclosure Commission. See, generally, Neb. Rev. Stat. §§ 49-1401 through 49-14,141 (Reissue 2010 & Cum. Supp. 2014). See, also, § 49-1405 (defining "Ballot question" and related provisions) and §§ 49-1445 through 49-1479.02 (reporting requirements, including § 49-1461 regarding specific filing requirements for ballot question).

As the statutes now exist, we understand that the statutory scheme requires that filings with the Secretary of State focus on identifying persons assuming responsibility for the initiative or referendum petition process, whereas filings with the Accountability and Disclosure Commission focus on identifying those persons who are financially supporting the effort. Together, these separate reporting requirements to the Secretary of State and to the Accountability and Disclosure Commission would facilitate the purpose of allowing the media and the public to know who is behind the effort—whether that person's backing of the petition takes the form of financial contributions or the form of taking legal responsibility for the petition process.

We further note that the definition we adopt is consistent with standards of statutory construction specifically related to laws implementing the rights of initiative and referendum. Although much of our case law considers the initiative process, and we recognize the origin of the rights of initiative and referendum are different, we find the salutory objectives described in the initiative cases persuasive, and we logically apply many of those principles to the referendum process. See *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011) (applying initiative principles to initiative and referendum process in municipality).

[6] We have stated that the power of initiative must be liberally construed to promote the democratic process, that the right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter, and that the provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual. *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006). See, also, *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006), and *Loontjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003). We also stated that the right of initiative constitutionally provided should not be circumscribed by restrictive legislation or narrow and strict interpretation of the statutes pertaining to its exercise. See *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968). These standards apply to the power of referendum as well as to the power of initiative. See *City of North Platte, supra* (courts liberally construe grants of municipal initiative and referendum powers to permit, rather than restrict, power and to attain, rather than prevent, its object).

With these standards in mind, we believe that the interpretation of § 32-1405(1) urged by the Hargesheimers would tend to restrict the powers of initiative and referendum by making compliance with the statute more precarious. If "sponsoring the petition" were construed to include persons who could be said to have heavily participated in the initiation or supported the petition process, such construction would inject ambiguity and make adherence difficult. Identifying the level of support needed to be such a sponsor would not be clear and would expose the petition process to procedural challenges and the risk of defects unrelated to the substance of the petition. The definition urged by the Hargesheimers does not facilitate the exercise or preservation of the initiative and referendum process. By contrast, the definition of "sponsoring the petition" that we adopt herein facilitates the initiative and referendum process by limiting the category of sponsors to those persons

or entities who have specifically agreed to be responsible for the petition process and serve in the capacities the statutes require of sponsors.

Applying our definition of "sponsoring the petition," to wit, "assuming responsibility for the initiative or referendum petition process," we determine that the district court did not err when it concluded that the Hargesheimers' complaint did not state a claim upon which relief could be granted under § 32-1412(2). Accepting the Hargesheimers' allegations regarding activities that Ricketts had undertaken in support of the referendum petition as true, we determine that such activities would not have established that Ricketts was "sponsoring the petition" as that phrase is used in § 32-1405(1) and that therefore, the referendum petition was not insufficient on this basis. Although Ricketts' alleged activities would indicate that he supported the process in a significant way and that he may have played a part in initiating the process, such activities do not form a basis to conclude that he was "sponsoring the petition" in the sense of assuming responsibility for the referendum petition process. Instead, it was the Named Sponsors who assumed such responsibility. Thus, the absence of Ricketts' name and address in the list of sponsors would not invalidate the petition and such alleged failure would not support the relief requested by the Hargesheimers.

Finally, the Hargesheimers contend that the district court should not have dismissed the complaint with prejudice and instead should have allowed them an opportunity to amend the complaint, complete discovery, or have an evidentiary hearing. However, they did not make a request to amend the complaint and they have not shown how an amendment could have cured the only claim made in the complaint—that given Ricketts' activities, the failure to include Ricketts' name in the list of sponsors made the petition legally insufficient. Because the complaint did not state a claim that is plausible on its face, neither discovery nor a hearing would yield a different

outcome on this issue. We find no error in the district court's dismissal of the complaint with prejudice.

Consideration of Document Attached to Motion to Dismiss Was Not Necessary to Disposition of Motions, and We Need Not Consider Whether It Was Error to Take Judicial Notice of Such Document.

The Hargesheimers claim that the district court erred when it took judicial notice of the document attached to the Named Sponsors' motion to dismiss and relied on such document when it stated that the document met "all the requirements" of § 32-1405(1). We refer to our foregoing analysis. Disposition of this case is based solely on the definition of sponsor under § 32-1405(1), and the complaint's allegations relative thereto. As a result, the court's consideration of the document was unnecessary to the district court's disposition of the motion to dismiss and therefore, we need not consider whether it was error for the court to take judicial notice of the document. The court's comment regarding the validity of the entirety of the document was mere dictum.

[7] For completeness, we note that in the Hargesheimers' reply brief, they raised for the first time an issue regarding whether the list of sponsors filed with the referendum petition was a properly "sworn statement" under § 32-1405(1). However, this issue was not presented to or ruled on by the district court and we will not consider the issue in this appeal. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Purdie v. Nebraska Dept. of Corr. Servs.*, 292 Neb. 524, 872 N.W.2d 895 (2016).

CONCLUSION

This case presents the limited question of statutory construction: Who is a "sponsor" under § 32-1405(1), which requires that the names and addresses of those individuals and

entities "sponsoring the petition" be filed with the Secretary of State prior to obtaining signatures on an initiative or referendum petition? Given our conclusion explained above that sponsors under § 32-1405(1) are individuals or entities assuming responsibility for the initiative or referendum process, we determine that even if the allegations in the Hargesheimers' complaint regarding Ricketts' involvement with the referendum petition were taken as true, Ricketts would not be required to be listed as a "person . . . sponsoring the petition" under § 32-1405(1) and that the alleged failure to include his name in the list of sponsors did not make the referendum petition legally insufficient; thus, the Hargesheimers failed to state a claim upon which relief could be granted. Because this was the only challenge to the referendum petition raised in the Hargesheimers' complaint, the district court did not err when it sustained the motions and dismissed the complaint with prejudice. We further conclude that consideration of the document attached to the Named Sponsors' motion to dismiss was not necessary to the disposition of the motion, and we therefore need not determine whether it was error to take judicial notice of the document. We do not consider whether the list of sponsors filed with the referendum petition was a properly "sworn statement," because the issue was not presented to or ruled on by the district court.

Affirmed.

Connolly and Stacy, JJ., not participating.

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

Elizabeth E. Stanosheck, appellee, v. Joseph P. Jeanette, appellant.

881 N.W.2d 599

Filed July 15, 2016. No. S-15-490.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists if 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. **Property Division: Appeal and Error.** As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate. The date of valuation is reviewed for an abuse of the trial court's discretion.
4. **Divorce: Property Division.** In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.
5. **Property Division.** Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2008) is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties.
6. ____. The ultimate test in determining the appropriateness of a property division is fairness and reasonableness as determined by the facts of each case.
7. **Divorce: Property Division.** As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
8. **Divorce: Property Division: Proof.** Where there is nothing on the record to show the source of premarital funds, they should be considered part of the marital estate.

9. **Property Division: Proof.** The burden of proof rests with the party claiming that property is nonmarital.
10. **Divorce: Property Division: Pensions.** Under Neb. Rev. Stat. § 42-366(8) (Reissue 2008), the general rule is that amounts added to and interest accrued on pension or retirement accounts which have been earned during the marriage are part of the marital estate, but contributions before marriage or after dissolution are not assets of the marital estate.
11. ____: ____: ____. Investment earnings accrued during the marriage on the nonmarital portion of a retirement account may be classified as nonmarital where the party seeking the classification proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is due solely to inflation, market forces, or guaranteed rate rather than the direct or indirect effort, contribution, or fund management of either spouse.

Appeal from the District Court for Cass County: Jeffrey J. Funke, Judge. Affirmed in part, and in part vacated and remanded for further proceedings.

Steven M. Delaney and A. Bree Robbins, of Reagan, Melton & Delaney, L.L.P., for appellant.

Amie C. Martinez, of Anderson, Creager & Wittstruck, P.C., L.L.O., and Megan M. Schutt, Senior Certified Law Student, for appellee.

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

Stacy, J.

I. NATURE OF CASE

In this appeal from a decree of dissolution, error is assigned to the district court's classification, valuation, and division of certain marital property. After a de novo review, we find no abuse of discretion and affirm the district court's judgment in all respects but one—the division of the parties' retirement accounts. As it regards the retirement accounts,

we vacate the decree in part and remand the cause for further proceedings.

II. BACKGROUND

Elizabeth E. Stanosheck (Elizabeth) and Joseph P. Jeanette (Joseph) were married in 2008. Elizabeth filed for dissolution in January 2014. From the time the divorce was filed until a few months before trial, the parties lived together in the marital home. They had no joint debts other than the mortgage on their home, a loan against Joseph's retirement account, and various household expenses. Joseph paid the majority of these expenses, and Elizabeth reimbursed him $600 to $800 per month. During the pendency of the action, a temporary order was entered on the agreement of the parties, requiring each to contribute payment toward the joint debts and home expenses, with Elizabeth paying 40 percent and Joseph paying 60 percent.

Trial was held in January 2015. The parties reached a comprehensive property settlement agreement, so trial was limited to just a few contested issues: (1) whether the marital estate should be valued at the time of trial or the time of filing, (2) how to divide the remaining proceeds from the sale of the marital home, and (3) whether Joseph was entitled to set off as nonmarital property a portion of the market growth to his retirement account.

1. Valuation Date

Elizabeth asked the court to value the marital estate at the time of trial, and Joseph asked that it be valued at the time the dissolution was filed. The district court found the date of trial was the more appropriate valuation date, reasoning:

> Though the evidence indicates that the parties were not actively spending time together, such as eating meals together or engaging in social activities together, the parties were still married, still residing in the home together, and still sharing household expenses.

> Therefore, the Court finds that the valuation date for the division of assets and debts should be the date of trial herein.

2. Division of Proceeds From Sale of Marital Home

During the marriage, Joseph took out a $50,000 loan against his retirement account to contribute to building the parties' home. Payments on the loan were made every 2 weeks by withholding sums from Joseph's paycheck. At the time of trial, Joseph had paid back $12,000 on the loan. The marital home was sold prior to trial. The parties agreed to divide a portion of the net sale proceeds immediately and held $50,000 from the sale in trust, with the agreement that $38,000 of that sum would be used to repay the balance of the loan against Joseph's retirement account. The parties disagreed as to how the remaining $12,000 should be divided. Elizabeth asked that it be split equally between the parties, and Joseph asked to be awarded the entire $12,000 as reimbursement for the loan payments made during the marriage. The district court found the loan was a marital debt and noted that all repayment on the debt occurred during the marriage using sums earned during the marriage. The court then awarded each party an equal share of the remaining $12,000 sale proceeds.

3. Division of Retirement Accounts

Both parties had retirement plans which predated the marriage and which increased in value during the marriage. With the exception of Joseph's Thrift Savings Plan, the parties agreed how the various retirement accounts should be classified, valued, and divided. The court accepted the agreement of the parties, finding it was fair, reasonable, and not unconscionable. The evidence adduced by the parties concerning their respective retirement accounts is set out below.

(a) Elizabeth's Retirement Accounts

Elizabeth had a retirement account with the Nebraska Public Employees Retirement System (NPERS) prior to the marriage. During the marriage, she rolled funds over from her NPERS account into an account with a securities investment company. Elizabeth also started a 401K retirement account with a new employer after the divorce was filed but before trial.

With respect to each of Elizabeth's retirement accounts, the parties stipulated that any premarital funds would be set off to her and that the "amounts that accrued during the term of the marriage" would be divided by the parties. The district court accepted the parties' stipulation and, in the narrative portion of the decree, made specific findings that Joseph should be awarded 50 percent of the "'accumulated contributions plus interest'" in both of Elizabeth's retirement accounts from the date of marriage to the date of trial. The judgment portion of the decree, however, omitted any reference to dividing Elizabeth's retirement accounts. The record indicates Elizabeth's attorney prepared the decree and Joseph's attorney approved the decree as to form before it was submitted to the court.

(b) Joseph's Retirement Accounts

Joseph had several retirement accounts which predated the marriage. He had a 401K defined contribution plan from a prior job. He had a Federal Employees' Retirement System (FERS) account through his current employer. Within this FERS account, he had a pension fund and a Thrift Savings Plan (hereinafter TSP). The TSP is a defined contribution plan. During the marriage, Joseph rolled over approximately $85,000 from his 401K into the TSP.

Regarding Joseph's FERS pension, the parties agreed Elizabeth was entitled to a portion of his pension "based upon the date of the marriage, the length of service of [Joseph], and the overlap between date of marriage, date of service, and the

valuation date." The district court accepted the parties' stipulation in that regard and found that Joseph had approximately 19 years of premarital service that would be excluded from Elizabeth's share of the annuity payments. The court then awarded each party 50 percent of Joseph's FERS pension benefits accrued from the date of marriage to the date of trial. No error is assigned to the manner in which the court divided Joseph's FERS pension.

The parties' primary disagreement at trial was over how to classify, value, and divide that portion of Joseph's TSP which accumulated during the parties' marriage. Simplified, the parties agreed that all contributions made to Joseph's TSP before the marriage were properly set off as nonmarital property and that the nonmarital funds rolled over into the TSP during the marriage were properly set off as nonmarital property. But the parties disagreed on whether all of the TSP investment earnings that accrued during the marriage were properly included in the marital estate.

Joseph took the position that some of the TSP growth that accrued during the marriage was marital property and that some was not. Specifically, he argued that the growth attributable to the nonmarital property portion of his TSP should also be classified as nonmarital and set off entirely to him. Joseph presented the testimony of an actuary who determined the total number of shares held in the TSP at the time of the marriage, the time the divorce was filed, and the time of trial. The expert then determined the value of the TSP account at each point in time by multiplying the number of shares in the TSP on that date by the price per share on that date. The expert testified the price per share varied with market conditions and over time had moved slowly in conjunction with movement in the stock market.

According to the expert, on the date of marriage, the TSP had 21,485.8536 shares valued at $15.3822 per share, for a total value of $330,499.70. The subsequent rollover of his premarital 401K into the TSP resulted in the purchase of an

additional 4,839.3736 TSP shares valued at $17.6207 per share for a total value of $85,273.15. On the date of trial, the TSP contained 32,523.5724 shares valued at $22.8987 per share for a total value of $744,747.52. As such, it was the expert's opinion that at the time of trial, Joseph's TSP had a total value of $744,747.52, of which $141,934.05 was marital (6,198.3452 shares at $22.8987 per share) and $602,813.47 was nonmarital (26,325.2272 shares at $22.8987 per share).

Elizabeth took the position that, just as the parties agreed to do with both of her retirement accounts, the court should classify all the passive market growth which occurred during the marriage as marital property and should divide it equally between the parties.

The district court made a factual finding that the increases in value to Joseph's TSP during the marriage were "attributable to the rollover of [his 401K] retirement plan, additional contributions made to the plan by [Joseph] during the marriage, and growth attributable to market gains." The court cited our holdings in *Priest v. Priest*[1] and *Reichert v. Reichert*[2] for the general proposition that "the marital estate includes that portion of pensions or retirement accounts earned during the marriage." The court then rejected Joseph's suggestion that investment income derived from the nonmarital property portion of his TSP account should be set off as nonmarital property, reasoning: "[N]either Nebraska case law nor Nebraska statutory authority authorize the classification of passive accumulations earned during the marriage as a non-marital asset. Therefore, this Court finds that the passive accumulations of the TSP account earned during the parties' marriage are part of the marital estate." The court set off as nonmarital the value of the TSP on the date of the marriage ($330,499.70) and the value of Joseph's 401K on the date it

[1] *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996).

[2] *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994).

was rolled over into the TSP ($85,273.15). As to the remaining TSP sums, the court awarded Elizabeth 50 percent of the "'accumulated contributions plus interest'" from the date of marriage to the date of trial.

Joseph timely appealed, and we granted his petition to bypass the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

Joseph assigns, rephrased and consolidated, that the district court erred in four respects: (1) valuing the marital estate at the time of trial rather than the date the divorce was filed; (2) dividing the remaining $12,000 from the sale of the marital home equally, rather than awarding the entire sum to Joseph; (3) classifying all of the growth in Joseph's TSP account during the marriage as marital property; and (4) omitting reference to Joseph's share of Elizabeth's retirement accounts in the judgment portion of the decree.

IV. STANDARD OF REVIEW

[1,2] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.[3] A judicial abuse of discretion exists if 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.[4]

V. ANALYSIS

1. Valuation Date

[3] As a general principle, the date upon which a marital estate is valued should be rationally related to the

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[3] *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013).

[4] *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

property composing the marital estate.[5] The date of valuation is reviewed for an abuse of the trial court's discretion.[6]

Here, the court valued all the marital property at the time of trial rather than the date the divorce action was filed. The court found it significant that, even after filing for divorce, the parties continued to live together in the marital home and share in household expenses. The valuation date applied by the district court was rationally related to the property composing the marital estate, and we find no abuse of discretion in valuing the marital estate at the time of trial. Joseph's assignment of error to the contrary is without merit.

2. Sale Proceeds

[4-6] In a divorce action, the purpose of a property division is to distribute the marital assets equitably between the parties.[7] Equitable property division under Neb. Rev. Stat. § 42-365 (Reissue 2008) is a three-step process.[8] The first step is to classify the parties' property as marital or nonmarital.[9] The second step is to value the marital assets and marital liabilities of the parties.[10] The third step is to calculate and divide the net marital estate between the parties.[11] The ultimate test in determining the appropriateness of a property division is fairness and reasonableness as determined by the facts of each case.[12]

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[5] *Blaine v. Blaine*, 275 Neb. 87, 744 N.W.2d 444 (2008); *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002); *Brunges v. Brunges*, 260 Neb. 660, 619 N.W.2d 456 (2000).

[6] See, *Blaine, supra* note 5; *Tyma, supra* note 5.

[7] *Tyma, supra* note 5.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[7] After selling their home during the pendency of this case, the parties reached agreement regarding an equitable division of all but $12,000 of the net sale proceeds. Elizabeth asked that the remaining $12,000 be divided equally between the parties, and Joseph asked that the $12,000 be awarded solely to him as reimbursement for payments made on the TSP loan. It is undisputed that Joseph made these loan payments through automatic paycheck withholding of money earned during the marriage. As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.[13]

The court divided the $12,000 equally between the parties, reasoning that the TSP loan was a marital debt and all repayment on the debt occurred during the marriage using sums earned during the marriage.[14] The court did not abuse its discretion in awarding the parties an equal share of the remaining $12,000 sale proceeds.

3. Retirement Accounts

Joseph assigns that the district court erred in several respects when classifying, valuing, dividing, and decreeing division of the parties' retirement accounts. As it regards Joseph's TSP, he does not dispute that a portion of his TSP is properly classified as marital property, but he argues the trial court abused its discretion in classifying all of the appreciation which occurred during the marriage as marital property. Joseph also argues the court's decision to determine the value of the TSP shares, rather than divide the marital shares outright, was improper. Finally, as it regards Elizabeth's retirement

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[13] *Sitz v. Sitz*, 275 Neb. 832, 749 N.W.2d 470 (2008).

[14] *Id*. at 837-38, 749 N.W.2d at 475 (husband's "contributions to the savings plan were made with deductions from his . . . paycheck which was marital property. Accordingly, the contributions to the savings plan made during the marriage . . . were subject to division").

accounts, Joseph argues the court erred by failing to reference his share of Elizabeth's retirement accounts in the judgment portion of the decree.

[8,9] The rules regarding classification of property in dissolution actions are well established. Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.[15] Where there is nothing on the record to show the source of premarital funds, they should be considered part of the marital estate.[16] The burden of proof rests with the party claiming that property is nonmarital.[17]

[10] Neb. Rev. Stat. § 42-366(8) (Reissue 2008) provides: "The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and deferred compensation benefits owned by either party, whether vested or not vested." When applying this statute, we have held generally that amounts added to and interest accrued on pension or retirement accounts which have been earned during the marriage are part of the marital estate, but contributions before marriage or after dissolution are not assets of the marital estate.[18]

In *Coufal v. Coufal*,[19] decided after the decree was entered in the present case, we recognized a narrow and fact-specific exception to the general rule that the marital estate includes amounts added to and interest accrued on pensions and retirement accounts. The husband in *Coufal* participated in NPERS. Before the marriage, his NPERS account had a balance of $76,271.45. At trial, he presented evidence the

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[15] *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015).

[16] *Shockley v. Shockley*, 251 Neb. 896, 560 N.W.2d 777 (1997).

[17] See, *Brozek, supra* note 4; *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[18] *Coufal, supra* note 15.

[19] *Id.*

account had a balance of $219,830.07. Pursuant to Neb. Rev. Stat. § 84-1301(17) (Reissue 2014), members of NPERS were guaranteed a statutory rate of return on their retirement plans. The husband claimed the premarital portion of his NPERS account should be valued to include the statutorily guaranteed interest on his premarital principal. He offered expert testimony establishing that, given the statutory rate of return, the adjusted value of his premarital principal was $120,010.82.

The district court in *Coufal* concluded the interest accruing on the premarital portion of the husband's NPERS account was part of the marital estate, reasoning that the interest accruing during the marriage did not fit into any recognized exception to the general rule that property acquired by either party during the marriage is included in the marital estate.

On appeal, we framed the issue as "whether the increase in value of the premarital portion of the retirement account should be considered as part of the marital estate."[20] To determine which portion of the NPERS retirement account was nonmarital, we examined to what extent the appreciation in the separate premarital portion of the account was caused by the efforts of either spouse. We analogized the NPERS account to a certificate of deposit with a fixed rate of interest owned by one spouse before the marriage. And we observed that the increase in value of the premarital portion of the NPERS account was not contingent on the husband's continued employment, but, rather, was guaranteed by statute prior to the marriage and was not derived from the contributions of either party during the marriage. We concluded the increase in value of the premarital portion of the husband's retirement account was readily identifiable and traceable to the premarital principal, and we rejected the suggestion that the growth was inextricably commingled with marital property.

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[20] *Id.* at 382, 866 N.W.2d at 78.

Ultimately, we concluded on the unique facts in *Coufal* that the increase in value of the premarital portion of the NPERS account was not a marital asset.[21]

We stated in *Coufal* that "[o]ur reasoning and conclusion are specific to the facts presented in this case,"[22] but Joseph argues on appeal that our reasoning has application beyond the NPERS retirement account at issue in *Coufal* to potentially include retirement accounts like the TSP at issue here. Elizabeth argues it would be inequitable to apply the *Coufal* exception to Joseph's retirement account while not applying it to hers, particularly when she had an NPERS account which predated the marriage—the precise type of account we considered in *Coufal*.

[11] We agree the reasoning of *Coufal* is not necessarily restricted to any particular kind of retirement account; rather, the applicability of *Coufal* depends upon the facts of each case and the evidence adduced. After *Coufal*, investment earnings accrued during the marriage on the nonmarital portion of a retirement account may be classified as nonmarital where the party seeking the classification proves: (1) The growth is readily identifiable and traceable to the nonmarital portion of the account and (2) the growth is due solely to inflation, market forces, or guaranteed rate rather than the direct or indirect effort, contribution, or fund management of either spouse.

Here, we are mindful that neither the parties nor the district court had the benefit of our analysis in *Coufal* when this case was tried or decided. It makes little sense to conduct a de novo review of the evidence adduced and the findings made against a standard neither known to nor contemplated by the parties or the court at the time the case was tried. Because *Coufal* recognized a fact-specific exception to the

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[21] *Coufal, supra* note 15.

[22] *Id.* at 381, 866 N.W.2d at 77.

general rules governing classification and division of retirement accounts and because here, both parties have retirement accounts which may arguably fall within the exception, we conclude it is appropriate to vacate that portion of the decree which divided the parties' retirement accounts and remand the cause for further consideration and/or proceedings. In so doing, we express no opinion regarding the applicability of the *Coufal* exception to the specific facts of this case.

Accordingly, we vacate that portion of the decree which classifies, values, and divides the parties' retirement accounts, and we remand the cause for further consideration and/or proceedings regarding the equitable division of the parties' retirement accounts.

Because we are vacating the decree as it regards division of the parties' retirement accounts and remanding the cause for further proceedings, it is unnecessary to reach Joseph's final assignment of error.

VI. CONCLUSION

The judgment of the district court is affirmed in all respects but one. That portion of the decree concerning the retirement accounts of the parties is vacated, and the cause is remanded to the district court for further consideration and/or proceedings to determine the appropriate classification, valuation, and division of the parties' retirement accounts.

Affirmed in part, and in part vacated and remanded for further proceedings.

Heavican, C.J., not participating.

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

Roger Jerome Burnett, appellee, v. Jeffrey Clyde Maddocks, appellant, and Opal Maddocks et al., appellees.

881 N.W.2d 185

Filed July 15, 2016. No. S-15-712.

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 resolves questions of law and fact independently of the trial court's determinations.
3. **Foreign Judgments: Jurisdiction: States.** Under the Full Faith and Credit Clause of art. IV, § 1, of the federal constitution, a judgment rendered in the court of a sister state which had jurisdiction has the same validity and effect in Nebraska as in the rendering state.
4. ____: ____: ____. The validity and effect of a judgment is determined with reference to the laws of the rendering state.
5. **Wills: Intent.** The cardinal rule in construing a will is to ascertain and effectuate the testator's intent if such intent is not contrary to the law.
6. ____: ____. A court must examine a will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meanings of words used in the will, and assume that the testator understood the words used in the will.
7. **Parent and Child: Words and Phrases.** The generally accepted meaning of the word "son" is a parent's male child.
8. **Wills: Parent and Child: Intent.** Stepchildren are generally not included in a devise to "children" unless the testator shows a different intent.

Appeal from the District Court for Pawnee County: Daniel E. Bryan, Jr., Judge. Reversed and remanded with directions.

Eugene L. Hillman, of Hillman, Forman, Childers & McCormack, for appellant.

Heather Voegele-Andersen and Brenda K. Smith, of Dvorak & Donovan Law Group, L.L.C., for appellee Roger Jerome Burnett.

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

Connolly, J.

SUMMARY

Roger Jerome Burnett seeks to quiet title to a quarter section of farmland in Pawnee County, Nebraska (Property). He argues that he owns the Property because he is the "eldest son" of Merrill Maddocks under the will of Merrill's great-uncle. In 2006, a Colorado court entered a decree for adult adoption which made Burnett, then 58 years old, Merrill's heir under the intestacy laws. The trial court quieted title to the Property in Burnett.

Jeffrey Clyde Maddocks, the person who takes the Property if Burnett is not Merrill's "eldest son," appeals. We conclude that Burnett is not Merrill's "son" under the will because he lacked a parent-child relationship with Merrill. We reverse, and remand with directions to quiet title to the Property in Jeffrey.

BACKGROUND

Charles W. Maddocks died in 1938. His will directed the executor to reduce certain assets to cash and purchase a farm selected by Charles' nephew, A. Walter Maddocks (Walter). Item 7(b) of the will provided:

> I give and bequeath to my said nephew, A. WALTER MADDOCKS, a life estate for the term of his natural life in and to the . . . farm so purchased, and at his death I give and bequeath to MERRILL MADDOCKS, a son of said A. Walter Maddocks, a life estate for the term of the natural life of said Merrill Maddocks, in and to said . . . farm, with remainder over at his death to his eldest son, in fee simple; or, if said Merrill Maddocks shall

> leave no son surviving, then with remainder over in fee simple to the eldest grand-son in the male line of said A. Walter Maddocks, then living; or, if there is then living no grand-son, in the male line of descent, of said A. Walter Maddocks, then with remainder over to the surviving heirs at law of said A. Walter Maddocks . . . .

The county court for Pawnee County admitted Charles' will for probate.

A few years later, the executor of Charles' estate bought the Property. The deed quoted part of item 7(b) of Charles' will and stated that Walter had selected the Property. The deed further stated that the parties intended that "title to the premises herein and hereby conveyed shall vest in the grantees strictly in the manner provided by said last will and testament."

Walter died in 1977. His grandson, Jeffrey, survived him. Burnett stipulated that, at Walter's death, Jeffrey was "the eldest grand-son in the male line of said A. Walter Maddocks, then living."

In 1988, Burnett's mother married Merrill. In 2006, a Colorado court entered a decree for adult adoption under which Merrill adopted Burnett as his adult "heir at law." As a legal term of art, "heir" means one who receives an intestate decedent's property.[1] And, as discussed below, the only effect of the decree was to make Burnett the heir of Merrill for intestate succession.

In 2014, Merrill died. He did not leave any surviving children.

After Merrill died, Burnett filed a complaint to quiet title to the Property in him. Burnett alleged that the Property was his because he was Merrill's "eldest son" under Charles' will.

Jeffrey was the only defendant who answered. He alleged the Property passed to him under Charles' will because he was the eldest grandson in Walter's male line. Jeffrey argued

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[1] See Black's Law Dictionary 839 (10th ed. 2014).

that Burnett was not Merrill's "eldest son" under the will because "it was not legally possible to adopt an adult" in Nebraska when Charles died. Jeffrey alleged a counterclaim against Burnett and a cross-claim against the other defendants seeking to quiet title to the Property in him.

In its decree, the court quieted title to the Property in Burnett and dismissed Jeffrey's counterclaim and cross-claim. It stated that Burnett was Merrill's "eldest son" because the Colorado decree was entitled to full faith and credit in Nebraska.

Jeffrey appeals. We note that neither he nor Burnett informed the trial court of what effect the decree for adult adoption had under Colorado law. We asked the parties to submit supplemental briefs on that issue.

ASSIGNMENTS OF ERROR

Jeffrey assigns, restated, that the court erred by (1) quieting title in Burnett and (2) not quieting title in Jeffrey.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity.[2] On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.[3]

ANALYSIS

Jeffrey argues that Charles, the testator, did not intend the "eldest son" of Merrill to include an adult man whom Merrill adopted in 2006. Jeffrey notes that Nebraska did not allow stepparents to adopt their adult stepchildren until 1984.[4] So he argues that Charles would not have contemplated Merrill's adopting an adult "son" when Charles died in 1938.

This is not the first case to challenge an adult adoptee's status under the will of a testator who died before Nebraska

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[2] *Schellhorn v. Schmieding*, 288 Neb. 647, 851 N.W.2d 67 (2014).

[3] *Id.*

[4] See 1984 Neb. Laws, L.B. 510, § 1.

permitted adult adoption. We held in *Satterfield v. Bonyhady*[5] that a person adopted as an adult by her stepfather was her stepfather's "child" under a will executed by a testator who died before Nebraska allowed adult adoption. We emphasized that adoption under Nebraska law, whether the adoptee is a child or an adult, creates the "usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent."[6] In *Satterfield*, the stepfather adopted his stepdaughter in Nebraska.

[3,4] Merrill did not adopt Burnett in Nebraska. Instead, he adopted Burnett as his "heir at law" in a decree entered by a Colorado court. Under the Full Faith and Credit Clause of art. IV, § 1, of the federal constitution, a judgment—including an adoption decree—rendered in the court of a sister state which had jurisdiction has the same validity and effect in Nebraska as in the rendering state.[7] And we determine the validity and effect of a judgment with reference to the laws of the rendering state.[8]

So we must look to Colorado law to determine the effect of the Colorado decree. Under title 19, article 5, of the Colorado Revised Statutes, a child under 18 years of age or, with the court's approval, an adult who is 18, 19, or 20 years old may be "adopted as a child."[9] A person so adopted becomes, "to all intents and purposes, the child of the petitioner" and is entitled to all the rights and privileges and subject to all the obligations of a child born in lawful wedlock to

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[5] *Satterfield v. Bonyhady*, 233 Neb. 513, 446 N.W.2d 214 (1989).

[6] Neb. Rev. Stat. § 43-110 (Reissue 2008).

[7] *In re Trust Created by Nixon*, 277 Neb. 546, 763 N.W.2d 404 (2009), citing *Russell v. Bridgens*, 264 Neb. 217, 647 N.W.2d 56 (2002).

[8] See, *Russell v. Bridgens, supra* note 7; *Susan H. v. Keith L.*, 259 Neb. 322, 609 N.W.2d 659 (2000); *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988); 50 C.J.S. *Judgments* § 1278 (2009).

[9] See Colo. Rev. Stat. Ann. § 19-5-201 (West 2016).

the petitioner.[10] Conversely, the legal rights and obligations between the adoptee and the adoptee's biological parents are severed.[11]

But the parties agree that Merrill did not adopt Burnett under title 19, article 5. Instead, he adopted Burnett under Colo. Rev. Stat. Ann. § 14-1-101 (West 2016). Section 14-1-101 allows a person to "adopt an adult as [an] heir at law" by petitioning for a decree "declaring [the adult] the heir at law of the petitioner and entitled to inherit from the petitioner any property in all respects as if such adopted person had been the petitioner's child born in lawful wedlock."

Under Colorado law, the "legal effects of adult adoption are quite different from those flowing from adoption of a child."[12] More specifically, the effects of adult adoption are relatively minor:

> No obligation whatsoever is placed upon the person adopted with respect to the adoptive parent. He is granted no rights whatever, other than the acquisition of an heir at law, who may or may not even bear his name. It is merely a means of giving effect to a personal transaction mutually agreeable between two adults. No rights of the natural parents of the person adopted are taken from them, or even mentioned, where the purpose of the adoption is to acquire an adult "heir at law."[13]

A decree for adult adoption "does not have the power to affect the interests determined by an express disposition."[14] Section

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[10] Colo. Rev. Stat. Ann. § 19-5-211(1) (West 2005).

[11] § 19-5-211(2).

[12] *Matter of Trust Created by Belgard*, 829 P.2d 457, 459 (Colo. App. 1991).

[13] *Martin v. Cuellar*, 131 Colo. 117, 122, 279 P.2d 843, 845 (1955). See, *In re P.A.L.*, 5 P.3d 390 (Colo. App. 2000); *Herrera v. Glau*, 772 P.2d 682 (Colo. App. 1989).

[14] *Matter of Trust Created by Belgard, supra* note 12, 829 P.2d at 460.

14-1-101 has the "express purpose of making one an intestate heir of the adopting person."[15]

So, giving the decree for adult adoption the same effect it has in Colorado, Burnett is entitled to inherit from Merrill as if he were Merrill's child born in lawful wedlock for intestate succession. Does that make him Merrill's "son" under Charles' will? In a similar case, a California court held that the settlor did not intend the word "issue" to include adults adopted in Colorado under § 14-1-101. In *Ehrenclou v. MacDonald*,[16] the settlor made his daughter, Jacqueline Wolber (Jacqueline), a life beneficiary of a trust. On Jacqueline's death, the trustees were to distribute the assets to her "'living lawful issue.'"[17] Jacqueline had two biological children, and she adopted two adults—Steven MacDonald (Steven) and Cynthia Hutt (Cynthia)—as her heirs at law in Colorado under § 14-1-101. After Jacqueline died, her biological children sought a declaration that they were her only "living lawful issue."

The court said that whether Steven and Cynthia were Jacqueline's "living lawful issue" depended on whether they had the "*status* of being Jacqueline's children with all the rights and duties between them as parent and child."[18] Their status, in turn, depended on the legal relationship between Jacqueline and Steven and Cynthia under Colorado law.

The court concluded that the relationship between Jacqueline and her adopted adult heirs was something decidedly less than the relationship between a parent and her children:

> The status conferred by a Colorado adult "adoption" is that of "heir at law." Nothing more. Nothing less. Thus, although the adopted person gains the right to inherit

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[15] *Id.* at 459.

[16] *Ehrenclou v. MacDonald*, 117 Cal. App. 4th 364, 12 Cal. Rptr. 3d 411 (2004).

[17] *Id.* at 367, 12 Cal. Rptr. 3d at 413.

[18] *Id.* at 373, 12 Cal. Rptr. 3d at 417 (emphasis in original).

> from the adopting person, the adopting person does not gain such a right from the adopted person. And the "adoption" does not sever the parent-child relationship between the adopted person and his or her natural parents. The adopted person retains all the rights and duties as the child of the natural parents, including the right to inherit from them as their heir at law.[19]

Because Steven and Cynthia did not have a parent-child relationship with Jacqueline, the court determined that the settlor would not have considered them Jacqueline's "living lawful issue."

We likewise conclude that the Colorado decree did not create a parent-child relationship between Merrill and Burnett. There is more to being a parent than serving as a medium through which property passes to an heir under the laws of intestate succession. The critical point is not that Colorado might define the parent-child relationship differently than Nebraska, but that Colorado extends the relationship to one class of adoptees and not to another.[20] Burnett is a member of the latter class.

Burnett argues that the effect of the decree under Colorado law is irrelevant. He cites *In re Trust Created by Nixon*,[21] in which we held that an adult adopted in California was the adopting person's "child" under a will which stated that "'issue'" included "'"persons legally adopted."'" Our focus in *In re Trust Created by Nixon* was whether the adoption decree violated Nebraska's public policy. We concluded that the decree was not contrary to our public policy and was therefore entitled to full faith and credit. Burnett correctly

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[19] *Id.* at 374, 12 Cal. Rptr. 3d at 419.

[20] See *Sanders v. Yanez*, 238 Cal. App. 4th 1466, 190 Cal. Rptr. 3d 495 (2015).

[21] *In re Trust Created by Nixon, supra* note 7, 277 Neb. at 553, 763 N.W.2d at 410.

notes that we did not belabor the effect of the decree under California law.

But this case shows that we cannot assume that any foreign decree with "adoption" in its title has the same effect as an adoption decree entered by a Nebraska court. Not all "adoption" decrees are equal. As we said in *In re Trust Created by Nixon*, a foreign adoption decree has "the *same* validity and effect in Nebraska as in *the state rendering judgment*."[22] A foreign judgment is not entitled to *greater* effect in Nebraska than it would have in the rendering state.[23]

[5,6] Now we reach the ultimate question in this case: Did Charles intend the "eldest son" of Merrill to include a man who lacked a parent-child relationship with Merrill but is treated as if he was Merrill's child for intestate succession? The cardinal rule in construing a will is to ascertain and effectuate the testator's intent if such intent is not contrary to the law.[24] A court must examine the will in its entirety, consider and liberally interpret every provision in the will, employ the generally accepted literal and grammatical meanings of words used in the will, and assume that the testator understood the words used in the will.[25]

[7,8] We conclude that Burnett is not Merrill's "eldest son" under item 7(b) of Charles' will. From the execution of the will to the present, the word "son" has referred to a parent's male child.[26] The will does not show Charles' intent to depart

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[22] *Id.* at 550, 763 N.W.2d at 408 (emphasis supplied).

[23] 50 C.J.S., *supra* note 8.

[24] *In re Estate of Mousel*, 271 Neb. 628, 715 N.W.2d 490 (2006).

[25] *Id.*

[26] The New Oxford American Dictionary 1625 (2001); Webster's Encyclopedic Unabridged Dictionary of the English Language 1356 (1989); Webster's Third New International Dictionary of the English Language, Unabridged 2172 (1981); Webster's New International Dictionary of the English Language 2397 (2d ed. 1943).

from this generally accepted meaning. The Colorado decree did not create a parent-child relationship between Merrill and Burnett, so Burnett is not Merrill's male child. Nor does Burnett's status as Merrill's stepson make him Merrill's "son" under item 7(b). Stepchildren are generally not included in a devise to "children," and nothing in the will suggests that Charles had a different intent.[27]

Burnett and Jeffrey stipulated that, other than Burnett, Merrill did not have a surviving son. They also stipulated that Jeffrey was the "eldest grand-son in the male line of said A. Walter Maddocks" when Walter died in 1977. Jeffrey's allegation that he was the eldest grandson in Walter's male line living when Merrill died was not contested by Burnett or any of Jeffrey's codefendants. We determine that Merrill did not leave a surviving son and that Jeffrey was the eldest grandson in Walter's male line when Merrill died. So, the Property passed to Jeffrey under Charles' will.

CONCLUSION

Because Merrill and Burnett did not have a parent-child relationship, Burnett was not Merrill's "eldest son" under item 7(b) of Charles's will. Merrill did not leave a surviving son, so the Property passes to the eldest grandson in Walter's male line. That person is Jeffrey. We therefore reverse, and remand with directions to quiet title to the Property in Jeffrey.

Reversed and remanded with directions.

Stacy, J., participating on briefs.

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[27] See, 80 Am. Jur. 2d *Wills* § 1037 (2013); 96 C.J.S. *Wills* § 1032 (2011); 4 William J. Bowe & Douglas H. Parker, Page on the Law of Wills § 34.17 (rev. ed. 1961).

Nebraska Supreme Court
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State of Nebraska, appellee, v. Brody L. Duncan, appellant.

882 N.W.2d 650

Filed July 15, 2016. No. S-15-763.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.
3. **Criminal Law: Statutes: Appeal and Error.** It is a fundamental principle of statutory construction that courts strictly construe penal statutes, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
4. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
5. **Theft: Value of Goods.** Whether amounts are taken pursuant to one scheme or course of conduct is relevant not to whether the defendant is guilty of the underlying theft offense, but solely to whether the values of multiple stolen items can be aggregated for purposes of grading the offense.

6. **Theft: Value of Goods: Proof.** Although Neb. Rev. Stat. § 28-518(8) (Cum. Supp. 2014) requires some value to be proved as an element of a theft offense, the statutory language does not require proof of a particular threshold value.
7. **Theft: Value of Goods: Words and Phrases.** A finding of "one scheme or course of conduct" is not an essential element of the offense of theft, even when the State is attempting to aggregate amounts pursuant to Neb. Rev. Stat. § 28-518(7) (Cum. Supp. 2014).

Appeal from the District Court for Seward County: James C. Stecker, Judge. Affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, 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.

Kelch, J.

NATURE OF CASE

Brody L. Duncan was accused of unlawfully taking two items belonging to Hymark Towing (Hymark), a Chevrolet Tahoe and a combine trailer. Rather than being charged with two Class IV felonies (theft by unlawful taking, more than $500 but less than $1,500), Duncan was charged with one Class III felony (theft by unlawful taking, more than $1,500) under the theory that the values of the Tahoe and the combine trailer could be aggregated, pursuant to Neb. Rev. Stat. § 28-518(7) (Cum. Supp. 2014), because they were "pursuant to one scheme or course of conduct." The jury found Duncan guilty of unlawfully taking both items, but made a special finding that the items were not taken pursuant to one scheme or course of conduct. On the jury's verdict, the district court found that Duncan was guilty of a Class IV felony (theft by unlawful taking, more than $500 but less than $1,500). Duncan appeals. We affirm.

FACTS

Monte Stava owned and operated Hymark, a full-service lockout and towing business. As part of the business, Monte sometimes sold unclaimed vehicles in satisfaction of towing and storage debts pursuant to Neb. Rev. Stat. § 60-2404 (Reissue 2010). In order to sell the vehicles, Hymark had to obtain titles to the abandoned vehicles, which could be done through a sheriff's office.

Monte battled cancer for about 8 years before he passed away in November 2011. Before his death, there were times when Monte was extremely ill and his friends and relatives "pitched in" to help run the business. One of those friends was Duncan.

After Monte passed away, Duncan began handling the day-to-day operations. Monte's widow, Kasey Stava, decided to try to continue Hymark. Kasey's mother had been acting as the bookkeeper for Hymark prior to Monte's death, and after Monte's death, she wanted to set up a payroll account. She contacted Duncan and asked him what he would need moving forward. The parties agreed that Duncan would make $500 per week, plus $200 per "crush load."

The parties dispute whether Hymark was behind on paying Duncan for the work he performed before Monte's death. The bookkeeper testified that prior to Monte's death, none of the people assisting Monte received a regular salary. Hymark's checking account reflects that Duncan was paid $400, $500, and $4,000 in February, June, and December 2011, respectively, but there was no evidence as to the amount of work Duncan was performing during those times.

In February 2013, the parties had a falling out, and either Duncan quit Hymark or his employment was terminated. In March or April, Kasey sold Hymark to a new owner.

Tahoe

Duncan claims that in exchange for his help at Hymark, Monte gave him a heavily damaged Tahoe that had been

towed and stored on Hymark's lot. At Duncan's trial on the theft charge, there was evidence that Monte liked to barter with people and trade favors, and, as explained below, two witnesses testified that Monte told them he intended to give Duncan the Tahoe. However, the only evidence that Monte actually did give Duncan the Tahoe was Duncan's statements to others that he did.

Larry Payne was a friend of Monte's, and at all relevant times, he owned a shop out of his home in Seward, Nebraska, where he worked on cars as a hobby. At Duncan's trial, Payne testified that Duncan called Payne about 6 months after Monte died and wanted Payne to pull the motor out of the Tahoe so that Duncan could put the motor into a demolition derby car. Rather than pulling the motor out of the Tahoe, Payne offered to buy a motor and an "intake" for Duncan's demolition derby car if Duncan would let Payne keep the Tahoe. Duncan agreed.

Payne testified that when Duncan showed up with the Tahoe, Payne asked Duncan, "'This Tahoe is yours, right?' . . . 'Monte gave it to you?'" Duncan said, "'Yes.'" Payne testified that he had guessed that Monte had given the Tahoe to Duncan because of a prior conversation Payne had with Monte.

The conversation in question allegedly occurred sometime in late spring or early summer 2010. Payne testified that Monte had called Payne and asked Payne if he would come look at some vehicles in Monte's lot to see if they were worth listing on the Internet. Payne explained that he would sometimes list Monte's vehicles on the Internet for him. Payne testified that he and Monte walked around the lot looking at the vehicles. They approached the Tahoe, and Payne asked Monte, "'What's the deal on this one?'" Payne testified that Monte said, "'I'm saving it for [Duncan].'"

On redirect, Payne admitted that after the exchange with Duncan, he had sent text messages to Duncan asking Duncan what Kasey wanted for the Tahoe and offered $500 to $700. On recross, Payne testified that this was because he was

trying to "help settle the estate" and make amends. Payne explained:

> [T]he estate wasn't settled because of that vehicle . . . . I just — I had no idea that anybody was mad at me for anything that I had done. I was just trying to make [amends.] I just thought if it was a matter of money, I would give her what she wanted to make her happy with the vehicle.

In February 2013, to get a title to the Tahoe for Payne, Duncan submitted an application for an abandoned title to the Seward County Sheriff's Department. At the same time, he also submitted applications for other vehicles on behalf of Hymark. Duncan paid for all of the application processing fees with a Hymark check. The officer processing those applications had frequently processed abandoned title applications for Hymark. So when he noticed Duncan's name on the Tahoe's application, he became concerned. When he confronted Duncan about it, Duncan told him that Monte and Kasey had given him the Tahoe. The officer asked Duncan to have Kasey contact him to confirm this, and Duncan indicated that he would.

Two days later, a person called the officer in reference to the Tahoe. She identified herself as Kasey and stated that yes, she had given the Tahoe to Duncan. But the officer was familiar with Kasey's voice and did not recognize the voice on the telephone. He decided to call Kasey's home. The officer got in contact with Kasey and asked her if she had called him earlier. She indicated that she had not. As a result of the conversation, the officer did not issue the title to Duncan.

After Duncan had failed to provide Payne with a title for over a year, Payne asked Duncan for the telephone number of the attorney handling Monte's estate, who was also a friend of Monte's prior to his death, so that Payne could try to make some progress on the title himself.

After Payne called the attorney handling the estate, the attorney checked the estate's inventory for the Tahoe but did

not see it listed and did not remember coming across it when conducting the inventory in the winter and spring of 2012. The attorney then asked Kasey if she knew anything about the Tahoe, and Kasey stated that she had reported it as stolen. Sometime later, the attorney told Payne that the Tahoe had been listed as stolen. Payne responded that the Tahoe was not stolen—that Monte had given it to Duncan and that it was at Payne's house.

A search warrant was executed, and an investigator seized the Tahoe from Payne's property in October 2013. Approximately 2 days later, Duncan called the investigator, wanting to explain the circumstances surrounding the Tahoe. Duncan met with and was interviewed by the investigator on January 16, 2014. The interview was recorded, and a portion of it was published to the jury.

During the interview, Duncan told the investigator that Monte had given him the Tahoe in exchange for work that Duncan had done for Hymark. He said that this kind of transaction was common with Monte: "If he couldn't pay me, he found a way that . . . would help me out." Duncan explained that at the time Monte gave him the Tahoe, Duncan had a Chevrolet pickup on which the Tahoe's parts would fit. Duncan said that the Tahoe sat on Hymark's lot until July 2012, when he needed a motor for his demolition derby car and called Payne to have him remove the motor from the Tahoe.

Duncan told the investigator that when he gave Payne the Tahoe, he assumed Hymark had the title to it, but that he later found out that Hymark did not. Duncan said he then submitted the application for the title himself, along with the titles for Hymark. Duncan told the investigator that when he later called about the Tahoe's title, the officer processing his application told him that the title could not be issued to Duncan. Duncan said that he did not understand what the problem was and gave up on the title.

The investigator told Duncan that somebody called the officer, but that it was not Kasey. Duncan responded, "Okay,"

and then stated that he did not know who else it would have been.

Proceeds of Combine Trailer

The investigator also asked Duncan about a combine trailer that Monte had bought at an auction. Duncan told the investigator that he had sold it for Hymark and kept the proceeds. Duncan said that Hymark was behind on paying him for the first year he worked and that Kasey's mother, the bookkeeper, told Duncan that he should keep the proceeds as payment for his services.

The purchaser of the trailer testified that in December 2011, he negotiated with Kasey for the trailer and agreed to pay $1,250. The purchaser testified that he wrote the check and gave it to Duncan, but that he did not fill in the payee line of the check because he did not know how to spell Kasey's name. When the purchaser received his bank statement, he noticed Duncan's name on the payee line of the check, but he testified that this did not disturb him, "[b]ecause Monte and [Duncan] were friends and worked together all their life[,] and . . . more than likely [Duncan] was owed labor or owed something so they just did it that way."

The bookkeeper testified that she did not tell Duncan that he could sell the combine trailer to make up for his salary. Kasey also testified that she never gave Duncan permission to sell the trailer and take the proceeds.

Duncan's Trial

After the State rested its case, Duncan moved to dismiss the charge, arguing that no reasonable juror could find Duncan guilty beyond a reasonable doubt of the charge set forth in the information. Although Duncan conceded there was sufficient evidence that, if believed, created a jury question on whether Duncan had unlawfully taken the proceeds of the combine trailer, he argued:

> [I]f this [theft of the Tahoe] count stood on its own, there would be insufficient evidence for the Court to send

> this count to the jury and the case would be dismissed. However, since we can't really dismiss something that isn't a count, my request would be that the Court rule that this issue does not go to the jury.

The court overruled Duncan's motion.

The jury reached its verdict the day after the conclusion of the evidence. The jury found that Duncan stole the Tahoe, which the jury valued at $750, and the check, which the jury valued at $1,250. The jury also found that the Tahoe and the check were not taken pursuant to one scheme or course of conduct. Because the value of the check and that of the Tahoe could not be aggregated, the judge found Duncan guilty of unlawful taking, more than $500 but less than $1,500, a Class IV felony. On June 26, 2015, Duncan filed a motion for a new trial, which was denied. Duncan was sentenced to 4 years of probation. He timely appeals.

ASSIGNMENTS OF ERROR

Duncan assigns that the trial court erred (1) in instructing the jury on the elements of the offense and the effect of its finding on the element of "one scheme or course of conduct" under § 28-518(7), (2) in failing to find Duncan not guilty based upon the jury's finding that the thefts were not part of one scheme or course of conduct, and (3) in failing to grant a new trial based upon the jury verdict. He also assigns that (4) the evidence was insufficient to support the verdict on the theft of the Tahoe and (5) he was prejudiced by the improper joinder for trial of two unrelated offenses.

STANDARD OF REVIEW

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

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[1] *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] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.[2]

ANALYSIS

The primary issue in this case is whether a finding that the amounts were "taken pursuant to one scheme or course of conduct" is an essential element of the crime of theft when a defendant is charged with one theft offense involving multiple items pursuant to § 28-518(7). Duncan argues that it is, that the district court erred in failing to instruct the jury that it is, and that the district court erred in finding Duncan guilty of theft on the jury's verdict. We conclude that such a finding is not an essential element of the crime of theft, regardless of whether the State is attempting to aggregate amounts pursuant to § 28-518(7), but is instead relevant for purposes of grading the offense. We therefore affirm Duncan's conviction of theft by unlawful taking, a Class IV felony.

The information charged Duncan with one count of "Theft By Unlawful Taking More Than $1,500," "Class III Felony," pursuant to § 28-518 and Neb. Rev. Stat. § 28-511 (Reissue 2008).

Section 28-511(1) states that "[a] person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." The grading of theft crimes is governed by § 28-518, which provides, in relevant part:

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[2] *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

> (1) Theft constitutes a Class III felony when the value of the thing involved is over one thousand five hundred dollars.
>
> (2) Theft constitutes a Class IV felony when the value of the thing involved is five hundred dollars or more, but not over one thousand five hundred dollars.
>
> . . . .
>
> (7) Amounts taken pursuant to one scheme or course of conduct from one or more persons may be aggregated in the indictment or information in determining the classification of the offense, except that amounts may not be aggregated into more than one offense.
>
> (8) In any prosecution for theft under sections 28-509 to 28-518, value shall be an essential element of the offense that must be proved beyond a reasonable doubt.

[3,4] It is a fundamental principle of statutory construction that courts strictly construe penal statutes, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.[3] In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.[4]

[5] Whether amounts are taken pursuant to one scheme or course of conduct is relevant not to whether the defendant is guilty of the underlying theft offense, but solely to whether the values of multiple stolen items can be aggregated for purposes of grading the offense.[5] This is supported by the statutory language, as well as our case law. Section 28-518

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[3] *State v. Thacker*, 286 Neb. 16, 834 N.W.2d 597 (2013).

[4] *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012).

[5] See § 28-518(7) and *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

grades the degree of theft according the value of the property stolen. Under § 28-518(7), an act of theft involving multiple items of property constitutes one offense if the items were taken "pursuant to one scheme or course of conduct."[6] With such an offense, § 28-518(7) provides that the value of the individual stolen items may be considered collectively for the explicit purpose of "determining the classification of the offense."[7] If the Legislature had intended to make a finding of "one scheme or course of conduct"[8] an essential element of the crime of theft, we believe it would have done so explicitly, just as it explicitly made "value" an essential element of the crime of theft in the very next subsection.[9]

[6] We have previously explained that although § 28-518(8) requires some value to be proved as an element of a theft offense, the statutory language does not require proof of a particular threshold value.[10] Accordingly, when the jury here determined the values of the check and the Tahoe, the value element set forth in § 28-518(8) was satisfied. Although those values could not be aggregated pursuant to § 28-518(7), Duncan is no less guilty of theft. Instead, he is guilty of a lesser degree of theft.

We conclude that the district court was correct in determining, based on the jury verdict, that Duncan was guilty of a Class IV felony theft offense. We note that this disposition is not unlike the disposition of the charges in *State v. Garza*,[11] which was upheld after the 1992 amendments to § 28-518.[12] In *Garza*, the defendant was convicted of theft by shoplifting

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[6] See *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007).

[7] See *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992).

[8] See § 28-518(7).

[9] See § 28-518(8).

[10] See § 28-518 and *State v. Gartner, supra* note 5.

[11] *State v. Garza, supra* note 7.

[12] *State v. Gartner, supra* note 5.

as a Class IV felony. This court found that there was insufficient evidence of the value of the stolen property to justify a finding of theft punishable as a felony. We concluded, however, that the evidence showed beyond a reasonable doubt that the property stolen had some intrinsic value, notwithstanding the absence of evidence establishing a specific value. We thus set aside the felony sentence and remanded the matter to the district court with direction to impose an appropriate sentence for theft as a Class II misdemeanor. Here, the judge similarly imposed an appropriate sentence according to the jury's verdict and the value of the items stolen. The value of the check ($1,250) and the value of the Tahoe ($750) both fell within the Class IV felony range ($500 to $1,500). Had the values of these items been aggregated, Duncan would have been guilty of a Class III felony (more than $1,500). However, the judge properly found that Duncan was guilty of a Class IV felony and sentenced him accordingly.

Duncan argues that the jury's finding that there was no "one scheme or course of conduct" under § 28-518(7) requires a finding of not guilty. He argues that "if the state seeks to implicate the penalty provisions of § 28-518(7), [the subsection allowing aggregation,] it must assume the risk if it fails to prove the 'one scheme' element."[13] Otherwise, Duncan says, "the net result is the defendant faces trial on two unrelated offenses that could not otherwise have been properly joined for trial" under Neb. Rev. Stat. § 29-2002 (Reissue 2008).[14]

Section 29-2002 provides, in relevant part:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or

[13] Brief for appellant at 17.

[14] *Id.*

> on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .
>
> (3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses in an indictment, information, or complaint or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

We note that § 29-2002 does not apply here because Duncan was not charged with two or more offenses within the same information; instead, Duncan was charged with committing one offense, a theft involving multiple items of property.

Duncan argues that the same potential for prejudice exists whether a defendant is charged with multiple offenses within the same information pursuant to § 29-2002 or charged with one theft offense involving multiple items pursuant to § 28-518(7). Duncan's concern appears to be that by aggregating the thefts of multiple items into one offense pursuant to § 28-518(7), rather than charging the thefts as separate counts within the same information pursuant to § 29-2002, the State can effectively avoid § 29-2002(3), which allows a court to order separate trials for separate counts if it appears that the defendant or the State would be prejudiced by the joinder. Duncan argues that although a defendant charged with multiple offenses could have filed a motion to sever, there is nothing he could have done to challenge the State's choice to plead the theft of the two items as a single offense.

Indeed, we have said that the right to sever is statutory,[15] and nothing in § 28-518(7) allows a court to sever a single offense into multiple counts. However, we are not convinced

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[15] *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

that the absence of such a provision within § 28-518 shows any intent by the Legislature that a finding of "one scheme" under § 28-518(7) is to be interpreted as an essential element of the offense.

Duncan's argument about prejudice seems to contemplate a situation where the State has alleged, without a good faith basis, that acts of theft were committed pursuant to "one scheme or course of conduct" as contemplated by § 28-518(7). However, we note that if the jury determines that the acts of theft were *not* pursuant to one scheme or course of conduct, the values of the stolen items cannot be aggregated and the State is limited to one conviction of a lesser degree than it charged. In such a case, the State will have forgone obtaining multiple convictions for the separate acts of theft.

Here, the State took a risk when it alleged that Duncan was guilty of one offense involving two items, rather than two offenses. Had the State charged Duncan with two offenses, the jury verdict suggests that Duncan would have been found guilty of two Class IV felonies. But because the State chose to charge him with one offense, he was convicted of only one.

[7] Because we conclude that a finding of "one scheme or course of conduct" is not an essential element of the offense, even when the State is attempting to aggregate amounts pursuant to § 28-518(7), a number of Duncan's assignments of error are without merit. The trial court did not err in failing to instruct the jury that "one scheme or course of conduct" is an element of the offense under § 28-518(7), because it is not. The trial court also did not err in finding Duncan guilty of the Class IV felony offense or in refusing to grant Duncan's request for a new trial, notwithstanding the jury's finding that the takings of the Tahoe and the check were not pursuant to one scheme or course of conduct.

The only remaining assignment of error is Duncan's assignment that the evidence was insufficient to support the jury's verdict on the theft of the Tahoe. However, Duncan specifically stated in his brief that he "does not challenge the

sufficiency of the evidence to support the jury verdict regarding [his] conversion of the proceeds from the sale of the combine trailer."[16]

We conclude that there was sufficient evidence to support Duncan's conviction, because even without the evidence relating to the Tahoe, any rational trier of fact could have found the essential elements of the crime of theft beyond a reasonable doubt. Duncan does not challenge the jury's finding that he was guilty of theft by unlawful taking of the check. Nor does he challenge the jury's valuation of the check at $1,250. These findings support Duncan's conviction of theft by unlawful taking, more than $500 but less than $1,500, a Class IV felony. Therefore, Duncan's last assignment of error is without merit.

CONCLUSION

We conclude that a finding of "one scheme or course of conduct" is not an essential element of the crime of theft, regardless of whether the State is attempting to aggregate amounts pursuant to § 28-518(7). We also conclude that there was sufficient evidence to support Duncan's conviction of the Class IV felony theft offense. We therefore affirm.

Affirmed.

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[16] Brief for appellant at 22.

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

State of Nebraska, appellee, v. Manuel A. Aguallo, appellant.

881 N.W.2d 918

Filed July 15, 2016. No. S-15-849.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
2. **Criminal Law: Statutes: Legislature: Sentences.** Generally, if the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.
3. **Statutes: Appeal and Error.** Statutory language 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. **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.
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. ____: ____: ____. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
7. **Sentences: Legislature: Intent: Time.** The Legislature did not intend penalty reductions made in 2015 to Class IIIA felonies to apply retroactively to offenses committed prior to August 30, 2015.

8. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which 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.

Appeal from the District Court for Box Butte County: Travis P. O'Gorman, Judge. Affirmed.

Bell Island, of Island & Huff, P.C., L.L.O., 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.

Stacy, J.

Manuel A. Aguallo appeals his sentence for sexual assault of a child, third degree. He contends the district court erred in failing to retroactively apply recent statutory amendments which reduced the penalty for Class IIIA felonies. We find the reduced penalty provisions do not apply to Aguallo, and we affirm his conviction and sentence.

FACTS

On March 4, 2015, the State filed an information charging Aguallo with sexual assault of a child, third degree, in violation of Neb. Rev. Stat. § 28-320.01 (Reissue 2008). The offense was alleged to have occurred on or about January 25, 2015. He entered a plea of no contest on July 17. On September 9, he was sentenced to a prison term of 59 to 60 months.

At sentencing, the district court considered the effect of certain amendments made to Nebraska's sentencing laws by 2015 Neb. Laws, L.B. 605. We describe some of L.B. 605's changes while reciting the facts of the sentencing hearing, and we analyze the applicability of those legislative changes later in the opinion.

L.B. 605 amended Nebraska law to, among other things, reduce the penalties for a variety of felonies. Before L.B. 605, Class IIIA felonies were punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both, with no minimum term of imprisonment.[1] L.B. 605 reduced the maximum term of imprisonment for Class IIIA felonies from 5 to 3 years and added maximum and minimum terms of postrelease supervision.[2]

L.B. 605 also amended the indeterminate and determinate sentencing scheme for Nebraska felonies. Prior to L.B. 605, Neb. Rev. Stat. § 29-2204 (Reissue 2008) required the court to

> fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony . . . . If the criminal offense is a Class IV felony, the court shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be . . . more than one-third of the maximum term . . . .[3]

Thus, as it existed before L.B. 605, § 29-2204 authorized indeterminate sentencing for all felonies and, except for Class IV felonies, courts could impose an indeterminate sentence with identical minimum and maximum terms, i.e., a sentence of 60 to 60 months' imprisonment.[4]

L.B. 605 amended § 29-2204 to restrict indeterminate sentencing to the more serious felonies and ushered in determinate sentencing with postrelease supervision for Classes III, IIIA, and IV felonies.[5] As it regards indeterminate sentencing, L.B. 605 amended § 29-2204 to provide:

> Except when the defendant is found guilty of a Class IA felony, in imposing a sentence upon an offender for any

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[1] See Neb. Rev. Stat. § 28-105 (Reissue 2008).

[2] See § 28-105 (Supp. 2015).

[3] § 29-2204(1)(a)(ii)(A).

[4] *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

[5] See § 29-2204 (Supp. 2015) and Neb. Rev. Stat. § 29-2260 (Supp. 2015).

> class of felony other than a Class III, IIIA, or IV felony, the court shall fix the minimum and the maximum terms of the sentence to be served within the limits provided by law. . . . The minimum term fixed by the court shall be any term of years less than the maximum term imposed by the court.[6]

And L.B. 605 amended § 29-2260 to address determinate sentencing:

> For all sentences of imprisonment for Class III, IIIA, or IV felonies, other than those imposed consecutively or concurrently with a sentence to imprisonment for a Class I, IA, IB, IC, ID, II, or IIA felony, the court shall impose a determinate sentence within the applicable range in section 28-105, including a period of post-release supervision.[7]

In 2016, the Legislature amended § 29-2260 again and moved the primary provisions governing determinate sentencing for Classes III, IIIA, and IV felonies from § 29-2260 to § 29-2204.02.[8]

In summary, L.B. 605 requires that—for those classes of felonies where indeterminate sentencing is still required—courts cannot impose a sentence with identical minimum and maximum terms. And except for circumstances not relevant here, L.B. 605 and L.B. 1094 require imposition of a determinate sentence and a term of postrelease supervision for Classes III, IIIA, and IV felonies.

At Aguallo's sentencing, the district court referenced the sentencing changes imposed by L.B. 605. The court made an express finding that the reduced penalty for Class IIIA felonies did not apply to Aguallo, reasoning that the statutory language of L.B. 605—codified at § 28-105 (Supp. 2015) and Neb. Rev. Stat. § 28-116 (Supp. 2015)—clearly states

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[6] § 29-2204(1) and (1)(a).

[7] § 29-2260(5).

[8] See 2016 Neb. Laws, L.B. 1094, §§ 11 and 16.

the reduced penalties are not to be applied retroactively to "any offense committed prior to August 30, 2015." The court also commented that because of the L.B. 605 amendments, it could no longer impose an indeterminate sentence with identical minimum and maximum terms. The court then sentenced Aguallo to an indeterminate sentence of 59 to 60 months' imprisonment.

Aguallo filed this timely appeal, which we moved to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[9]

ASSIGNMENT OF ERROR

Aguallo assigns that the district court erred in finding he was not entitled to the reduction in penalties for Class IIIA felonies implemented by L.B. 605.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[10]

ANALYSIS

[2] Generally, if the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.[11] We sometimes refer to this rule as the "*Randolph* doctrine," after its progenitor.[12]

Here, Aguallo was convicted of a sexual assault which occurred in January 2015, prior to the effective date of L.B. 605. The question presented is whether the sentencing

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[9] Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 2014).

[10] *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015); *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013).

[11] *State v. Duncan*, 291 Neb. 1003, 870 N.W.2d 422 (2015).

[12] See, *id.*; *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971).

changes implemented by L.B. 605 should have been applied retroactively to Aguallo.

[3-6] Our analysis is guided by familiar rules of statutory construction. Statutory language 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.[13] 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.[14] 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.[15] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[16]

When the Legislature amended the penalty provisions in § 28-105 to, among other things, reduce the penalties for Class IIIA felonies, it included the following language regarding retroactive application: "The changes made to the penalties for Class III, IIIA, and IV felonies by laws 2015, LB605, do not apply to any offense committed prior to August 30, 2015, as provided in section 28-116."[17] As such, the plain language of § 28-105(7) provides that L.B. 605's penalty

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[13] *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013); *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

[14] *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

[15] *State v. Mucia*, 292 Neb. 1, 871 N.W.2d 221 (2015); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[16] *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012).

[17] § 28-105(7).

changes do not apply to "any offense" committed prior to August 30, 2015.

Section 28-116 provides in part:

> The changes made to the sections listed in this section by Laws 2015, LB605, shall not apply to any offense committed prior to August 30, 2015. Any such offense shall be construed and punished according to the provisions of law existing at the time the offense was committed. For purposes of this section, an offense shall be deemed to have been committed prior to August 30, 2015, if any element of the offense occurred prior to such date.

Section 28-116 then goes on to list more than 60 statutes that were amended in some respect by the many provisions of L.B. 605. The list of amended statutes in § 28-116 includes § 28-105 (statute imposing penalties for Class IIIA felonies), § 29-2204 (statute governing determinate and indeterminate sentences for felonies other than Classes IA, III, IIIA, and IV), and § 29-2260 (statute governing determinate sentences for Classes III, IIIA, and IV felonies).

On appeal, Aguallo observes that the list of statutes in § 28-116 does not include the statute under which he was convicted, § 28-320.01, and he argues this omission suggests the Legislature intended to permit retroactive application of the reduced penalties to his offense. We disagree.

[7] It is clear from reviewing L.B. 605 that § 28-320.01 is not among the statutory sections listed in § 28-116 for the simple reason that L.B. 605 did not make any changes to the classification or the elements of that crime. L.B. 605 did, however, make changes to the penalties for all Class IIIA felonies, and § 28-320.01 is a Class IIIA felony. It is clear from the plain language of §§ 28-105(7) and 28-116 that the Legislature did not intend the penalty reductions to Class IIIA felonies to apply retroactively to offenses committed prior to the effective date of L.B. 605. It is thus immaterial that the offense Aguallo committed is not among those listed in § 28-116, and his argument to the contrary is without merit.

Finally, although the State did not file a cross-appeal contending the sentence imposed was excessively lenient, it urges us to recognize plain error. The State argues the district court committed plain error in imposing an indeterminate sentence of 59 to 60 months' imprisonment when it could have, consistent with Nebraska law in effect at the time the offense was committed and L.B. 605, imposed a sentence of 60 months to 60 months' imprisonment.

[8] Plain error exists where there is error, plainly evident from the record but not complained of at trial, which 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.[18] Aguallo's sentence of 59 to 60 months' imprisonment was within the statutory limits for a Class IIIA felony,[19] and the slight difference in punishment about which the State complains does not rise to the level of plain error under the circumstances of this case.

CONCLUSION

The reduced penalties for Class IIIA felonies do not apply retroactively to Aguallo, because his offense was committed before the effective date of L.B. 605. Aguallo's sentence of 59 to 60 months' imprisonment was within statutory limits and was not plain error. His conviction and sentence are affirmed.

Affirmed.

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[18] *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

[19] See § 28-105 (Reissue 2008).

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Joshua D. Carr, appellant.

881 N.W.2d 192

Filed July 15, 2016. Nos. S-15-921, S-15-922.

1. **Pleas: Courts.** A trial court has discretion to allow defendants to withdraw their guilty or no contest pleas before sentencing.
2. **Pleas: Appeal and Error.** An appellate court will not disturb the trial court's ruling on a presentencing motion to withdraw a guilty or no contest plea absent an abuse of discretion.
3. **Pleas.** When a defendant moves to withdraw his or her plea before sentencing, a court, in its discretion, may sustain the motion for any fair and just reason, provided that such withdrawal would not substantially prejudice the prosecution.
4. **Pleas: Proof.** A defendant moving to withdraw his or her plea before sentencing has the burden to show the grounds for withdrawal by clear and convincing evidence.
5. **Pleas: Evidence.** Newly discovered evidence can be a fair and just reason to withdraw a guilty or no contest plea before sentencing.
6. ____: ____. If a defendant moves to withdraw his or her plea because of newly discovered evidence, the court must consider the credibility of the newly discovered evidence.
7. **Pleas.** To support a finding that a defendant freely, intelligently, voluntarily, and understandingly entered a guilty plea, a court must inform a defendant about (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.
8. ____. To support a finding that a defendant freely, intelligently, voluntarily, and understandingly entered a guilty plea, the record must show a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.

9. **Pleas: Right to Counsel.** A court's failure to inform a defendant of the right to assistance of counsel does not necessarily render the plea invalid if the defendant was actually represented by counsel.

Appeals from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

Sarah P. Newell, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Connolly, J.

SUMMARY

Joshua D. Carr argues that the court abused its discretion by not allowing him to withdraw his guilty and no contest pleas before sentencing because of newly discovered evidence. After the court accepted Carr's pleas, he deposed a previously unknown witness whose testimony, Carr contends, would impeach the State's witnesses. The court overruled Carr's motion to withdraw his pleas because it determined that the newly discovered evidence did not exculpate Carr and was not credible. We conclude that the court did not abuse its discretion, and we therefore affirm.

BACKGROUND

In 2014, the State filed two informations against Carr. In case No. S-15-921, the State charged Carr with robbery and use of a firearm to commit a felony for events occurring on September 11, 2014 (the robbery case). In case No. S-15-922, the State charged Carr with first degree murder, attempted robbery, possession of a stolen firearm, and two counts of use of a firearm to commit a felony (the homicide case). The State

alleged that the homicide case arose from the robbery and death of Maurice Williams on August 30, 2014.

Carr and the State reached a plea agreement. He pleaded guilty to the robbery charge in the robbery case, and in exchange, the State dismissed the use of a firearm charge. In the homicide case, Carr pleaded no contest to an amended information charging him with attempted robbery, use of a firearm to commit a felony, and manslaughter.

Before accepting Carr's pleas, the court received a factual basis for the charges. For the robbery case, the prosecutor stated:

> [O]n Thursday, September 11th, 2014 at approximately 2:00 a.m., three male individuals contacted the residents of an apartment [on] Huntington Avenue, Lincoln, Lancaster County, Nebraska, at the front door. The three individuals said they were looking for a place to "cool out."
>
> After a short period of time, one of the three individuals pulled out a black semi-automatic handgun and asked where the marijuana was. As one individual pointed a gun at and threatened the individuals in the apartment . . . the other two searched the apartment and collected [cash and personal property].
>
> A person who was in the apartment during the robbery identified the three male individuals responsible as . . . Carr, Micheal [sic] Nevels and Jomarcus Scott.
>
> [Later], law enforcement contacted . . . Carr and . . . Scott and they located a . . . handgun during the search of . . . Scott. . . . Scott admitted to the robbery at [the apartment on] Huntington with . . . Carr and . . . Nevels.

The State gave the following factual basis for the charges in the amended information in the homicide case:

> [O]n Saturday, August 30th, 2014 at approximately 1:03 a.m., Lincoln police officers were sent to [an apartment on] "R" Street, . . . Lincoln, Lancaster County, Nebraska. [Persons] reported that . . . Williams had been shot. Law

enforcement and emergency personnel found . . . Williams lying on the floor inside the residence. He was found to have sustained a single gunshot wound.

He was transported to Bryan LGH West Hospital and soon thereafter pronounced dead. The cause of death was determined to be from the single gunshot wound.

. . . Carr was identified as a suspect when a witness reported to law enforcement that . . . Carr had stated he shot . . . Williams with a rifle during a robbery attempt. A rifle . . . was sent to the Nebraska state laboratory, along with a bullet recovered from [the apartment on] "R" Street, and the items were found to be a ballistic match.

The laboratory located a fingerprint on the rifle that matched . . . Carr's left middle finger. Law enforcement located a photograph on social media as well as on . . . Carr's phone depicting . . . Carr holding the rifle.

Several individuals agreed to law enforcement interviews after August 30th, 2014. From these interviews, law enforcement learned that . . . Carr and three others planned to rob . . . Williams of marijuana and money. They rode together in a vehicle to [the apartment on] "R" Street.

Once there, one of the four made the secure residence accessible, and . . . Carr and another went into the residence. . . . Carr had the rifle and held . . . Williams . . . at gunpoint while the other person looked for money in the bedroom. . . . Williams was heard to say to . . . Carr that they "weren't going to do him like that." As Williams attempted to walk past . . . Carr and toward the bedroom, the rifle discharged and a bullet struck . . . Williams, fatally injuring him.

. . . Carr and the other person then quickly left the residence, got into an awaiting vehicle occupied by the two others involved in the planning of the robbery and left the area.

> During driving away from the scene, . . . Carr was reported to have said he thought he shot him. In the days after the shooting, . . . Carr told others that he had in fact shot . . . Williams during a robbery attempt and that he would take responsibility for it. Approximately one week after the shooting, . . . Carr gave the rifle to a friend on the promise of $100. The friend placed the rifle in a closet at a St. Paul residence, where it was located by law enforcement . . . .

A few days before the sentencing hearing, Carr moved for a continuance. His attorney said that the State had informed her that "new potentially exculpatory information had surfaced from a previously unknown confidential informant." Carr's attorney said she needed more time to locate and depose the informant. The court continued the sentencing hearing.

A few days before the rescheduled sentencing hearing, Carr moved to withdraw his pleas in both cases because of newly discovered evidence. At the hearing on his motion to withdraw, Carr offered the deposition of Traeshawn Davis, the previously unknown witness.

Davis testified about two statements: one made by Jomarcus Scott and another by Carr. Davis said that in September 2014, Scott asked him for a ride "out of town." Davis testified that Scott had "blood on his T-shirt and his basketball shorts." He asked what had happened, and Scott told him "'we fucked up, we fucked up, we fucked up, he's dead.'" Davis asked who was dead, and Scott said "'Mo.'" According to the affidavit of Carr's attorney, Davis knew Williams as "Mo."

Davis was "pretty certain" his conversation with Scott occurred in September 2014. Davis remembered having a welfare appointment for his son around September 16 and stated, "I was already saying, you know, it's like not even two weeks away that we got to go for his [son's welfare] appointment." Davis denied that his conversation with Scott could have occurred in August.

Davis also testified about an interaction he had with Carr. In July 2015, law enforcement arrested Davis on an unrelated matter and placed him in the same "Pod" of the county jail as Scott. Davis and Scott quarreled, so Davis moved to a different pod, which happened to hold Carr. After Davis told his pod mates why he had moved, Carr shared with him paperwork related to the shooting of Williams so Davis could "see everything that [Scott] said."

Later, Davis said that he, Carr, and other inmates were playing cards when an inmate commented that Williams' death was "messed up." Carr replied, according to Davis, "'honestly, you know, it is what it is. I just wish it wouldn't have happened like that, but I wasn't the one who pulled the trigger first.'"

At the hearing on Carr's motion to withdraw his pleas, the court also received an affidavit signed by his attorney. Carr's attorney stated that "[t]he State's case in both prosecutions is based primarily on cooperating witnesses, none of which [sic] indicated that . . . Scott was involved in [Williams'] homicide."

Carr's attorney also questioned the veracity of Davis' testimony about the statement Carr made while playing cards in jail. She averred that she had spoken with another inmate who was in the same "grouping" as Carr at the county jail. The inmate could not recall Carr's making the statement attributed to him by Davis. To the contrary, the inmate said that Carr had "always maintained his innocence." For example, when another inmate suggested that Carr had killed Williams, Carr responded, "'Man, did I ever say I did it?'" Carr's attorney further stated that the security manager at the jail told her that Davis and Carr were not released from their cells at the same time, but that Davis could have eavesdropped on Carr's conversations from a nearby cell.

The court overruled Carr's motion to withdraw his guilty and no contest pleas. It stated that Davis' testimony bore little relation to the charges in the robbery case. As for the homicide case, Carr's purported jailhouse statement tended to inculpate

him. The court noted that the record lacked the statements of the "cooperating witnesses" whom Carr argued he might impeach with Scott's alleged statement to Davis. Furthermore, the court found that Davis "insisted" that his conversation with Scott occurred "some days" after Williams' homicide. Even if none of the witnesses placed Scott at the scene of the shooting, the court reasoned that Scott's statement did not exculpate Carr, because the "question is not whether Scott was present, but rather, whether Carr was present."

After the court sentenced Carr, he appealed in both cases. We sustained his motion to consolidate the appeals and then granted his petition to bypass the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Carr assigns that the court erred by (1) overruling his motion to withdraw his guilty and no contest pleas because of newly discovered evidence and (2) overruling his motion to withdraw his guilty and no contest pleas because he did not enter them freely, intelligently, voluntarily, and understandingly.

STANDARD OF REVIEW

[1,2] A trial court has discretion to allow defendants to withdraw their guilty or no contest pleas before sentencing.[1] An appellate court will not disturb the trial court's ruling on a presentencing motion to withdraw a guilty or no contest plea absent an abuse of discretion.[2]

ANALYSIS

Court Did Not Abuse Its Discretion by Overruling Carr's Motion to Withdraw His Pleas Because of Newly Discovered Evidence

Carr argues that the court abused its discretion by overruling his motion to withdraw his pleas. He contends that

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[1] See *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

[2] See *id.*

defendants ought to be entitled to withdraw their guilty or no contest pleas upon the "mere suggestion of potentially exculpatory evidence" or the discovery of evidence "material to the preparation of the defense."[3] The State argues that Carr's standard is too lenient and would make withdrawal "automatic."[4]

[3,4] The right to withdraw a plea previously entered is not absolute.[5] When a defendant moves to withdraw his or her plea before sentencing, a court, in its discretion, may sustain the motion for any fair and just reason, provided that such withdrawal would not substantially prejudice the prosecution.[6] The defendant has the burden to show the grounds for withdrawal by clear and convincing evidence.[7]

[5] Newly discovered evidence can be a fair and just reason to withdraw a guilty or no contest plea before sentencing.[8] We have recognized that matters affecting the credibility of a major witness are material to the defense in a criminal case.[9] So evidence which the defendant might use to impeach an important witness for the State, in addition to evidence which

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[3] Brief for appellant at 24, 34.

[4] Brief for appellee at 21.

[5] *State v. Ortega, supra* note 1.

[6] *State v. Schanaman*, 286 Neb. 125, 835 N.W.2d 66 (2013).

[7] See *State v. Ortega, supra* note 1.

[8] See, *U.S. v. Yamashiro*, 788 F.3d 1231 (9th Cir. 2015); *Winsted v. State*, 241 P.3d 497 (Wyo. 2010); *State v. Kivioja*, 225 Wis. 2d 271, 592 N.W.2d 220 (1999); *State v. Gomes*, 79 Haw. 32, 897 P.2d 959 (1995); *Garnett v. State*, 769 P.2d 371 (Wyo. 1989); *State v. Gallegos*, 738 P.2d 1040 (Utah 1987) (superseded by statute as recognized in *State v. Ruiz*, 282 P.3d 998 (Utah 2012)). See, generally, Annot., 14 A.L.R.6th 517 (2006). But see, *State v. Pitre*, 506 So. 2d 930 (La. App. 1987); *State v. Braverman*, 348 So. 2d 1183 (Fla. App. 1977).

[9] *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983).

tends to show the defendant's factual innocence, may form the basis for withdrawal.[10]

[6] Carr argues that the court may not consider whether the newly discovered evidence is credible. We agree insofar as the defendant does not have to convince the court that the defendant is innocent or that a jury would acquit the defendant.[11] But even the authority that Carr cites asks whether the newly discovered evidence could have "at least plausibly motivated a reasonable person in [the defendant's] position not to have pled guilty," which requires some judgment as to the potency of the evidence.[12] Furthermore, the court must consider the credibility of the evidence lest the defendant's right to withdraw a guilty or no contest plea becomes absolute: "In order to assess whether a reason actually exists, the [trial] court must engage in some credibility determination of the proffered reason, without which withdrawal would be automatic, a matter of right."[13]

We conclude that the court did not abuse its discretion by determining that Carr failed to show a fair and just reason to withdraw his guilty and no contest pleas by clear and convincing evidence. As the court noted, Davis' testimony bore little relation to the crimes charged in the robbery case. And the statement Carr purportedly made in jail while playing cards—"'I wasn't the one who pulled the trigger first'"—

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[10] See *U.S. v. Garcia*, 401 F.3d 1008 (9th Cir. 2005). But cf., *State v. French*, 200 Neb. 137, 262 N.W.2d 711 (1978); *Ogden v. State*, 13 Neb. 436, 14 N.W. 165 (1882).

[11] See *U.S. v. Garcia, supra* note 10; *United States v. Morgan*, 567 F.2d 479 (D.C. Cir. 1977). See, also, *State v. Gallegos, supra* note 8.

[12] *U.S. v. Garcia, supra* note 10, 401 F.3d at 1011–12. See, *U.S. v. Bryant*, 557 F.3d 489 (7th Cir. 2009); *Jefferson v. Com.*, 27 Va. App. 477, 500 S.E.2d 219 (1998). See, also, *State v. Kivioja, supra* note 8; *State v. Gomes, supra* note 8; *State v. Gallegos, supra* note 8.

[13] *State v. Kivioja, supra* note 8, 225 Wis. 2d at 291, 592 N.W.2d at 230.

would tend to inculpate Carr for the charges in the homicide case.

That leaves Davis' recollection of his conversation with Scott. According to Davis, Scott told him that "'we'" had made a mistake and that "'Mo'" was dead. The court did not err by emphasizing that Scott's statement would not necessarily exculpate Carr. Newly discovered impeachment evidence may form the basis for a motion to withdraw a guilty or no contest plea, but the fact that the evidence is useful only for impeachment is relevant to the court's exercise of discretion.[14]

Furthermore, the court found that Davis lacked credibility. His deposition testimony was inconsistent with his statements to police. (Davis explained that the police must have "rearranged my words.") And records from the county jail showed that Davis could not have observed Carr's purported jailhouse admission in the manner in which Davis claimed to have observed the admission. Furthermore, as the court found, Davis "insisted" that his conversation with Scott occurred sometime during the first 2 weeks of September 2014, whereas Williams was shot on August 30.

Finally, Carr did not offer at the withdrawal hearing the statements of the "cooperating witnesses" whom he argued Scott's statement would impeach. The only evidence that Scott's statement was inconsistent with the statements of the cooperating witnesses was one sentence in the affidavit of Carr's attorney: "The State's case in both prosecutions is based primarily on cooperating witnesses, none of which [sic] indicated . . . Scott was involved in [Williams'] homicide." So the court did not know, for example, whether the cooperating witnesses purported to give a complete list of everyone involved in the homicide, or if they instead focused on Carr's involvement. The strength of Carr's proof was relevant to

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[14] See *U.S. v. Bryant, supra* note 12.

whether he met his burden to show a fair and just reason by clear and convincing evidence.

Carr Freely, Intelligently, Voluntarily, and Understandingly Entered His Pleas

[7,8] Carr argues that he did not enter his pleas freely, intelligently, voluntarily, and understandingly, because he did not know about Scott's statement to Davis. To support a finding that a defendant freely, intelligently, voluntarily, and understandingly entered a guilty plea, a court must inform a defendant about (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.[15] The record must also show a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.[16] Taking the foregoing steps is enough to ensure that a plea is a voluntary and intelligent choice among the alternative courses of action open to a defendant, which is the ultimate standard by which we test pleas of guilty or no contest.[17]

Here, the record shows that the court informed Carr of the nature of the charges, the right to confront witnesses, the right to a jury trial, the privilege against self-incrimination, and the range of penalties for the crimes charged. And the State provided a factual basis for the charges in both cases.

[9] The record does not show that the court informed Carr of the right to assistance of counsel. But this failure does not necessarily render the plea invalid if the defendant was actually represented by counsel.[18] For example, we held in *State*

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[15] *State v. Ortega, supra* note 1.

[16] *Id.*

[17] See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

[18] See *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009).

v. Watkins[19] that the defendant's plea was valid despite the court's failure to inform him of the right to counsel because the defendant was accompanied by appointed counsel when he entered the plea, he told the court he had had enough time to discuss the plea agreement with his attorney and was satisfied with his attorney's efforts, and his attorney told the court that he had no reason to think that the defendant was not freely, intelligently, and voluntarily entering his plea.

We conclude that Carr freely, intelligently, voluntarily, and understandingly entered his guilty and no contest pleas even if the court did not inform him of the right to counsel. Like the defendant in *Watkins*, Carr had appointed counsel at his plea hearing. Carr told the court he had spoken with his attorney about his trial rights and had had sufficient time to do so. Carr also told the court that he was satisfied with his attorney and thought that she was competent. Carr's attorney told the court that she had spoken with Carr about his rights and thought that he understood them. She further said she believed Carr was "freely, voluntarily, knowingly, and intelligently" waiving his trial rights.

CONCLUSION

We conclude that the court did not abuse its discretion by overruling Carr's motion to withdraw his guilty and no contest pleas because of newly discovered evidence. We therefore affirm.

Affirmed.

Stacy, J., not participating.

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[19] *Id.*

Nebraska Supreme Court
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State of Nebraska, appellee, v. Robert C. Thompson, appellant.

881 N.W.2d 609

Filed July 15, 2016. No. S-15-971.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Statutes: Legislature: Intent.** The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.
3. **Criminal Law: Statutes: Legislature: Intent.** In reading a penal 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.
4. **Statutes.** To the extent there is a conflict between two statutes, the specific statute controls over the general statute.
5. ____. A statute may be repealed by implication if a new law contains provisions which are contrary to, but do not expressly repeal, the provisions of the former law.
6. ____. A legislative act which is complete in itself and is repugnant to or in conflict with a prior law repeals the prior law by implication to the extent of the repugnancy or conflict. However, repeals by implication are not favored.
7. ____. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed.

Chelsey R. Hartner, Chief Deputy Madison County Public Defender, for appellant.

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

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

Wright, J.

NATURE OF CASE

Robert C. Thompson was convicted in the district court for Madison County, Nebraska, of driving under the influence (DUI), third offense, with a blood alcohol concentration of .15 or greater, in violation of Neb. Rev. Stat. § 60-6,197.03(6) (Cum. Supp. 2014). He was sentenced to a period of 24 months' probation and was ordered to immediately serve 60 days in the county jail as a condition of his probation. Thompson appeals, asserting that the district court erred in imposing a jail term as a condition of probation. For the reasons set forth below, we affirm.

BACKGROUND

On November 30, 2014, Thompson was involved in a motor vehicle accident in which he struck another vehicle from behind. He was ultimately arrested and charged with DUI, third offense, with a blood alcohol concentration of .15 or greater, in violation of § 60-6,197.03(6). Thompson pled guilty as charged. Following an enhancement hearing, Thompson's conviction was enhanced to a third offense, making it a Class IIIA felony.

At sentencing, the parties agreed that probation would be appropriate but disagreed as to whether a jail term could be imposed as a condition of probation. Thompson argued that a jail term could no longer be imposed as a condition of probation for any felony because 2015 Neb. Laws, L.B. 605, removed the provision in Neb. Rev. Stat. § 29-2262 (Supp. 2015) that previously allowed up to 180 days in jail as a condition of probation for felony offenses. The State acknowledged the amendment to § 29-2262, but noted that a jail term was arguably still available for a felony DUI, because § 60-6,197.03(6), which is the more specific statute, expressly

requires that a jail term be imposed as a condition of probation for a felony DUI.

The district court agreed with the State and found that a jail term of 60 days was required under § 60-6,197.03. It imposed a period of 24 months' probation in the Specialized Substance Abuse Supervision program with various conditions, including 60 days' jail time, a $1,000 fine, and a 10-year license revocation. Thompson appeals.

ASSIGNMENT OF ERROR

Thompson assigns that the district court erred in imposing a jail term as a condition of his probation, as that is no longer permissible under § 29-2262.

STANDARD OF REVIEW

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

ANALYSIS

This appeal presents an issue of statutory interpretation. The question before us is whether a jail term may be imposed as a condition of probation for a felony DUI. Thompson argues that a court cannot impose a jail term as a condition of probation for any felony offense, including a felony DUI, because L.B. 605 removed the provision in § 29-2262 that previously allowed up to 180 days in jail as a condition of probation for felony offenses.

We note that the amendments made by L.B. 605 became effective on August 30, 2015, which was after Thompson committed the present offense but before he was sentenced. This begs the question whether the amendments to § 29-2262 apply retroactively to this case. Most of the amendments in L.B. 605 are not retroactive, as set forth in Neb. Rev. Stat. § 28-116 (Supp. 2015). However, the State concedes, and we agree,

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[1] *State v. Mendoza-Bautista*, 291 Neb. 876, 869 N.W.2d 339 (2015).

that the changes made to § 29-2262 do apply in this case, because Thompson was sentenced after August 30, 2015.[2] Thus, we must analyze this case in light of the amendments to § 29-2262.

Prior to L.B. 605, § 29-2262 provided, in relevant part:

> (2) The court may, as a condition of a sentence of probation, require the offender:
>
> . . . .
>
> (b) To be confined periodically in the county jail or to return to custody after specified hours but not to exceed (i) for misdemeanors, the lesser of ninety days or the maximum jail term provided by law for the offense and (ii) for felonies, one hundred eighty days.[3]

As part of L.B. 605, the Legislature removed the provision relating to felony offenses but left the provision relating to misdemeanors intact.[4] Thus, Thompson argues that imposing a jail term as a condition of probation for a felony offense is no longer permissible under § 29-2262.

The State argues that a jail term is still available as a condition of probation for a felony DUI because § 60-6,197.03(6), which sets forth the penalty for third-offense aggravated DUI, a Class IIIA felony, is more specific and therefore controls over § 29-2262, which is the more general probation statute that applies to all offenses. Section 60-6,197.03 provides as follows:

> Any person convicted of a violation of section 60-6,196 [DUI of alcohol or drugs] or 60-6,197 [refusal to submit to chemical test] shall be punished as follows:

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[2] See Neb. Rev. Stat. § 83-1,135.02(2) (Supp. 2015) (stating that "[i]t is the intent of the Legislature that the changes made to sections 29-2262 . . . apply to all committed offenders under sentence, on parole, or on probation on August 30, 2015, and to all persons sentenced on and after such date").

[3] § 29-2262(2) (Cum. Supp. 2014).

[4] See § 29-2262(2)(b) (Supp. 2015).

. . . .

(6) If such person has had two prior convictions and, as part of the current violation, had a concentration of fifteen-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood or fifteen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath or refused to submit to a test as required under section 60-6,197, such person shall be guilty of a Class IIIA felony . . . . The court shall also sentence such person to serve at least one hundred eighty days' imprisonment in the city or county jail or an adult correctional facility.

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, . . . include, as conditions, the payment of a one-thousand-dollar fine, *confinement in the city or county jail for sixty days*, and, upon release from such confinement, the use of a continuous alcohol monitoring device and abstention from alcohol use at all times for no less than sixty days.

(Emphasis supplied.)

[2-4] The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent.[5] In reading a penal 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] To the extent there is a conflict between two statutes, the specific statute controls over the general statute.[7]

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[5] See *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014).

[6] *State v. McIntyre*, 290 Neb. 1021, 863 N.W.2d 471 (2015).

[7] *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012).

We agree with the State that § 60-6,197.03 is the more specific statute and that it plainly requires confinement in jail for 60 days as a condition of probation for this offense. Thompson concedes that § 60-6,197.03 is the more specific statute, but argues that by amending § 29-2262, the Legislature implicitly repealed the provision in § 60-6,197.03(6) which required 60 days in jail as a condition of probation.

[5-7] A statute may be repealed by implication if a new law contains provisions which are contrary to, but do not expressly repeal, the provisions of the former law.[8] A legislative act which is complete in itself and is repugnant to or in conflict with a prior law repeals the prior law by implication to the extent of the repugnancy or conflict.[9] However, repeals by implication are not favored.[10] A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable.[11] In determining whether the new enactment is repugnant, we look at the new enactment for any indication of an evident legislative intent to repeal the former statute.[12]

We find no indication that the Legislature intended to repeal the relevant portion of § 60-6,197.03(6) when it amended § 29-2262. In fact, the Legislature amended other portions of § 60-6,197.03 as part of L.B. 605, but did not remove the language in subsection (6) requiring 60 days in jail as a condition of probation for this offense. If the Legislature intended to remove that requirement, it could have easily done so when it amended the other portions of the statute in L.B. 605. Its failure to do so evidences a clear intent to retain such requirement, rather than to implicitly repeal it.

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[8] *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995).

[9] *State v. Retzlaff*, 223 Neb. 811, 394 N.W.2d 295 (1986).

[10] *Id.*

[11] *Id.*

[12] *State v. Null, supra* note 8.

Additionally, we find no repugnancy between these two statutes, because the sentencing provisions in § 60-6,197.03 apply only to convictions for DUI and refusal to submit to a chemical test, whereas § 29-2262 sets forth the various conditions of probation that may generally be imposed for all offenses. For that reason, Thompson's reliance on *State v. Retzlaff*[13] is misplaced.

The issue in *Retzlaff* was whether Neb. Rev. Stat. § 39-669.20 (Reissue 1984), which formerly contained the penalty for motor vehicle homicide, was implicitly repealed by the Legislature's subsequent enactment of Neb. Rev. Stat. § 28-306 (Reissue 1985), which codified the offense of motor vehicle homicide and set forth the applicable penalty. We held that the enactment of § 28-306 constituted an implicit repeal of § 39-669.20, noting that the repugnancy between the two statutes was "plain and unavoidable" because they prescribed different penalties for the same crime.[14] On the other hand, the two statutes at issue here do not prescribe different penalties for the same crime and are not otherwise repugnant. Therefore, we reject Thompson's argument of repeal by implication.

CONCLUSION

For the reasons set forth herein, we find no error in the district court's ordering Thompson to serve a period of 60 days' jail time as a condition of his sentence of probation in the Specialized Substance Abuse Supervision program for his conviction of DUI, third offense, with a blood alcohol concentration of .15 grams or greater, a Class IIIA felony.

Affirmed.

Heavican, C.J., not participating.

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[13] *State v. Retzlaff, supra* note 9.

[14] *Id.* at 813, 394 N.W.2d at 297.



Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

Jennifer Lorenzen, appellee, v. David M. Lorenzen, appellant.

883 N.W.2d 292

Filed July 22, 2016. No. S-15-514.

1. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Divorce: Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
3. ____: ____. Under Neb. Rev. Stat. § 42-365 (Reissue 2008), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
4. ____: ____. As a general rule, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.
5. **Divorce: Property Division: Pensions.** Only that portion of a pension which is earned during the marriage is part of the marital estate.
6. ____: ____: ____. Generally, amounts added to and interest accrued on pensions or retirement accounts which have been earned during the marriage are part of the marital estate. Contributions to pensions before marriage or after dissolution are not assets of the marital estate.
7. **Social Security: Divorce.** Social Security benefits themselves are not subject to direct division in a dissolution proceeding.
8. **Constitutional Law: Federal Acts: Social Security: Divorce: Property Division.** The anti-assignment clause of the Social Security Act and the

Supremacy Clause of the U.S. Constitution prohibit a direct offset to adjust for disproportionate Social Security benefits in the property division of a dissolution decree.

Appeal from the District Court for Saunders County: Mary C. Gilbride, Judge. Affirmed.

John H. Sohl for appellant.

Mark J. Krieger and Terri M. Weeks, of Bowman & Krieger, for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

David M. Lorenzen appeals from the property division portion of the decree of the district court for Saunders County dissolving his marriage to Jennifer Lorenzen. David claims that because the court determined that Jennifer's future Social Security benefits should not be considered part of the marital estate, the court erred when it included a certain portion of David's pension plan as marital property, which plan he argues was intended as a substitute for Social Security. Finding no error, we affirm.

STATEMENT OF FACTS

David and Jennifer were married in December 1991, and Jennifer filed a complaint seeking to dissolve the marriage in December 2013. The parties reached agreement on issues relating to child custody and developed a parenting plan. They also agreed on several issues relating to the division of marital property, but a trial was required to determine certain property-related issues, including the division of the parties' retirement plans.

Evidence at the trial established the following facts relevant to the issues in this appeal: During the marriage, Jennifer had

worked as a teacher in the public schools and later as an associate professor of education at a private university. As a result of such employment, Jennifer had two retirement accounts. In addition, throughout her employment, Jennifer had paid Social Security taxes and, upon her retirement or disability, she would be eligible for any Social Security benefits to which she would be entitled by law at such time.

At the time of trial, David had been employed as a firefighter for the city of Lincoln since 1990, a year and a few months before the parties married. In his job as a firefighter, David was not subject to Social Security taxes, and as a result, he would not be eligible for Social Security benefits upon retirement or disability. Although he was not eligible for Social Security, David contributed to a police/fire pension system administered by the city of Lincoln. David testified that when he was first hired, he contributed a percentage that was equivalent to the Social Security rate in effect at that time to the pension plan. He testified that in 1995, he exercised an option to increase his contribution to a somewhat higher percentage, and he has contributed at the higher percentage since that time. David has two other retirement accounts, in addition to the pension plan.

With the exception of David's pension plan, the parties agreed as to the treatment and division of the parties' retirement plan assets. Jennifer contended that the portion of the pension plan that was earned during the marriage should be divided equally between the parties. David contended that, because Jennifer would be eligible for Social Security benefits and he would not, and because the pension plan was intended as a substitute for Social Security benefits, the portion of the pension plan that was attributable to contributions he had made to it in lieu of Social Security should not be considered in the division of marital property. David argued that the only portion of the pension plan that should be divided between the parties was the portion attributable to the optional contributions he had made in excess of the Social Security rate

during the marriage. David presented testimony of an actuarial professional who calculated the portion of the pension plan that was attributable to David's contributions in excess of the Social Security rate.

In the decree of dissolution, the court addressed the parties' dispute regarding the division of David's pension plan. The court determined that David's proposed treatment of the pension plan was the sort of offset against Social Security benefits that was prohibited under this court's holding in *Webster v. Webster*, 271 Neb. 788, 716 N.W.2d 47 (2006). The court concluded that the entire marital portion of the pension plan should be included in the marital estate. The court thereafter divided the marital estate equally between the parties.

David appeals from the ruling regarding the treatment of his pension plan.

ASSIGNMENT OF ERROR

David claims that the district court erred when it determined that the entire marital portion of his pension plan should be included in the marital estate which was divided equally between the parties.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015). This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees. *Id*.

ANALYSIS

David claims that the district court erred when it determined that the entire marital portion of his pension plan should be included in the marital estate which was divided equally between the parties. He contends that because the pension plan was intended to be a substitute for Social Security benefits,

and because Jennifer's Social Security benefits could not be considered in the division of property, the portion of the pension plan that was attributable to contributions he had made in lieu of Social Security payments should be considered his separate property and should not be divided between the parties. In effect, David argues that because provision for Jennifer's retirement by way of Social Security is not included in the marital estate, provision for his retirement reminiscent of Social Security should likewise be excluded. We find no merit to David's arguments.

[2,3] Because David takes issue with the district court's treatment of property, we review general standards relating to the division of property. Under Nebraska's divorce statutes, "[t]he purpose of a property division is to distribute the marital assets equitably between the parties." Neb. Rev. Stat. § 42-365 (Reissue 2008). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015). We have stated that under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Despain v. Despain, supra*. Because he argued that part of the pension plan should have been deemed nonmarital property and set aside to him, David's proposed treatment of his pension plan was directed at the first step of the division of property process.

[4-6] When parties to a divorce fail to agree upon a property settlement, Neb. Rev. Stat. § 42-366(8) (Reissue 2008) confers upon the court the power to "order an equitable division of the marital estate" and specifically provides that the marital estate subject to such division shall include "any pension plans,

retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested." As a general rule, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015). Applying this general rule to pensions, we have held that only that portion of a pension which is earned during the marriage is part of the marital estate. *Id*. Although there are exceptions, generally, amounts added to and interest accrued on such pensions or retirement accounts which have been earned during the marriage are part of the marital estate. *Id*. Contributions to pensions before marriage or after dissolution are not assets of the marital estate. *Id*.

The district court in this case applied these general rules to the pension plans. The court excluded from the marital estate portions of David's pension plan that were contributed and earned prior to the marriage. And the court determined that the portion of David's pension plan that was earned during the marriage, the "marital portion," should be included in the marital estate. David, however, argued that because he did not contribute to Social Security and because the pension plan was intended as a substitute for Social Security, a part of the marital portion, equivalent to contributions he would have made to Social Security had he been eligible, should be excluded from the marital estate and considered his separate property. David argued that such treatment would be fair in this case, because Jennifer would be eligible to receive Social Security benefits but her future Social Security benefits could not be subject to division as part of the marital estate.

At this point, we clarify the limited scope of the analysis required in this appeal. David's assignment of error is directed to the court's treatment of his pension plan as marital property. David does not otherwise claim that the court's overall division and equalization of the marital estate—which is within the general rule of one-third to one-half to each spouse, *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006)—should

be reviewed. Compare *Marriage of Peterson*, 243 Cal. App. 4th 923, 197 Cal. Rptr. 3d 588 (2016) (denying appellate relief to wife and noting that because of community property equal division statutes, courts were required to subject wife's pension plan to equal division even though husband's Social Security contributions excluded from community property). And neither party contends that David's potential access to Jennifer's Social Security retirement through "derivative benefits" should be factored into our appellate review of David's claimed error. Accordingly, we limit our consideration to the focus of David's argument addressed to the characterization of his pension plan.

[7,8] We start by noting that the district court properly excluded Jennifer's future Social Security benefits from the marital estate and from consideration in the property division. In *Webster v. Webster*, 271 Neb. 788, 796, 716 N.W.2d 47, 54 (2006), we stated that 42 U.S.C. § 407(a) (2000) "preempts state law that would authorize distribution of Social Security benefits, and that Social Security benefits themselves are not subject to direct division in a dissolution proceeding." In *Webster*, we held that "the anti-assignment clause of the Social Security Act and the Supremacy Clause of the U.S. Constitution prohibit a direct offset to adjust for disproportionate Social Security benefits in the property division of a dissolution decree." 271 Neb. at 800, 716 N.W.2d at 56. We noted that the "U.S. Supreme Court has not specifically addressed whether a state court can indirectly offset or otherwise consider the parties' respective Social Security benefits in dividing marital property in a dissolution proceeding," *id.* at 797, 716 N.W.2d at 54, and we cited decisions by other state courts interpreting the Social Security Act which supported our decision. We concluded in *Webster* that the trial court did not err when it refused the husband's request that, because he had not contributed to Social Security and his wife had, the court should allow him "'to offset some of the inequity in social security benefits against his payment of

pension benefits to'" his wife. 271 Neb. at 791, 716 N.W.2d at 50.

David argues that what he proposed differs from what is prohibited under *Webster*, because instead of focusing on the Social Security benefits Jennifer will receive and providing an offset to him based on the anticipated amount of her benefits, he focused on the assertion that his contributions to his pension plan were made as a substitute for Social Security contributions. David argues that his contributions to the pension plan, to the extent they were made in lieu of Social Security contributions, should be treated the same as the contributions Jennifer made to Social Security and should be excluded from the marital estate and the property division.

In rejecting David's argument, the district court cited *In re Marriage of Mueller*, No. 4-13-0918, 2014 WL 2155238 (Ill. App. May 19, 2014) (unpublished opinion), which, the district court said, presented "the identical situation as in the present case." In *In re Marriage of Mueller*, the husband was a police officer who did not pay into Social Security and instead paid into a city pension account; in the dissolution proceeding, he "sought an offset from the division of his pension for an amount representing Social Security benefits he would have received." The Illinois Appellate Court in *In re Marriage of Mueller* concluded that the offset proposed by the husband was improper based on Illinois precedent similar to our holding in *Webster*.

We note that, subsequent to the entry of the decree of dissolution in this case, the Illinois Supreme Court affirmed the decision of the Illinois Appellate Court in the *In re Marriage of Mueller* case. See *In re Marriage of Mueller*, 2015 IL 117876, 34 N.E.3d 538, 393 Ill. Dec. 337 (2015), *cert. denied* 577 U.S. 1138, 136 S. Ct. 1163, 194 L. Ed. 2d 176 (2016). The Illinois Supreme Court held that in determining the division of marital assets, the trial court could not reduce the husband's pension benefits by an amount of hypothetical Social Security benefits he might have received had he been eligible. The

Illinois Supreme Court stated that § 407(a) "imposes a broad bar against using any legal process to reach Social Security benefits." *In re Marriage of Mueller*, 2015 IL 117876 at ¶ 20, 34 N.E.3d at 542, 393 Ill. Dec. at 341. The Illinois Supreme Court recognized that the treatment proposed by the husband in *In re Marriage of Mueller* was "not strictly speaking an offset," but the court characterized the proposed method as creating "parallel benefits for [the husband] that would affect the division of marital property." 2015 IL 117876 at ¶ 23, 34 N.E.3d at 543, 393 Ill. Dec. at 342.

The Illinois Supreme Court in *In re Marriage of Mueller* determined the husband's proposal to be inappropriate under § 407(a), as well as for two additional reasons. First, the court noted that under Illinois divorce law, pension benefits attributable to contributions made during the marriage are marital property but Social Security benefits are not. Social Security benefits are not marital property, because "participants in the Social Security program do not have accrued property rights to their benefits"; instead they have "expectancies," but they "are never guaranteed to get out what they put into it because Congress has reserved the ability to alter, amend, or even repeal parts of the Social Security Act." *In re Marriage of Mueller*, 2015 IL 117876 at ¶ 24, 34 N.E.3d at 543, 393 Ill. Dec. at 342. Social Security benefits therefore are not "owned" in the same sense as are pension benefits to which a participant is entitled, and they should not be considered marital property in the same way that pension benefits are.

Second, the Illinois Supreme Court stated that "as a matter of policy, any rule permitting trial courts to consider the mere existence of Social Security benefits without considering their value, and thereby violating federal law, is nearly impossible to apply." *Id.* at ¶ 25, 34 N.E.3d at 544, 393 Ill. Dec. at 343. The court noted difficulties in applying the method proposed by the husband in *In re Marriage of Mueller* because of "the uncertainties inherent in Social Security benefits" and the speculation involved in estimating such benefits. 2015 IL

117876 at ¶ 26, 34 N.E.3d at 544, 393 Ill. Dec. at 343. The court determined that it was "both illogical and inequitable" to adjust the marital estate for "hypothetical Social Security benefits that, even if [the husband] had participated in that program, he may not ever receive." *Id.* at ¶ 26, 34 N.E.3d at 545, 393 Ill. Dec. at 344.

We generally agree with the reasoning of the Illinois Supreme Court in *In re Marriage of Mueller* and find its reasoning applicable in this case. As noted above, we determined that federal law "prohibit[s] a direct offset to adjust for disproportionate Social Security benefits in the property division of a dissolution decree." *Webster v. Webster*, 271 Neb. 788, 800, 716 N.W.2d at 47, 56 (2006). Although the treatment urged by David is not strictly speaking a direct offset for Jennifer's expected Social Security benefits, his treatment creates hypothetical parallel Social Security benefits attributable to him and requires those benefits to be offset against the value of his pension plan. David's proposal differs from the one considered by the Illinois Supreme Court in *In re Marriage of Mueller*, because David does not focus on expected Social Security benefits but instead on contributions made in lieu of Social Security payments. David's method might reduce the level of speculation inherent in predicting future benefits, but it still has the effect of offsetting pension benefits based on hypothetical benefits David might have received had he been eligible to participate in the Social Security program.

The policy concerns cited by the Illinois Supreme Court are also relevant here, and David's proposed treatment is inappropriate for reasons of both Nebraska law and policy. As noted above, under § 42-366(8), a pension plan is specifically required to be included in the marital estate subject to division by the court. By contrast, even without the federal law prohibitions discussed above, Social Security benefits likely would not be considered marital property under Nebraska law, because their receipt and value are purely speculative. As noted by the Illinois Supreme Court, participants in the Social

Security program have only an expectancy of benefits and not an accrued property right. By contrast, a participant in a pension plan has a legal right to benefits in accordance with the terms of the plan. Because of these differences between Social Security benefits and pension plans, it is not appropriate to equate a portion of a pension plan as being the equivalent of Social Security benefits and to therefore exclude it from the marital estate. Even though David's contributions to the pension plan may have been made as a substitute for participation in the Social Security program, significant differences in participants' rights to pension benefits as compared to Social Security benefits make it inappropriate to treat the two types of benefits as equivalent.

In this case, David sought to have a specific portion of his pension plan excluded from the marital estate, and the purpose for his proposed exclusion would have been to adjust for the disproportion in the parties' expectation of Social Security benefits. David's proposal was effectively a direct offset from the marital estate based on the fact that Jennifer was expected to receive Social Security benefits and he was not. Such a direct offset is prohibited by federal law and our precedent. We therefore conclude that the district court did not abuse its discretion when it rejected David's request.

CONCLUSION

We determine that the district court did not abuse its discretion when it rejected David's request to treat the part of the marital portion of his pension plan that was akin to contributions he had made in lieu of Social Security payments as his separate property rather than marital property. We therefore affirm the decree of dissolution.

Affirmed.

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

Weitz Company, LLC, v. Hands, Inc., doing business as H & S Plumbing and Heating, appellant.

882 N.W.2d 659

Filed July 22, 2016. No. S-15-581.

1. **Equity: Estoppel.** Although a party can raise estoppel claims in both legal and equitable actions, estoppel doctrines have their roots in equity.
2. **Equity: Appeal and Error.** In reviewing judgments and orders disposing of claims sounding in equity, an appellate court decides factual questions de novo on the record and reaches independent conclusions on questions of fact and law. But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Forbearance: Estoppel.** A claim of promissory estoppel requires a plaintiff to show: (1) a promise that the promisor should have reasonably expected to induce the plaintiff's action or forbearance, (2) the promise did in fact induce the plaintiff's action or forbearance, and (3) injustice can only be avoided by enforcing the promise.
4. ____: ____. A plaintiff claiming promissory estoppel need not show a promise definite enough to support a unilateral contract, but it must be definite enough to show that the plaintiff's reliance on it was reasonable and foreseeable.
5. **Contracts.** Usages of trade are strong evidence of the foreseeability of reliance on a promise.
6. **Estoppel.** Evidence that a promisee had little time to act on the promise shows that the promisee's reliance was foreseeable.
7. **Contracts: Contractors and Subcontractors.** A general contractor can reasonably rely on a subcontractor's bid even if the general contractor and subcontractor contemplate signing a formal subcontract with additional standard terms after the bidding process ends.

8. **Contractors and Subcontractors.** A general contractor cannot demand that a subcontractor agree to unusual and onerous terms while still holding the subcontractor to its original bid.
9. ____. If a subcontractor's bid is so low that a mistake should be apparent, a general contractor cannot reasonably rely on the bid.
10. **Estoppel: Damages.** No single measure of damages applies in every promissory estoppel case.
11. ____: ____. The damages that the promisor ought to pay under promissory estoppel are those that justice requires.
12. **Damages: Proof.** A plaintiff's burden is to prove his or her damages to a reasonable certainty, not beyond all reasonable doubt.
13. **Election of Remedies.** The election of remedies doctrine is an affirmative defense.
14. **Pleadings.** A party must specifically plead an affirmative defense for the court to consider it.

Appeal from the District Court for Douglas County: Joseph S. Troia, Judge. Affirmed.

Brian S. Kruse, of Rembolt Ludtke, L.L.P., for appellant.

Gregory C. Scaglione, Kristin M.V. Krueger, and Patrice D. Ott, of Koley Jessen, P.C., L.L.O., for appellee.

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

Connolly, J.

I. SUMMARY

The Weitz Company, LLC (Weitz), a general contractor, received an invitation to bid on a planned nursing facility. Hands, Inc., doing business as H & S Plumbing and Heating (H&S), submitted a bid to Weitz for the plumbing work, as well as the heating, ventilation, and air conditioning (HVAC) parts of the job. Weitz' bid to the project owner incorporated the amount of H&S' bid. After the owner awarded the project to Weitz, H&S refused to honor its bid. Weitz completed the project with different subcontractors at greater expense.

At trial, Weitz sought to enforce H&S' bid under promissory estoppel. The court determined that Weitz reasonably

and foreseeably relied on H&S' bid, and it therefore estopped H&S from reneging. The court measured Weitz' damages as the difference between H&S' bid and the amount Weitz paid to substitute subcontractors. H&S appeals. We affirm the judgment and the amount of damages.

II. BACKGROUND

1. Weitz Is Invited to Bid

In 2011, the Evangelical Lutheran Good Samaritan Society (Good Samaritan) invited four "prequalified General Contractors," including Weitz, to bid on a proposed nursing facility in Beatrice, Nebraska. Good Samaritan chose the four prequalified general contractors based on "prior relationships" recommendations from its architect and its own research.

Good Samaritan is a "big player" in the retirement living market. Weitz is a "dominant contractor" in the same market. Alan Kennedy, a Weitz executive, said that Weitz had sought to build a relationship with Good Samaritan that would lead to "negotiated work," meaning that Good Samaritan would work with Weitz without inviting other general contractors to bid. Kennedy testified that negotiated work is "one of the best places to be as a contractor." When Good Samaritan invited Weitz to bid on the Beatrice project, Weitz knew of another potential project with Good Samaritan in Sarpy County, Nebraska.

Good Samaritan's "Invitation to Bid" stated that it would not consider bids received after 2 p.m. on August 30, 2011 (bid day). The invitation incorporated certain "Instructions to Bidders," which provided that Good Samaritan and its architect could object to a general contractor's proposed subcontractors. The invitation stated that "[n]o bids may be withdrawn for a period of 60 days after opening of bids." If a general contractor refused to enter into a contract, the instructions provided to bidders state that the general contractor would forfeit its bid security as liquidated damages. A bid security is a bond that "assures the owner that [it] can rely upon the

bids." But Good Samaritan did not ask for bid securities, because it prequalified the general contractors.

2. Bid-Day Madness

Before bid day, Weitz assigned "lead person[s]" to the different categories of work on the project, referred to as "tickets." The ticket leaders reviewed the project specifications and created a "scope checklist" that described the work for each ticket. Weitz prepared scope checklists because subcontractors sometimes excluded certain work from their bid.

On bid day, Weitz assembled its people in a conference room to collect and organize the hundreds of bids from subcontractors. Ticket leaders called out the bids after comparing them with the scope checklist. Weitz then added the numbers to a "bid day spreadsheet."

Subcontractors in the mechanical, engineering, and plumbing fields typically submit their bids within 15 minutes of the deadline. As a result, Weitz is often "at the wire turning in [its] number to an owner." Brian Mahlendorf, a project executive for Weitz, oversaw Weitz' bid for the Good Samaritan project. Mahlendorf said that Weitz received H&S' bid "less than 15 minutes or so" before the 2 p.m. deadline.

Kennedy, who had been involved in "well over a hundred bids," testified that it was "customary for general contractors to rely on bids submitted by subcontractors" and that subcontractors submit bids because they want the job. Mahlendorf, who had more than 20 years of experience in the construction industry, testified that it was customary for Weitz to rely on subcontractors' bids, that subcontractors knew that Weitz relied on their bids, and that subcontractors submitted bids because they wanted to procure work. Mahlendorf said it was "very rare" for a subcontractor to refuse to honor its bid.

3. H&S Submits a Bid to Weitz

On bid day, H&S sent Weitz a bid for the plumbing and HVAC parts of the project. H&S' base bid was $2,430,600. For

alternate duct and radiant heating work, H&S quoted $39,108 and $52,500, respectively. H&S also sent Weitz a "revised" base bid of $2,417,000, but Weitz received the revised bid too late to use in its bid to Good Samaritan.

Kennedy and Mahlendorf would confirm a subcontractor's bid if it looked "funny" or "off," but H&S' bid did not seem unusual to them. Weitz had estimated what each ticket would cost based on historical data, and H&S' bid was above Weitz' estimate. Mahlendorf was also comfortable with H&S because Weitz had worked with H&S before. Furthermore, Mahlendorf assumed that H&S was "actually looking at [its] number" because it sent Weitz a revised bid. Two of the other four prequalified general contractors stated that they planned to use H&S for the plumbing and the HVAC work.

Kennedy and Mahlendorf testified that the market for construction services was weak in 2011. Subcontractors were "aggressively seeking work" and making low bids to "keep their people busy." Kennedy said that subcontractors' bids had "ranges that you hadn't traditionally seen in the marketplace." A difference of 15 percent between the lowest and second-lowest bids was not uncommon.

4. Weitz Submits Its Bid to Good Samaritan

Mahlendorf said that Weitz used H&S' bid in its own bid to Good Samaritan. Weitz chose H&S' bid because it included the "complete scope with the lowest cost." Mahlendorf said that H&S' bid was "comprehensive" and that Weitz was "willing to take it as is." Mahlendorf added H&S' base bid to Weitz' bid-day spreadsheet for the plumbing and HVAC tickets.

On bid day, Weitz sent Good Samaritan a base bid of $9.2 million. Kennedy and Mahlendorf testified that Weitz' base bid of $9.2 million included H&S' $2,430,600 bid. Weitz promised Good Samaritan that it would execute a contract for its base bid if offered the project within 60 days. Weitz' bid to Good Samaritan included a list of "Major Sub-Contractors."

For the plumbing subcontractor, Weitz wrote "HEP or H&S." For the HVAC subcontractor, Weitz wrote "Falcon or H&S."

Mahlendorf explained that he used a disjunctive list of major subcontractors because H&S' bid "came in late enough after this form had been basically ready to send out, and we had to add [its] name to those two line items." Mahlendorf said that Weitz did not use the bids of the other plumbing and HVAC subcontractors, "HEP" and Falcon Heating and Air Conditioning (Falcon), to reach its $9.2 million base bid. Even if Weitz could have used HEP and Falcon instead of H&S, Mahlendorf said that Weitz intended to use H&S.

5. Good Samaritan Awards the Project to Weitz

On September 1, 2011, Weitz received "early indications" that Good Samaritan would select its bid. Weitz received "[f]inal notification" on September 2. Mahlendorf called H&S on September 6 and told the head of H&S' engineering department that Weitz had won the bidding and had "carried the H & S number." He said that he told H&S that "we used [its] number in our bid, and we were prepared to enter into a contract with [H&S] and move forward."

Usually, after the owner of a project accepted Weitz' bid, Weitz asked its subcontractors to sign a "subcontract" establishing the "[e]xact contract terms" between Weitz and the subcontractor. Weitz had used a similar subcontract for more than a dozen years. H&S' chief executive officer testified that in the 10 or 15 times that H&S had worked with Weitz, Weitz had always accepted H&S' revisions to the subcontract.

Weitz signed a contract with Good Samaritan for the base bid of $9.2 million plus six additional areas of work not included in the base bid. The opening paragraph of the contract states that it was "made and entered" on, and has an "Effective Date" of, September 7, 2011. But "Date: 9-19-11" appears below the signature of Good Samaritan's representatives.

Under the contract, Good Samaritan and its architect had the right to reject Weitz' proposed subcontractors. But Good Samaritan did not veto H&S or any of Weitz' other subcontractors. Good Samaritan's architect could not recall having a "conversation of significance" about subcontractors. Despite an owner's reservation of the right to veto subcontractors, Mahlendorf said that "[i]n the real world," a general contractor treats an owner's silence as an approval and that owners are usually silent.

6. H&S Reneges on Its Bid

Hugh Sieck, Jr., H&S' owner and chief executive officer, was fishing in Alaska on bid day. Sieck testified that he told his team of estimators before he left for Alaska not to send a bid to Weitz. He had "bitter feelings" for Weitz because it had a "history of bid shopping," meaning that Weitz would "get a bid, . . . look at it, and [it] will go to another contractor to get a lower number." Sieck said every general contractor "bid shops," but he thought Weitz did more than most.

John Sampson, who worked for one of the other prequalified general contractors, called Sieck on bid day and suggested that Sieck review H&S' bid. Sampson noticed a "considerable difference" between H&S' bid and the other subcontractors' bids, although he did not say what the difference was or whether the scope of the subcontractors' bids differed. Asked what might prompt him to confirm a bid with a subcontractor, Sampson said a difference of 10 or 15 percent between bids might be enough "if I had to pull a number out of the air," but "when it gets 20 or 30 percent then you really start getting concerned."

According to Sieck, he ordered a member of H&S' estimating team to "[p]ull your bid" after Sieck spoke with Sampson. But when Sieck returned to H&S' offices on September 6, 2011, he learned that his employees had, contrary to orders, submitted a bid to Weitz and had failed to withdraw the bid. He "surmised" that H&S' bid contained errors, so he "told [his] team to go out and find a mistake."

Lloyd Ness, the person responsible for preparing the plumbing and piping parts of H&S' bid, said that Sieck was upset after bid day because H&S "left too much money on the table." Ness testified that H&S' estimating team reviewed its bid after Sieck returned but concluded there "was not a hair out of place." So, according to Ness, Sieck told him to "lie to Weitz and tell Weitz that we forgot travel time and we missed showers." Ness refused to lie and resigned because of the incident. Sieck denied asking Ness to lie. Another member of H&S' estimating team, Thomas Santillan, Jr., said that Sieck did not ask him to lie.

Sieck personally took a hand in looking for a mistake and ultimately landed on a miscalculation involving shower units. He told Santillan to inform Weitz of H&S' "'belief of the mistake.'"

On September 8, 2011, Santillan sent an e-mail with a letter attachment to Mahlendorf stating that H&S had found two errors after "thoroughly reviewing" its bid: (1) a miscalculation of the cost of shower installation and (2) the omission of travel time from the cost of labor. The collective magnitude of the claimed errors exceeded $250,000.

Santillan later took another look at H&S' bid and concluded that the original calculation of the cost for shower installation was, in fact, correct. But Santillan maintained that H&S had underbid travel costs. And Santillan said that H&S eventually unearthed "numerous mistakes" in its bid. Specifically, "the material was just not accurate," "the dollar amount did not appear to be accurate," and "there wasn't enough material."

Mahlendorf came to H&S' offices for a meeting on September 9, 2011. According to Sieck, Mahlendorf mentioned, "'I've got to get to Beatrice because I haven't got all my shopping done.'" Sieck understood Mahlendorf's statement to mean that "as per usual, they are out shopping the bids."

But Mahlendorf said that Sieck's recollection did not "comport with [Mahlendorf's] memory." Asked if Weitz would ever "carry one number but you continue negotiating and replace it

with a different bidder," Mahlendorf said he was "sure that has happened for some reason or another." But he said that Weitz did not intend to shop H&S' bid. H&S' bid was "comprehensive," and Weitz was "willing to take it as is."

Weitz and H&S could not come to terms. The magnitude of H&S' error kept growing and eventually ballooned to more than $430,000. In October 2011, Weitz informed H&S that it would use other subcontractors.

7. Weitz Honors Its Bid to Good Samaritan

Weitz did not try to withdraw its bid from Good Samaritan because of its dispute with H&S. Instead, it completed the project with other plumbing and HVAC subcontractors. Kennedy and Mahlendorf testified that the bidding documents prohibited Weitz from withdrawing or modifying its bid for 60 days. And the contract between Weitz and Good Samaritan was "already in progress" by the time Weitz learned that H&S would not honor its bid.

Business reasons also prevented Weitz from abandoning the project. Kennedy testified that the "integrity of our bids" was particularly important if the owner selected Weitz as a prequalified general contractor. Mahlendorf explained that backing out would have harmed Weitz' reputation in its industry:

> On a project like this where the architect and owner have preselected general contractors, if we wouldn't honor our bid, we would be at risk for future work from the design firm that did it and in addition to the owner group. From a business standpoint, we do a lot of [business with] senior living [clients], and it would be detrimental if we were starting to be excluded from senior living clients like the Good Samaritan Society.

Withdrawal would have also lowered Weitz' standing with Good Samaritan's architect, with which Weitz had an "ongoing business relationship."

8. Weitz Measures Its Losses

After H&S made it clear that it would not stand by its bid, Weitz asked for bids from other subcontractors. Weitz selected the subcontractors Falcon and "MMC" for the plumbing and HVAC portions of the project because their bids had the "lowest cost complete scope that we could obtain." The amount Weitz paid Falcon and MMC under their subcontracts was $1,187,900 and $1,626,800, respectively. The subcontract prices did not include any "change orders," which could have affected the total amount Weitz ultimately paid to the subcontractors. H&S' bid did not include change orders either.

To calculate Weitz' damages, Mahlendorf added Falcon's and MMC's subcontract prices for the sum of $2,814,700. From that sum, Mahlendorf subtracted H&S' base bid of $2,430,600 and its bids of $39,108 and $52,500 on optional work which Good Samaritan ultimately asked Weitz to perform. The difference is $292,492.

9. Procedural History

Weitz pleaded two causes of action in its complaint against H&S. First, Weitz alleged that H&S breached a contract formed by Weitz' acceptance of H&S' bid. Second, Weitz argued that promissory estoppel bound H&S to its bid because Weitz reasonably and foreseeably relied on the bid.

A few years after H&S filed its answer—which did not affirmatively allege an election of remedies defense—it moved for an "Order requiring [Weitz] to elect between its claim for breach of contract and promissory estoppel." The court overruled H&S' motion.

After a bench trial, the court determined that the parties had not formed a contract. But it enforced H&S' bid under promissory estoppel. The court awarded Weitz damages of $292,492.

III. ASSIGNMENTS OF ERROR

H&S assigns, restated, that the court erred by (1) entering a judgment for Weitz on its promissory estoppel claim, (2) "awarding breach of contract damages instead of reliance

damages for promissory estoppel," and (3) overruling H&S' pretrial motion to require Weitz to elect between its contract and promissory estoppel claims.

IV. STANDARD OF REVIEW

[1,2] Although a party can raise estoppel claims in both legal and equitable actions, estoppel doctrines have their roots in equity.[1] In reviewing judgments and orders disposing of claims sounding in equity, we decide factual questions de novo on the record and reach independent conclusions on questions of fact and law.[2] But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.[3]

V. ANALYSIS

1. Promissory Estoppel

H&S argues that the court should not have enforced its bid under promissory estoppel. Courts often use promissory estoppel to hold a subcontractor to its bid until the general contractor has had a reasonable length of time to accept the bid after receiving the prime contract.[4] The leading case is

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[1] *deNourie & Yost Homes v. Frost*, 289 Neb. 136, 854 N.W.2d 298 (2014).

[2] *Id.*

[3] *Id.*

[4] See, e.g., *Matherne Contractor v. Grinnell Fire Protec. Sys.*, 915 F. Supp. 818 (M.D. La. 1995); *Ferrer v. Taft Structurals*, 21 Wash. App. 832, 587 P.2d 177 (1978); 4 Richard A. Lord, A Treatise on the Law of Contracts by Samuel Williston § 8:8 (4th ed. 2008); 1 Steven G.M. Stein, Construction Law § 2.05[3][b] (2014); Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 Yale L.J. 1249 (1996); Janine McPeters Murphy, Note, *Promissory Estoppel: Subcontractors' Liability in Construction Bidding Cases*, 63 N.C. L. Rev. 387 (1985). See, also, Restatement (Second) of Contracts § 87(2) & comment *e.*, illustration 6 (1981). But see *Home Electric Co. v. Hall and Underdown Heating and Air Cond. Co.*, 86 N.C. App. 540, 358 S.E.2d 539 (1987).

Drennan v. Star Paving Co.[5] There, the California Supreme Court held that because the general contractor was bound by its bid, fairness required that the general contractor have an opportunity to accept the subcontractor's bid after receiving the prime contract. *Drennan* has had a "very broad following."[6]

[3,4] In Nebraska, a claim of promissory estoppel requires a plaintiff to show: (1) a promise that the promisor should have reasonably expected to induce the plaintiff's action or forbearance, (2) the promise did in fact induce the plaintiff's action or forbearance, and (3) injustice can only be avoided by enforcing the promise.[7] The promise need not be definite enough to support a unilateral contract, but it must be definite enough to show that the plaintiff's reliance on it was reasonable and foreseeable.[8] Here, we start our review of the court's judgment by asking if H&S' bid was a promise on which it should have foreseen reliance.

(a) H&S' Bid Was a Promise on Which Reliance Was Foreseeable

H&S' bid was a promise to perform the work described in the bid. H&S said it was "bidding the Plumbing, Hydronic Piping, & HVAC portion" of the Good Samaritan project and specifically listed the work that it was willing to perform. H&S asked for the general contractors' "consideration" and hoped to "be of service" to them.

[5,6] And H&S should have foreseen that Weitz would rely on its bid. Kennedy and Mahlendorf testified that subcontractors generally expect (and hope) that general contractors will rely on their bids. Usages of trade are strong evidence of the

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[5] *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 333 P.2d 757 (1958).

[6] 4 Lord, *supra* note 4, § 8:8 at 183.

[7] See *deNourie & Yost Homes v. Frost, supra* note 1.

[8] See *id.*

foreseeability of reliance.[9] Furthermore, Weitz received H&S' bid about 15 minutes before the 2 p.m. deadline. Evidence that a promisee had little time to act on the promise shows that the promisee's reliance was foreseeable.[10] And, as noted, H&S expressly asked Weitz to consider its bid. Having determined that H&S should have expected Weitz to rely on its bid, our next question is whether Weitz in fact relied on the bid and, if so, whether its reliance was reasonable.

(b) Weitz Reasonably Relied on H&S' Bid

Weitz relied on H&S' bid by including the base amount of H&S' bid in Weitz' own bid to Good Samaritan. Mahlendorf testified that he slotted H&S' bid into the plumbing and HVAC tickets, which is reflected in the bid-day spreadsheet. Although Weitz disjunctively listed the major subcontractors in its bid to Good Samaritan, the evidence shows that Weitz actually relied on H&S' bid. Both Kennedy and Mahlendorf testified that Weitz' $9.2 million base bid incorporated H&S' base bid of $2,430,600.

We further conclude that Weitz' reliance on H&S' bid was reasonable. The evidence shows that general contractors customarily rely on subcontractors' bids. Mahlendorf testified that it was "very rare" for a subcontractor to refuse to honor its bid. In particular, Weitz had worked with H&S 10 or 15 times before without incident. Weitz' reliance was also reasonable because it had only 15 minutes to review H&S' bid.[11] Weitz could not independently verify every item in H&S' bid in a quarter of an hour. How could competitive bidding function at all if general contractors *did not* rely on subcontractors' bids?

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[9] *Pavel v. A.S. Johnson*, 342 Md. 143, 674 A.2d 521 (1996).

[10] See *Cass County Bank v. Dana Partnership*, 275 Neb. 933, 750 N.W.2d 701 (2008).

[11] See *id.*

H&S marshals a number of arguments why Weitz did not reasonably rely on its bid, which we consolidate into five that merit discussion. First, H&S argues that the bidding documents "absolutely precluded any reliance."[12] Specifically, H&S emphasizes that Good Samaritan had the right to veto subcontractors.

But the bare fact that Good Samaritan could have, in theory, rejected H&S' bid did not make Weitz' reliance on H&S' bid unreasonable. Good Samaritan did not object to any of Weitz' subcontractors. Mahlendorf testified that despite an owner's reservation of the right to veto subcontractors, owners generally do not exercise that right "[i]n the real world." If the chance that Good Samaritan would nix H&S were significant, Weitz' reliance on H&S' bid might not have been reasonable. But the record lacks this evidence.

We similarly reject H&S' second argument, which is that Weitz' reliance was unreasonable because Weitz "did not require any quotation be kept open for any period of time as a precondition to its consideration."[13] General contractors customarily rely on subcontractors' bids, as discussed above, and the record lacks any evidence that prudent general contractors turn away bids that do not have such a provision. We cannot find any authority that conditions promissory estoppel, as a matter of law, on a demand by the general contractor that subcontractors insert such clauses into their bids. The only case that H&S cites is from a jurisdiction that allowed parties to use promissory estoppel only as a defense.[14] That case is an outlier.[15]

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[12] Brief for appellant at 23.

[13] *Id.* at 22.

[14] See *Home Electric Co. v. Hall and Underdown Heating and Air Cond. Co., supra* note 4.

[15] See Joseph C. Kovars & Michael A. Schollaert, *Truth and Consequences: Withdrawn Bids and Legal Remedies*, 26 Constr. Law. 5 (Summer 2006).

H&S' third argument is that Weitz did not reasonably rely on its bid because it could have pulled out of the project without any consequences. H&S notes that, although the invitation to bid required Weitz to hold its bid open for 60 days, Good Samaritan did not ask for a bid security. Furthermore, Weitz knew that H&S had cold feet before Weitz and Good Samaritan formally signed a contract.

But H&S could not expect Weitz to abandon the project because H&S decided its bid was too low. Weitz promised Good Samaritan that it would hold its bid open for 60 days, and breaking that promise would have sullied Weitz' reputation. In particular, Good Samaritan might have been reluctant to work with Weitz again. Losing Good Samaritan's business would have been a significant loss to Weitz because Weitz and Good Samaritan are both active in the retirement living market. Pulling out of the project would also have jeopardized Weitz' preexisting relationship with the project architect. Good Samaritan selected the prequalified general contractors based, in part, on the architect's recommendations. Weitz did not have to tell Good Samaritan that, as things turned out, it would not build the facility because of a squabble with a plumbing and HVAC subcontractor.

The fourth reason why, according to H&S, Weitz did not reasonably rely on its bid is that Weitz "attempted to accept quotations on materially different terms."[16] H&S argues, restated, that Weitz did not rely on its subcontractors' bids, because it later asked subcontractors to sign a subcontract that did not mirror the terms of the subcontractors' bids. H&S backed out before Weitz could send it a subcontract. But H&S suggests that Weitz would have sent it a subcontract similar to the one that Weitz sent to its other subcontractors and that this hypothetical subcontract would have been materially different from H&S' bid.

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[16] Brief for appellant at 16.

[7,8] A general contractor can reasonably rely on a subcontractor's bid even if the general contractor and subcontractor contemplate signing a formal subcontract with additional standard terms after the bidding process ends.[17] But a general contractor cannot demand that a subcontractor agree to unusual and onerous terms while still holding the subcontractor to its original bid.[18] For example, in *Hawkins Constr. Co. v. Reiman Corp.*,[19] a general contractor demanded that a subcontractor agree to multiple "nonstandard additional conditions which could be considered onerous." After the subcontractor refused to accept the terms, the general contractor tried to enforce the subcontractor's bid under promissory estoppel. We held that the general contractor's reliance was not reasonable because it could not assume that the subcontractor would acquiesce to onerous nonstandard terms.

But differences between a subcontractor's bid and the subcontract do not matter if they are an "afterthought" raised by a subcontractor that wants to avoid its promise for other reasons.[20] Here, H&S reneged because its bid was too low, and it did so before Weitz sent it a subcontract. So, H&S' dispute with the terms of the subcontract is even less than an afterthought: It is imaginary. Plus, Sieck testified that Weitz had always accepted H&S' revisions to the subcontract.

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[17] See, *Preload Technology v. A.B. & J. Const. Co., Inc.*, 696 F.2d 1080 (5th Cir. 1983); *Debron Corp. v. National Homes Construction Corp.*, 493 F.2d 352 (8th Cir. 1974); *Saliba-Kringlen Corp. v. Allen Engineering Co.*, 15 Cal. App. 3d 95, 92 Cal. Rptr. 799 (1971).

[18] *APAC-Southeast, Inc. v. Coastal Caisson Corp.*, 514 F. Supp. 2d 1373 (N.D. Ga. 2007); *Haselden-Langley Const. v. D.E. Farr*, 676 P.2d 709 (Colo. App. 1983).

[19] *Hawkins Constr. Co. v. Reiman Corp.*, 245 Neb. 131, 136, 511 N.W.2d 113, 117 (1994).

[20] *Reynolds v. Texarkana Construction Co.*, 237 Ark. 583, 586, 374 S.W.2d 818, 820 (1964).

Finally, we reach H&S' fifth argument as to why Weitz did not reasonably rely on its bid: It was so low that Weitz was on notice that H&S had made mistakes. Differences between the scope of H&S' bid and the scopes of the other bids make a dollar-for-dollar comparison difficult, but H&S asserts that its bid was "considerably lower" than the those of its rivals.[21]

[9] We conclude that H&S' bid was not so low that Weitz' reliance on it was unreasonable. If a bid is so low that a mistake should be apparent, a general contractor cannot reasonably rely on the bid.[22] But H&S' bid was higher than what Weitz had budgeted based on historical data. Furthermore, the market for construction services was weak in 2011 and subcontractors were bidding aggressively. Kennedy and Mahlendorf testified that bids during this period could be unusually low compared to years in which the market was more robust.[23] H&S sent its bid to all four of the prequalified general contractors. Two of the general contractors, including Weitz, chose H&S without first checking to see if H&S had made a mistake.

So, H&S' bid was a promise on which reliance was foreseeable and Weitz reasonably relied on the bid. One question remains: Did the court have to enforce H&S' bid to prevent injustice?

(c) Enforcement of H&S' Bid Was Necessary to Prevent Injustice

We conclude that the court could avoid injustice only by enforcing H&S' bid. As discussed above, many courts

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[21] Brief for appellant at 30.

[22] See, e.g., *Diede Const. v. Monterey Mechanical Co.*, 125 Cal. App. 4th 380, 22 Cal. Rptr. 3d 763 (2004); Stein, *supra* note 4.

[23] See *Powers Constr. Co., Inc. v. Salem Carpets, Inc.*, 283 S.C. 302, 322 S.E.2d 30 (1984).

have recognized the unfairness of allowing a subcontractor to renege after the general contractor has relied on the subcontractor's bid in the general contractor's own successful bid to the owner. H&S argues that it is not fair to enforce its bid, because it made mistakes. But Weitz should not have to bear the cost of H&S' errors: "As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it."[24]

H&S argues that we should not enforce its bid, because Weitz engaged in the "unethical practice of bid shopping."[25] A general contractor bid shops by taking the lowest subcontractor's bid to other subcontractors and asking them to undercut it.[26] Courts are reluctant to use promissory estoppel if the general contractor bid shopped, either because bid shopping shows that the general contractor did not rely on the bid, or because injustice no longer requires enforcement of the bid, or both.[27]

But the record does not show that Weitz shopped H&S' bid. Sieck testified that he had "bitter feelings" about an

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[24] *Drennan v. Star Paving Co., supra* note 5, 51 Cal. 2d at 416, 333 P.2d at 761.

[25] Brief for appellant at 19.

[26] See, *Preload Technology v. A.B. & J. Const. Co., Inc., supra* note 17; *Constructors Supply v. Bostrom Sheet Metal Works*, 291 Minn. 113, 190 N.W.2d 71 (1971); 1 E. Allan Farnsworth, Farnsworth on Contracts § 3.25 (3d ed. 2004).

[27] See *Preload Technology v. A.B. & J. Const. Co., Inc., supra* note 17; *Complete Gen. Constr. Co. v. Kard Welding*, 182 Ohio App. 3d 119, 911 N.E.2d 959 (2009); *Pavel v. A.S. Johnson, supra* note 9; Michael L. Closen & Donald G. Weiland, *The Construction Industry Bidding Cases: Application of Traditional Contract, Promissory Estoppel, and Other Theories to the Relations Between General Contractors and Subcontractors*, 13 J. Marshall L. Rev. 565 (1980). But see *Saliba-Kringlen Corp. v. Allen Engineering Co., supra* note 17.

earlier project in which Weitz bid shopped. That project, however, involved a bidding process different from the competitive process used by Good Samaritan. The only direct evidence that Weitz bid shopped during the Beatrice project is Sieck's testimony about Mahlendorf's aside about "shopping" in Beatrice. Mahlendorf did not remember making that statement. He testified that Weitz had no intent to shop H&S' bid. In a credibility battle, Mahlendorf has the better of the admittedly bitter Sieck, who candidly testified about "toying with" his memory of the communications between H&S and Weitz.

In conclusion, H&S' bid was a promise on which reliance was foreseeable. Weitz actually and reasonably relied on the bid. And justice required the court to enforce H&S' bid. So the court did not err by entering a judgment for Weitz on its promissory estoppel claim.

2. Damages

H&S does not agree with the amount of damages. It argues that the court erred by "awarding benefit of the bargain / contract damages rather than reliance damages."[28] H&S further contends that Weitz did not prove its damages with reasonable certainty and that its damages are necessarily zero, because Good Samaritan did not ask for a bid security.

[10,11] No single measure of damages applies in every promissory estoppel case.[29] The commentary to the Restatement (Second) of Contracts[30] explains that the ultimate standard for enforcing the promise—the prevention of injustice—also

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[28] Brief for appellant at 18.

[29] See, e.g., *Dynalectric v. Clark & Sullivan Construct.*, 127 Nev. 480, 255 P.3d 286 (2011); 3 Eric Mills Holmes, Corbin on Contracts § 8:8 (Joseph M. Perillo ed., rev. ed. 1996).

[30] See Restatement, *supra* note 4, § 90 & comment *d*. See, also, Restatement (Second) of Contracts § 349, comment *b*. (1981).

guides the measurement of damages. The damages that the promisor ought to pay are those that justice requires.[31] In some cases, justice requires only reliance damages.[32]

For example, we approved of reliance damages in *Rosnick v. Dinsmore*.[33] There, we held that contract law's "definiteness" requirement does not apply to promissory estoppel.[34] To explain this distinction, we stated that promissory estoppel provides for damages as justice requires, rather than damages based on the benefit of the bargain.[35] In the "usual" case, we anticipated that courts would award damages measured by the promisee's reliance.[36] We note that if a promise is indefinite, the theoretical availability of damages measured by the promise's value might be moot.[37]

We did not limit damages to the extent of the promisee's reliance in *every* promissory estoppel case. As we said in *Rosnick*, promissory estoppel provides for damages as justice requires. Remedial flexibility is consistent with promissory estoppel's equitable roots.[38] Justice does not require the same measure of damages in every context.

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[31] See, *Dynalectric v. Clark & Sullivan Constuct., supra* note 29; *US Ecology, Inc. v. State*, 129 Cal. App. 4th 887, 28 Cal. Rptr. 3d 894 (2005); *Hunter v. Hayes*, 533 P.2d 952 (Colo. App. 1975).

[32] See, e.g., *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69 (2d Cir. 1989). But see *Skebba v. Kasch*, 297 Wis. 2d 401, 724 N.W.2d 408 (Wis. App. 2006).

[33] *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990). See, also, *Goff-Hamel v. Obstetricians & Gyns. P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999).

[34] *Rosnick v. Dinsmore, supra* note 33, 235 Neb. at 749, 457 N.W.2d at 800.

[35] *Id.* But see *Garwood Packaging, Inc. v. Allen & Co., Inc.*, 378 F.3d 698, 703 (7th Cir. 2004) (calling premise in *Rosnick v. Dinsmore, supra* note 33, "mistaken").

[36] *Rosnick v. Dinsmore, supra* note 33, 235 Neb. at 749, 457 N.W.2d at 800.

[37] See Mary E. Becker, *Promissory Estoppel Damages*, 16 Hofstra L. Rev. 131 (1987).

[38] See *deNourie & Yost Homes v. Frost, supra* note 1.

In the construction bidding context, courts have "consistently and uniformly" measured the general contractor's damages as the difference between the reneging subcontractor's bid and the amount the general contractor paid to replacement subcontractors.[39] Here, the court measured Weitz' damages in a consistent manner. It is "plain that justice required this measure of damages."[40]

[12] We reject H&S' argument that Weitz did not prove its damages with enough exactitude. A plaintiff's burden is to prove his or her damages to a reasonable certainty, not beyond all reasonable doubt.[41] Nor were Weitz' damages zero simply because Good Samaritan did not ask for a bid security. As we explained above, H&S could not demand that Weitz walk away from the project because H&S was unhappy with its bid.

3. Election of Remedies

[13,14] Finally, H&S waived its argument that the court should have required Weitz to elect between its contract and promissory estoppel claims. The election of remedies doctrine is an affirmative defense.[42] A party must specifically plead an

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[39] *Dynalectric v. Clark & Sullivan Construct., supra* note 29, 127 Nev. at 486, 255 P.3d at 290. See, *Preload Technology v. A.B. & J. Const. Co., Inc., supra* note 17; *Janke Const. Co., Inc. v. Vulcan Materials Co.*, 527 F.2d 772 (7th Cir. 1976); *Matherne Contractor v. Grinnell Fire Protec. Sys., supra* note 4; *Double AA Builders v. Grand State Const.*, 210 Ariz. 503, 114 P.3d 835 (Ariz. App. 2005); *Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197 (Minn. App. 2005); *Alaska Bussell Elec. v. Vern Hickel Const.*, 688 P.2d 576 (Alaska 1984); Becker, *supra* note 37; Kovars & Schollaert, *supra* note 15; Comment, *Once More into the Breach: Promissory Estoppel and Traditional Damage Doctrine*, 37 U. Chi. L. Rev. 559 (1970).

[40] *Dynalectric Co. v. Clark & Sullivan Construct., supra* note 29, 127 Nev. at 487, 255 P.3d at 291.

[41] See *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010).

[42] *Porter v. Smith*, 240 Neb. 928, 486 N.W.2d 846 (1992).

affirmative defense for the court to consider it.[43] H&S did not specifically plead election of remedies as a defense, so we will not consider it.

VI. CONCLUSION

We affirm the judgment for Weitz on its promissory estoppel claim. H&S' bid was a promise, and it should have foreseen that Weitz, as was usual in the construction industry, might rely on the bid. Weitz reasonably relied on the bid by incorporating it in Weitz' own bid to the project owner. And the court could avoid injustice only by enforcing H&S' bid. We further conclude that the court correctly measured Weitz' damages.

Affirmed.

Miller-Lerman, J., not participating.

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[43] See *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014). See, also, Neb. Ct. R. Pldg. § 6-1108(c).

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Susan L. Edwards, appellant, v. Hy-Vee, Inc., a foreign corporation, doing business as Hy-Vee, appellee.

883 N.W.2d 40

Filed July 22, 2016. No. S-15-682.

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: Liability: Proximate Cause.** In premises liability cases, an owner or occupier is subject to liability for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves (1) that the owner or occupier either created the condition, knew of the condition, or by exercise of reasonable care would have discovered the condition; (2) that the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) that the owner or occupier should have expected that the visitor either would not discover or realize the danger or would fail to protect himself or herself against the danger; (4) that the owner or occupier failed to use reasonable care to protect the visitor against the danger; and (5) that the condition was a proximate cause of damage to the visitor.
3. **Negligence: Words and Phrases.** Constructive knowledge is generally defined as knowledge that one using reasonable care or diligence should have.
4. **Negligence: Liability: Invitor-Invitee: Notice.** In order for a defendant to have constructive notice of a condition, the condition must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit a defendant or the defendant's employees to discover and remedy it.
5. **Negligence: Evidence: Liability: Juries.** In the absence of evidence to support an inference of the possessor's actual or constructive knowledge

of a hazardous condition, the Nebraska Supreme Court has refused to allow the jury to speculate as to the possessor's negligence.

6. **Summary Judgment.** Inferences based upon guess or speculation do not create material issues of fact for purposes of a summary judgment.
7. **Liability: Invitor-Invitee.** The owner of a business is not an insurer of a patron's safety.
8. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to 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.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

James R. Welsh and Christopher P. Welsh, of Welsh & Welsh, P.C., L.L.O., for appellant.

Daniel J. Welch, Catherine Dunn Whittinghill, and Damien J. Wright, of Welch Law Firm, P.C., for appellee.

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

Cassel, J.

INTRODUCTION

After a grocery store's customer slipped on a piece of watermelon and fell, she sued the store for her injuries. A man was handing out watermelon samples to customers approximately 6 feet from where the customer fell, but there was no evidence that the watermelon was on the floor at the location of the fall for any period of time. The district court entered summary judgment in favor of the store. Because there is no genuine issue of material fact as to whether the store created or had actual or constructive knowledge of the condition, we affirm the summary judgment. In doing so, we decline the customer's invitation to adopt a "mode-of-operation" approach to determine premises liability.

BACKGROUND

Susan L. Edwards slipped and fell as she was leaving a grocery store operated by Hy-Vee, Inc., doing business as Hy-Vee. She sued Hy-Vee, alleging that it was negligent in a number of ways and that it knew or should have known that the floor was wet and that the wet area was a hazard to its customers.

Hy-Vee moved for summary judgment. Evidence adduced at the hearing established that as Edwards was leaving the store, she slipped on what looked like a piece of watermelon. Edwards' daughter picked a watermelon seed off the bottom of Edwards' shoe. Approximately 6 feet from where Edwards fell, a man was handing out watermelon samples to customers. Edwards did not know how long the watermelon was on the floor.

The district court granted summary judgment in favor of Hy-Vee. The court determined that the distribution of watermelon samples in a high traffic location was not enough to support a claim that Hy-Vee created the dangerous condition. The court also found that there was no genuine issue of material fact that Hy-Vee did not have actual or constructive notice of the dangerous condition.

Edwards timely appealed, and because of the novel approach she advocated, we moved the case to our docket.[1]

ASSIGNMENTS OF ERROR

Edwards assigns that the district court erred in granting Hy-Vee's motion for summary judgment and in finding that Hy-Vee did not create the hazardous condition or have constructive knowledge of the watermelon on the floor.

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

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[1] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

facts and that the moving party is entitled to judgment as a matter of law.[2]

ANALYSIS

[2] In premises liability cases, an owner or occupier is subject to liability for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves (1) that the owner or occupier either created the condition, knew of the condition, or by exercise of reasonable care would have discovered the condition; (2) that the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) that the owner or occupier should have expected that the visitor either would not discover or realize the danger or would fail to protect himself or herself against the danger; (4) that the owner or occupier failed to use reasonable care to protect the visitor against the danger; and (5) that the condition was a proximate cause of damage to the visitor.[3] We address Edwards' claims that there was a genuine issue of material fact as to whether Hy-Vee created the condition or had constructive knowledge of the condition.

Creation of Hazardous Condition

We first consider whether the district court erred in finding as a matter of law that Hy-Vee did not create the hazardous condition. Edwards contends that Hy-Vee created the hazard by permitting samples of watermelon to be handed out to customers in the store. We analyze the two cases discussed by the district court and the parties.

Edwards directs our attention to *Chelberg v. Guitars & Cadillacs*.[4] In that case, a patron at a nightclub slipped and fell in clear liquid located 4 or 5 feet from a trough that was filled with ice and bottles of beer. Evidence established that

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[2] *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016).

[3] *Hodson v. Taylor*, 290 Neb. 348, 860 N.W.2d 162 (2015).

[4] *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998).

generally, a bartender would pull out a bottle and dry it with a towel before handing it to a customer, but sometimes customers pulled out bottles themselves. Then, when the beer trough closed, the bartender loaded the remaining beer bottles into cardboard cases and placed them on a dolly. After the beer trough closed on the day in question, the patron fell in the area where the dolly was loaded. We concluded that a question of fact existed as to whether the nightclub created the dangerous condition. We stated that a fact finder could determine that the bottles pulled out of the trough could drip on the floor. Further, a fact finder could find that employees allowed customers to remove bottles without wiping them and that employees removed bottles without wiping them when the beer trough closed. Thus, a fact finder could reasonably infer that the nightclub created the dangerous condition through the participation of its employees.

On the other hand, Hy-Vee argues that this case is more analogous to *Derr v. Columbus Convention Ctr.*[5] There, a hotel guest slipped on ice on the last step of a stairway. An ice machine was located 3 or 4 feet to the right of the stairway. We stated that in contrast to the situation in *Chelberg*, there was no evidence to suggest that hotel employees were actively involved in spilling the ice. We reasoned that the ice was spilled on the stair most likely from an ice bucket of another guest and that there was no evidence that any hotel employee created or was aware of the ice spill. Thus, we determined that a fact finder could not reasonably infer that the hotel created the hazard.

Chelberg is distinguishable from the instant case. The key to potential liability in that case was the active involvement of the nightclub's employees in creating the dangerous condition. There is no such evidence in this case. A fact finder could not reasonably infer that the man handing out samples dropped the watermelon, particularly when Edwards slipped approximately 6 feet away from the "sample stand." The only reasonable

[5] *Derr v. Columbus Convention Ctr.*, 258 Neb. 537, 604 N.W.2d 414 (2000).

inference from the watermelon's distance from the stand is that it was dropped by a customer, and not a Hy-Vee employee.

One cannot reasonably infer that Hy-Vee created the hazardous condition based on a customer's dropping of the watermelon. Edwards contends that Hy-Vee is not relieved of liability merely because the watermelon was likely dropped by a customer. She argues that the customer's actions were reasonably foreseeable and cites to a case[6] for the proposition that an owner is liable for the intervening acts of third parties if the intervening act is reasonably foreseeable. But to say that Hy-Vee created the condition through the actions of a third party would expand the definition of "created" well beyond its plain and ordinary meaning.

Because there was no evidence from which a fact finder could reasonably infer that Hy-Vee created the dangerous condition through the participation of its employees, the district court did not err in finding as a matter of law that Hy-Vee did not create the hazard.

Constructive Knowledge of Condition

[3] Edwards next argues that the district court erred in finding as a matter of law that Hy-Vee did not have constructive knowledge of the dropped watermelon. Constructive knowledge is generally defined as knowledge that one using reasonable care or diligence should have.[7] Edwards suggests that a genuine issue of material fact exists as to whether the man handing out watermelon samples reasonably should have known that pieces of watermelon were being dropped on the floor. We disagree.

[4-6] There is no evidence to support an inference that Hy-Vee had constructive knowledge of the watermelon on the floor. In order for a defendant to have constructive notice of a condition, the condition must be visible and apparent and it must exist for a sufficient length of time prior to an accident

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[6] See *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009).

[7] *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014).

to permit a defendant or the defendant's employees to discover and remedy it.[8] In the absence of evidence to support an inference of the possessor's actual or constructive knowledge of the hazardous condition, this court has refused to allow the jury to speculate as to the possessor's negligence.[9] Edwards did not know how long the watermelon was on the floor, and there was no evidence that Hy-Vee employees observed any watermelon on the floor. Edwards points to evidence that the man handing out samples had a cane, but this evidence simply does not raise an inference that the man put the watermelon on the floor or that he knew of its presence. Inferences based upon guess or speculation do not create material issues of fact for purposes of a summary judgment.[10] Because there is no evidence or reasonable inference that Hy-Vee knew or should have known of the watermelon on the floor, Hy-Vee was entitled to judgment as a matter of law.

Mode-of-Operation Rule

[7] Finally, we address Edwards' argument that Nebraska should adopt the mode-of-operation rule. This rule or approach to premises liability is a departure from the traditional premises liability approach. We have repeatedly stated that the owner of a business is not an insurer of a patron's safety.[11] But the mode-of-operation rule tends to make the owner just that. We decline to adopt the approach.

The mode-of-operation rule alters what a plaintiff must prove to make a prima facie case. "The 'mode-of-operation' rule looks to a business's choice of a particular mode of operation and not events surrounding the plaintiff's accident. Under the rule, the plaintiff is not required to prove notice if the proprietor could reasonably anticipate that hazardous conditions

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[8] *Range v. Abbott Sports Complex*, 269 Neb. 281, 691 N.W.2d 525 (2005).

[9] *Id.*

[10] *Id.*

[11] See *Sacco v. Carothers*, 257 Neb. 672, 601 N.W.2d 493 (1999).

would regularly arise."[12] In other words, "[a] plaintiff's proof of a particular mode-of-operation simply substitutes for the traditional elements of a *prima facie* case—the existence of a dangerous condition and notice of a dangerous condition."[13] One reason given for the rule is that it is "'unjust to saddle the plaintiff with the burden of isolating the precise failure' that caused an injury, particularly where a plaintiff's injury results from a foreseeable risk of harm stemming from an owner's mode of operation."[14]

The mode-of-operation rule has not been adopted by a majority of states. It appears that the traditional approach has been consistently followed by at least 21 states, including Nebraska.[15] Two other states have returned to the traditional

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[12] *Chiara v. Fry's Food Stores of Arizona, Inc.*, 152 Ariz. 398, 400, 733 P.2d 283, 285 (1987).

[13] *Id.*

[14] *Sheehan v. Roche Bros. Supermarkets, Inc.*, 448 Mass. 780, 788, 863 N.E.2d 1276, 1284 (2007).

[15] See *Herrera v. Fleming Cos.*, 265 Neb. 118, 655 N.W.2d 378 (2003). See, also, *S. H. Kress & Company v. Thompson*, 267 Ala. 566, 103 So. 2d 171 (1957); *Kremer v. Carr's Food Center, Inc.*, 462 P.2d 747 (Alaska 1969); *Ortega v. Kmart Corp.*, 26 Cal. 4th 1200, 114 Cal. Rptr. 2d 470, 36 P.3d 11 (2001); *Howard vs. Food Fair, New Castle*, 57 Del. 471, 201 A.2d 638 (1964); *Richardson v. Commodore, Inc.*, 599 N.W.2d 693 (Iowa 1999), *abrogated on other grounds, Koenig v. Koenig*, 766 N.W.2d 635 (Iowa 2009); *Maans v. Giant*, 161 Md. App. 620, 871 A.2d 627 (2005); *Clark v Kmart Corporation*, 465 Mich. 416, 634 N.W.2d 347 (2001); *Norman v. Tradehome Shoe Stores, Inc.*, 270 Minn. 101, 132 N.W.2d 745 (1965); *Sullivan v. Skate Zone, Inc.*, 946 So. 2d 828 (Miss. App. 2007); *Rallis v. Demoulas Super Markets, Inc.*, 159 N.H. 95, 977 A.2d 527 (2009); *Nourse v. Food Lion, Inc.*, 127 N.C. App. 235, 488 S.E.2d 608 (1997); *Johanson v. Nash Finch Company*, 216 N.W.2d 271 (N.D. 1974); *Anaple v. Oil Co.*, 162 Ohio St. 537, 124 N.E.2d 128 (1955); *Van Den Bron v. Fred Meyer, Inc.*, 86 Or. App. 329, 738 P.2d 1011 (1987); *Martino, Aplnt. v. Great A. & P. Tea Co.*, 419 Pa. 229, 213 A.2d 608 (1965); *Habershaw v. Michaels Stores, Inc.*, 42 A.3d 1273 (R.I. 2012); *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001); *Janis v. Nash Finch Co.*, 780 N.W.2d 497 (S.D. 2010); *Winn-Dixie Stores, Inc. v. Parker*, 240 Va. 180, 396 S.E.2d 649 (1990); *McDonald v. University of W.Va.*, 191 W. Va. 179, 444 S.E.2d 57 (1994).

approach after court decisions were legislatively overruled.[16] We have identified 17 states that have adopted and retain the mode-of-operation rule.[17] Several states apply a "recurring condition rule," where a recurring potential hazard—in contrast with one arising from a particular mode of operation—may subject a store to liability.[18] Several states appear to have a hybrid approach.[19] And several other states apparently follow a burden-shifting approach.[20] Such divergence among the states

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[16] See, *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315 (Fla. App. 2001) (superseded by statute as stated in *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So. 3d 418 (Fla. App. 2014)); *Gonzales v. Winn-Dixie Louisiana, Inc.*, 326 So. 2d 486 (La. 1976) (superseded by statute as stated in *Holden v. State Univ. Med. Center*, 690 So. 2d 958 (La. App. 1997)).

[17] See, *Chiara v. Fry's Food Stores of Arizona, Inc., supra* note 12; *Kelly v. Stop and Shop, Inc.*, 281 Conn. 768, 918 A.2d 249 (2007); *Gump v. Walmart Stores, Inc.*, 93 Hawaii 428, 5 P.3d 418 (1999), *affirmed in part and in part reversed on other grounds* 93 Hawaii 417, 5 P.3d 407 (2000); *McDonald v. Safeway Stores, Inc.*, 109 Idaho 305, 707 P.2d 416 (1985); *Golba v. Kohl's Dept. Store, Inc.*, 585 N.E.2d 14 (Ind. App. 1992); *Jackson v. K-Mart Corp.*, 251 Kan. 700, 840 P.2d 463 (1992); *Sheehan v. Roche Bros. Supermarkets, Inc., supra* note 14; *Sheil v. T.G. & Y. Stores Co.*, 781 S.W.2d 778 (Mo. 1989); *FGA, Inc. v. Giglio*, 278 P.3d 490 (Nev. 2012); *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559, 818 A.2d 314 (2003); *Lingerfelt v. Winn-Dixie Texas, Inc.*, 645 P.2d 485 (Okla. 1982); *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292 (Tex. 1983); *Canfield v. Albertsons, Inc.*, 841 P.2d 1224 (Utah App. 1992); *Malaney v. Hannaford Bros. Co.*, 177 Vt. 123, 861 A.2d 1069 (2004); *Pimentel v. Roundup Company*, 100 Wash. 2d 39, 666 P.2d 888 (1983); *Steinhorst v. H. C. Prange Co.*, 48 Wis. 2d 679, 180 N.W.2d 525 (1970); *Buttrey Food Stores Division v. Coulson*, 620 P.2d 549 (Wyo. 1980).

[18] See, *Brookshires Grocery Co. v. Pierce*, 71 Ark. App. 203, 29 S.W.3d 742 (2000); *Dumont v. Shaw's Supermarkets, Inc.*, 664 A.2d 846 (Me. 1995); *Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004).

[19] See, *Dunlap v. Marshall Field & Co.*, 27 Ill. App. 3d 628, 327 N.E.2d 16 (1975); *Donoho v. O'Connell's, Inc.*, 13 Ill. 2d 113, 148 N.E.2d 434 (1958); *Mahoney v. J. C. Penney Company*, 71 N.M. 244, 377 P.2d 663 (1962); *Zerilli v. Western Beef Retail, Inc.*, 72 A.D.3d 681, 898 N.Y.S.2d 614 (2010).

[20] See, *Safeway Stores, Inc. v. Smith*, 658 P.2d 255 (Colo. 1983); *Robinson v. Kroger*, 268 Ga. 735, 493 S.E.2d 403 (1997); *Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3d 431 (Ky. 2003).

demonstrates that the mode-of-operation rule has not demonstrated the degree of superiority necessary to depart from long-settled law.

The traditional approach to premises liability balances two competing policies—requiring stores to exercise reasonable care to maintain the premises in a safe condition and protecting stores from becoming the insurers of their patrons' safety. Although virtually every court adopting the mode-of-operation rule declares that it is not making the store an insurer of its patrons' safety,[21] as early as 1994 a commentator recognized that in mode-of-operation rule cases, courts have created results approaching strict liability.[22] At oral argument, Edwards forthrightly acknowledged that she preferred a strict-liability approach. And the commentator noted that at least one scholar has directly advocated for strict liability—emphasizing the goal of accident reduction, i.e., deterrence.[23] But the commentator recognized that there is a practical limit to what a storekeeper can do to prevent accidents, concluding that "a rule of strict liability would impose a financial burden on storekeepers far in excess of that necessary to provide an adequate incentive."[24]

Moreover, the rule's adoption for self-service supermarkets would inevitably lead to pressure to expand the rule. Indeed, building upon a decision of Massachusetts' high court,[25] a recent case note expressly advocated extending the Massachusetts rule beyond the context of a self-service

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[21] See, e.g., *Jackson v. K-Mart Corp., supra* note 17.

[22] See Steven D. Winegar, *Reapportioning the Burden of Uncertainty: Storekeeper Liability in the Self-Service Slip-and-Fall Case*, 41 UCLA L. Rev. 861 (1994).

[23] See *id.* (citing Edmund Ursin, *Strict Liability for Defective Business Premises—One Step Beyond* Rowland *and* Greenman, 22 UCLA L. Rev. 820 (1975)).

[24] *Id*. at 896.

[25] *Sheehan v. Roche Bros. Supermarkets, Inc., supra* note 14.

supermarket.[26] The policy issues involved require thoughtful analysis of costs and benefits, which can be best addressed in the legislative arena.

[8] The traditional approach is the product of the common law's long experience and refinement. The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to 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.[27] The argument for the mode-of-operation rule fails this test. No matter which approach courts adopt, they universally declare that they are not making stores the insurers of their patrons. But common sense, confirmed by legal scholarship, teaches that adoption of the mode-of-operation rule effectively leads to strict liability. Thus, departure from the traditional approach leads to the very result the departing courts disclaim. And the experience of two states—which adopted the rule by court decisions only to be overruled legislatively—counsels that we exercise caution. In the light of this experience, we decline to adopt the mode-of-operation rule.

CONCLUSION

Because there was no evidence from which a reasonable finder of fact could infer that Hy-Vee created the dangerous condition or had constructive knowledge of the watermelon on the floor, the district court did not err in granting summary judgment in favor of Hy-Vee.

Affirmed.

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[26] William Brekka, *Extending the Mode-of-Operation Approach Beyond the Self-Service Supermarket Context*, 48 New Eng. L. Rev. 747 (2014) (advocating extension including, but not limited to, nightclub that permits patrons to bring drinks onto crowded dance floor, fast-food restaurant that permits customers to carry food to and from tables, racetrack that sells bottled drinks but does not provide trash receptacles, pizza counter that does not provide tables for customers, or movie theater that sells snacks and allows patrons to bring them into dark theater).

[27] *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

Nebraska Supreme Court
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State of Nebraska, appellee, v. Angelo M. Bol, appellant.

882 N.W.2d 674

Filed July 22, 2016. No. S-15-706.

1. **Pleas.** To support a finding that a defendant has entered a guilty plea freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination. The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.
2. **Trial: Interpreters.** The appointment of an interpreter for an accused at trial largely rests in the trial court's discretion.
3. ____: ____. A trial court does not abuse its discretion by failing to appoint an interpreter if the record shows that the defendant had a sufficient command of the English language to understand questions posed and answers given.
4. **Trial: Witnesses: Interpreters.** Generally, a defendant is entitled to an interpreter only if he or she timely requests one, or it is otherwise brought to the trial court's attention that the defendant or a witness has a language difficulty that may prevent meaningful understanding of, or communication in, the proceeding.
5. **Effectiveness of Counsel: Proof: Appeal and Error.** To establish ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that counsel's deficiency prejudiced the defendant.
6. **Effectiveness of Counsel: Evidence: Appeal and Error.** An appellate court addresses an ineffective assistance claim raised on direct appeal only if the record allows the court to adequately review the question without an evidentiary hearing.

Appeal from the District Court for Buffalo County: William T. Wright, Judge. Affirmed.

Charles D. Brewster, of Anderson, Klein, Brewster & Brandt, 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.

Connolly, J.

SUMMARY

Angelo M. Bol pleaded no contest to first degree murder. The court accepted Bol's plea and sentenced him to life imprisonment. On appeal, Bol argues that his plea was involuntary and that the court should have appointed him an interpreter because he had trouble understanding the English language. We conclude that Bol could comprehend the proceedings and communicate in English. We therefore affirm.

BACKGROUND

According to the prosecutor's factual basis to support Bol's plea of no contest, in December 2014, Bol got in a fight with the victim. The fight occurred at the meatpacking plant where they worked. Later, Bol's employer fired him. Bol went home and returned to the plant with a handgun. Bol waited a few hours for a shift change. While the victim was leaving the plant, Bol approached him, supposedly to ask a question. He then shot the victim several times in the torso and head. The victim died at the scene.

Although Bol focuses his assignments of error on the plea hearing, the record includes Bol's motion to suppress statements that he made at the scene and to an investigator for the county sheriff during questioning at the jail. Bol claimed that his statements were not freely and voluntarily made

because the court did not properly inform him of his constitutional rights.

Officers responding at the scene wondered if Bol could speak English because he never said a word. They learned that Bol was Sudanese and tried to find an interpreter to come to the jail. But when the investigator asked Bol during the booking procedure if he understood English, he said yes. His native language is Dinka Bor. The interpreter who came to the jail appeared to know Bol or to know of him, and the sheriff's office decided not to use him. Because Bol had answered questions during the booking procedure in English, the sheriff's office decided that an interpreter was unnecessary. The booking procedure took 3 to 4 minutes. Later, the investigator read Bol his *Miranda* rights, had him sign a waiver form, and told him that if he did not understand something, he needed to tell the investigator. Bol said that he was willing to speak to the investigator. During the 2-hour interview, Bol never said that he did not understand a question.

Immigration officials told the investigator that Bol came to the United States in 2001 and became a lawful permanent resident in 2004. In addition to working in various meatpacking plants, Bol obtained a commercial driver's license. The court overruled the motion to suppress Bol's statements, finding that Bol gave his consent freely and voluntarily.

At the plea hearing, Bol's attorney stated that Bol had reached a plea agreement with the State. In exchange for Bol's plea of guilty or no contest to first degree murder, the State agreed to dismiss the charge of using a weapon to commit a felony. The court informed Bol that he would give up the constitutional rights the court would next describe by pleading guilty or no contest to the charges. The court informed Bol that he had the right to (1) have a trial by a jury of 12 persons or the judge alone; (2) be presumed innocent; (3) have guilt proved beyond a reasonable doubt; (4) have the court determine whether bond was appropriate; (5) be represented by counsel at the county's expense if he could not

afford an attorney; (6) remain silent and not testify, or testify if he wished; (7) have witnesses against him testify and cross-examine them; (8) call witnesses and present evidence; and (9) use the court's subpoena power to compel a witness' testimony. Conversely, the court explained that Bol still had the right to counsel through sentencing and a direct appeal but that he would likely waive any court error to that point in the proceedings by entering a plea.

After this explanation, the court asked Bol a series of questions calling for yes or no answers. First, it asked Bol whether he had a condition or illness, or had used any substance, that would affect his ability to understand. Bol said no. After Bol's attorney described the plea agreement, Bol confirmed to the court that the stated agreement was correct and that he was satisfied with his attorney's advice and representation. Bol denied being compelled to comply with the agreement. The following colloquy then occurred:

> [Court]: Do you understand that if you plead guilty or no contest to Count I in the amended information, which now charges you with first-degree murder, a Class IA felony, you will, in essence, be telling this Court that you committed the crime described in Count I or at least you do not contest the accuracy of the facts stated in Count I; do you understand that?
>
> [Bol]: No.
>
> [Court]: Okay. What is it about that you don't understand?
>
> [Bol]: The process, the way it work.
>
> [Court]: All right. Basically what's going to happen is if you plead guilty or no contest, there will not be any trial. What will happen is you are telling the Court that I did that crime. Or you are saying I'm not going to agree that I did that crime, but I am going to say that I'm not going to contest it[.] I'm not going to argue against anything that's said in Count I.
>
> [Bol]: Well, yeah.

[Court]: Do you understand that?

[Bol]: Yeah.

[Court]: Okay. In this particular case the State has filed an amended information, that is, it has changed the original information. The way they changed it is they have dismissed the second count. That leaves one count only against you. That count now charges you with first-degree murder, which is a Class IA felony, . . . one of the most serious levels of felony under Nebraska law.

. . . .

Do you understand that is the charge or count to which you will be pleading guilty or no contest today?

[Bol]: Yes.

. . . .

[Court]: Now, did you hear my description of the rights that you have under the constitution of the United States, the constitution of the State of Nebraska and the laws of both?

[Bol]: Yes.

[Court]: Do you have any questions with regard to those rights?

[Bol]: No.

[Court]: Do you understand that you will waive or give up all the rights I have told you you will waive or give up, if you plead guilty or no contest?

[Bol]: Yes.

[Court]: Do you understand if you plead guilty or no contest, I'll find you guilty of Count I, first-degree murder, a Class IA felony, without a trial; do you understand that?

[Bol]: What that mean?

[Court]: All right. Again, I want to make sure you understand this very clearly. If you plead guilty or no contest to Count I, I'm going to find you guilty of Count I, but there is going to be no trial. Your admission that you are guilty will be the sole basis upon which I will

make a determination and I will find you guilty. Do you understand that?

[Bol]: Yes.

The court asked the prosecutor to advise Bol of the potential penalties he faced if he pleaded guilty or no contest. The prosecutor stated that "first-degree murder is a Class IA felony, punishable by a term of life imprisonment. That is the sentence." The court asked Bol if he understood the potential penalties; Bol said yes.

Next, the court then explained that Bol's conviction was likely to adversely affect his ability to remain in the country or become naturalized, "assuming that you are ever released from prison." When the court asked Bol if he still wished to enter a plea of guilty or no contest, his attorney stated that Bol had a question about the immigration consequences. When the court again explained that if Bol were ever released, his conviction would adversely affect his ability to stay in the country, Bol asked, "How can I leave if I will be sentenced to life?" The court responded as follows:

> [Court]: That's correct; however, life sentences are not always necessarily life sentences. There are occasions when persons who are sentenced to life in prison get released, perhaps long after the prison term commences, but you need to know that if that would occur for some reason unknown to us at this point, that most likely would adversely affect your ability to remain in this country, work in this country or ever complete the naturalization process. Do you understand that?
>
> [Bol]: Correct.
>
> [Court]: All right. Would you please stand. . . . [W]ith regard to Count I of the amended information . . . charging you with first-degree murder, a Class IA felony under Nebraska law, how, sir, do you plead? What is your plea?
>
> [Bol]: Guilty or no contest.
>
> [Court]: It has to be one or the other. It can't be both.

After an off-the-record discussion between Bol and his attorney, the court and Bol further conversed:

> [Court]: . . . [L]et's do this for purposes of the record, you are apparently having a little bit of difficulty understanding. I want to make sure you understand. There is little difference between a plea of guilty or no contest. Both will result in a guilty judgment. The only difference is that a plea of guilty can be used against you in some later court proceeding as an identification of guilt. A no contest plea typically cannot be used in most other civil and criminal proceedings, as the plea of guilty can be used. That's the only difference. Both will result in the finding you are guilty. Do you understand that?
>
> [Bol]: It's kind of difficult to understand that.
>
> [Court]: I understand that. Let's go over it one more time. If you plead guilty, it's going to happen because I'm going to find you guilty. I'm going to enter a judgment of guilt on first-degree murder, okay. If you plead no contest, I'm going to find you guilty, I'm going to enter a judgment of guilty of first-degree murder.
>
> The only difference between the two pleadings is the potential affect they might have on their use against you in some other civil or criminal proceedings. Typically a no contest plea cannot be used in other civil or criminal proceedings. That is, your plea of guilty can be used in certain other civil or criminal proceedings. That's the only difference between the two pleas. Both are going to result in a judgment of guilt. Which one do you wish to enter?
>
> [Bol]: Plead no contest.
>
> . . . .
>
> [Court]: All right. Thank you. . . . [L]isten carefully to me. Has anyone threatened, pressured or forced you to enter this plea against your will?
>
> [Bol]: Yeah.

> [Court]: Okay. Did you understand what I just said? It's extremely important . . . that you know what is going on. What I want to make sure of is that no one has threatened, beat you, tortured you, done anything similar to that to get you to enter this plea. Has anyone done anything like that?
>
> [Bol]: No.
>
> [Court]: Has anyone promised you anything that isn't reflected in this hearing today —
>
> [Bol]: No.
>
> [Court]: — to get you to enter this plea?
>
> [Bol]: No.
>
> [Court]: Okay. Thank you. You can be seated.

After this colloquy, the court asked the prosecutor to provide the factual basis for the plea. The court found beyond a reasonable doubt that a factual basis for the plea existed and that Bol understood his rights, the nature of the charges, and the possible penalties and consequences. It found that Bol had entered his plea freely, voluntarily, knowingly, and intelligently. It accepted Bol's plea and judged him guilty of first degree murder.

Later, at the sentencing hearing, Bol extensively spoke about the workplace harassment he had suffered to explain why he had committed the crime. This explanation comprises 6 pages of transcript and showed Bol's competence with English. When the court explained how his actions showed that he had planned the killing and intended to kill the victim, Bol agreed. He did not appear to have any problem following the court's extensive comments. The court sentenced him to life in prison.

ASSIGNMENTS OF ERROR

Bol assigns, restated, that the court erred by (1) accepting Bol's plea without ensuring that he understood the charges against him and his constitutional rights; (2) determining that Bol entered his plea freely, intelligently, voluntarily, and

understandingly; (3) not appointing Bol an interpreter; and (4) failing to inform Bol of the minimum and maximum penalties for first degree murder. Bol also assigns that (5) his trial counsel was ineffective for not assuring that Bol understood the proceedings.

ANALYSIS

Bol generally argues that he "did not understand what was going on."[1] As a result, he contends that his plea was involuntary and that the court should have appointed him an interpreter.

[1] To support a finding that a defendant has entered a guilty plea freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.[2] The record must also establish a factual basis for the plea and that the defendant knew the range of penalties for the crime charged.[3]

[2,3] Courts have held that a defendant's inability to comprehend criminal proceedings or communicate in English at such proceedings can result in a violation of the defendant's due process and Sixth Amendment rights.[4] But like most other courts,[5] in *State v. Topete*,[6] this court adopted an abuse of discretion standard for a court's decision whether a defendant requires an interpreter:

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[1] Brief for appellant at 9.

[2] *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

[3] *Id.*

[4] See 2 Barbara E. Bergman & Nancy Hollander, Wharton's Criminal Evidence § 8:5 (15th ed. 1998 & Cum. Supp. 2015-16).

[5] See, *id.*; Annot., 32 A.L.R.5th 149, § 29 (1995).

[6] *State v. Topete*, 221 Neb. 771, 773, 380 N.W.2d 635, 636 (1986).

> The appointment of an interpreter for an accused at trial is a matter resting largely in the discretion of the trial court.[7]
>
> Even though a defendant might not speak grammatically correct English, where the record satisfactorily demonstrates that such defendant had a sufficient command of the English language to understand questions posed and answers given, there has been no abuse of discretion in refusing to appoint an interpreter.[8]
>
> If a defendant understands and communicates reasonably well in the English language, the mere fact that such defendant might be able to accomplish self-expression a little better in another language does not warrant utilizing an interpreter at trial.[9]
>
> Nebraska statutory law requires the appointment of an interpreter in a court proceeding . . . when the defendant is "unable to communicate the English language."[10]

Section 25-2401 (Reissue 2008) is essentially the same as it was in 1986. It provides that it is

> the policy of this state that the constitutional rights of persons unable to communicate the English language cannot be fully protected unless interpreters are available to assist such persons in legal proceedings. It is the intent of sections 25-2401 to 25-2407 to provide a procedure for the appointment of such interpreters to avoid injustice and to assist such persons in their own defense.

In 1987, the Legislature somewhat amended the interpreter statutes as part of a law requiring interpreters for deaf or hard

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[7] *Perovich v. United States*, 205 U.S. 86, 27 S. Ct. 456, 51 L. Ed. 722 (1907); *Prokop v. State*, 148 Neb. 582, 28 N.W.2d 200 (1947).

[8] *State v. Faafiti*, 54 Haw. 637, 513 P.2d 697 (1973).

[9] *Flores v. State*, 509 S.W.2d 580 (Tex. Crim. 1974).

[10] Neb. Rev. Stat. § 25-2401 (Reissue 1979).

of hearing persons.[11] The most significant change in chapter 25 concerned the definition of deaf person.[12] The legislative history does not suggest that the 1987 amendments were a response to *Topete*.[13]

[4] Neither Bol nor his attorney requested an interpreter. This failure is not a waiver of Bol's due process rights, but it is relevant to whether the court should have recognized on its own that Bol needed interpretative services. Generally,

> the defendant in a criminal proceeding may be entitled to have an interpreter provided only where he or she timely requests one, or it is otherwise brought to the trial court's attention that the defendant or a witness has a language difficulty that may prevent meaningful understanding of, or communication in, the proceeding.[14]

We conclude that the record shows that Bol had the ability to comprehend the proceedings and communicate in English. So the court did not violate Bol's constitutional rights by accepting his no contest plea. Nor did it abuse its discretion by not appointing Bol an interpreter sua sponte. And the claimed language barrier did not render Bol's plea involuntary.

Bol argues that he did not freely, intelligently, voluntarily, and understandingly enter his plea because no one told him about the range of penalties for first degree murder. At the court's direction, the prosecutor told Bol that the punishment was "a term of life imprisonment. That is the sentence." Bol suggests that the prosecutor should have instead stated that

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[11] See 1987 Neb. Laws, L.B. 376, § 3, codified at Neb. Rev. Stat. § 20-152 (Reissue 2012).

[12] See 1987 Neb. Laws, L.B. 376, § 12.

[13] See Judiciary Committee Hearing, L.B. 376, 90th Leg., 1st Sess. 1-8 (Feb. 11, 1987).

[14] 32 A.L.R.5th, *supra* note 5, § 22 at 260.

"the minimum sentence was life imprisonment and the maximum sentence was life imprisonment."[15]

We determine that Bol knew the penalty for his crime. First degree murder is a Class IA felony.[16] Under Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014), the punishment for a Class IA felony is simply "Life imprisonment." There is no maximum or minimum penalty.

Nor did the court err by telling Bol that pleading no contest to first degree murder would probably lower his chance of living in the United States or becoming a citizen, should Nebraska ever release Bol for "some reason unknown to us at this point." The court had a duty to advise Bol about the immigration consequences of his plea under Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2008). Failure to do so could have allowed Bol to vacate his conviction.[17]

Finally, Bol argues that his attorney provided ineffective assistance by (1) failing to ensure that he understood his constitutional rights and the likely consequences of entering a plea; (2) failing to stop the plea hearing when it became apparent that Bol had no idea what was going on; and (3) failing to request an interpreter.

[5,6] To show that his counsel was ineffective, Bol must show that his counsel's performance was deficient and that counsel's deficiency prejudiced him.[18] The fact that a defendant raises an ineffective assistance of counsel claim on direct appeal does not necessarily mean that we can resolve it.[19] The key is whether the record allows us to adequately review the question.[20] We will not address an ineffective assistance

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[15] Brief for appellant at 12.

[16] Neb. Rev. Stat. § 28-303(2) (Reissue 2008).

[17] § 29-1819.02(2).

[18] See *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016).

[19] *Id.*

[20] *Id.*

of counsel claim on direct appeal if it requires an evidentiary hearing.[21]

Here, the record on direct appeal shows that Bol's counsel was not ineffective. Bol had the ability to comprehend the proceedings and communicate in English. The record shows that Bol had a sufficient command of the English language to understand the questions posed and the answers given. So his counsel was not ineffective for failing to ensure that Bol understood his constitutional rights, failing to stop the plea hearing, and failing to request an interpreter.

CONCLUSION

Bol understood the proceedings. His plea was voluntary, the court did not abuse its discretion by not appointing him an interpreter, and his counsel was not ineffective. We therefore affirm.

Affirmed.

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[21] *Id.*

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

In re Interest of Alan L., a child under 18 years of age. State of Nebraska, appellee, v. Alan L., appellant.

882 N.W.2d 682

Filed July 22, 2016. No. S-15-860.

1. **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.
2. **Judgments: Res Judicata.** Whether the doctrine of claim preclusion, or res judicata, bars relitigation of a claim presents a question of law.
3. **Constitutional Law: Due Process.** Whether the procedures given an individual comport with constitutional requirements for procedural due process presents a question of law.
4. **Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
5. **Juvenile Courts: Probation and Parole.** Under Neb. Rev. Stat. § 43-286 (Cum. Supp. 2014), before a juvenile court can order a juvenile's placement at a youth rehabilitation and treatment center, the Office of Probation Administration must review and consider thoroughly what would be a reliable alternative to commitment at such a center. It must also provide a report to the court that supports one of the following conclusions: (1) there are untried conditions of probation or community-based services that have a reasonable possibility for success or (2) all levels of probation and options for community-based services have been studied thoroughly and none are feasible. The review should consider the success or failure of prior supervisory conditions, even if the conditions were imposed by some other agency responsible for the child's care.
6. **Juvenile Courts.** In considering whether the State has shown that a juvenile should be placed at a youth rehabilitation and treatment center,

a juvenile court is not required to repeat measures that were previously ineffective or unsuccessful.

7. **Juvenile Courts: Probation and Parole: Time.** Under Neb. Rev. Stat. § 43-286(1) (Cum. Supp. 2014), the State can file a motion to commit a juvenile to the Office of Juvenile Services for placement at a youth rehabilitation and treatment center at only three points in a delinquency proceeding: (1) before a court enters an original disposition, (2) before a court enters a new disposition following a new adjudication, or (3) before a court enters a new disposition following a motion to revoke probation or supervision.
8. **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.
9. **Juvenile Courts: Probation and Parole: Time.** Prospectively, a revocation motion is concurrently required even if the State is seeking a juvenile's commitment to the Office of Juvenile Services for probation violations.
10. **Judgments: Res Judicata.** Claim preclusion bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both action.
11. **Res Judicata.** The doctrine of claim preclusion bars relitigation not only of those matters actually litigated, but also of those matters that a party could have litigated in the prior action.
12. **Juvenile Courts: Judgments: Time.** A juvenile court can compare the facts as they existed when it entered a previous order to new facts arising after that order to determine whether a change in circumstances warrants a different decision. This general principle applies when the State files successive motions to change a juvenile's disposition under Neb. Rev. Stat. § 43-286 (Cum. Supp. 2014).

Appeal from the Separate Juvenile Court of Sarpy County: Robert B. O'Neal, Judge. Affirmed.

Dennis P. Marks, Deputy Sarpy County Public Defender, for appellant.

Gary Brollier, Deputy Sarpy County Attorney, and Andrew T. Erickson, Senior Certified Law Student, for appellee.

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

Connolly, J.

I. SUMMARY

Alan L. appeals from the juvenile court's August 2015 commitment order. That order committed him to the Office of Juvenile Services (OJS) for commitment at a youth rehabilitation and treatment center (YRTC). The court held two commitment hearings. In its first order, the court concluded that the evidence failed to support a commitment order. About 2 months later, the court found that the State had proved the necessary conditions for the commitment.

Alan argues that claim preclusion barred the State from presenting any new evidence at the second commitment hearing that was available to it before the first commitment hearing. He also contends that the commitment hearing violated his right to due process because he could not confront and cross-examine persons who provided adverse information against him. Finally, he contends that the State failed to produce sufficient evidence to show that all levels of probation supervision and community-based services had failed.

We affirm. We conclude that despite the State's failure to comply with our case law for seeking a new disposition or commitment to OJS, Alan was not deprived of his right to due process. We further conclude that new evidence at the second commitment hearing, which became available after the first hearing, showed a change of circumstances that justified the court's commitment order.

II. BACKGROUND

Because Alan challenges the State's commitment procedures, it would be helpful for future cases to clarify the proper procedures under recent statutory amendments to the juvenile code. So we set out the procedures here with some detail.

Alan was born in September 1998. He was released from the YRTC on parole in the summer of 2014. In January 2015,

when Alan was age 16 and on parole, the county attorney's office filed a juvenile petition that alleged three counts of conduct constituting a misdemeanor offense. Alan admitted to being a minor in possession of alcohol, and the State dismissed the other charges.

Alan's parole officer reported that Alan had refused to cooperate with a chemical dependency evaluation, refused to charge his electronic monitor, and failed to attend school. His parole officer stated that she was authorized to seek a parole revocation but preferred to seek a disposition order placing him on probation. She believed that if Alan were sent back to the YRTC on probation, the State would have more supervision over him when he was released. After the hearing, the court adjudicated Alan under Neb. Rev. Stat. § 43-247(1) (Supp. 2013) (nontraffic misdemeanor or infraction), ordered a psychiatric evaluation, and scheduled a disposition hearing for March 26.

But in February 2015, new circumstances required the court to hold a detention hearing—not a disposition hearing. Following an altercation in his home, police officers took Alan into custody. A probation officer then placed Alan in secured detention at the Douglas County Youth Center because he posed an extreme risk to the community.

At the detention hearing, a probation officer testified about the altercation. Alan had demanded that his mother take him to his girlfriend's house, but she refused. Alan pushed her down and left the house angry but came back a few minutes later with a gun, which he allegedly held to her head. He then pointed the gun at his mother's boyfriend and demanded transportation, but the boyfriend refused.

After police officers took him into custody, he told a probation officer that he was bipolar and was not taking his medications. He also admitted to being involved with gangs and "brought up at least two incidents where he pulled a gun on another person." In addition, the probation officer stated that Alan had said he had been using and selling cocaine and using

alcohol. The court continued his secure detention pending the disposition hearing.

Later, in March 2015, the county attorney's office filed a supplemental petition with four new charges against Alan stemming from the altercation at his home in February. It alleged two additional counts of felonious conduct (making terroristic threats and use of a weapon to commit a felony), and two additional counts of misdemeanor conduct (third degree assault and a separate count of criminal mischief).

About a month later, the court held a disposition hearing on the original petition. (It had not yet held an adjudicated hearing on the supplemental petition.) The court placed Alan on probation and allowed him to move with his mother to Colfax County, Nebraska. At the adjudication hearing, Alan's mother had stated that she believed Alan needed medication for his mood changes. So the court ordered him to comply with three evaluations (psychological, psychiatric, and chemical dependency) and to have no contact with gangs or his mother's boyfriend.

In May 2015, after Alan had returned to Sarpy County, his new probation officer, Nicole Mercer, placed him in detention again for noncooperation. Later that month, the county attorney's office moved to commit Alan to OJS for placement at a YRTC. The motion alleged that Alan had (1) been previously committed to the YRTC and discharged in the summer of 2014; (2) claimed to be a gang member; (3) failed to cooperate with a predisposition interview and evaluation; (4) failed to attend school; (5) failed to complete probation or "Tracker"; and (6) expressed no desire to cooperate with further testing or evaluations. Generally, the motion alleged that Alan had exhausted all levels of probation supervision and that there was an immediate and urgent need to place him at the YRTC to protect him and the public. The motion also alleged that the YRTC would offer him treatment, schooling, and behavioral regimes, thus reducing his access to drugs. The motion, however, did not contain allegations about Alan's conduct in February.

On the same day that the county attorney filed a commitment motion, the court held a detention hearing. The evidence showed that Mercer had detained Alan in May after a home visit. Mercer had told Alan not to leave the house for a week without an adult, apparently because he had not cooperated with court-ordered evaluations. Alan told Mercer to get off his property and used "colorful" language. The record reflects that after the court adjudicated Alan on the supplemental petition, Mercer recommended the court continue Alan's detention and schedule a hearing on his commitment to the YRTC. The court continued Alan's detention and scheduled a combined review hearing, an arraignment on the supplemental petition, and a hearing on the commitment motion.

At the June 2015 hearing, Alan admitted to two counts of misdemeanor conduct on February 14, 2015 (third degree assault and criminal mischief). He admitted that he had threatened to shoot his mother's boyfriend with an unloaded gun and had kicked off his electronic monitor. The county attorney dismissed the counts alleging felonious conduct. The court adjudicated Alan under § 43-247(1) and continued the commitment hearing to the next week.

A week later, the court held a combined disposition hearing on the supplemental petition and a commitment hearing. The county attorney stated that because he had moved for a YRTC commitment before Alan admitted to the charges in the supplemental petition, he did not know whether he needed to amend the motion. The court recognized that the motion did not reflect the allegations in the supplemental petition but stated that it did not want to keep Alan in secure detention any longer than necessary if he was ready to proceed. Alan's attorney stated that he was ready.

Mercer testified that Alan initially walked away angry from the psychiatric evaluation, but he later completed it. He had not, however, complied with the recommendation that he take medication. He told the psychiatrist that he did not want treatment, and the psychiatrist did not think Alan would cooperate

with services. Furthermore, Alan had missed his appointment for a chemical dependency evaluation and had not been tested for drug use since returning to Sarpy County. Mercer said Alan's mother could not control him. Also, Mercer said that the previous year, she had supervised Alan at the YRTC and that he was part of her high-risk caseload. She did not believe there were any community-based services or other programming that probation could provide to help Alan.

But Alan's attorney successfully objected that the court could not question Mercer about services that Alan had received during his previous parole. After an off-the-record discussion with counsel, the court stated from the bench that it was denying the commitment motion "for lack of sufficient evidence presented at this hearing." In its June 2015 journal entry, the court "determined that the evidence was not sufficient at this time to meet the three prong test." But it continued the disposition on the supplemental petition to July.

In July 2015, the county attorney filed an amended motion to commit Alan to the YRTC. The allegations were the same. The court continued the disposition hearing to give the county attorney time to respond to Alan's argument that claim preclusion barred any new evidence that the State could have presented at the June commitment hearing. The court again continued the disposition hearing to August.

In August 2015, Alan filed a "motion to bar" any evidence of his conduct before the court's June order that found the evidence insufficient to support a commitment. The county attorney's office filed a second amended motion to commit. The only new allegations involved its claims that Alan had sabotaged a placement by threatening to run away or harm the staff there and that no other placement options were available. Later in August, at the second commitment hearing, the court received Mercer's affidavit with new information about Alan's conduct. She stated that Alan had sabotaged a placement in Arizona. The affidavit had three attachments: Mercer's summary of the State's supervision

efforts, a chemical dependency evaluation, and a psychiatric evaluation. Alan's attorney then called Mercer as a witness. After the hearing, the court found that the allegations of the second amended motion for commitment were true, placed him on intensive supervision probation, and committed him to OJS for placement at the YRTC.

III. ASSIGNMENTS OF ERROR

Alan assigns, restated, that the court erred in ordering his commitment to the YRTC for the following reasons:

(1) The State failed to show by a preponderance of the evidence that all levels of probation supervision and community-based services had been exhausted;

(2) the doctrine of res judicata barred the State from presenting evidence at the August 2015 commitment hearing that it had presented, or could have presented, before the court entered its June order in which it declined to commit Alan to the YRTC;

(3) the "change of circumstances" principle did not apply to the court's August 2015 commitment order because in its June order, the court failed to make specific findings that would show what circumstances had changed; and

(4) the August 2015 commitment hearing deprived him of his due process right to confront and cross-examine his accusers.

IV. STANDARD OF REVIEW

[1-4] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.[1] Whether the doctrine of claim preclusion, or res judicata, bars relitigation of a claim presents a question of law.[2] Whether the procedures given an individual comport with constitutional requirements for procedural

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[1] *In re Interest of Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016).

[2] See *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014).

due process presents a question of law.[3] And an appellate court independently reviews questions of law decided by a lower court.[4]

V. ANALYSIS

1. Alan Was Not Denied Due Process

Alan contends that the State denied him due process at the August 24, 2015, commitment hearing because it did not call as witnesses the persons who authored the reports that supported Mercer's affidavit. He argues that if the State had filed a motion to revoke his probation, he would have had a statutory right to confront and cross-examine witnesses against him. He contends that he was denied these rights at the commitment hearing and that the defect was not cured by his attorney's ability to call his probation officer as a witness. He argues that he could only ask Mercer open-ended questions on direct examination instead of cross-examining her.

As discussed later, we agree that the commitment procedures did not comply with our previous requirements under Neb. Rev. Stat. § 43-286 (Cum. Supp. 2012). This statute sets out a juvenile court's disposition options for juveniles who have been adjudicated under § 43-247(1), (2), or (4). Section 43-286 also governs revocation hearings for such juveniles. In 2013 and 2014, however, the Legislature substantially amended § 43-286. But we have not yet determined how our previous requirements interplay with the new statutory procedures for a YRTC placement when a court has already entered a disposition. As explained later, despite procedural flaws, the court's procedures did not deny Alan an opportunity to challenge the State's recommendations for the commitment. So he was not denied due process. But for future cases, we explain the effect of the statutory amendments.

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[3] See *In re Interest of Landon H.*, 287 Neb. 105, 841 N.W.2d 369 (2013).

[4] See *Adair Asset Mgmt. v. Terry's Legacy*, 293 Neb. 32, 875 N.W.2d 421 (2016).

(a) Legislature Imposed New Requirements for Commitments to OJS

Before 2013, § 43-286 did not constrain a juvenile court's discretion in a disposition order to commit a juvenile age 12 or older to OJS for placement at a YRTC. But a court could not place a juvenile under age 12 at a YRTC "unless he or she has violated the terms of probation or has committed an additional offense and the court finds that the interests of the juvenile and the welfare of the community demand his or her commitment."[5]

In 2013, the Legislature amended § 43-286 for all dispositions entered on or after July 1, 2013. After that date, a court could commit juveniles age 14 or older to OJS for placement at a YRTC as a condition of intensive supervision probation, but only if it made specific findings of fact. It had to find the existence of three conditions for a commitment: (1) all levels of probation supervision had been exhausted; (2) all options for community-based services have been exhausted; and (3) placement of such juvenile is a matter of immediate and urgent necessity for the protection of such juvenile or the person or property of another, or it appears that such juvenile is likely to flee the jurisdiction of the court.[6] Additionally, the commitment could not conflict with Neb. Rev. Stat. § 43-251.01 (Supp. 2013).[7] The 2013 bill amended § 43-251.01 to prohibit placing a juvenile under age 14 at a YRTC.[8]

A year later, the Legislature again amended § 43-286 to require the State to file a commitment motion and a juvenile court to conduct a hearing on that motion before the court could commit a juvenile to OJS for placement at a YRTC. Like the 2013 requirements, the 2014 requirements apply to

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[5] 2011 Neb. Laws, L.B. 463, § 4.

[6] 2013 Neb. Laws, L.B. 561, § 23.

[7] See *id.*

[8] See *id.*, § 10.

all dispositions entered on or after July 1, 2013.[9] The amended § 43-286 requires the State's motion to set forth "specific factual allegations" that support the specified general allegations necessary for the commitment. It provides that at the hearing, the county attorney must prove the three conditions for a commitment by a preponderance of the evidence: (1) all levels of probation supervision have been exhausted; (2) all options for community-based services have been exhausted; and (3) the juvenile's placement at a YRTC is a "matter of immediate and urgent necessity for the protection of the juvenile or the person or property of another" or "it appears that such juvenile is likely to flee the jurisdiction of the court."[10]

But before these amendments, we had interpreted § 43-286 to require the State to comply with the procedural requirements for a new disposition when a juvenile court has already entered a disposition.

(b) A Court Cannot Change a Disposition Under § 43-286(1)(a) Unless the State Complies With Procedures for a New Disposition

[5,6] We have previously considered the 2013 amendment of § 43-286, which required a court to find the three statutory conditions existed before committing a juvenile to OJS for placement at a YRTC. In *In re Interest of Nedhal A.*,[11] we explained that by imposing these conditions, the Legislature intended to make a juvenile's placement at a YRTC the placement of last resort. We held that before a juvenile court can order this placement, the "Office of Probation Administration must review and consider thoroughly what would be a reliable alternative to commitment at YRTC."[12] It must also provide

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[9] See 2014 Neb. Laws, L.B. 464, § 20 (codified at § 43-286(1)(b)(ii) (Cum. Supp. 2014)).

[10] See § 43-286(1)(b)(ii)(B)(III).

[11] *In re Interest of Nedhal A.*, 289 Neb. 711, 856 N.W.2d 565 (2014).

[12] *Id.* at 716, 856 N.W.2d at 569.

a report to the court that supports one of the following conclusions: (1) there are "untried conditions of probation or community-based services [that] have a reasonable possibility for success" or (2) "all levels of probation and options for community-based services have been studied thoroughly and . . . none are feasible."[13] And the "review should consider the success or failure of prior supervisory conditions, even if the conditions were imposed by some other agency responsible for the child's care, such as [the Department of Health and Human Services]."[14] For example, the office could consider a juvenile's previous supervision under an adjudication in a neglect and dependency case.[15] In considering whether the State has shown that a juvenile should be placed at a YRTC, we specifically declined to require a juvenile court to repeat measures that were previously ineffective or unsuccessful.[16]

The juvenile in *In re Interest of Nedhal A.* had not previously been placed on probation for a law violation.[17] But we did not interpret the exhaustion requirement for probation supervision to mean that the juvenile must have previously been on probation and failed to comply with probation conditions. Instead, we required a report showing whether untried conditions of probation or community-based services had a reasonable possibility for success or were unfeasible.[18] But that case is distinguishable. We did not have to consider the proper procedures when a juvenile court has previously entered a disposition.

Notably, the 2013 and 2014 amendments did not change the dispositions authorized under § 43-286(1)(a). And both this

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[13] *Id.*

[14] *Id.*

[15] See *id.*

[16] See *id.*

[17] See *In re Interest of Nedhal A., supra* note 11.

[18] *Id.*

court and the Nebraska Court of Appeals have held that once a court has entered a disposition, it is plain error to change that disposition when the State has not complied with the applicable statutory procedures.[19] The procedures for changing an existing disposition are now codified at § 43-286(5).[20] Section 43-286(5)(b) governs the procedure for revoking a juvenile's probation or court supervision and changing the disposition. Section 43-286(5)(a) allows a court to enter a new disposition when there are new allegations that "the juvenile is again a juvenile described in" § 43-247(1), (2), (3)(b), or (4). Complying with the procedures under § 43-286(5) is important because in a new adjudication proceeding or a revocation proceeding, the juvenile is entitled to procedural protections, including the right to confront and cross-examine adverse witnesses.[21]

[7] Of course, the Legislature would have been aware of our holdings regarding changes to an existing disposition before it enacted the 2013 and 2014 amendments to § 43-286. Yet, it did not create a freestanding commitment hearing. Instead, it specifically required a commitment to OJS to be part of a juvenile court's disposition. We must construe the provisions of § 43-286 so that they are consistent and harmonious.[22] So when a juvenile court has already entered a disposition under § 43-286(1)(a), the commitment to OJS under § 43-286(1)(b) must be consistent with the procedures for a new disposition under § 43-286(5). Summed up, under § 43-286(1), the State can file a motion to commit a juvenile

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[19] See, *In re Interest of Markice M.*, 275 Neb. 908, 750 N.W.2d 345 (2008); *In re Interest of Torrey B.*, 6 Neb. App. 658, 577 N.W.2d 310 (1998).

[20] See L.B. 463, § 4.

[21] See Neb. Rev. Stat. § 43-279 (Reissue 2008) and § 43-286(5)(b)(ii).

[22] See, e.g., *Credit Mgmt. Servs. v. Jefferson*, 290 Neb. 664, 861 N.W.2d 432 (2015), quoting *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013); *Hoppens v. Nebraska Dept. of Motor Vehicles*, 288 Neb. 857, 852 N.W.2d 331 (2014).

to OJS for placement at a YRTC at only three points in a delinquency proceeding: (1) before a court enters an original disposition, (2) before a court enters a new disposition following a new adjudication, or (3) before a court enters a new disposition following a motion to revoke probation or supervision.

(c) State's Commitment Motion Did Not Comply With Procedures for a New Disposition

Here, in the court's disposition order following the first adjudication, the court placed Alan on probation and allowed him to live with his mother. Before the court entered that disposition, the county attorney's office had filed a supplemental petition with new allegations of conduct governed by § 43-247(1) and (2). But the State did not file a commitment motion before the court entered the first disposition that ordered probation and allowed Alan to live with his mother.

Later, after Alan's probation officer placed him in detention for noncooperation, the county attorney's office filed a commitment motion. The allegations focused solely on Alan's failure to comply with the terms of his probation. Yet, the county attorney did not move to revoke Alan's probation. Similarly, the allegations in the county attorney's two later commitment motions were related to Alan's noncooperation with his probation terms. But the State never filed a motion to revoke his probation.

These procedures did not comply with our case law regarding changes to a disposition. The commitment motion did not rest on new allegations under § 43-247. Because the motion rested on probation violations, the State should have filed a motion to revoke probation to support its requested change in the disposition. Although Nebraska appellate courts have previously reversed orders changing a disposition because of procedural flaws, we do not find plain error here.

(d) Commitment Hearing Did Not Deprive Alan of Any Procedural Rights

[8] 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.[23] It is true that we found plain error in *In re Interest of Markice M.*[24] There, the State claimed that its motion for an evaluation hearing was a continuation of the disposition phase, after which the juvenile court could change the disposition. We rejected that argument. We stated that the motion contained no factual allegations that the juvenile had violated a term of his probation or a court order. The probation officer asked for a placement change because of concerns about the juvenile's safety, not his probation violations. We held that "[w]hen the State contends that a juvenile placed on probation has violated a term of probation or an order of the court, it is required to file a motion to revoke or change the disposition."[25] We found plain error because it failed to do so. Similarly, the Court of Appeals has held that a juvenile court committed plain error in committing a juvenile to OJS for placement at a YRTC when the State had not filed a pleading, motion, or notice that claimed the juvenile had violated the terms of his probation.[26]

[9] It is true that the State did not comply with our holding that it must move to revoke a juvenile's probation when it claims that a change in the disposition is required for probation violations. And we emphasize that prospectively, a revocation motion is concurrently required even if the State is seeking a juvenile's commitment to OJS for probation

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[23] *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014).

[24] *In re Interest of Markice M., supra* note 19.

[25] *Id.* at 912-13, 750 N.W.2d at 349.

[26] *In re Interest of Torrey B., supra* note 19.

violations. But we have not previously held this. And the State's motion did put Alan on notice that it was seeking a commitment to OJS because of his probation violations. Alan did not contend that he did not have notice of its claim. And he has not shown that the State denied him any protections that he would have received had the State filed a revocation motion.

For probation revocations, § 43-286(5)(b)(ii) requires that juveniles have specified procedural protections, such as the rights to an attorney and to present evidence refuting the State's claims or showing mitigating circumstances. In particular here, a juvenile has the right to "confront persons who have given adverse information concerning the alleged violations [and] cross-examine such persons."[27] Alan was represented by counsel and not precluded from presenting evidence. He argues that he could not confront or cross-examine any persons "who authored the exhibit or who were identified as sources in the exhibit."[28] But the record fails to show that he attempted to subpoena the authors of the two evaluations attached to Mercer's affidavit.

As discussed above, in *In re Interest of Nedhal A.*,[29] we specifically held that the Office of Probation Administration must provide a report to the court showing that it has thoroughly considered whether untried probation conditions or community-based services have a reasonable probability for success or are not feasible. And the office must consider the success or failure of previous supervisory conditions, even if they were imposed by a different state agency.[30] Mercer prepared that summary, and Alan's attorney called her as a witness. But Alan argues that because the State did not call

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[27] § 43-286(5)(b)(ii).

[28] Brief for appellant at 17.

[29] *In re Interest of Nedhal A., supra* note 11.

[30] See *id.*

Mercer, he could not cross-examine her. He argues that his attorney could ask Mercer only open-ended questions on direct examination. We reject that argument. Nothing prevented his attorney from asking Mercer leading questions.[31]

We conclude that Alan was not denied any procedural due process rights at the commitment hearing. We turn to his argument that the doctrine of res judicata precluded the court's consideration of the State's evidence at the August 24, 2015, commitment hearing.

2. State's Evidence That Alan Had Sabotaged a Placement Was Not Barred by the Doctrine of Claim Preclusion

On August 24, 2015, the court heard the county attorney's amended commitment motion and Alan's motion to bar any new evidence of his conduct before June 18. The court took judicial notice of the June 18 transcript. Relying on *In re Interest of V.B. and Z.B.*,[32] the court concluded it was not limited to considering new evidence that had arisen after the June 18 commitment hearing. The court reasoned that this case showed a juvenile court can consider new evidence with evidence previously presented in a juvenile case.

Alan argues that in the second amended commitment motion, the only new allegations were the claims that (1) he had sabotaged a placement at an Arizona residential treatment facility and (2) no other suitable placements were available. He contends that res judicata, i.e., the doctrine of claim preclusion,[33] barred any evidence that the State could have presented at the June 18 commitment hearing. He also contends that the court could not consider evidence showing a change of circumstances. He argues that because the court's first order failed to

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[31] See Neb. Rev. Stat. § 27-611 (Reissue 2008).

[32] *In re Interest of V.B. and Z.B.*, 220 Neb. 369, 370 N.W.2d 119 (1985).

[33] See *Hara, supra* note 2.

set out findings of fact, the record fails to show what changed circumstances the court could have relied on in committing Alan. We disagree.

As stated, our review of this case is de novo on the record and we reach our conclusions independently of the juvenile court's findings.[34] Under this review, we conclude that the record did show changed circumstances that justified the commitment.

(a) Claim Preclusion Bars Relitigation of Claims That Were Available in Previous Litigation

We agree with Alan that the State could have presented most of the evidence it presented at the August 24, 2015, commitment hearing at the earlier June 18 hearing. We recognize that the State attempted to present evidence of its previous supervisory efforts through Mercer's testimony on June 18. Part of the procedural problem in this case stems from the court's failure to overrule Alan's incorrect objection to that evidence. But our decision in *In re Interest of Nedhal A.*[35] was issued in December 2014, 6 months before the court's first commitment hearing. And the Office of Probation Administration failed to present the required report showing the State's previous supervisory efforts and the office's thorough consideration of other probation or supervisory options. So at the August 24 hearing, the court was limited to considering evidence that showed changed circumstances.

[10,11] Claim preclusion bars the relitigation of a claim that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits,

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[34] *In re Interest of Isabel P. et al., supra* note 1.

[35] *In re Interest of Nedhal A., supra* note 11.

and (4) the same parties or their privies were involved in both actions.[36] The doctrine bars relitigation not only of those matters actually litigated, but also of those matters that a party could have litigated in the prior action.[37] The doctrine rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.[38]

(b) Claim Preclusion Does Not Bar Consideration of Changed Circumstances

In *In re Interest of V.B. and Z.B.*, the case the court relied on, we discussed the effect of claim preclusion in considering successive motions to terminate parental rights.[39] After the first hearing, the juvenile court declined to terminate the parents' rights. After the State filed a supplemental petition to terminate, the court found the evidence sufficient to terminate both parents' rights. On appeal, the parents argued that claim preclusion barred reconsideration of evidence presented at the previous hearing which did not result in a termination order. We disagreed that "the only relevant time period in this case is from the date of the court's previous order."[40] We quoted the following statement from a case involving a child custody dispute:

> "A custodial order is conclusive as to all matters prior to its promulgation. But the doctrine of res judicata cannot settle a question of a child's welfare for all time to come; it cannot prevent a court at a subsequent time from determining what is best for the children at that time. The usual way of expressing this rule is to say

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[36] *Hara, supra* note 2.

[37] See *id.*

[38] *Id.*

[39] *In re Interest of V.B. and Z.B., supra* note 32.

[40] *Id.* at 371, 370 N.W.2d at 121.

> that 'circumstances have changed' when the order is no longer in the children's interest."[41]

We concluded that the same reasoning applied to successive parental termination proceedings:

> In determining whether a change of circumstances exists so as to modify a juvenile court's previous order to a decision terminating parental rights, the court can use the time period prior to the previous order in conjunction with the time period after the previous order to determine whether there is a requisite change of circumstances since the original disposition order. . . . When a second termination proceeding is not itself barred, the proof is not limited by res judicata or collateral estoppel principles to facts or evidence which was not considered in, or which came into being after, the first proceeding. . . . The court would have been barred in the instant case from using evidence prior to the [first] order as the sole basis for terminating parental rights. However, the court correctly used evidence from the time period prior to the [first] order in conjunction with evidence from the time period after the [first] order in determining that there was the requisite change of circumstances or stagnation of conditions to terminate parental rights . . . .[42]

[12] In *In re Interest of V.B. and Z.B.*, we held that a juvenile court can compare the facts as they existed when it entered a previous order to new facts arising after that order to determine whether a change in circumstances warrants a different decision. We conclude that this general principle applies when the State files successive motions to change a juvenile's disposition under § 43-286.

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[41] *Id.* at 372, 370 N.W.2d at 121 (citations omitted).

[42] *Id.* at 372, 370 N.W.2d at 122.

3. Change in Circumstances Was Sufficient to Support the Court's Commitment Order

At the first commitment hearing on June 18, 2015, Alan had still not completed the court-ordered chemical dependency evaluation. The evaluation was not completed until June 29. This mental health provider stated that Alan had superficially cooperated in the evaluation and had provided information that conflicted with facts the provider knew about from other sources. She concluded that if the court placed him in his mother's home, he would present a risk to the community because of low supervision in the home and his history of aggression. She concluded that finding a placement in a group home with a treatment program would also be difficult because he was unlikely to comply with a structured environment. She cited his high-risk and aggressive behaviors, gang involvement, low response to psychiatric treatment, and refusal to take medications or engage in probation. She suggested a placement in "a boot camp program" or at the Arizona residential treatment facility, which was impliedly a highly structured program also.

But Mercer stated in her affidavit that after she obtained a placement for Alan at the Arizona facility, he sabotaged that placement during a telephone interview with the facility's representative. Alan "expressed that he did not want to go there and indicated that he would assault staff or other youths or run away." In Mercer's summary of supervision efforts, she reported that Alan told the representative that he would not cooperate with any programs and would never give up his gang ties.

We conclude that this evidence was sufficient to show a change in circumstances warranting Alan's commitment to OJS for placement at a YRTC. The evidence at the June 18, 2015, hearing showed that Alan had not cooperated with probation and psychiatric treatment while placed in his home. But the new evidence showed that Alan was also unlikely to

cooperate with any out-of-home treatment programs even after the State had made substantial efforts for his rehabilitation. And even if treatment at the Arizona facility did not constitute community-based services, Alan's conduct in response to that potential placement showed that he would not cooperate with a highly structured treatment placement that would provide more security than a typical group home treatment program. This evidence effectively tied the court's hands. It could only reasonably conclude that placing Alan in his home, a group home, or even a more structured treatment program would result in the endangerment of himself or others. It did not err in finding that all options for probation supervision and community-based services had been exhausted and that Alan's placement at a YRTC was a matter of urgent necessity for his own protection or the protection of others.

We conclude that the court did not err in placing Alan on intensive supervision probation and committing him to OJS for placement at the YRTC in Kearney, Nebraska.

Affirmed.



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. Laird T. Moore, respondent.

881 N.W.2d 923

Filed July 22, 2016. No. S-15-1177.

Original action. Judgment of suspension.

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

Per Curiam.

INTRODUCTION

This case is before the court on the conditional admission filed by Laird T. Moore, respondent, on May 26, 2016. The court accepts respondent's conditional admission and orders that respondent be suspended from the practice of law for a period of 2 years followed by 2 years' monitored probation upon reinstatement.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on May 3, 2002. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska.

On December 18, 2015, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent. The formal charges consist of two counts against respondent. In the two counts, it is alleged that by his conduct, respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond.

§§ 3-501.1 (competence); 3-501.3 (diligence); 3-501.4(a) and (b) (communications); 3-501.15(a), (c), and (d) (safekeeping property); 3-508.1(b) (bar admission and disciplinary matters); and 3-508.4(a) and (d) (misconduct).

With respect to count I, the formal charges state that on November 20, 2014, a client filed a grievance against respondent stating that respondent had failed to adequately represent her in her divorce case. On November 26, the Counsel for Discipline mailed a copy of the client's grievance to respondent at his then-current business address. Respondent was instructed to submit a written response to the client's grievance, but he did not.

On January 15, 2015, the Counsel for Discipline sent a followup letter to respondent directing him to submit a written response to the client's grievance. Respondent did not respond to the January 15 letter. On February 4, the Counsel for Discipline sent another followup letter to respondent. On February 13, respondent called the Counsel for Discipline and stated that he would submit his response to the client's grievance on February 17. On February 18, the Counsel for Discipline received respondent's initial response to the client's grievance.

A copy of respondent's response was mailed to the client, who submitted her reply on March 13, 2015. In her response, the client stated that respondent was not prepared for her trial, he had not contacted witnesses, and he had failed to deliver her file to her new attorney despite repeated requests. The client further stated in her response that respondent failed to provide an accounting of his time to justify the fee she paid him.

On July 10, 2015, the Counsel for Discipline sent a letter to respondent asking for specific information regarding respondent's representation of the client. In addition, the Counsel for Discipline requested that respondent provide evidence that he had deposited the client's $1,450 advance fee payment into his trust account. The letter was mailed to respondent's personal residence, and it was also sent to his current e-mail address.

The formal charges state that as of December 17, respondent had not yet responded to the July 10 letter.

The formal charges allege that by his actions with respect to count I, respondent violated his oath of office as an attorney and professional conduct rules §§ 3-501.1; 3-501.3; 3-501.4(a) and (b); 3-501.15(a), (c), and (d); 3-508.1(b); and 3-508.4(a) and (d).

With respect to count II, the formal charges state that on January 17, 2011, a second client and her son signed fee agreements with respondent to represent their interests arising from a traffic collision. On March 2, 2015, the second client filed a grievance against respondent stating that respondent had neglected her case and had failed to communicate with her.

On March 5, 2015, the Counsel for Discipline sent respondent a copy of the second client's grievance. Respondent was directed to file a response within 15 working days. The March 5 letter was mailed to respondent by certified mail at his office address maintained by respondent with the Attorney Services Division of the Nebraska Supreme Court. The certified letter was received at respondent's address on March 9. Respondent did not respond to the March 5 letter.

On June 10, 2015, the Counsel for Discipline mailed a followup letter to respondent. On June 18, the letter was returned to the Counsel for Discipline as undeliverable.

On July 10, 2015, the Counsel for Discipline sent a copy of its June 10 letter to respondent at his e-mail address. The formal charges state that as of December 17, respondent had not responded to the letter or otherwise contacted the Counsel for Discipline.

The formal charges allege that by his actions with respect to count II, respondent violated his oath of office as an attorney and professional conduct rules §§ 3-501.1, 3-501.3, 3-501.4(a) and (b), 3-508.1(b), and 3-508.4(a) and (d).

On February 29, 2016, respondent filed an answer to the formal charges. By his denials in his answer, respondent raised issues of fact, and accordingly, a referee was appointed.

On May 26, 2016, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he conditionally admitted that he violated his oath of office as an attorney and professional conduct rules §§ 3-501.1; § 3-501.3; 3-501.4(a) and (b); 3-501.15(a), (c), and (d); 3-508.1(b); and 3-508.4(a) and (d). In the conditional admission, respondent knowingly does not challenge or contest the truth of the matters conditionally asserted and waived all proceedings against him in connection therewith in exchange for a 2-year suspension followed by 2 years' monitored probation. Upon reinstatement, if accepted, the monitoring shall be by an attorney licensed to practice law in the State of Nebraska and who shall be approved of by the Counsel for Discipline. Respondent shall submit a monitoring plan with his application for reinstatement which shall include, but not be limited to, the following: During the first 6 months of probation, respondent will meet with and provide the monitor a weekly list of cases for which respondent is currently responsible, which list shall include the date the attorney-client relationship began; the general type of case; the date of last contact with the client; the last type and date of work completed on the file (pleading, correspondence, document preparation, discovery, or court hearing); the next type of work and date that work should be completed on the case; any applicable statutes of limitations and their dates; and the financial terms of the relationship (hourly, contingency, et cetera). After the first 6 months through the end of probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information as set forth above. Respondent shall work with the monitor to develop and implement appropriate office procedures to ensure that the clients' interests are protected. Respondent shall reconcile his trust account within 10 working days of receipt of the monthly bank statement and provide the monitor with a copy within 5 working days. Respondent shall submit a quarterly compliance report to the Counsel for Discipline, demonstrating that

respondent is adhering to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of probation. If at any time the monitor believes respondent has violated the professional conduct rules or has failed to comply with the terms of probation, the monitor shall report the same to the Counsel for Discipline. Finally, respondent shall pay all the costs in this case, including the fees and expenses of the monitor, if any.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's proposed discipline is appropriate and consistent with sanctions imposed in other disciplinary cases with similar acts of misconduct.

ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.1; § 3-501.3; 3-501.4(a) and (b); 3-501.15(a), (c), and (d); 3-508.1(b); and 3-508.4(a) and (d) and his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is suspended from the practice of law for a period of 2 years, effective immediately, after which period respondent may apply for reinstatement to the bar. Should respondent apply for reinstatement, his reinstatement shall be conditioned upon respondent's being on probation for a period of 2 years, including monitoring, following reinstatement, subject to the terms agreed to by respondent in the conditional admission and outlined above. Acceptance of an application for reinstatement is conditioned on the application's being accompanied by a proposed monitored probation plan, the terms of which are consistent with this opinion. Respondent shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is also 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 suspension.

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. Maynard H. Weinberg, respondent.

881 N.W.2d 928

Filed July 22, 2016. No. S-16-266.

Original action. Judgment of public reprimand.

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

Per Curiam.

INTRODUCTION

This case is before the court on the conditional admission filed by Maynard H. Weinberg, respondent, on May 17, 2016. The court accepts respondent's conditional admission and enters an order of public reprimand.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on June 24, 1966. At all relevant times, he was engaged in the practice of law in Omaha, Nebraska.

On March 9, 2016, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent. The formal charges consist of one count against respondent. With respect to the one count, the formal charges state that in July 2012, respondent was retained by a client in an employment matter. Respondent and the client mutually

agreed to a fee of $100 per hour, and this rate was never renegotiated during the pendency of the matter.

In late September 2012, the matter was transferred to another attorney for primary representation (the primary attorney), but respondent continued to provide some legal services to the client, and respondent billed the client for his individual services. Between July 2012 and December 2013, respondent billed the client for 147.5 hours of work at $100 per hour and $209.20 in expenses. The client timely paid all of the billing, in the amount of $14,959.70.

In December 2013, a hearing was held in the client's case in the district court for Lancaster County, and attorney fees were addressed. On February 7, 2014, the district court issued an order which awarded attorney fees for respondent in the amount of 20.25 hours of work at $175 per hour and 4 hours of work at $100 per hour, which, according to the formal charges, totaled $3,943.74. These attorney fees were awarded to the client as partial reimbursement of the fees that the client had previously paid to respondent.

Between February 2014 and February 2015, respondent billed the client for 84 hours of work at $100 per hour for appellate work in the client's case. The client timely paid all of the billing, in the amount of $8,400.

On March 20, 2015, an opinion issued by this court awarded attorney fees to the client in the amount of $7,938. The award of attorney fees in the amount of $7,938 was for both of the client's attorneys, respondent and the primary attorney. This court remanded the matter to the district court with directions to divide the $7,938 between the two attorneys.

The defendant from the client's case issued two separate checks in the amounts of $3,943.74 and $7,938, and both checks were issued in the name of respondent and the primary attorney. The primary attorney waived any additional payment out of either of the two checks, because he had been paid in full by the client for all billed legal services.

The primary attorney endorsed the two checks and remitted them to respondent. Respondent deposited both checks in his trust account.

On March 20, 2015, respondent sent a letter to the client, asking permission to receive the additional funds of $3,943.74 and $7,938, totaling $11,881.74, to reimburse respondent for the difference between the $100 per hour charged to the client and the $175 per hour he would normally charge for that type of work. The client declined respondent's request to renegotiate their fee arrangement. Despite repeated requests from the client, respondent did not disburse the fees to the client.

On May 15, 2015, the client filed a grievance against respondent, alleging that respondent was improperly withholding the client's funds in an attempt to force him to accept a renegotiated fee for services previously rendered. In his response to the grievance, respondent asserted that he was entitled to the full amount of $11,881.74 because the courts had awarded these amounts as attorney fees. On February 10, 2016, after investigation by the Counsel for Discipline, respondent paid the full amount of $11,881.74 to the client.

The formal charges allege that by his actions, respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-501.5(a) and (b) (fees), 3-501.15(d) (safekeeping property), and 3-508.4(a) (misconduct).

On May 17, 2016, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he conditionally admitted that he violated his oath of office as an attorney and professional conduct rules §§ 3-501.5(a) and (b), 3-501.15(d), and 3-508.4(a). In the conditional admission, respondent knowingly does not challenge or contest the truth of the matters conditionally asserted and waived all proceedings against him in exchange for a public reprimand.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's proposed discipline is appropriate and consistent with sanctions imposed in other disciplinary cases with similar acts of misconduct.

ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.5(a) and (b), 3-501.15(d), and 3-508.4(a) and his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings

against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is publically reprimanded. Respondent is directed to pay costs and expenses in accordance with 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 public reprimand.

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

James Huntington et al., appellants, v. Donald H. Pedersen et al., appellees, and K.C. Engdahl, garnishee-appellee.

883 N.W.2d 48

Filed July 29, 2016. No. S-14-1134.

1. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
3. **Garnishment: Statutes.** Garnishment in aid of execution is a legal remedy unknown at common law and was created by statute.
4. **Garnishment: Liability: Service of Process: Time.** A garnishee's liability is to be determined as of the time of the service of the summons in garnishment.
5. **Garnishment: Liability: Proof.** In an action to determine the liability of the garnishee, the plaintiff has the burden to establish why the garnishee was liable to the defendant at the time notice of garnishment was served.
6. **Garnishment: Pleadings.** The plaintiff is required to frame the issues in garnishment proceedings and does so through the application to determine liability.
7. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.
8. ____: ____. 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.

9. **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.
10. **Words and Phrases.** As a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion.
11. **Garnishment: Legislature: Intent.** The Nebraska Legislature sought to protect a garnishee from the often unnecessary and sometimes oppressive litigation by demanding an expeditious disposition of garnishment proceedings.
12. **Garnishment: Liability: Time.** To achieve prompt disposition, the garnishment statutes have specified a relatively short time for counteraction by a judgment creditor or garnishor in the event of any dissatisfaction with a garnishee's disclosure contained in answers to interrogatories, namely, a written application filed within 20 days in order to determine liability where a garnishee's answers negate a debt, property, or credit due the judgment debtor from the garnishee.
13. **Garnishment: Liability.** While garnishment affords the plaintiff a remedy or means to satisfy a judgment, the garnishment statutes also embody a remedy and mechanism for the garnishee to obtain resolution of a question concerning the garnishee's liability to avoid unnecessary litigation.
14. **Judgments: Res Judicata.** Claim preclusion bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
15. **Res Judicata.** Claim preclusion bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
16. ____. Claim preclusion rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.
17. **Garnishment: Pleadings: Liability.** In a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue.
18. ____: ____: ____. Although filed earlier in time, an answer to interrogatories which states that a garnishee has no property, money, or credit due and owing to the judgment debtor acts as a denial of all issues presented by the application to determine garnishee liability filed by the garnishor.

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

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellants.

K.C. Engdahl, pro se.

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

Miller-Lerman, J.

NATURE OF CASE

Judgment creditors James Huntington, Tony C. Clark, and Professional Management Midwest, Inc. (collectively the appellants) served garnishment interrogatories on the judgment debtors' attorney, K.C. Engdahl, on two occasions. On both occasions, Engdahl responded that he did not have any property belonging to the judgment debtors. The appellants did not challenge Engdahl's answers in the first garnishment proceeding; however, they did file an application to determine Engdahl's garnishment liability in response to Engdahl's answers in the second garnishment proceeding. The second garnishment proceeding gives rise to this appeal. The district court for Douglas County overruled the appellants' motion to determine garnishment liability, based upon its determination that when the appellants did not file a motion to determine Engdahl's liability after he responded to the first garnishment interrogatories, he was released and discharged as to the property sought therein and, based on claim preclusion, such property could not be sought again by the appellants in this second garnishment proceeding. The appellants appeal. We affirm.

STATEMENT OF FACTS

The original action underlying this case was brought by the appellants against Donald H. Pedersen, Marcee Pedersen, and Practice Business Consultants LLC (collectively the debtors)

and two other defendants not at issue in this appeal. The original litigation between the parties resulted in several judgments against the debtors in favor of the appellants in excess of $2 million. On July 31, 2013, the district court filed an amended judgment which specifically set forth the amounts owed by the debtors to the appellants.

On August 23, 2013, Engdahl filed a notice of appeal on behalf of the debtors from the July 31 amended judgment, and that appeal was filed in the Nebraska Court of Appeals as case No. A-13-733. That is not the appeal currently before us. The debtors paid Engdahl $15,000 to prosecute the appeal. The Court of Appeals issued a show cause order directing the parties to demonstrate that "there had been a full disposition of all the claims as to all the parties to the action" and, if not, to show why the appeal should not be dismissed for lack of jurisdiction. The debtors' appeal was subsequently dismissed for lack of jurisdiction.

After the July 31, 2013, amended judgment in the underlying action was filed, the appellants made two failed garnishment attempts to collect on the judgments from Engdahl, the debtors' attorney. The appellants' first garnishment attempt occurred in 2013. The appellants had issued three "Summons[es] and Order[s] of Garnishment in Aid of Execution" of the amended judgment, each dated August 29, 2013, as to three debtors. The summonses were served on Engdahl as garnishee. On September 11, Engdahl filed answers to the interrogatories attached to the summonses, in which answers he indicated that he did not have any property belonging to the debtors. The appellants did not file an application to determine Engdahl's garnishment liability following his answers to the 2013 interrogatories.

In June 2014, a debtor's examination was held, at which Donald testified. He stated that he had paid Engdahl a flat attorney fee in the amount of $15,000 to prosecute the appeal of the July 31, 2013, amended judgment. Donald testified that he could not remember with specificity the date that he

delivered the money orders to Engdahl; however, copies of the money orders Donald used to pay Engdahl were dated August 23, 2013. As noted, also on August 23, Engdahl filed the notice of appeal, and it was after that date that Engdahl filed his answers, on September 11.

Following the debtor's examination, the appellants' second garnishment attempt against Engdahl occurred. On June 30, 2014, the appellants had issued a summons and order of garnishment in aid of execution of the July 31, 2013, amended judgment with respect to Donald. Engdahl was served on July 3, 2014. Engdahl's answers to interrogatories related to the second garnishment were signed by Engdahl on July 7 and filed with the court on July 9. Engdahl again stated that he was not in possession of any property belonging to or owed to the debtor Donald.

On July 18, 2014, the appellants filed a motion to determine garnishee liability. In their motion, the appellants stated that Engdahl did not earn some or all of the $15,000 attorney fee paid to him by the debtors for the appeal in case No. A-13-733 and that therefore, the money belonged to the debtors. The motion further stated that Donald had made a demand upon Engdahl for the return of the $15,000 attorney fee, but that Engdahl had refused the demand.

A hearing was conducted. In an order filed November 18, 2014, the district court determined that the appellants were seeking to garnish the $15,000 attorney fee in this second garnishment proceeding but that application of Neb. Rev. Stat. § 25-1030 (Reissue 2008) precluded relief for the appellants. Section 25-1030 states in relevant part:

> If the garnishee appears and answers and his or her disclosure is not satisfactory to the plaintiff . . . the plaintiff may file an application within twenty days for determination of the liability of the garnishee. The application may controvert the answer of the garnishee, or may allege facts showing the existence of indebtedness of the garnishee to the defendant or of the property and

> credits of the defendant in the hands of the garnishee. The answer of the garnishee, if one has been filed, and the application for determination of the liability of the garnishee shall constitute the pleadings upon which trial of the issue of the liability of the garnishee shall be had. If the plaintiff fails to file such application within twenty days, the garnishee shall be released and discharged.

The district court found that when Engdahl filed his answers to the first garnishment interrogatories in September 2013, he was already in possession of the $15,000 attorney fee payment. Thus, to the extent that the appellants wanted to challenge Engdahl's interrogatory answers filed September 11, 2013, stating that he was not in possession of funds of the debtors including Donald, § 25-1030 required the filing of an application to determine Engdahl's garnishment liability within 20 days of Engdahl's September 11 answers to the 2013 interrogatories. The district court stated that because the appellants did not file an application to determine Engdahl's liability within 20 days of Engdahl's answers to the first garnishment interrogatories, Engdahl stood "released and discharged as to those funds." Because Engdahl had been released and discharged as to the attorney fee funds in the first garnishment proceeding, the district court concluded that the appellants were precluded from collecting those same funds in the second garnishment proceeding.

The appellants appeal the November 18, 2014, order.

ASSIGNMENT OF ERROR

The appellants generally assign, consolidated and restated, that the district court erred when it failed to find that Engdahl was liable to the appellants for the second garnishment served upon him and overruled the appellants' motion to determine Engdahl's garnishment liability.

STANDARDS OF REVIEW

[1] Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing

judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

[2] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court. *In re Interest of Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016).

ANALYSIS

The appellants generally claim that the district court erred when it determined that Engdahl was not liable on the second garnishment, which the appellants served on Engdahl in 2014, and when the court overruled the appellants' motion to determine Engdahl's liability. The appellants make several arguments generally challenging the district court's reasoning to the effect that the appellants' failure to challenge Engdahl's first answers to interrogatories in 2013 precluded their attempt to collect the same funds from Engdahl in this second garnishment proceeding. As explained below, we find no merit to the appellants' arguments.

[3] The subject of this appeal arises out of a garnishment. With respect to garnishment proceedings, we have recently stated:

> Garnishment in aid of execution is a legal remedy unknown at common law and was created by statute. Generally, in cases where a court enters judgment in favor of a creditor, the judgment creditor may, as garnishor, request that the court issue a summons of garnishment against any person or business owing money to the judgment debtor. As garnishee, the person or business owing money to the judgment debtor must answer written interrogatories furnished by the garnishor to establish whether the garnishee holds any property or money belonging to or owed to the judgment debtor. The garnishee is required to answer within 10 days from the date of service. If the garnishor is not satisfied with the

> interrogatory answers, it has 20 days to file an application for determination of the liability of the garnishee. Upon establishing through pleadings and trial that the garnishee holds property or credits of the judgment debtor, the garnishee must then pay such amounts to the court in satisfaction of the garnishor's judgment against the judgment debtor, subject to certain statutory exceptions with regard to wages.

ML Manager v. Jensen, 287 Neb. at 173-74, 842 N.W.2d at 570.

If the garnishee's answers to the interrogatories are not satisfactory to the garnishor, § 25-1030 provides the garnishor with the opportunity to challenge the garnishee's answers to the interrogatories. Section 25-1030 states, in its entirety:

> If the garnishee appears and answers and his or her disclosure is not satisfactory to the plaintiff, or if he or she fails to comply with the order of the court, by delivering the property and paying the money owing into court, or giving the undertaking required in section 25-1029, the plaintiff may file an application within twenty days for determination of the liability of the garnishee. The application may controvert the answer of the garnishee, or may allege facts showing the existence of indebtedness of the garnishee to the defendant or of the property and credits of the defendant in the hands of the garnishee. The answer of the garnishee, if one has been filed, and the application for determination of the liability of the garnishee shall constitute the pleadings upon which trial of the issue of the liability of the garnishee shall be had. If the plaintiff fails to file such application within twenty days, the garnishee shall be released and discharged.

We note, as an initial matter and as explained by the appellants to this court on appeal in both the first and second garnishments, the appellants sought to subject to garnishment all property or indebtedness which Engdahl may have had or

owed to the debtors. Thus, as it relates to the $15,000 attorney fee, the appellants sought to garnish the same payment of attorney fees to Engdahl in both the first and second garnishment proceedings.

With respect to the first garnishment, the record contains three summonses in aid of execution that were served on Engdahl which sought any property or indebtedness owed by Engdahl to the debtors. Engdahl filed his answers to the interrogatories attached to these summonses on September 11, 2013, in which answers he stated that he held no property belonging to the debtors; and, as noted, the appellants did not file an application to determine Engdahl's garnishment liability.

[4] We have stated that a garnishee's liability is to be determined as of the time of the service of the summons in garnishment. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002), *disapproved on other grounds, ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014). In its order filed November 18, 2014, from which this appeal is taken, the district court found that Donald had paid Engdahl $15,000 to represent him in the appeal of the underlying case. It is undisputed that Engdahl filed the notice of appeal for the underlying case on August 23, 2013, and that the appeal was pending at the time the first garnishment was filed and Engdahl was served. The court specifically found that the $15,000 payment was in Engdahl's possession at the time the first garnishment was served. The district court stated: "Engdahl had been paid the [$15,000] funds and was in possession of the funds by the time he received the first garnishment interrogatory in September, 2013." To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *ML Manager v. Jensen, supra*. Upon our review of the record, we cannot say that the district court's finding that Engdahl possessed the $15,000 at the time the first garnishment was

served was clearly wrong, and therefore, such finding will not be set aside. Thus, for purposes of our analysis, we accept the district court's finding that Engdahl had been paid and was in possession of the $15,000 attorney fee at the time he filed his first answers to interrogatories denying he owed any amount to the debtors.

With respect to the second garnishment, the record contains a summons in aid of execution that was served on Engdahl seeking any property or indebtedness owed by Engdahl to the judgment debtor Donald. Engdahl filed his answers to the second interrogatories on July 9, 2014, again stating that he held no property belonging to Donald. Within 20 days of Engdahl's answers to the second interrogatories, the appellants filed their motion to determine Engdahl's garnishment liability. In the motion, the appellants alleged that Donald had paid Engdahl a $15,000 attorney fee to prosecute the appeal of the underlying case, that Engdahl had not earned some or all of the $15,000 payment, and that thus, the money belonged to Donald and Engdahl was liable for that amount.

[5,6] In their application, the appellants specified that they were seeking to garnish the $15,000 attorney fee payment and alleged that Engdahl was liable for that amount. In an action to determine the liability of the garnishee, the plaintiff has the burden to establish why the garnishee was liable to the defendant at the time notice of garnishment was served. *Gerdes v. Klindt*, 253 Neb. 260, 570 N.W.2d 336 (1997). The plaintiff is required to frame the issues in the garnishment proceedings and does so through the application to determine liability. *Id*. Based on the foregoing principles and given the findings of the district court, the $15,000 payment sought to be garnished by the appellants was the subject of both the first and second garnishments. In other words, the appellants sought to garnish the same property in both the first and second garnishment proceedings.

Having established that the appellants sought to garnish the same property, specifically the $15,000 payment, in both the

first and second garnishment proceedings, we must determine what legal effect the first garnishment proceeding had on the second garnishment proceeding. In doing so, we apply the garnishment statutes, specifically § 25-1030, quoted above. We recently clarified the application of the rules of statutory interpretation to garnishment statutes. In *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014), we recognized that in earlier cases, we had stated that because garnishment statutes were in derogation of common law, they were to be strictly construed; however, we noted that by stating this in our prior cases, we ignored Neb. Rev. Stat. § 25-2218 (Reissue 2008), which provides that "[t]he rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code." Therefore, we held in *ML Manager* that "[b]ecause the garnishment statutes are part of chapter 25, we will view them under our general rules of statutory interpretation." 287 Neb. at 177, 842 N.W.2d at 572.

[7-9] Regarding our general rules of statutory interpretation, we have stated that the rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible. *Hoppens v. Nebraska Dept. of Motor Vehicles*, 288 Neb. 857, 852 N.W.2d 331 (2014). 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. *In re Estate of Alberts*, 293 Neb. 1, 875 N.W.2d 427 (2016). 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. *Village at North Platte v. Lincoln Cty. Bd. of Equal.*, 292 Neb. 533, 873 N.W.2d 201 (2016).

We apply these rules to § 25-1030. In this case, in response to the first garnishment interrogatories, Engdahl stated that

he did not have any property belonging to the debtors. Under § 25-1030, the appellants had the opportunity to challenge Engdahl's answers to the interrogatories by filing an application to determine garnishee liability within 20 days of Engdahl's answers. Section 25-1030 provides in part that "[i]f the garnishee appears and answers and his or her disclosure is not satisfactory to the plaintiff . . . the plaintiff may file an application within twenty days for determination of the liability of the garnishee."

[10] However, the appellants failed to file an application to determine Engdahl's garnishment liability within 20 days after Engdahl filed his answers to the first interrogatories. Section 25-1030 provides that "[i]f the plaintiff fails to file such application within twenty days, the garnishee shall be released and discharged." As a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion. *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015). In considering § 25-1030, we have stated:

> The words *release* and *discharge* have relatively popular and generally accepted meanings. *Release* means "to relieve from something that confines, burdens, or oppresses." Webster's Third New International Dictionary, Unabridged 1917 (1981). *Discharge* means "to relieve of a charge, load, or burden . . . to free from something that burdens . . . release from an obligation." *Id*. at 644.

NC+ Hybrids v. Growers Seed Assn., 228 Neb. 306, 310, 422 N.W.2d 542, 545 (1988) (*NC+ Hybrids II*) (emphasis in original). Accordingly, under the plain language of § 25-1030, if a garnishor fails to file an application to determine the garnishee's liability within 20 days of when the garnishee's answers to interrogatories are filed, the statute "prescribe[s] an unequivocal and mandatory conclusion" that the garnishee shall be released and discharged. *NC+ Hybrids II*, 228 Neb. at 312, 422 N.W.2d at 546.

[11-13] This reading of the plain language of the statute is consistent with our previous pronouncements regarding § 25-1030. We have previously stated that the statutory language indicates that the purpose of § 25-1030 was to create an expedited garnishment proceeding. *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014); *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985) (*NC+ Hybrids I*), *disapproved on other grounds, ML Manager v. Jensen, supra*. As a stranger to the proceedings in which a judgment has been obtained, a garnishee is normally an innocent third party exposed to inconvenience and hazards or expense of extended litigation. *Id*. The Nebraska Legislature sought to protect a garnishee from this often unnecessary and sometimes oppressive litigation by demanding an expeditious disposition of proceedings. *Id*. To achieve prompt disposition, the garnishment statutes have specified a relatively short time for counteraction by a judgment creditor or garnishor in the event of any dissatisfaction with a garnishee's disclosure contained in answers to interrogatories, namely, a written application filed within 20 days in order to determine liability where a garnishee's answers negate a debt, property, or credit due the judgment debtor from the garnishee. *Id*. While garnishment affords the plaintiff a remedy or means to satisfy a judgment, the garnishment statutes also embody a remedy and mechanism for the garnishee to obtain resolution of a question concerning the garnishee's liability to avoid unnecessary litigation. *ML Manager v. Jensen, supra*; *NC+ Hybrids II*.

The history of the action reflected in our opinion in *NC+ Hybrids II* is factually similar to the present case. In that case, the garnishor failed to challenge the garnishee's answers to initial garnishment interrogatories by filing an application to determine the garnishee's liability within 20 days of the garnishee's initial answers, and accordingly, judgment was entered in favor of the garnishee which discharged the garnishee of liability. We affirmed the order of discharge on

appeal. See *NC+ Hybrids I*. The garnishor filed a subsequent garnishment against the garnishee which was directed toward the same property that was at issue in the initial garnishment proceeding. The garnishee claimed that the initial garnishment proceeding had been terminated by discharge of the garnishee and that the garnishor's interrogatories served in the subsequent garnishment proceeding were not valid. The district court agreed with the garnishee.

[14-16] In affirming the district court's decision in *NC+ Hybrids II*, we looked to the doctrine of res judicata, now called claim preclusion. Claim preclusion bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. See *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014). The doctrine bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action. *Id*. The doctrine rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause. *Id*.

In *NC+ Hybrids II*, we determined that when a garnishor fails to file an application to determine garnishment liability in order to challenge the garnishee's answers to interrogatories, the resulting judgment of discharge of the garnishee pursuant to § 25-1030 is a judgment on the merits as an adjudication of the garnishee's liability. In *NC+ Hybrids II*, we observed that the garnishor's subsequent garnishment sought to garnish the same property or indebtedness as had been sought in the initial garnishment and that therefore, "[t]he question of [the garnishee's] liability which was raised in the previous garnishment is the same ultimate question raised in [the garnishor's] subsequent garnishment proceeding." 228 Neb. at 313, 422 N.W.2d at 546. We determined that res

judicata precluded another determination of the garnishee's liability in the subsequent garnishment proceeding, because the garnishee had already obtained a favorable judgment on the garnishor's garnishment claim based on the same property or indebtedness.

In *NC+ Hybrids II*, we specifically held:

> Adhering to the policy embodied in the doctrine of res judicata, we now hold that, when a garnishee answers and denies an obligation or indebtedness to the judgment debtor, but the plaintiff fails to contest, controvert, or traverse such denial by the garnishee, a subsequent judgment of discharge, as the result of the plaintiff's failure to respond, is a judgment on the merits as an adjudication of the garnishee's liability to the plaintiff for the obligation or indebtedness to the judgment debtor which is the subject of the garnishment proceeding.

228 Neb. at 312-13, 422 N.W.2d at 546. In addition, we noted in *NC+ Hybrids II* that other "[c]ourts have applied the doctrine of res judicata to garnishment proceedings" under similar procedural histories. 228 Neb. at 312, 422 N.W.2d at 546 (citing cases).

In the present case, similarly to *NC+ Hybrids II*, the property the appellants sought to garnish in the first garnishment proceeding has been found to be the same as the property sought in the second garnishment proceeding, herein specifically the $15,000 attorney fee Donald paid to Engdahl. In the first garnishment proceeding, when the appellants failed to file an application to determine Engdahl's garnishment liability after Engdahl filed his answers to the interrogatories stating that he had no property belonging to the debtors, Engdahl was "released and discharged" pursuant to § 25-1030. This discharge was tantamount to a judgment on the merits as an adjudication of Engdahl's liability to the appellants for the obligation or indebtedness of the debtors which was the subject of the first garnishment proceeding. See *NC+ Hybrids II*.

[17,18] In the second garnishment proceeding, Engdahl again stated in his answers to the interrogatories that he held no property belonging to the debtor Donald. The appellants subsequently filed their motion to determine Engdahl's garnishment liability. In a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue. *Spaghetti Ltd. Partnership v. Wolfe*, 264 Neb. 365, 647 N.W.2d 615 (2002), *disapproved on other grounds, ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014); *Gerdes v. Klindt*, 253 Neb. 260, 570 N.W.2d 336 (1997). See, also, § 25-1030 (stating that "[t]he answer of the garnishee, if one has been filed, and the application for determination of the liability of the garnishee shall constitute the pleadings upon which trial of the issue of the liability of the garnishee shall be had"). Although filed earlier in time, an answer to interrogatories which states that a garnishee has no property, money, or credit due and owing to the judgment debtor acts as a denial of all issues presented by the application to determine garnishee liability filed by the garnishor. See *Gerdes v. Klindt, supra*. In their motion to determine Engdahl's garnishment liability, the appellants specified that they sought to garnish the $15,000 attorney fee payment given to Engdahl by Donald. The appellants did not allege another or a new basis for claiming that Engdahl held property of one of the appellants. The issue framed was limited to the $15,000 attorney fee.

Because the first garnishment interrogatories were addressed to any property or indebtedness Engdahl owed the appellants and Engdahl was found to have been in possession of the $15,000 attorney fee at the time summons were served on Engdahl in the first garnishment, the unchallenged first garnishment answers resulted in a judgment on the merits in favor of Engdahl as garnishee as to the subject of the first proceeding. The question of Engdahl's liability which was raised in the first garnishment is the same ultimate question raised in

the appellants' second garnishment proceeding, and therefore, the appellants' motion to determine Engdahl's garnishment liability in connection with the second garnishment proceeding was effectively precluded. See *NC+ Hybrids II*. The district court did not err when it overruled the appellants' motion to determine Engdahl's garnishment liability.

CONCLUSION

When the appellants did not file a motion to determine Engdahl's liability after he responded to the first garnishment interrogatories, he was released and discharged as to the property sought therein and, based on claim preclusion, such property could not be sought again by the appellants in this second garnishment proceeding. The district court did not err when it overruled the appellants' motion to determine Engdahl's garnishment liability in the second garnishment proceeding. Accordingly, we affirm.

Affirmed.

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

State of Nebraska, appellee, v. William E. Smith, appellant.

883 N.W.2d 299

Filed July 29, 2016. No. S-15-127.

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 records and files affirmatively show that the defendant is entitled to no relief.
2. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
3. ____: ____. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **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.
5. **Effectiveness of Counsel: Proof: Appeal and Error.** 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 his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
6. ____: ____: ____. To show prejudice under the prejudice component of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052,

80 L. Ed. 2d 674 (1984), the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

7. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.
8. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
9. ____: ____. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim.
10. **Indictments and Informations.** Objections to an information or the content of an information should be raised by a motion to quash.
11. **Pleas: Indictments and Informations: Waiver.** When a defendant enters a plea in a case, he waives objections to all defects in an information that can be reached by a motion to quash, except those defects which are of such a fundamental character as to make the indictment wholly invalid.
12. **Effectiveness of Counsel: Appeal and Error.** When claims of a trial counsel's performance are procedurally barred, an appellate court examines claims regarding trial counsel's performance only if the defendant assigns as error that appellate counsel was ineffective for failing to raise trial counsel's performance.
13. **Postconviction: Judicial Notice: Appeal and Error.** A reviewing court considering a motion for postconviction relief may take judicial notice of the record in the direct appeal.
14. **Homicide: Words and Phrases.** A "sudden quarrel" is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.
15. **Homicide.** Although provocation negates malice, malice is not a statutory element of second degree murder in Nebraska.
16. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district

court for disposition through a defendant's motion for postconviction relief.

17. **Double Jeopardy: Statutes: Proof.** In a double jeopardy analysis, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or one is whether each provision requires proof that the other does not.
18. **Appeal and Error.** An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Lancaster County: Paul D. Merritt, Jr., Judge. Affirmed.

William E. Smith, pro se.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Wright, Connolly, Miller-Lerman, and Kelch, JJ., and Pirtle, Judge.

Kelch, J.

I. INTRODUCTION

William E. Smith appeals the district court's order that denied his motion for postconviction relief without an evidentiary hearing. Smith asserts that he received ineffective assistance of appellate counsel, that the district court erred in hearing his claims of ineffective assistance of appellate counsel at a hearing on his motion for new counsel, and that plain error permeates the record. Because we find no merit in Smith's claims, we affirm.

II. BACKGROUND

1. Original Convictions and Sentences

Smith was involved in an altercation in 2008. Consequently, the State charged Smith with one count of attempted second

degree murder, a Class II felony; one count of first degree assault, a Class III felony; and one count of use of a weapon to commit a felony, a Class III felony. Following a trial, a jury found Smith guilty of the crimes charged. Smith was sentenced to 25 to 35 years' imprisonment for attempted second degree murder and 15 to 20 years' imprisonment for first degree assault, to run concurrently. He was sentenced to 15 to 20 years' imprisonment for use of a weapon to commit a felony, to run consecutively with the other sentences.

2. Appellate History

On direct appeal to the Nebraska Court of Appeals, Smith assigned and argued that the jury should have been instructed that if his intent to kill resulted from a sudden quarrel, he should have been convicted of attempted sudden quarrel manslaughter. See *State v. Smith*, 19 Neb. App. 708, 811 N.W.2d 720 (2012). He also assigned and argued that the jury should have been instructed that he acted in self-defense. We summarized the Court of Appeals' reasoning in our subsequent further review of that opinion:

> [T]he Court of Appeals determined that a self-defense instruction was not warranted by the evidence. It further determined that Smith's trial counsel could not have been deficient in failing to request an instruction on attempted sudden quarrel manslaughter, because at the time of the trial, that crime did not exist in Nebraska. The court reasoned that trial counsel could not have been ineffective "for not anticipating how the courts would rule." [*State v. Smith*, 19 Neb. App. at 728, 811 N.W.2d at 738.] But the Court of Appeals concluded that under our decision in [*State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011)], the trial court had a sua sponte duty to instruct on attempted sudden quarrel manslaughter because it was a lesser-included offense of attempted second degree murder and there was some evidence of a sudden quarrel occurring immediately before the shooting. We granted petitions for further review filed by each party.

State v. Smith, 284 Neb. 636, 640-41, 822 N.W.2d 401, 407 (2012).

On further review, we affirmed the judgment of the Court of Appeals, based on different reasoning. See *State v. Smith, supra*. We held that "(1) the trial court had no duty to instruct on attempted sudden quarrel manslaughter in the absence of a request to do so and (2) Smith's trial counsel was not ineffective in failing to request such an instruction." *Id*. at 654, 822 N.W.2d at 415. But under the plain error doctrine, we held that Smith was entitled to a new trial at which the jury could be instructed on the distinction between second degree murder and voluntary sudden quarrel manslaughter to determine whether Smith committed attempted second degree murder. Such an instruction, we held, was supported by the evidence.

We reasoned that *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011), occasioned a significant change in the law after Smith's case was tried and while it was pending on appeal. At the time Smith's case was tried, voluntary manslaughter was an unintentional crime and the crime of attempted voluntary manslaughter did not exist. Therefore, there was no reason for Smith to request an instruction on attempted voluntary manslaughter. We emphasized that voluntary manslaughter is not a lesser-included offense of second degree murder. Instead, we held that voluntary manslaughter is a lesser degree of homicide than second degree murder and that the two are differentiated only by the presence or absence of the sudden quarrel provocation.

> Thus, where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of a sudden quarrel, a jury must be given the option of convicting of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation.

State v. Smith, 284 Neb. at 656, 822 N.W.2d at 417.

We rejected Smith's remaining arguments, including his argument that the Court of Appeals erred in finding he was not entitled to a self-defense instruction in the first trial.

3. Motion for New Counsel

After we issued our opinion, Smith filed a motion for new counsel, seeking to dismiss his counsel, who had represented him on direct appeal. Smith made claims of ineffectiveness, including that his counsel had failed to disclose a conflict of interest. Without addressing Smith's claims, the district court discharged Smith's counsel and appointed him new counsel for the retrial of the attempted second degree murder charge. We summarize pertinent facts from the hearing on Smith's motion for new counsel in more detail in the analysis section below.

4. Plea

In lieu of a new trial, Smith pled no contest on June 26, 2013, to the amended charge of attempted voluntary manslaughter. He was sentenced to 20 months' to 5 years' imprisonment, to be served concurrently with his sentence of 15 to 20 years' imprisonment for first degree assault. The sentence of 15 to 20 years' imprisonment for use of a weapon to commit a felony remained consecutive to the other sentences.

5. Postconviction Proceedings

On March 26, 2014, Smith filed an "Amended Verified Petition for Postconviction Relief," which is the only postconviction motion in the record before us. Smith essentially argued (1) that the theory of sudden quarrel provocation should have reduced his first degree assault conviction to third degree assault and (2) that his convictions for first degree assault and attempted voluntary manslaughter together violated constitutional principles of double jeopardy. He used this contention as a basis for interrelated arguments about due process, ineffective assistance of trial counsel, trial court error, ineffective assistance of appellate counsel, appellate

court error, and disproportionate sentencing. Smith's motion for postconviction relief did not raise claims concerning any conflict of interest.

Following a hearing, the district court denied Smith's motion for postconviction relief and denied an evidentiary hearing on the matter. It found no factual basis supporting Smith's claims that his constitutional rights had been infringed so as to render his conviction void or voidable, and it found no showing that Smith's trial counsel or appellate counsel had been deficient or that Smith had been prejudiced by any deficiency, if it had indeed existed.

Smith now appeals.

III. ASSIGNMENTS OF ERROR

Smith assigns, condensed and restated, (1) that the district court erred in denying his motion for postconviction relief without an evidentiary hearing despite Smith's claims that his appellate counsel was ineffective; (2) that the district court erred in hearing his claims of ineffective assistance of appellate counsel at the hearing on his motion for new counsel, prior to his motion for postconviction relief; and (3) that plain error permeates the record.

IV. 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 records and files affirmatively show that the defendant is entitled to no relief. *State v. Determan*, 292 Neb. 557, 873 N.W.2d 390 (2016).

[2,3] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *State v. Branch*, 290 Neb. 523, 860 N.W.2d 712 (2015). With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate

court reviews such legal determinations independently of the lower court's decision. *State v. Branch, supra*.

V. ANALYSIS

1. Ineffective Assistance of Appellate Counsel

[4] Smith alleges that the district court erred in denying his motion for postconviction relief without an evidentiary hearing despite Smith's claims that his appellate counsel was ineffective. 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. *State v. Ware*, 292 Neb. 24, 870 N.W.2d 637 (2015). 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. *Id*.

[5,6] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington, supra*, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015). To show prejudice under the prejudice component of the *Strickland* test, the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *State v. Thorpe, supra*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

[7-9] When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015). That is, courts begin by assessing the strength of the claim appellate counsel failed to raise. *Id.*

Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Id.* When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the *Strickland* test. *State v. Sellers, supra.* If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim. *Id.*

(a) Unchallenged Convictions

Smith chiefly assigns that the trial court committed plain reversible error and abused its discretion when it denied his amended petition for postconviction relief without an evidentiary hearing. To support this assignment, Smith argues that appellate counsel was ineffective by failing to challenge his convictions for first degree assault and use of a weapon to commit a felony. But as a preliminary matter, we note that he attempts to combine this argument with a theory that he pled to a "reduced charge of attempted voluntary manslaughter [which] effectively erradicated [sic] and eliminated the charges of first degree assault and use of a weapon." Brief for appellant at 21. However, this argument that his plea somehow vitiated the other convictions is procedurally barred because Smith did not challenge the charge of attempted second degree murder on remand.

Smith appealed his three convictions to the Court of Appeals, which affirmed the convictions for first degree assault and use of a weapon to commit a felony but reversed the conviction for attempted second degree murder and remanded the cause for a new trial. This court affirmed the decision of the Court of Appeals. As a result, after remand, Smith's convictions for first degree assault and use of a weapon to commit a felony were final judgments. See *State v. Shannon*, 293 Neb. 303, 876 N.W.2d 907 (2016) (issuance of mandate by appellate

court is date judgment of conviction becomes final for purposes of postconviction review).

[10,11] The only pending matter after appeal and remand was the retrial on the charge of attempted second degree murder. However, Smith pled no contest to the amended charge of attempted voluntary manslaughter. Rather than filing a motion to quash or otherwise attacking the validity of the attempted second degree murder charge after remand, on double jeopardy grounds, for example, Smith entered his plea, which waived his right to challenge the retrial of that charge. Objections to an information or the content of an information should be raised by a motion to quash. See, Neb. Rev. Stat. § 29-1808 (Reissue 2008); *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). When a defendant enters a plea in a case, he waives objections to all defects in an information that can be reached by a motion to quash, except those defects which are of such a fundamental character as to make the indictment wholly invalid. *Nelson v. State*, 167 Neb. 575, 94 N.W.2d 1 (1959).

Smith's convictions for first degree assault and use of a weapon to commit a felony were final judgments, and his plea without challenging the information did not affect those convictions. Therefore, Smith's contention—that his plea to a "reduced charge of attempted voluntary manslaughter . . . effectively eradicated and eliminated the charges of first degree assault and use of a weapon"—is without merit.

We now turn to Smith's primary argument that appellate counsel was ineffective on appeal by failing to challenge his convictions for first degree assault and use of a weapon to commit a felony. The basis of such challenge, Smith contends, would have been trial counsel's failure to request a lesser-included instruction or an instruction on "sudden quarrel."

[12] First, the State correctly argues that any claims as to trial court error or ineffective assistance of trial counsel would be procedurally barred on postconviction review, because Smith had new counsel on direct appeal. See *State v. Sellers*,

290 Neb. 18, 858 N.W.2d 577 (2015). When claims of a trial counsel's performance are procedurally barred, an appellate court examines claims regarding trial counsel's performance only if the defendant assigns as error, as Smith did in the instant case, that appellate counsel was ineffective for failing to raise trial counsel's performance. See *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010). However, if trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel failed to bring an ineffective assistance of trial counsel claim. *State v. Sellers, supra.* As a result, any conclusion that Smith's appellate counsel's performance was ineffective in regard to the charges of first degree assault or use of a weapon to commit a felony would require us to find that trial counsel should have requested a lesser-included instruction or an instruction on "sudden quarrel."

[13] Regarding Smith's assertion concerning a lesser-included instruction, we must examine the record on direct appeal to determine whether the jury was instructed as to a lesser-included charge for first degree assault. A reviewing court considering a motion for postconviction relief may take judicial notice of the record in the direct appeal. *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002); *State v. Bennett*, 256 Neb. 747, 591 N.W.2d 779 (1999). In reference to the charge of first degree assault, the trial court did instruct the jury as to the lesser-included charge of third degree assault. There would be no lesser-included charge for use of a weapon to commit a felony. Smith was afforded the proper lesser-included instruction.

[14,15] We next address Smith's contention that appellate counsel should have argued that "sudden quarrel" also affected the charges of first degree assault and use of a weapon to commit a felony. A "sudden quarrel" is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013). Although provocation negates malice, malice is not a statutory element of second degree murder in Nebraska. *Id.*

The same principle applies to first degree assault, because "[a] person commits the offense of assault in the first degree if he or she intentionally or knowingly causes serious bodily injury to another person." See Neb. Rev. Stat. § 28-308(1) (Cum. Supp. 2014). Malice is not an element of first degree assault, and, as such, "sudden quarrel" would not be applicable to negate it. A similar rationale applies to use of a deadly weapon to commit a felony, which does not have malice as an element. See Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2014).

Smith also contends that *State v. Butler*, 10 Neb. App. 537, 634 N.W.2d 46 (2001), stands for the proposition that because "provocation" can mitigate an intentional killing, it may also mitigate a charge of assault. However, *Butler* is distinguishable because the Court of Appeals was addressing "provocation" as it relates to a claim of self-defense in connection with an assault charge. In *Butler*, the Court of Appeals was discussing Neb. Rev. Stat. § 28-1409(4)(a) (Reissue 1995), which provided that the use of deadly force in self-defense is not justifiable if "'[t]he actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter.'" 10 Neb. App. at 553, 634 N.W.2d at 61.

Smith's appellate counsel did raise ineffective assistance of trial counsel for failing to request a self-defense instruction on all charges. Both the Court of Appeals and this court rejected that claim. "Provocation" may have been related to Smith's self-defense claim, but it would not act to mitigate his charge of assault; and the holding in *Butler* should not be interpreted for such a proposition.

Accordingly, these assigned errors by Smith are without merit.

(b) Appellate Counsel's Conflict of Interest

[16] Smith assigns as error that appellate counsel was ineffective by representing him notwithstanding a conflict of

interest; however, Smith did not set forth this issue in his amended petition for postconviction relief. An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015). Consequently, this issue shall not be addressed.

(c) Double Jeopardy Violations

Smith argues:

> All things considered, had appellate counsel assigned error to the [charges of first degree assault and use of a weapon to commit a felony], "double jeopardy" would have [forbidden] a retrial, and by the same token, the reduced charge of attempted [voluntary] manslaughter vitiates the first degree assault charge, which in turn negates the use of a weapon charge.

Brief for appellant at 28. Again, the only count remanded for retrial was the attempted second degree murder charge and, as discussed above, the convictions for both first degree assault and use of a deadly weapon to commit a felony were affirmed and became final judgments. Any double jeopardy argument would have applied only to the charge of attempted second degree murder, and Smith assigns no error in regard to that charge.

[17] Further, the offenses of first degree assault and attempted voluntary manslaughter do not violate double jeopardy. In a double jeopardy analysis, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or one is whether each provision requires proof that the other does not. *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009), citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). First degree assault and attempted voluntary manslaughter are two distinct offenses. As pointed out by the State, first degree assault requires

serious bodily injury to occur and attempted voluntary manslaughter does not require any injury to occur. See, § 28-308; Neb. Rev. Stat. § 28-305 (Supp. 2015); Neb. Rev. Stat. § 28-201 (Supp. 2015).

We find that Smith was not placed in double jeopardy by his appellate counsel's actions; and therefore, Smith's appellate counsel was not ineffective in this respect.

2. Hearing on Motion for New Counsel

Smith assigns that the district court erred in hearing his claims of ineffective assistance of appellate counsel at a hearing on his motion for new counsel—claims which Smith asserts pertained to his motion for postconviction relief. Smith alleges that on April 8, 2013, a hearing was held regarding his claim of ineffective assistance of appellate counsel, before his plea to attempted voluntary manslaughter. The bill of exceptions for April 8 reflects that this allegation has no merit:

> THE COURT: Okay. This is the matter of State of Nebraska versus William E. Smith, CR08-1249.
>
> You're Mr. Smith, sir?
>
> [Smith]: Yes, I am, sir.
>
> THE COURT: Thank you, sir.
>
> Excuse me.
>
> On March 28th, 2013, I entered a judgment in accordance with the mandate of the Nebraska Supreme Court, which vacated and set aside the conviction for attempted second degree murder, and ordered me to have — set a retrial with respect to that charge.
>
> . . . Smith had filed, on January 18th, 2013 — before we take up where we're going with that, on January 13th — 18th, 2013, he filed a motion to dismiss current counsel and appoint new counsel. I issued an order after that was filed, saying I couldn't do anything while that case was on appeal, because I didn't have jurisdiction to do anything. So, when I entered judgment last week, or on

> March 28th, I did say we'd go ahead and take up first this motion to dismiss.
>
> I have read the motion. I have some questions about it but I want to ask, first, . . . whether you still wish to pursue this motion or if you wish to withdraw it at this time. I don't know, so I just want to make sure.
>
> [Smith]: I wish to pursue it, Your Honor.

Clearly, the hearing on April 8 was only upon Smith's motion to dismiss counsel, and he never objected to the hearing. The district court allowed Smith to make a record as to why he desired his counsel dismissed. Later in the hearing, Smith, not the court, attempted to initiate a dialog about postconviction relief, but the court declined to discuss it. Accordingly, this error has no merit.

3. Plain Error

[18] Finally, Smith assigns that plain error permeates the record. An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). Having already rejected all of Smith's claims, we find no plain error.

VI. CONCLUSION

For the reasons set forth above, we hold that the district court did not err in denying Smith's motion for postconviction relief and denying an evidentiary hearing on the matter.

Affirmed.

Heavican, C.J., and Cassel and Stacy, JJ., not participating.

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

RM Campbell Industrial, Inc., appellee, v. Midwest Renewable Energy, LLC, appellant.

886 N.W.2d 240

Filed July 29, 2016. No. S-15-529.

1. **Res Judicata: Collateral Estoppel.** The applicability of claim and issue preclusion is a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Principal and Agent.** The scope of an agent's authority is a question of fact.
4. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
6. **Contracts.** The determination of whether goods or nongoods predominate a contract is generally a question of law.
7. **Judgments: Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
8. **Res Judicata.** The doctrine of res judicata, or claim preclusion, bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.

9. ____. The doctrine of res judicata, or claim preclusion, rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.
10. **Judgments: Collateral Estoppel.** Under the doctrine of collateral estoppel, or issue preclusion, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.
11. **Collateral Estoppel.** There are four conditions that must exist for issue preclusion to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or 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.
12. **Res Judicata: Collateral Estoppel.** In contrast to claim preclusion, the doctrine of issue preclusion does not apply to matters which might or could have been litigated but were not.
13. **Principal and Agent: Words and Phrases.** An "agent" is a person authorized by the principal to act on the principal's behalf and under the principal's control.
14. **Agency.** For an agency relationship to arise, the principal manifests assent to the agent that the agent will act on the principal's behalf and subject to the principal's control and the agent manifests assent or otherwise consents so to act.
15. **Agency: Intent.** An agency relationship may be implied from the words and conduct of the parties and the circumstances of the case evidencing an intention to create the relationship irrespective of the words or terminology used by the parties to characterize or describe their relationship.
16. **Principal and Agent.** Actual authority is authority that the principal expressly grants to the agent or authority to which the principal consents.
17. ____. A subcategory of actual authority is implied authority, which courts typically use to denote actual authority either to (1) do what is necessary to accomplish the agent's express responsibilities or (2) act in a manner that the agent reasonably believes the principal wishes the agent to act, in light of the principal's objectives and manifestations.
18. ____. When a principal delegates authority to an agent to accomplish a task without specific directions, the grant of authority includes the agent's ability to exercise his or her discretion and make reasonable determinations concerning the details of how the agent will exercise that authority.

19. ____. Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority.
20. ____. Apparent authority gives an agent the power to affect the principal's legal relationships with third parties. The power arises from and is limited to the principal's manifestations to those third parties about the relationships.
21. **Principal and Agent: Proof.** Apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct. Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.
22. **Principal and Agent.** For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.
23. ____. Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.
24. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.
25. **Contracts: Actions: Substantial Performance.** To successfully bring an action on a contract, a plaintiff must first establish that the plaintiff substantially performed the plaintiff's obligations under the contract. To establish substantial performance under a contract, any deviations from the contract must be relatively minor and unimportant.
26. **Contracts: Substantial Performance.** If there is substantial performance, a contract action may be maintained, but without prejudice to any showing of damage on the part of the defendant for failure to receive full and complete performance.
27. **Contracts: Substantial Performance**: **Damages.** Where there is a lack of substantial performance, but there has been a part performance and it has been of substantial benefit to the other party and he or she has accepted and retained the benefits thereof, he or she should not be permitted entirely to avoid the duties assumed by him or her under his or her contract, and, under such circumstances, the party partially performing is entitled to recover the reasonable or fair value of such performance, subject to the reciprocal right of the other party to recoup such damages as he or she has suffered from the failure of the part-performing party to perform fully or substantially his or her contract.

28. **Uniform Commercial Code.** Nebraska's Uniform Commercial Code applies to transactions in goods. If a transaction is not for the sale of goods, the provisions of the Uniform Commercial Code do not apply to that transaction.
29. **Uniform Commercial Code: Sales: Warranty.** The test for inclusion in or exclusion from the sales provisions of the Uniform Commercial Code is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.
30. ____: ____: ____. The Uniform Commercial Code applies when the principal purpose of the transaction is the sale of goods, even though in order for the goods to be utilized, some installation is required. On the other hand, if the contract is principally for services and the goods are merely incidental to the contract, the provisions of the Uniform Commercial Code do not apply.
31. **Contracts: Quantum Meruit.** Quantum meruit is premised on the existence of a contract implied by law; however, the law only implies a contract and allows a recovery under the theory when the parties have not entered into an express agreement.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed.

Jerrold L. Strasheim for appellant.

Karl Von Oldenburg, of Brumbaugh & Quandahl, P.C., L.L.O., for appellee.

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

Heavican, C.J.

INTRODUCTION

RM Campbell Industrial, Inc. (Campbell), filed suit against Midwest Renewable Energy, LLC (Midwest), for breach of contract and sought damages in the amount of $158,010.98. Following trial, the jury found for Campbell in the amount of $154,510.98. Midwest appeals. We affirm.

FACTUAL BACKGROUND

Midwest owns an ethanol plant in Sutherland, Nebraska. At the relevant time, Randall Kramer worked for both Midwest and another entity, KL Process Design Group, LLC (KL Process). In August 2006, at a time when Kramer worked for both entities simultaneously, Kramer entered into a purchase order contract with Campbell for work on the first phase in the construction of the Sutherland plant. It is not disputed that the work pursuant to this contract was paid for and completed.

In November 2006, Kramer again approached Campbell about doing work as a subcontractor on the expansion of the Sutherland plant. Second and third phases were anticipated, but Campbell and Kramer entered into a contract for goods and services for only the second phase of the project. The contract, entered into on November 9, totaled $2,411,431.02. By this time, Kramer was employed only by KL Process and the terms of the contract itself indicated that the contract was between Campbell and KL Process.

Initially, Campbell sent invoices for payment to KL Process' offices in South Dakota. But by May 2007, the owner and president of Campbell testified he was told to send the invoices directly to Midwest at the address of the Sutherland plant. Invoices were approved by KL Process and then paid by Midwest's controller on Midwest's account; the evidence shows that this was done primarily to take advantage of tax incentives offered by the State of Nebraska, colloquially referred to as "L.B. 775" incentives.[1]

In August 2007, KL Process updated Campbell on its financial situation and Midwest's current inability to pay outstanding balances until new financing had been obtained. No complaint was made about Campbell's performance. In February 2008, Midwest wrote to Campbell regarding Midwest's lack of

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[1] See, 1987 Neb. Laws, L.B. 775; Employment and Investment Growth Act, Neb. Rev. Stat. §§ 77-4101 to 77-4112 (Reissue 2009 & Cum. Supp. 2014).

payment and acknowledged an amount owed of $919,020.45. Midwest also sent a check for $32,089.96, with the promise of an additional $30,000 to be paid monthly thereafter.

But no payment was made in March. Midwest acknowledged the debt in writing once more, made no complaint about Campbell's services, and promised to make payment as soon as there was money to do so. That same month, KL Process informed Campbell that it had ceased work on the second phase of the project, but that it believed the work stoppage was temporary; however, work never resumed on the second phase.

Campbell filed suit against KL Process (now KL Energy Corporation) and Midwest. KL Energy Corporation is in bankruptcy and is not a party to this appeal. Suit proceeded against Midwest for breach of contract based upon the 2-page purchase order between KL Process and Campbell.

Several threshold issues were decided prior to trial and are relevant on appeal. Midwest contended that a prior lien action involving the Sutherland plant filed in Lincoln County District Court barred Campbell's action under the principles of collateral estoppel and res judicata. Midwest also contended that Campbell, a foreign corporation, lacked the appropriate certificate to transact business or file suit in Nebraska. These arguments were both rejected by the district court.

At trial, Midwest argued that there was no contract between it and Campbell because KL Process lacked the actual or apparent authority to bind Midwest to any agreement. Midwest also argued that Campbell failed to substantially complete its obligations under the contract. The jury found for Campbell in the amount of $154,510.98.

ASSIGNMENTS OF ERROR

Midwest assigns, consolidated and restated, that the district court erred in (1) finding that Campbell's breach of contract action was not barred by res judicata or collateral estoppel; (2) finding that Campbell could maintain suit despite its failure to

hold a Nebraska certificate of authority; (3) concluding there was sufficient evidence for a jury question on (a) whether KL Process acted as an agent of Midwest in entering into the subcontract with Campbell and (b) whether KL Process had actual or apparent authority to bind Midwest to the subcontract, such that there was an enforceable contract between Midwest and Campbell, and in instructing the jury as it did; (4) not finding that Campbell had to prove substantial compliance with the subcontract and not instructing the jury on this; (5) finding there was a jury question regarding proximate causation; (6) applying article 2 of Nebraska's Uniform Commercial Code (U.C.C.) and not the common law to the agreement; and (7) finding there was a jury question on damages and incorrectly instructing the jury regarding damages.

STANDARD OF REVIEW

[1] The applicability of claim and issue preclusion is a question of law.[2]

[2] Statutory interpretation presents a question of law.[3]

[3] The scope of an agent's authority is a question of fact.[4]

[4] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[5]

[5] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.[6]

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[2] *McGill v. Lion Place Condo. Assn.*, 291 Neb. 70, 864 N.W.2d 642 (2015).

[3] *Pettit v. Nebraska Dept. of Corr. Servs.*, 291 Neb. 513, 867 N.W.2d 553 (2015).

[4] *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 773 N.W.2d 145 (2009).

[5] *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015).

[6] *Id.*

[6] The determination of whether goods or nongoods predominate a contract is generally a question of law.[7]

ANALYSIS

Effect of Lincoln County Construction Lien.

In its first assignment of error, Midwest assigns that the district court erred in not finding that the dismissal of Campbell's construction lien at the time of the judicial foreclosure of another lienholder's lien operated to preclude Campbell's suit.

Campbell filed a construction lien on the Sutherland plant in Lincoln County, Nebraska, on April 11, 2008. Another supplier, Avid Solutions, Inc. (Avid), subsequently commenced a foreclosure on its own construction lien on September 29. Avid named Campbell as a fellow lienholder and served it with the complaint against Midwest. Campbell did not appear.

Proceedings continued against Midwest in Avid's foreclosure. In a journal entry dated June 7, 2011, the district court ruled on several preliminary matters, including noting that a "default judgment will be entered against any Defendant who does not appear at the contested trial." The district court's decree, entered on July 14, noted that Campbell, as well as others, did not appear at trial and that their liens were "dismissed and released."

[7-9] The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.[8] The doctrine bars

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[7] See *MBH, Inc. v. John Otte Oil & Propane*, 15 Neb. App. 341, 727 N.W.2d 238 (2007) (citing to other jurisdictions as issue of first impression in Nebraska).

[8] *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.[9] The doctrine rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause.[10]

[10,11] Under the doctrine of collateral estoppel, or issue preclusion, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.[11] There are four conditions that must exist for issue preclusion to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or 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.[12]

[12] As an initial matter, we conclude that issue preclusion is not applicable here to bar Campbell's suit. In contrast to claim preclusion, the doctrine of issue preclusion does not apply to matters which might or could have been litigated but were not.[13] Campbell never appeared in Avid's lien foreclosure proceedings, and the issue of whether Campbell and Midwest had an agreement was not fully and fairly litigated for purposes of issue preclusion.

Turning next to claim preclusion, we conclude that the issue of an agreement between Campbell and Midwest was not decided on its merits. Claim preclusion bars relitigation, not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action. But we conclude that there was no decision on the merits in the underlying lien foreclosure, because Campbell did not

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] 47 Am. Jur. 2d *Judgments* § 493 (2006).

participate in the Avid foreclosure and was a party only by virtue of Neb. Rev. Stat. § 52-155(2) (Reissue 2010), which provides that "all claimants having recorded liens may join as plaintiffs and those who do not join as plaintiffs may be joined as defendants."

The district court and Campbell rely on *Tilt-Up Concrete v. Star City/Federal*,[14] which holds that a construction lien did not eliminate a contractor's common-law right to sue for breach of contract. While we do not find *Tilt-Up Concrete* to be absolutely dispositive as to issue preclusion, we noted in that case that a plaintiff on similar facts was not precluded from bringing a contract action simply because that plaintiff also foreclosed on a construction lien. The choice inherent from *Tilt-Up Concrete* would be obviated if we were to conclude that, here, Avid's foreclosing on its own lien precluded other lienholders from bringing a separate action to recover contract damages.

Midwest's first assignment of error is without merit.

Certificate of Authority.

In its second assignment of error, Midwest assigns that the district court erred in not dismissing Campbell's suit, because Campbell is a foreign corporation that does not hold a Nebraska certificate of authority. It is not disputed that Campbell is a foreign corporation and has not, at any relevant time, held a certificate of authority in Nebraska.

Neb. Rev. Stat. § 21-20,168(1) (Reissue 2012) provides that "[a] foreign corporation may not transact business in this state until it obtains a certificate of authority from the Secretary of State." As relevant to this analysis, subsection (2) of § 21-20,168 explains that, among other exceptions, transacting business in interstate commerce shall not constitute transacting business within the meaning of subsection (1) of

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[14] *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

§ 21-20,168.[15] Neb. Rev. Stat. § 21-20,169(1) (Reissue 2012) provides that "[a] foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority."

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.[16] Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.[17]

Reading §§ 21-20,168 and 21-20,169 together, we conclude that because Campbell was transacting business in interstate commerce, it was not transacting business for purposes of § 21-20,169(1).

This result is consistent with *Allenberg Cotton Co. v. Pittman*.[18] There, the plaintiff, a foreign corporation, sued to enforce a contract with a Mississippi defendant. The Mississippi Supreme Court held that the contract was in intrastate commerce and could not be maintained by a foreign corporation. The U.S. Supreme Court disagreed and held that the contract was in interstate commerce and that the Mississippi statute precluding suit by a foreign corporation which did not hold a certificate of authority was in contravention of the Commerce Clause.

We conclude that Campbell did not need to obtain a certificate of authority in order to maintain this suit against Midwest. There is no merit to Midwest's second assignment of error.

Existence of Contract.

In its third assignment of error, Midwest contends that there was no enforceable contract between it and Campbell,

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[15] See, also, *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 95 S. Ct. 260, 42 L. Ed. 2d 195 (1974).

[16] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015).

[17] *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

[18] *Allenberg Cotton Co. v. Pittman, supra* note 15.

because it did not directly enter into a contract with Campbell and because KL Process was not Midwest's agent and was not acting with actual or apparent authority. Midwest also assigns that instruction No. 5 was an incorrect statement of the law and that the district court erred in not giving its proposed instructions Nos. 6 through 8.

[13-15] An "agent" is a person authorized by the principal to act on the principal's behalf and under the principal's control.[19] For an agency relationship to arise, the principal "manifests assent" to the agent that the agent will "'act on the principal's behalf and subject to the principal's control.'"[20] And the agent "'manifests assent or otherwise consents so to act.'"[21] An agency relationship may be implied from the words and conduct of the parties and the circumstances of the case evidencing an intention to create the relationship irrespective of the words or terminology used by the parties to characterize or describe their relationship.[22]

[16-18] Actual authority is authority that the principal expressly grants to the agent or authority to which the principal consents.[23] A subcategory of actual authority is implied authority, which courts typically use to denote actual authority either to (1) do what is necessary to accomplish the agent's express responsibilities or (2) act in a manner that the agent reasonably believes the principal wishes the agent to act, in light of the principal's objectives and manifestations.[24] When a principal delegates authority to an agent to accomplish a task without specific directions, the grant of authority includes the agent's ability to exercise his or her discretion and make

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[19] *Koricic v. Beverly Enters. - Neb., supra* note 4.

[20] *Id.* at 717, 773 N.W.2d at 150.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Koricic v. Beverly Enters. - Neb., supra* note 4.

reasonable determinations concerning the details of how the agent will exercise that authority.[25]

[19-21] Apparent authority is authority that is conferred when the principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon an agent's apparent authority.[26] Apparent authority gives an agent the power to affect the principal's legal relationships with third parties.[27] The power arises from and is limited to the principal's manifestations to those third parties about the relationships.[28] Stated another way, apparent authority for which a principal may be liable exists only when the third party's belief is traceable to the principal's manifestation and cannot be established by the agent's acts, declarations, or conduct.[29] Manifestations include explicit statements the principal makes to a third party or statements made by others concerning an actor's authority that reach the third party and the third party can trace to the principal.[30]

[22,23] For apparent authority to exist, the principal must act in a way that induces a reasonable third person to believe that another person has authority to act for him or her.[31] Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction.[32]

Midwest is, of course, correct in that it did not directly contract with Campbell. Midwest further argues that this

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[25] *Id.*

[26] *StoreVisions. v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

court need look no further than the terms of the contract between it and KL Process to see that KL Process was not acting as its agent. That contract specifically notes:

> Nothing in the Contract Documents is intended or deemed to create any legal or contractual relationship between [Midwest] and Design Consultant, any Subcontractor or Sub-Subcontractor, except that KL Process shall provide in its contracts with such Subcontractor and Sub-Subcontractors that [Midwest] is an intended third party beneficiary of those contracts with the right to enforce them.

But there is no evidence that Campbell or its owner and president was aware of the terms of the contract between Midwest and KL Process. Moreover, the contract between Campbell and KL Process was executed in November 2006. At that time, the contract between Midwest and KL Process had not yet been executed; the latter contract was not entered into until July 18, 2007.

A review of other provisions of that contract show that while Midwest may not have wanted to be liable on contracts entered into by KL Process, it nevertheless maintained a significant amount of control over KL Process. For example, KL Process had to provide notice to Midwest of any design consultant or subcontractor it wished to use and could not enter into binding contracts with those parties without notice to Midwest. And Midwest had veto power over any design consultant or subcontractor.

In any case, how KL Process and Midwest characterized their relationship does not affect our resolution of this issue. As this court has noted, an agency relationship may be implied from the words and conduct of the parties and the circumstances of the case evidencing an intention to create the relationship, irrespective of the words or terminology used by the parties to characterize or describe their relationship.

The jury was instructed in instruction No. 4 as follows:

> An agency relationship existed in this case between [Midwest] and KL Process if you find [Midwest] consented to these two things:
>
> 1. That KL Process would act on behalf of [Midwest], and
>
> 2. That [Midwest] would have the right to control KL Process' acts. It does not matter whether [Midwest] actually exercised control over KL Process, so long as [Midwest] had the right to do so.

Instruction No. 5 provided:

> An agency may also exist, by apparent authority, if you find:
>
> 1. That [Midwest] led [Campbell] to believe that KL Process was authorized to act on behalf of [Midwest], and
>
> 2. That [Campbell's] belief that KL Process had authority to act for [Midwest] was reasonable.
>
> If you so find, then as between [Midwest] and [Campbell], [Midwest] is bound by the acts of KL Process.

The evidence at trial was that the contract between Midwest and KL Process indicated that Midwest was not legally bound by any contract with a subcontractor. But the evidence also showed that Midwest hired KL Process to build its ethanol plant and that Campbell knew the work it had been hired to do was to be done for Midwest. The evidence also showed that at the time of the first phase of the project, Kramer worked for both Midwest and KL Process when he hired Campbell. The evidence showed that Midwest paid Campbell and acknowledged the debt owed to Campbell on multiple occasions via e-mail and letter. Finally, the evidence showed that because of the tax incentives,[33] it was to Midwest's advantage to pay Campbell directly. Given all this, we conclude there was sufficient evidence that an agency relationship existed in this case, by either actual or apparent authority.

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[33] See, L.B. 775; §§ 77-4101 to 77-4112.

[24] We turn next to Midwest's arguments regarding the jury instructions on the question of apparent authority. To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.[34] A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.[35]

Midwest objected to instruction No. 5 and had requested instead that its proposed instructions Nos. 6 through 8 be given to the jury.

As to instruction No. 5, Midwest contends that the jury should have been instructed that the party relying on apparent authority cannot be negligent and must use ordinary prudence and that instruction No. 5 was in error because it did not so state. Midwest contended that its proposed instruction No. 6 was a virtual copy of NJI2d Civ. 6.08, entitled "Agency—Apparent Authority," and that instruction No. 7, regarding reliance on apparent authority, and instruction No. 8, defining negligence, should have also been given to the jury.

We disagree with Midwest's characterization of its proposed instruction No. 6. In reality, the instruction given, instruction No. 5, and not proposed instruction No. 6, was almost identical to NJI2d Civ. 6.08. Contrary to Midwest's assertion, NJI2d Civ. 6.08 does not require that the jury find that the party relying on the apparent authority not be negligent and use ordinary prudence. Rather, a jury must only find that the party must be acting reasonably.

The district court did not err in instructing the jury in conformity with instruction No. 5 instead of Midwest's proposed

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[34] *Golnick v. Callender, supra* note 5.

[35] *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007).

instructions Nos. 6 and 7, dealing with apparent authority. And because the jury did not need to be instructed as to negligence, it was not error for the court to refuse proposed instruction No. 8. There is no merit to Midwest's third assignment of error.

Substantial Compliance.

In its fourth assignment of error, Midwest contends that the district court erred in not finding that Campbell had to prove that it had substantially complied with the contract and so instructing the jury.

[25,26] To successfully bring an action on a contract, a plaintiff must first establish that the plaintiff substantially performed the plaintiff's obligations under the contract.[36] To establish substantial performance under a contract, any deviations from the contract must be relatively minor and unimportant.[37] If there is substantial performance, a contract action may be maintained, but without prejudice to any showing of damage on the part of the defendant for failure to receive full and complete performance.[38]

[27] Where there is a lack of substantial performance, but there has been a part performance and it has been of substantial benefit to the other party and he or she has accepted and retained the benefits thereof, he or she should not be permitted entirely to avoid the duties assumed by him or her under his or her contract, and, under such circumstances, the party partially performing is entitled to recover the reasonable or fair value of such performance, subject to the reciprocal right of the other party to recoup such damages as he or she has suffered from the failure of the part-performing party to perform fully or substantially his or her contract.[39]

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[36] *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995).

[37] *Id.*

[38] *Id.*

[39] See *Young v. Tate*, 232 Neb. 915, 442 N.W.2d 865 (1989).

Midwest argues that instructions Nos. 3 and 8, providing for damages generally and giving the specific measure of damages, were incorrect, because they did not instruct regarding substantial performance. But on these facts, we find no error.

There is no dispute that the full terms of the goods and services contract were not met; Campbell ceased providing goods and services when Midwest stopped paying for the work already done. But the record shows that on these facts, this was part performance that was a substantial benefit to Midwest, which accepted and retained the benefit through both the goods received and the tax incentives.

First, we note that the record shows that Midwest attempted to resell the products which Campbell provided under the contract. And Midwest acknowledged on various occasions that it owed the amount now at issue in this litigation. As such, Midwest should not be permitted to avoid the duty to pay.

There is no merit to Midwest's fourth assignment of error.

Proximate Causation.

In its fifth assignment of error, Midwest contends Campbell did not prove that Midwest's ceasing payments was the proximate cause of its claimed damages. Particularly, Midwest contends that Campbell's contract was with KL Process and that the reason Campbell was not paid was because KL Process declared bankruptcy.

Having concluded that the jury could find that KL Process was acting as Midwest's agent, there was also sufficient evidence for a jury to find that Campbell's contract losses were due to Midwest's failure to pay. The record is replete with evidence that Midwest, and not KL Process, paid Campbell's invoices and that Midwest acknowledged that a cash shortage meant it had not paid Campbell what was due and further indicated Midwest would pay Campbell as soon as it had funds to do so.

This assignment of error is without merit.

Applicability of U.C.C.

In its sixth and seventh assignments of error, Midwest contends that the district court erred in treating this as a contract under the U.C.C. rather than as one under common law and, accordingly, erred in its damages instruction to the jury. Specifically, Midwest objected to instructions Nos. 6 and 8. As to instruction No. 6, Midwest argues that it utilized sale-of-goods language from the U.C.C. when the contract was not controlled by the U.C.C. but by common law. And Midwest contends that, accordingly, the instruction on damages—instruction No. 8—should have been on quantum meruit, not the contract price instruction given to the jury.

[28-30] The U.C.C. applies to transactions in goods.[40] If a transaction is not for the sale of goods, the provision of the U.C.C. do not apply to that transaction.[41]

> The test for inclusion in or exclusion from the sales provisions is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.[42]

The U.C.C. applies when the principal purpose of the transaction is the sale of goods, even though in order for the goods to be utilized, some installation is required.[43] On the other hand, if the contract is principally for services and the goods are merely incidental to the contract, the provisions of the U.C.C. do not apply.[44]

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[40] Neb. U.C.C. § 2-102 (Reissue 2001).

[41] *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985).

[42] *Id.* at 308, 363 N.W.2d at 160.

[43] *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993).

[44] *Id.*

The total original contract was for $2,411,431.02. From examining that contract, over one-half of the total contract appears to be for goods, with the remainder for services. As such, we conclude that this contract was predominantly for the sale of goods and that the U.C.C. controls. There was no error in the damages instruction as given.

[31] And even if the contract were governed by the common law, we disagree that the proper measure of damages would have been under quantum meruit. Quantum meruit is premised on the existence of a contract implied by law; however, the law only implies a contract and allows a recovery under the theory when the parties have not entered into an express agreement.[45] But there is no dispute that there was an express contract in this case; the real issue is whether Midwest is a party to it. We have concluded that it was. Quantum meruit is therefore inapplicable.

Moreover, contrary to Midwest's contention, Campbell introduced proof of its damages in the form of the original contract price, the amount of goods and services provided to Midwest, and the amount actually paid by Midwest. This was an adequate measure of damages.

There is no merit to Midwest's sixth and seventh assignments of error.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

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[45] *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

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

Krista Marie Sellers, appellant and cross-appellee, v. Ryan O. Sellers, appellee and cross-appellant.

882 N.W.2d 705

Filed July 29, 2016. No. S-15-618.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Divorce: Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
3. ____: ____. Under Neb. Rev. Stat. § 42-365 (Reissue 2008) the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.
4. ____: ____. Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance.
5. ____: ____. Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse. If the separate property remains segregated or is traceable into its product, commingling does not occur.

Appeal from the District Court for Lincoln County: Richard A. Birch, Judge. Affirmed in part, and in part reversed and remanded with directions.

Patrick M. Heng, of Waite, McWha & Heng, for appellant.

Timothy P. Brouillette, of Brouillette, Dugan & Troshynski, P.C., L.L.O., for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Krista Marie Sellers appeals, and Ryan O. Sellers cross-appeals, from the decree entered by the district court for Lincoln County dissolving their marriage. The issues on appeal relate to the court's determination of whether a cattle herd and certain other assets and debts associated therewith should be included in the marital estate and, consequently, whether the division of property was proper. We affirm in part and in part reverse, and remand with directions.

STATEMENT OF FACTS

Krista and Ryan were first married in 2005. They divorced in 2008, but they reconciled soon thereafter, and they remarried on August 27, 2010. Krista filed a complaint to dissolve the marriage on April 9, 2014. Although the district court determined various issues concerning the dissolution, the issues raised on appeal relate solely to the property division involving certain assets and debts. Specifically, we are asked to assess whether a cattle operation, interests in three limited liability companies (LLCs), and a debt related to one of the LLCs should have been included in the marital estate. We therefore focus on the facts related to those issues.

Cattle Operation.

The court received into evidence a joint property statement showing the property possessed or owned and debts owed

by the parties at the time of dissolution and the respective value each party assigned to each item. Under the category of "Farm Business Equipment, Inventory, and Supplies," the list included, inter alia, cattle which the parties agreed were valued at over $600,000. In the decree of dissolution, the court found that the cattle were nonmarital property owned by Ryan prior to the marriage. The court stated:

> To the extent that there has been an increase in the value of the cattle, that increase resulted from the increase in the market value of cattle, and from the input of [Ryan's] inheritance of approximately $200,000. While [Krista] may have occasionally helped [Ryan] care for the cattle, such help was at most occasional and would not have resulted in any increase in the value of the livestock.

In his testimony at trial, Ryan acknowledged that around the time the parties remarried in August 2010, he owned cattle valued at approximately $130,000, and that at the time the parties separated, the value of the cattle had increased to over $600,000. He testified that he had used $104,000 of an inheritance to purchase additional cattle and approximately $75,000 of the inheritance had been used to pay back taxes. Ryan testified that the rest of the increase in the value of the cattle was because "the market for livestock ha[d] increased dramatically" in the last year. Ryan acknowledged, however, that he had bought and sold cattle throughout the duration of the marriage and that the cattle operation had been financed through an operating line of credit that was taken out in the names of both Ryan and Krista.

Three LLCs.

At the time the parties remarried in 2010, Ryan was the sole member of three LLCs: 5 Star Pawn, L.L.C.; Royal Colonial Inn, LLC; and Western Mobile Home Park, LLC. On August 27, 2010, the day the parties remarried, Ryan executed three documents; each document pertained solely to each of the LLCs. The three documents were received into evidence at trial. The documents were each titled "Assignment of Interest

in . . . by Gift" and stated (with the name of each of the respective LLCs inserted where indicated) that the assignment was by and between Ryan as "Transferor" and Ryan and Krista, as joint tenants with rights of survivorship, as "Transferee." However, elsewhere in the document, Ryan and Krista were referred to as "Transferees." The documents stated that "Transferor desires to assign to Transferee as a gift pursuant to [a provision of each of the LLCs' operating agreements], all of Transferor's 100% interest in . . . currently held by Transferor." The documents stated that Transferor "gifts, assigns, transfers, conveys, and delivers to Transferees" 100 percent interest as follows: 50 percent to "Ryan . . . as joint tenant with right of survivorship in Krista" and 50 percent to "Krista . . . as joint tenant with right of survivorship in Ryan."

After its consideration of the evidence in the decree of dissolution, the court made a finding that "[Ryan's] transfer to [Krista] of an interest in the LLCs was a gift from [Ryan] to [Krista.]" In reaching this finding, the court noted evidence that Krista had told Ryan that she "would not marry [Ryan] without the financial security that came from transfer of the property to her." The court also found that "[Ryan] signed the transfers after the marriage occurred. As such, the transfer was a gift made during the course of the marriage, and the interest transferred [to Krista] is included in the marital estate." The court further found that "when [Ryan] made the transfer to [Krista], he specifically transferred only 50 percent of his interest in the LLCs. The other 50 percent he retained for himself." Based on these findings, the court concluded that the 50-percent interests of the LLCs Ryan retained for himself were nonmarital property and were not subject to division but that the 50-percent interests transferred to Krista were marital property and were subject to division.

In dividing the marital assets, the court awarded the 50-percent interests in the LLCs that it had found to be marital property to Ryan. The court ordered Krista to assign Ryan all of her interests in the LLCs.

Debts of LLCs and Promissory Note.

During his testimony at trial, Ryan offered, and the court received into evidence, an exhibit that included a promissory note dated December 31, 2008, in the amount of $200,000 which listed Ryan, individually and as the sole member of the Royal Colonial Inn, as the maker of the note and Gregory G. and Judy M. Gifford as the holders of the note. The exhibit also included an amortization table which, Ryan testified, reflected "the balance owed roughly on today's date" for the loan as set forth in the property list. We note that the property list includes a line for debt to "Judy and Greg Gifford- Royal Colonial" and that the column for Krista's valuation of the debt contains no entry, while the column for Ryan's valuation of the debt lists $110,000. We note further that the trial was held on February 19, 2015, and that the amortization table shows a "Balance of Principal" of $109,299.76 on February 1 and $107,802.84 on March 1.

During Ryan's cross-examination of Krista, he asked her whether she was aware of the debt owed to the Giffords in connection with the Royal Colonial Inn and whether she had any reason to dispute the balance of the debt. Krista indicated she was aware of the debt and had no reason to dispute the balance. In connection with the debt to the Giffords, in her reply brief, Krista acknowledges the debt and indicates that the debt is being serviced by the income of the LLCs.

In the decree of dissolution, the district court stated that Ryan was "not entitled to a deduction from the marital estate for the debt" to the Giffords. The court further found that "[b]ecause only one-half of the LLCs is a marital asset, for purposes of property equalization" only one-half of the other debts associated with the LLCs should be considered as marital debt.

Division of Property.

Based on its findings, the court thereafter totaled the values of all the marital assets awarded and marital debts assigned

to each of the parties and divided the property. Such division did not include the cattle operation or the 50 percent of the interests in the LLCs that the court had found to be nonmarital property belonging to Ryan. The division also did not include the debt to the Giffords. However, the division included the 50 percent of the interests in the LLCs that the court found to have been gifted to Krista during the marriage and 50 percent of the debts that the court found to be related to the LLCs and therefore marital debt. The court determined that in total, Ryan had been distributed net marital assets of $415,522 and Krista had been distributed net marital assets of $15,622. The court therefore awarded Krista $199,958 "in order to equalize the marital property division."

Krista appeals the decree of dissolution, and Ryan cross-appeals.

ASSIGNMENTS OF ERROR

In her appeal, Krista claims that the district court erred when it (1) treated the cattle operation as nonmarital property belonging to Ryan and (2) treated her 50-percent interests in the three LLCs as marital property rather than as her separate property.

In his cross-appeal, Ryan claims that the district court erred when it found that his transfer of interests in the LLCs was a gift to Krista and when it therefore included the 50-percent interests in the LLCs as marital property rather than treating the entire interest in the LLCs as his separate property. He also claims that the court erred in its treatment of the debt to the Giffords associated with the Royal Colonial Inn.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. *Coufal v. Coufal*, 291 Neb. 378, 866 N.W.2d 74 (2015). This standard of review applies to the trial court's determinations

regarding custody, child support, division of property, alimony, and attorney fees. *Id*.

ANALYSIS

[2,3] The parties' assignments of error focus on the district court's treatment and division of the marital estate. We therefore review general standards relating to property division. Under Nebraska's divorce statutes, "[t]he purpose of a property division is to distribute the marital assets equitably between the parties." Neb. Rev. Stat. § 42-365 (Reissue 2008). The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015). We have stated that under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365. *Despain v. Despain, supra*. The parties' assignments of error in this case focus primarily on the first step of the property division process concerning the court's determination of which assets and debts were part of the marital estate and which were the separate property of one or the other party. Because the classification of assets and debts impacts the division of property, we must also consider the district court's orders relating to the division of property. Finally, because the considerations in the appeal and cross-appeal are intertwined, we analyze the parties' assignments of error together.

Cattle Operation.

Krista claims that the district court erred when it treated the cattle operation as nonmarital property belonging to Ryan despite the significant increase in its value during the

marriage. We find no abuse of discretion by the district court in this determination.

The court found that the cattle had been owned by Ryan prior to the marriage, and it appears undisputed that at the time the parties remarried in August 2010, Ryan owned cattle valued at approximately $130,000. However, the evidence indicated that at the time the parties separated, the value of the cattle had increased to over $600,000. Krista contended that the increase in the value of the cattle occurred because Ryan had bought and sold cattle throughout the duration of the marriage, and she noted evidence that Ryan had financed such activity through an operating line of credit that was taken out in the names of both Ryan and Krista. She argued that as a result of such activity, the cattle operation had become marital property.

The court, however, found that the "increase in the value of the cattle . . . resulted from the increase in the market value of cattle, and from the input of [Ryan's] inheritance." The court determined that the increase in value could not be attributed to the contribution or effort of Krista, whose "help [with the cattle] was at most occasional and would not have resulted in any increase in the value of the livestock."

[4,5] Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance. *Id*. Setting aside nonmarital property is simple if the spouse possesses the original asset, but can be problematic if the original asset no longer exists. *Id*. Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse. *Id*. If the separate property remains segregated or is traceable into its product, commingling does not occur. *Id*. The burden of proof rests with the party claiming that property is nonmarital. *Id*.

In this case, the district court determined that the cattle were Ryan's separate property based on two of the above-mentioned exceptions: property acquired before the marriage and property acquired by inheritance. With regard to the cattle Ryan owned at the time the parties married, we note the reasoning of the Nebraska Court of Appeals in *Shafer v. Shafer*, 16 Neb. App. 170, 741 N.W.2d 173 (2007). In *Shafer*, the husband had owned a herd of cattle at the time the parties married, and the couple owned a larger herd of cattle at the time they divorced 13 years later. The Court of Appeals determined that the husband did not need to show that the specific cattle he owned at the time of the marriage were the same specific cattle owned at the time of the divorce. The Court of Appeals stated:

> Obviously, one cannot draw a straight line from a cow owned by [the husband] to a cow owned 13 years later . . . , which is the prototypical "tracing" of a premarital asset so as to set it aside to the party who owned it at the time of the marriage. But in our view, the "disposable" nature of a cow does not, by itself, mean that a set-aside for preowned cattle is not allowable. Instead, it seems to us that the issue is resolved according to the particular facts of the case.

Id. at 178, 741 N.W.2d at 178-79. In *Shafer*, the Court of Appeals continued by noting evidence that the husband had been involved in the cattle business throughout the marriage and had reinvested proceeds from the sale of cattle owned at the time of marriage into replacement cattle that were part of the herd owned at the time of the divorce. The Court of Appeals determined:

> Given the undisputed evidence concerning the cattle herd . . . , the controlling precedent on set-aside of premarital assets, and the fact that this is an equitable matter, we can discern no reason not to set aside to [the husband] that portion of the value of the present cattle herd which is attributable to [his] premarital cattle. In

> doing so, we view the cattle herd as in effect a single asset—rather than taking a "cow by cow" approach to the tracing issue. Thus, we believe we have simply acknowledged the realities of what happens over time in a cattle operation. . . . To do otherwise seems to us to exalt form over substance and ignore the equitable nature of a dissolution action.

Id. at 178, 741 N.W.2d at 179. The Court of Appeals concluded in *Shafer* that it was appropriate for the trial court to set aside as the husband's separate property a portion of the value of the cattle herd owned at the time of divorce that reflected the value of the cattle herd the husband owned at the time of the marriage.

In the present case, the Sellers' marriage had lasted less than 4 years, as compared to the 13 years in *Shafer*, and therefore, it was even more reasonable to treat the cattle herd Ryan owned at the time of the marriage as being his separate property without requiring him to trace the specific animals. We note the facts of this case differ from *Shafer*, because the trial court in that case treated only a portion of the cattle herd owned at the time of the divorce as the husband's separate property and included a portion of the value of the herd as marital property to reflect that the herd had grown in size during the marriage. The court in this case treated the entire herd as Ryan's separate property even though the value of the herd had increased significantly. We determine that this difference was justified by the particular facts in this case.

With regard to Ryan's purchase of additional cattle using his separate inheritance, as noted above, property acquired by inheritance is an exception to the general rule that property acquired during the marriage is marital property, and an inheritance may remain separate property if it remains segregated or is traceable into its product. *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). In this case, in addition to Ryan's testimony regarding the increased market value, Ryan also presented evidence which allowed the district court

to trace a portion of Ryan's inheritance that was used to purchase additional cattle. Therefore, it was appropriate for the court to treat the cattle purchased using the inheritance as Ryan's separate property. Based on the record before the court, we conclude that the district court did not abuse its discretion when it determined that the cattle operation was Ryan's separate property, and we reject Krista's assignment of error.

Three LLCs.

Krista claims that the district court erred when it treated the 50-percent interests in the three LLCs that Ryan had gifted to her as marital property rather than as nonmarital property belonging to her. In his cross-appeal, Ryan claims that the district court erred when it found that his transfer of interests in the LLCs was a gift to Krista and included any portion of the LLCs as marital property rather than nonmarital property belonging entirely to him. Given the evidence, we determine that the district court did not err when it found that the transfer to Krista was a gift, but we conclude that it did err when it determined that Krista's interests were marital property rather than Krista's separate property.

We first address Ryan's claim that the district court erred when it found that his transfer to Krista of the interests in the LLCs was a gift. He argues that the transfers were merely an estate planning device and that he intended to keep the entirety of the interests as his separate property. He also argues that the fact that the interests in the LLCs transferred were to be held by Ryan and Krista as joint tenants should not lead to a presumption that he made a gift to Krista. He cites *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003), for the proposition that the manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's ability to determine how the property should be divided in an action for dissolution of marriage. Our point in *Schuman* was to disapprove a Court of Appeals' opinion to

the extent it could be read to hold that "nonmarital property which during a marriage is titled in joint tenancy cannot be considered as a nonmarital asset in an action for dissolution of marriage." 265 Neb. at 470, 658 N.W.2d at 39. In *Schuman*, we stated that the division of property "must depend upon the facts of the particular case and the equities involved." *Id*. Neither the district court nor this court is restricted in this case to an analysis of the documents which, standing alone, are not conclusive.

In the present case, the district court's finding that the transfer of interests in the three LLCs was a gift from Ryan to Krista was not based solely on the manner in which the property was titled or described in the assignment documents. Instead, there was testimonial evidence supporting the district court's ruling as well as several references in the transfer documents describing each transfer as being a "gift," based on which the court found, as urged by Krista, that Ryan intended to gift the 50-percent interests in the LLCs to Krista while retaining the 50-percent interests to himself. We find no error in such finding.

However, we conclude that having found Ryan had gifted the 50-percent interests in the LLCs to Krista, the court erred when it determined that the 50-percent interests Ryan had gifted to Krista were marital property but that the 50-percent interests he retained for himself were his separate property. Viewing the evidence regarding the transfers made by Ryan, we see two reasonable interpretations: (1) that Ryan gifted the 50-percent interests to Krista as her separate property and retained the 50-percent interests as his separate property or (2) that Ryan transferred 100-percent interests in the LLCs to the parties jointly. Under the second interpretation, it would have been proper to treat 100 percent of the interests as marital property subject to division in this action. As noted, the district court found the first interpretation was supported by the evidence. In the decree, the district court stated that "[Ryan's]

transfer to [Krista] of an interest in the LLCs was a gift from [Ryan] to [Krista]."

Having found the first interpretation, i.e., that Ryan gifted the 50-percent interests to Krista as her separate property and retained the 50-percent interests as his separate property, it would have been proper to treat each party's 50-percent interests as his or her separate, nonmarital property. Given the nature of the evidence under consideration, the court's determinations that Krista's 50-percent interests were marital property while Ryan's 50-percent interests were nonmarital property were not compatible with its finding that Ryan had gifted the 50-percent interests to Krista.

We therefore reverse the portion of the decree of dissolution in which the district court included Krista's 50-percent interests in the LLCs in the marital estate and divided her interests between her and Ryan. Instead, the court should have treated each party's 50-percent interests as separate property not subject to division and, upon remand, shall do so.

Debts of LLCs and Debt to Giffords.

In view of our resolution of the classification of the LLCs issue, the portion of the decree regarding the debts associated with the LLCs needs to be reexamined by the district court. Subparagraph 22(a) of the decree stated as follows:

> a. Because only one-half of the LLCs is a marital asset, for purposes of property equalization only one-half of the following debts associated with the LLCs should be taken into account in determining the value of the marital estate:
>
> (i) Hershey State Bank has a debt secured by the LLCs, in the total amount of $863,514.50, one-half of which is $431,757;
>
> (ii) Equitable business loan . . . is secured by property owned by Western Mobile Home Park, LLC, one-half of which is $53,800;

(iii) 2014 real estate taxes in the amount of $56,000 and are owed on real estate owned by the LLCs, one-half of which is $28,000;

(iv) The debt to Farmers State Bank is secured by property owned by Western Mobile Park, LLC, and one-half of the debt is $26,346.

Because the premise of subparagraph 22(a)(i) through (iv) is no longer accurate, we strike subparagraph 22(a)(i) through (iv) and direct the district court to reexamine the debts associated with the LLCs and, when calculating and dividing the marital estate upon remand, enter orders consistent with § 42-365.

Finally, Ryan claims in his cross-appeal that the court erred in its treatment of the debt to the Giffords associated with the Royal Colonial Inn. Given the evidence on this issue, the rationale of the district court's finding in subparagraph 22(d) of the decree that Ryan is not entitled to a deduction from the marital estate for the debt to the Giffords is not clear, and because we have determined above that the interests in the LLCs should be treated as the parties' separate properties, we reverse this finding and strike subparagraph 22(d) of the decree. We direct the district court to reexamine the evidence related to this debt and, when calculating and dividing the marital estates upon remand, enter orders consistent with § 42-365.

CONCLUSION

We determine that the district court did not err when it determined that the 50-percent interests in the three LLCs retained by Ryan were nonmarital property and the transfer of the 50-percent interests in the three LLCs to Krista was a gift, but it erred when it determined that the 50-percent interests in the LLCs that Ryan gifted to Krista should be part of the marital estate. We therefore reverse the district court's ruling which treated Krista's 50-percent interests in the three LLCs as marital property and divided them between

the parties. For the reasons explained above, we reverse and strike the decree's finding in subparagraph 22(a)(i) through (iv) and 22(d) related to the debts associated with the LLCs. We remand the cause to the district court with directions to treat the parties' respective 50-percent interests in the LLCs as nonmarital property, to reexamine the classification of debts associated with the three LLCs, and to redetermine the division of property based on such treatment. We find no abuse of discretion in the district court's determination that the cattle operation was Ryan's separate property, and we affirm this ruling.

Affirmed in part, and in part reversed and 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. Courtney W. Starks, appellant.

883 N.W.2d 310

Filed July 29, 2016. No. S-15-822.

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 records and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
4. ____: ____: ____. 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.
5. **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.
6. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
7. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** 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 his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.

8. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review.
9. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.
10. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
11. **Trial: Prosecuting Attorneys: Words and Phrases.** Prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.
12. **Trial: Evidence.** There are three components of a true violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963): The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

Courtney W. Starks, pro se.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

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

Miller-Lerman, J.

NATURE OF CASE

Courtney W. Starks, who stands convicted of first degree murder and use of a weapon to commit a felony, appeals the order of the district court for Douglas County which denied his motion for postconviction relief without an evidentiary hearing. Starks generally claimed that his counsel on direct appeal provided ineffective assistance by failing to raise several issues on appeal. We affirm the district court's denial of Starks' motion for postconviction relief.

STATEMENT OF FACTS

Starks was convicted of first degree murder and use of a weapon to commit a felony in connection with the death of Linda Wierzbicki in 1986. We affirmed his convictions and sentences in *State v. Starks*, 229 Neb. 482, 427 N.W.2d 297 (1988), and a complete discussion of the facts of the case may be found therein. Only those facts relevant to Starks' claims in the current postconviction action are set forth here.

One of Starks' assignments of error in his direct appeal was that the trial court erred when it failed to suppress his confession because the confession was the product of an illegal arrest. He argued that police officers "arrested" him and took him to police headquarters for questioning and that the officers lacked probable cause to believe he had committed the murder. We noted, however, that when Starks made the confession, he was not under arrest for this murder and that instead, he had been arrested for driving under the influence and had been transported to a police station for booking on several outstanding warrants that the arresting officer had discovered. Later that day, while Starks was still in jail based on this arrest, Officers James Wilson and Clyde Nutsch, neither of whom was the officer who had arrested Starks for driving under the influence, received a tip that Starks had been involved in the killing of Wierzbicki. Wilson and Nutsch discovered that Starks was already in custody,

and they transported him from the jail to police headquarters where they questioned him regarding the murder and he made his confession.

We concluded that Starks' assignment of error failed because he was not arrested by Wilson and Nutsch when he was taken to police headquarters for questioning. We reasoned that because Starks was already under arrest, "there was no new arrest, legal or otherwise, [and therefore] his confession was not the fruit of an illegal arrest, and the trial court did not err in refusing to suppress the confession." *State v. Starks*, 229 Neb. at 487, 427 N.W.2d at 300.

Starks filed a pro se motion for postconviction relief pursuant to Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2014), generally alleging ineffective assistance of appellate counsel. Although Starks had more than one appellate counsel, we adopt the singular reference to his counsel. In his motion for postconviction relief, Starks made several assertions that his counsel on direct appeal, who was different from his trial counsel, failed to adequately familiarize himself with Starks' case and that as a result, Starks was prejudiced by being denied appellate review of certain purportedly meritorious claims. Starks then set forth three specific errors that he claimed appellate counsel did not adequately present in the direct appeal.

Starks first claimed that the trial court had erred by admitting his confession "under an unconstitutional and erroneous standard." Starks specifically referred to the trial court's rejection of his argument that the police used deception in order to obtain the confession. At trial, the court determined that if there was deception, it did not produce a false or unworthy confession. Starks alleged that his appellate counsel "never assigned as error and argued that the trial court committed reversible error by admitting [his] confession under an erroneous standard." Starks alleged that the proper standard was "the totality of circumstances test."

Second, Starks claimed that there was prosecutorial misconduct in his trial, because the State allowed its witness, Nutsch,

to provide false testimony in connection with Starks' assertion that his confession was coerced. Starks alleged that at trial, he testified that Wilson and Nutsch had "used gruesome Polaroid photos as a form of psychological coercion to get him to confess." Starks further alleged that Nutsch testified, allegedly falsely, that the officers had not shown Starks any photographs and that they did not have any photographs at the time they interviewed Starks. The trial record shows that Nutsch testified that it took 24 hours to develop the film photographs taken at the scene and that the officers interviewed Starks within 24 hours after the murder had happened.

Starks claimed in his postconviction motion that "years after the trial," he came into possession of a report in which a police crime laboratory technician stated that she had taken seven Polaroid photographs which she had "turned over" to Nutsch. The relevant portion of the report was attached to Starks' postconviction motion. Starks argued that the report showed that Nutsch had lied when he said that he did not have any photographs at the time he interviewed Starks. Starks claimed in his postconviction motion that his counsel on direct appeal provided ineffective assistance when "counsel never assigned as error and argued that the prosecution committed reversible error by eliciting false testimony" from Nutsch.

Third, Starks claimed that at trial, the State did not fully comply with his discovery request for "all photographs," because the State did not provide the seven Polaroid photographs referenced in the laboratory technician's report. Starks alleged that such failure was a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), because the Polaroid photographs were material to his claim that his confession was the result of coercion and that they could have been used to impeach Nutsch's testimony to the effect that he did not have any photographs at the time he questioned Starks. In his postconviction motion, Starks asserted that counsel in his direct appeal "never assigned as error and

argued prosecutorial misconduct for suppression of requested Brady material."

The district court denied Starks' motion for postconviction relief without granting an evidentiary hearing. In its order denying the motion, the court first addressed Starks' allegation that his appellate counsel failed to adequately familiarize himself with the case. The court determined that this statement was a conclusory allegation and that Starks had failed to specify how the outcome would have been different if counsel had become more familiar with the case.

The court then addressed Starks' claim that appellate counsel had failed to assert that the trial court applied an improper standard when it reviewed the legality of Starks' confession. The court determined that this claim was without merit, because the legality of the confession was raised and reviewed on direct appeal and this court affirmed the trial court's ruling. The court further stated that it had reviewed the trial record and did not find any evidence that Starks' confession was obtained by police deception.

The court next addressed Starks' claim that appellate counsel failed to assert that the State knowingly presented false testimony, specifically Nutsch's trial testimony that he did not possess or show any photographs to Starks during the interview that resulted in his confession. The court determined that there was no evidence that Nutsch had testified falsely or that the State knew or should have known that Nutsch was giving false testimony. The court reasoned that although the laboratory technician's report stated that Polaroid photographs were given to Nutsch at some point, the report did not show that Nutsch had the photographs when he interviewed Starks.

The court finally addressed Starks' claim that appellate counsel failed to assert that the State committed a *Brady* violation when it did not provide the seven Polaroid photographs during the discovery process. The court found no merit to the claim and reasoned that it was logically inconsistent for

Starks to argue that he had never seen the Polaroid photographs but that the photographs were material to proving his claim that the police had coerced his confession by showing him the Polaroid photographs. The court noted that Starks did not allege that the photographs were newly discovered exculpatory evidence.

The district court concluded that the files and records in Starks' case affirmatively showed that Starks was entitled to no postconviction relief. The court therefore denied the motion without an evidentiary hearing.

Starks appeals.

ASSIGNMENT OF ERROR

Starks generally claims that the district court erred when it found that there was no merit to each of his claims and denied his motion for postconviction relief without an evidentiary hearing.

STANDARDS OF REVIEW

[1,2] 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 records and files affirmatively show that the defendant is entitled to no relief. *State v. DeJong*, 292 Neb. 305, 872 N.W.2d 275 (2015). A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015).

ANALYSIS

[3] Starks claims that the district court erred when it denied his postconviction motion without an evidentiary hearing. We therefore review standards relating to postconviction relief. The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2014), provides that

postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable. Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. DeJong, supra*.

[4,5] 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, supra*. 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.*

[6,7] Starks' postconviction claims center on the alleged ineffective assistance provided by his counsel on direct appeal. A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *Id*. 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 his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. DeJong, supra*. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *State v. DeJong*, *supra*. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *Id*.

[8-10] A claim of ineffective assistance of appellate counsel which could not have been raised on direct appeal may be raised on postconviction review. *State v. Nolan,* 292 Neb. 118, 870 N.W.2d 806 (2015). When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel actually prejudiced the defendant. *Id*. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise. *Id*. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Id*.

Starks initially argues that the district court erred when it determined that his allegation that his appellate counsel failed to adequately familiarize himself with the case was a conclusory allegation and that Starks failed to specify how the outcome would have been different if appellate counsel had become more familiar with the case. Starks contends that the court misread what he describes as "the preamble and introduction" to his specific claims of ineffective assistance of appellate counsel. Brief for appellant at 15. We therefore read this portion of Starks' motion for postconviction relief as being, as he characterizes it, an introduction to his specific claims of ineffective assistance of appellate counsel rather than as a separate claim for postconviction relief.

Reading Starks' postconviction motion in this manner, Starks alleged that appellate counsel failed to adequately familiarize himself with the record and that as a result, appellate counsel provided ineffective assistance when he failed to assert on direct appeal that (1) the trial court applied an improper standard when it reviewed the legality of Starks' confession, (2) the State knowingly presented false testimony by Nutsch to the effect that he did not possess or show any photographs to Starks during the interview that resulted in Starks' confession, and (3) the State committed a violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215

(1963), when it failed to provide the seven Polaroid photographs during discovery. The district court rejected each of these claims of ineffective assistance of appellate counsel, and, as we discuss below, we agree that these claims did not merit an evidentiary hearing or relief.

First, Starks alleged that appellate counsel failed to claim that the trial court applied an improper standard when it reviewed the legality of his confession. Contrary to this argument, in Starks' direct appeal to this court, *State v. Starks*, 229 Neb. 482, 427 N.W.2d 297 (1988), one of the assigned errors was that the trial court erred when it failed to suppress his confession. Although on direct appeal Starks did not specifically claim that the trial court used an improper standard, he argued that the trial court erred when it refused to suppress the confession, and this court fully examined this ruling.

Having reviewed the record, we agree with the district court's assessment that the trial record shows no error by the trial court in its consideration and rejection of Starks' challenge to his confession. In his postconviction motion, Starks contends that the trial court did not consider the evidence he presented to show that the police used deception and coercive tactics to obtain his confession. Contrary to this contention, the trial record shows that Starks testified that the police showed him gruesome photographs from the crime scene and he asserted at trial that the police used such tactics to overbear his will and force a confession. The record also shows that the State presented evidence to counter Starks' claims of an involuntary confession, including testimony by the police officer who obtained the confession.

After considering the evidence, the trial court rejected Starks' claim that the confession should be suppressed as having been coerced. Contrary to Starks' claim, the record does not show that the trial court failed to properly consider Starks' claims; instead, it shows that the trial court rejected his claim after considering the evidence. Furthermore, counsel on direct appeal challenged the legality of the confession. By its nature,

consideration of such challenge necessarily incorporated an assessment of the propriety of the trial court's legal analysis. We determined on direct appeal that "the trial court did not err in refusing to suppress the confession." *State v. Starks*, 229 Neb. at 487, 427 N.W.2d at 300. We therefore determine that the district court did not err when it rejected Starks' postconviction claim that his direct appeal counsel provided ineffective assistance by failing to raise issues regarding the legality of his confession.

Starks next asserts that appellate counsel failed to claim that the State engaged in prosecutorial misconduct by knowingly presenting false trial testimony by Nutsch to the effect that he did not possess or show any photographs to Starks during the interview that resulted in Starks' confession. Starks' argument in this respect is based on his alleged recent discovery of the laboratory technician's report in which it was stated that seven Polaroid photographs were given to Nutsch. The district court rejected this claim on the basis that the report did not show that the technician had given the Polaroid photographs to Nutsch before he interviewed Starks. We conclude that even if it could be inferred from the report that Nutsch had been given the Polaroid photographs before the interview, the district court properly rejected this claim.

[11] We have stated that prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial. *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

Fundamental to Starks' claim surrounding allegedly false testimony by Nutsch are Starks' testimony at trial that he was shown gruesome photographs and the allegation in his postconviction motion that he was shown "gruesome Polaroid photos as a form of psychological coercion." At trial, Starks in fact testified that he was shown gruesome photographs, which were in evidence, but he did not state that they were Polaroid photographs. The testimony of Nutsch at trial focused

on film photographs as distinguished from Polaroid photographs, and he stated that he did not show Starks photographs at the time of the interview because the "[c]rime Lab had the film, and it takes 24 hours for the film to turn around and come back and be developed and printed." Read broadly, the records and files show that although there was a conflict in the testimony as to whether photographs were shown to Starks, the discrepancy at trial was limited to whether film photographs were shown to Starks. The conflict was developed at trial. Even giving Starks the benefit of the assumption that he was shown gruesome photographs, we find there is no indication that the testimony of Nutsch, which was addressed to film photographs, was inaccurate or that the prosecutor knowingly presented false testimony. Given the context of the trial testimony surrounding the showing of photographs, we are not persuaded that Starks was denied his right to a fair trial.

The trial court rejected Starks' argument that his confession was coerced, and Starks has not shown how the existence of the Polaroid photographs would have changed the trial court's conclusion. In light of the record presented to the court in the original trial, we determine that the district court did not err when it rejected Starks' postconviction claim that appellate counsel provided ineffective assistance by failing to claim that the State engaged in prosecutorial misconduct by knowingly presenting false testimony by Nutsch.

[12] Finally, Starks alleged in his postconviction motion that appellate counsel failed to claim that the State committed a violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), when it failed to provide the Polaroid photographs during the discovery process. We have stated that there are three components of a true *Brady* violation: "'"The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have

ensued."'" *State v. Scott*, 284 Neb. 703, 719, 824 N.W.2d 668, 685 (2012). As explained below, we find no *Brady* violation, and therefore, appellate counsel was not deficient in failing to raise the *Brady* issue.

The Polaroid photographs are not in the record, and in any event, Starks has failed to demonstrate how their contents would have affected the outcome of this case. The report attached to the motion for postconviction relief states: "A total of seven (7) color polaroid photos were also taken by [the laboratory technician] and turned over to Officer NUTCH [sic]." The report does not otherwise directly disclose the contents of the Polaroid photographs. However, the report describes some photographs as depicting the driveway area, an air conditioning unit, and several shoe impressions. It is not clear that these mundane photographs were contained in the Polaroid photographs or other photographs.

Although we cannot infer—nor does Starks suggest—that the Polaroid photographs showed anything exculpatory for use by the accused, the report itself may have served to impeach the testimony of Nutsch, who claimed to have had no photographs at the time he interviewed Starks. But, as explained below, the record shows that the failure to produce this alleged *Brady* material was not prejudicial.

Even if the Polaroid photographs had been produced and their content was "gruesome," they could be no more gruesome than the enlarged photographs that were in fact received in evidence at the trial, explicitly showing the victim's bloodied body, and which, according to Starks, caused him to confess. At trial, Starks referred to these photographs as having overborne his will and caused him to confess. More and cumulative photographs, even if gruesome, would not have assisted Starks. Furthermore, at trial, Nutsch stated he had no photographs at the time he interviewed Starks. The accuracy of this testimony was directly challenged by the testimony of Starks, who referred to the photographs in evidence and testified that these were the photographs Nutsch had shown him

which caused him to confess. So, the persuasive value of the Polaroid photographs is absent and the credibility of Nutsch was in fact already made an issue at trial. The report and Polaroid photographs are not true *Brady* material, and Starks was not prejudiced by the absence of the report and Polaroid photographs from the trial. We therefore determine that the district court did not err when it rejected Starks' postconviction claim that appellate counsel provided ineffective assistance by failing to raise the alleged *Brady* violation.

CONCLUSION

We conclude that the district court did not err when it determined that a review of the records and files affirmatively showed that Starks' postconviction claims were without merit and did not entitle him to an evidentiary hearing. We therefore affirm the district court's order which denied Starks' motion for postconviction relief.

Affirmed.

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

State of Nebraska, appellee, v. Josip Milos, appellant.

882 N.W.2d 696

Filed July 29, 2016. No. S-15-1025.

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. **Constitutional Law: Search and Seizure.** The determination of whether the facts and circumstances constitute a voluntary consent to search, satisfying the Fourth Amendment, is a question of law.
3. **Criminal Law: Evidence: Appeal and Error.** 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. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
5. **Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.
6. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen. Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection.

7. **Police Officers and Sheriffs: Search and Seizure.** A tier-two police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning.
8. **Police Officers and Sheriffs: Search and Seizure: Arrests.** A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention.
9. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.
10. **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.
11. **Police Officers and Sheriffs: Search and Seizure.** In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.
12. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** An officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement.
13. **Constitutional Law: Warrantless Searches: Search and Seizure.** Warrantless searches and seizures are per se unreasonable under the Fourth Amendment, but a search undertaken with consent is a recognized exception.
14. **Search and Seizure.** In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne.
15. ____. Whether consent to search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent.
16. ____. Once given, consent to search may be withdrawn.
17. ____. Withdrawal of consent to search need not be communicated by "magic words," but an intent to withdraw consent must be made by unequivocal act or statement.
18. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** The standard for measuring the scope of a suspect's consent to search under the Fourth Amendment is that of objective reasonableness—what

would the typical reasonable person have understood by the exchange between the officer and the suspect?

19. **Police Officers and Sheriffs: Search and Seizure.** Conduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both.
20. **Warrantless Searches: Evidence.** A search of evidence in plain view is a recognized warrantless search exception.
21. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Mariclare Thomas for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

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

Cassel, J.

INTRODUCTION

Josip Milos appeals the overruling of his motion to suppress and his conviction for possession of a controlled substance. The totality of the circumstances demonstrates that (1) Milos' interaction with law enforcement was a tier-one police-citizen encounter and (2) he consented to a search. After Milos withdrew consent by placing his hand in the pocket being searched, the search did not continue. Rather, Milos threw the controlled substance to the ground in plain view. Because the district court did not err in overruling the motion to suppress and the evidence was sufficient to convict Milos, we affirm.

BACKGROUND

On March 17, 2014, at some point after 9 p.m., three law enforcement officers in plain clothes and an undercover vehicle were in the area of a carwash that was known for drug transactions. They were not investigating any report of criminal activity at that time, but, rather, were patrolling usual spots where drug transactions had occurred in the past. The officers turned into the carwash and observed two vehicles, a Dodge Caravan and a Chevrolet Tahoe, leave the parking lot. The officers lost track of the Tahoe and decided to follow the Caravan. As they were following the Caravan, two of the officers looked up the Tahoe's license plate on a mobile data terminal and discovered it belonged to an individual known to the officers as "a possible party who may be dealing in methamphetamine."

The Caravan appeared to approach the drive-through window of a fast-food restaurant and then parked in the restaurant's parking lot. The officers parked two stalls away from the Caravan. As one officer approached the passenger side of the Caravan, another officer spoke with Milos, the driver. The officer, who had his badge displayed, asked Milos if he would be "willing" to show his identification and to step out of the vehicle. Milos complied.

The officer asked if he could search Milos' pockets, and Milos gave permission. The officer thanked Milos "since this is all consensual" and again asked Milos if he would be willing to let the officer search Milos' pockets. Milos said "yes" and turned to face the car. When the officer tried to search Milos' front right pants pocket, Milos "jammed" his own hand into the pocket. The officer was concerned that Milos was reaching for a weapon, so the officer removed Milos' hand from the pocket and asked what he was doing. Milos replied that he was getting his cell phone charger. At that time, Milos had a cell phone charger in his right hand, which was in a tightly closed fist. Milos then "swiped" his left hand over his

right fist and threw a plastic baggie of what appeared to be methamphetamine on the ground. According to the officer, Milos did not withdraw his consent or attempt to limit the scope of the search. The State subsequently charged Milos with possession of a controlled substance.

Milos filed a motion to suppress statements and physical evidence obtained during the search. Following a hearing, the district court overruled the motion. The court found that consent was freely and voluntarily given. With regard to withdrawal of consent, the court stated:

> The instantaneous act of the officer starting into the pocket, [Milos] doing the same thing, whether that is particularly withdrawal of consent, I think the officer has some right . . . to worry about personal safety. At that point the hands come out of the pocket, . . . [Milos] then pulled his hands out of the pocket and discarded the baggie and [Milos] threw the baggie on the ground.
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> . . . [W]hether or not that consent was revoked or not, I'm not sure is relevant, maybe the Supreme Court will say it's relevant, but I don't think that's relevant because the hands come out of the pocket and then the drugs are displayed. To the extent — and I understand the factual nuances to the extent that [Milos] says at any point stop that, I think the officer has to stop. But the point where everybody reaches for the pocket and the drugs come out, I think that kind of instantaneous thing gives me at least enough to overrule the motion to suppress.

The case proceeded to a bench trial. The parties stipulated to the evidence, and Milos preserved his objection raised in the motion to suppress. The district court convicted Milos of possession of a controlled substance and sentenced Milos to probation.

Milos appealed, and we moved the case to our docket.[1]

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[1] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

ASSIGNMENTS OF ERROR

Milos assigns that the district court erred in overruling his motion to suppress and in finding sufficient evidence to convict him.

STANDARD OF REVIEW

[1] 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]

[2] The determination of whether the facts and circumstances constitute a voluntary consent to search, satisfying the Fourth Amendment, is a question of law.[3]

[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]

ANALYSIS

[4,5] The issues in this case center on the legality of the seizure of the methamphetamine. The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.[5] Evidence obtained as the fruit of an illegal search or seizure is inadmissible in a state prosecution and must be excluded.[6] Milos argues that the baggie of drugs should have

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[2] *State v. Woldt*, 293 Neb. 265, 876 N.W.2d 891 (2016).

[3] *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015).

[4] *State v. Jones*, 293 Neb. 452, 878 N.W.2d 379 (2016).

[5] *State v. Gilliam*, 292 Neb. 770, 874 N.W.2d 48 (2016).

[6] *Id.*

been suppressed, because it was discovered as the result of an illegal search and seizure.

Police-Citizen Encounter

[6-9] We have described three tiers of police-citizen encounters.[7] A tier-one police-citizen encounter involves the voluntary cooperation of the citizen elicited through noncoercive questioning and does not involve any restraint of liberty of the citizen. Because tier-one encounters do not rise to the level of a seizure, they are outside the realm of Fourth Amendment protection.[8] A tier-two police-citizen encounter involves a brief, nonintrusive detention during a frisk for weapons or preliminary questioning.[9] A tier-three police-citizen encounter constitutes an arrest, which involves a highly intrusive or lengthy search or detention.[10] Tier-two and tier-three police-citizen encounters are seizures sufficient to invoke the protections of the Fourth Amendment to the U.S. Constitution.[11]

[10-12] 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.[12] In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled.[13]

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[7] See *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[8] *State v. Gilliam, supra* note 5.

[9] See *id.*

[10] See *id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

But an officer's merely questioning an individual in a public place, such as asking for identification, is not a seizure subject to Fourth Amendment protections, so long as the questioning is carried on without interrupting or restraining the person's movement.[14]

The circumstances of the encounter demonstrate that it was a tier-one encounter. We have already recited the basic facts, which we do not repeat. It was dark outside, and the officers did not use their vehicle to trap the Caravan. The officer who spoke with Milos did not display a gun and did not direct Milos to step out of the vehicle. There is no evidence that the officer used a forceful tone of voice, touched Milos, or told Milos that he was not free to leave.

An officer's request that an individual step out of a parked vehicle does not automatically transform a tier-one police-citizen encounter into a tier-two encounter. Milos cites to a case from this court where we determined that an initial, tier-one encounter became a tier-two investigatory stop when the driver was asked to step out of his vehicle and to submit to field sobriety tests.[15] But there is no hard-and-fast rule that such a request results in a tier-two encounter; rather, the determination is driven by the totality of the circumstances. And as we discussed above, the totality of the circumstances lead to the conclusion that Milos was not seized. The circumstances surrounding the officer's request would not have made a reasonable person believe that he or she was not free to leave. We conclude that Milos was not seized when the officer asked if he would be willing to step out of the vehicle.

Search

[13-15] The officer did not need reasonable suspicion of criminal activity in order to search Milos, because Milos gave consent to search. Warrantless searches and seizures

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[14] See *id.*

[15] See *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

are per se unreasonable under the Fourth Amendment, but a search undertaken with consent is a recognized exception.[16] In order for a consent to search to be effective, it must be a free and unconstrained choice and not the product of a will overborne.[17] Whether consent to search was voluntary is to be determined from the totality of the circumstances surrounding the giving of consent.[18] Here, the officer denied using any threats, coercion, or force to obtain consent. The officer asked if Milos would be "willing" to let him search Milos' pockets, and Milos agreed that the officer could do so. Milos reaffirmed this permission even after the officer thanked him and mentioned that "this is all consensual." Based on the totality of the circumstances, Milos voluntarily consented to the search of his pockets.

[16-18] Once given, consent to search may be withdrawn.[19] Withdrawal of consent need not be communicated by "magic words," but an intent to withdraw consent must be made by unequivocal act or statement.[20] The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?[21]

[19] Conduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both.[22] And an officer conducting a consensual search has no authority to command the person being searched to stop interfering with

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[16] See *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

[17] *State v. Tyler, supra* note 3.

[18] *Id.*

[19] See *State v. Smith, supra* note 16.

[20] See *State v. Modlin*, 291 Neb. 660, 867 N.W.2d 609 (2015).

[21] *Id.*

[22] *State v. Smith, supra* note 16.

the search.[23] We have explained that a "suspect's deliberate interference with the search—actions designed to prevent law enforcement from searching further—are clearly sufficient to communicate a withdrawal of consent, because no reasonable observer could conclude that the suspect wanted the search to continue."[24]

Here, Milos placed his hand in the same pocket that the officer was trying to search, thereby interfering with the officer's ability to search. The officer then removed Milos' hand. These actions are inconsistent with a consensual search. The district court did not clearly decide whether Milos withdrew his consent, but we conclude that his actions sufficiently demonstrated a withdrawal of consent.

Plain View

Although Milos withdrew his consent to the search, the baggie of drugs was not discovered due to a continuation of the search. Rather, the evidence became plainly viewable due to Milos' own actions. After removing Milos' hand from the pocket, the officer saw Milos throw a baggie of what appeared to be methamphetamine on the ground.

[20,21] A search of evidence in plain view is another recognized warrantless search exception.[25] A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.[26]

All three elements were satisfied here. The officer was lawfully in the restaurant's parking lot. The baggie was in plain

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[23] *Id.*

[24] *Id.* at 932, 782 N.W.2d at 926.

[25] *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

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

view from that location. Based on the officer's training and experience, the incriminating nature of the baggie containing a crystalline substance that appeared to be methamphetamine was immediately apparent. And because the baggie was thrown in the same public area, the officer had a lawful right of access to the baggie.

The evidence was in plain view due to Milos' act of throwing the baggie on the ground. The district court did not err in overruling Milos' motion to suppress.

Sufficiency of Evidence

Milos premised his claim of insufficiency of the evidence on his argument that the evidence should have been suppressed. But we have already rejected his premise. It necessarily follows that his insufficiency argument fails. And he does not otherwise argue that the admitted evidence, including the baggie of methamphetamine, was insufficient to convict him of possession of a controlled substance. It clearly was sufficient.

CONCLUSION

We conclude that Milos was not seized for purposes of the Fourth Amendment, because the totality of the circumstances demonstrates that his interaction with law enforcement was a tier-one police-citizen encounter. The officer did not need reasonable suspicion of criminal activity to search Milos, because he consented to the search. Although Milos withdrew his consent to the search by placing his hand in the pocket being searched, there is no evidence that the officer continued the search after that point. Rather, the baggie of methamphetamine was in plain view of the officer after Milos threw it on the ground. Because the district court did not err in overruling the motion to suppress and the evidence was sufficient to convict Milos, we affirm.

Affirmed.

Connolly, J., not participating.

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

Drake-Williams Steel, Inc., appellant and cross-appellee, v. Continental Casualty Company, appellee and cross-appellant.

Employers Mutual Casualty Company and EMCASCO Insurance Company, appellees and cross-appellants, v. Drake-Williams Steel, Inc., appellant and cross-appellee.

883 N.W.2d 60

Filed August 5, 2016. Nos. S-15-445, S-15-446.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.
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. **Insurance: Contracts: Appeal and Error.** The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
4. **Insurance: Contracts.** In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.
5. **Insurance: Contracts: Proof.** In a coverage dispute between an insured and the insurer, the burden of proving prima facie coverage under a policy is upon the insured.
6. ____: ____: ____. If the insured meets the burden of establishing coverage of the claim, the burden shifts to the insurer to prove the applicability of an exclusion under the policy as an affirmative defense.

7. **Insurance: Contracts: Damages.** Standard commercial general liability policies provide coverage for accidents caused by faulty workmanship only if there is bodily injury or property damage to something other than the insured's work product.
8. **Insurance: Contracts.** The cost to repair and replace faulty workmanship is a business risk that is not covered under a commercial general liability policy.
9. **Insurance.** Business risks are normal, frequent, and predictable and do not involve the kind of fortuitous events for which insurance is obtained.
10. **Insurance: Contracts: Liability.** Where a product manufacturer is liable as a matter of contract to make good on or replace products that are defective or otherwise unsuitable because they are lacking in some capacity, the economic loss incurred because of the product or work is not what was bargained for as part of general liability coverage.
11. ____: ____: ____. There is a fundamental distinction between the noncovered business risk of having to correct faulty products or work and the covered risk of liability when faulty products or work cause damage to other property that cannot be corrected through the correction of the faulty products or work.

Appeals from the District Court for Douglas County: Joseph S. Troia, Judge. Affirmed.

Steven D. Davidson, of Baird Holm, L.L.P., and Thomas A. Vickers and Scott A. Ruksakiati, of Vanek, Vickers & Masini, P.C., for appellant.

Karen K. Bailey, of Engles, Ketcham, Olson & Keith, P.C., and John F. Maher, of Colliau, Carluccio, Keener, Morrow, Peterson & Parsons, for appellee Continental Casualty Company.

Marvin O. Kieckhafer, of Smith Peterson Law Firm, L.L.P., and Brian O'Gallagher, of Cremer, Spina, Shaughnessy, Jansen & Siegert, L.L.C., for appellees Employers Mutual Casualty Company and EMCASCO Insurance Company.

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

Wright, J.

I. NATURE OF CASE

This case concerns the meaning of coverage provisions in a general liability and umbrella policy insuring the fabricator of steel rebar under a purchase agreement with a general contractor. The rebar was improperly fabricated and had a reduced reinforcing capacity as a result. The defective rebar was incorporated into the construction of concrete pile caps that would form support for the Pinnacle Bank Arena (Arena). Several of the pile caps had to be modified in order to conform to the required specifications of the contract. The insurers refused to reimburse Drake-Williams Steel, Inc. (DWS), for costs incurred to modify these compromised pile caps. The insurers claimed the costs of the remedial measures did not fall under the coverage of the policies. The district court entered summary judgment in favor of the insurers. DWS appeals, and the insurers cross-appeal.

II. BACKGROUND

1. Rebar

M.A. Mortenson Company (Mortenson) is a general contractor hired by the city of Lincoln to build the Arena. Mortenson entered into a purchase agreement with DWS to supply rebar for the Arena. The rebar was improperly bent when it was fabricated by DWS and therefore did not conform to the terms of the purchase agreement. The rebar was incorporated into three components of the Arena: the columns, the grade beams, and the pile caps. The pile caps provide support for the Arena's columns, which in turn support the floor and the roof. The pile caps were made of concrete with reinforcing rebar and were installed below ground level on top of the concrete piles that extended to the bedrock. The grade beams were also made of concrete and rebar. The beams formed an oval around the Arena and connect different pile caps together and were also installed below ground level. DWS did not seek to recover any expenses for any corrections that were made to

the columns that contained the improperly bent rebar. No corrections were made to the grade beams.

The rebar was bent by DWS at too tight a radius and did not meet the specifications. This incorrect radius was determined to be the result of machine and operator error during the process of fabrication. Because of the incorrect radius, the rebar had approximately 50 percent of its normal reinforcing capacity. The nonconforming rebar that had not been cast in the concrete pile caps was removed and replaced by DWS. And DWS made no claim on this replacement. There were 52 pile caps that had been cast with improperly bent rebar. Approximately half of these pile caps with the nonconforming rebar would nevertheless perform adequately given the particular pile caps' shape or placement. But the other half were deemed incapable of providing the required structural support, because of the diminished reinforcing capacity of the nonconforming rebar. If these pile caps were not modified, they would not provide the support required. This could have resulted in a structural failure in part of the Arena. Engineers eventually determined that the most cost-effective solution was to install a reinforcing band around each of the compromised pile caps. This modification would provide the necessary structural support.

To modify these pile caps, new concrete was adhered to the sides of pile caps to make the existing pile caps wider. The new concrete was joined to the existing pile caps by new rebar that was drilled and epoxied into the existing pile caps. This process, once completed, made the pile caps wider and suitable for their intended purpose. The pile caps were essentially wrapped in a ring of concrete and rebar that would then perform as originally designed. The process required excavating around the pile caps, assembling a new form around the pile caps, placing rebar into that form, and pouring concrete into the form.

DWS initially refused to pay for the costs of the correction. Mortenson paid the costs and sought reimbursement from

DWS in the amount of $1,355,860. Eventually DWS reimbursed Mortenson. DWS sought coverage from its insurers. The insurers denied DWS' claim and commenced this action to determine their obligations under the policies of insurance.

2. Policies

For the period of November 1, 2010, to November 1, 2011, DWS was insured through a primary commercial general liability (CGL) policy with Employers Mutual Casualty Company (Employers). From November 1, 2011, to November 1, 2012, DWS was insured through a primary CGL policy with EMCASCO Insurance Company (EMCASCO). DWS was also insured during the relevant time period through an umbrella policy with Continental Casualty Company (Continental). DWS sought coverage under its CGL policies and the umbrella policy. We refer to the insurance companies collectively as "the Insurers."

The relevant coverage provisions of the umbrella policy with Continental are substantially similar to the provisions of the policies with Employers and EMCASCO.

(a) Damages and Property Damage

The policies agreed to cover "those sums that [DWS] becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies."

"Property damage" is defined by the EMCASCO policy as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
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> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

(b) Occurrence

The insurance applied to "'property damage' only if" the property damage "is caused by an 'occurrence.'"

"Occurrence" is defined by the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

3. Denial of Claim and Suit

The Insurers refused reimbursement under the coverage provisions and exclusions in their respective policies. Employers and EMCASCO eventually brought suit against DWS for declaratory judgment. DWS counterclaimed with actions for declaratory judgment and breach of contract. DWS also filed a separate complaint against Continental for declaratory judgment and breach of contract. The cases were consolidated.

The district court entered summary judgment in favor of the Insurers and overruled DWS' motion for partial summary judgment. The district court reasoned:

> Having now fully reviewed the exhibits, pleadings, arguments of counsel and the law, the Court finds that the pile caps with the nonconforming rebar (DWS's product) were damaged as a result of the nonconforming rebar in that the pile caps were deficient and unable to sustain the load that they were designed for had the proper rebar been used. The majority of courts have found that faulty workmanship would not constitute an accident and, therefore, be an occurrence per policy. The Court finds that for the impaired property exclusion to apply, it would have been necessary for the rebar to be repaired, replaced, adjusted, or removed. By installing the collar/band around the pile caps the impaired pile caps were restored to their intended use and there was no occurrence. The Court, therefore, finds that the "impaired property" exclusion applies.

DWS appeals. The Insurers cross-appeal.

III. ASSIGNMENTS OF ERROR

DWS assigns that the district court erred in (1) overruling DWS' motions for summary judgment, (2) sustaining the

Insurers' motions for summary judgment, (3) determining that there was no occurrence as defined in the policies, and (4) finding that the "impaired property" exclusion applied to preclude coverage.

The Insurers cross-appeal to the extent that the district court found that damages at issue consisted of "property damage" under the policies.

IV. STANDARD OF REVIEW

[1] The interpretation of an insurance policy presents a question of law that we decide independently of the trial court.[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]

V. ANALYSIS

[3,4] The facts are not disputed; the correctness of the district court's order in favor of the Insurers depends on the interpretation of the CGL policies. The meaning of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.[3] In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.[4]

[5,6] In a coverage dispute between an insured and the insurer, the burden of proving prima facie coverage under a

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[1] *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011).

[2] *Phillips v. Liberty Mut. Ins. Co.*, 293 Neb. 123, 876 N.W.2d 361 (2016).

[3] *Auto-Owners Ins. Co. v. Home Pride Cos.*, 268 Neb. 528, 684 N.W.2d 571 (2004).

[4] *Id.*

policy is upon the insured.[5] If the insured meets the burden of establishing coverage of the claim, the burden shifts to the insurer to prove the applicability of an exclusion under the policy as an affirmative defense.[6] The district court concluded that there was not an occurrence and also concluded, in the alternative, that the impaired property exclusion applied. We find as a matter of law that there was no "property damage." Therefore, for different reasons from those stated by the district court, we conclude there was no coverage.[7] Because there was no coverage under the policies, we do not determine the applicability of any exclusions.

In a similar case, the court in *F & H Const. v. ITT Hartford Ins. Co.*[8] held that there was no property damage under the CGL policy. The insured was to supply pile caps fabricated with a certain grade of steel. The insured mistakenly supplied caps with an inferior grade of steel. Those caps were welded onto steel piles before the defect was discovered. As a result, the structural units were inadequate for their intended purpose. In order to avoid the prohibitive cost of removing and replacing the piles, or cutting off the pile caps, the insured modified the pile caps by adding stiffener ribs and welding them onto the piles. Doing so resulted in the necessary structural support for the building. The project was thereby completed on time, and there was no claim for liquidated damages.

The question presented was whether welding defective pile caps to the piles was property damage within the meaning of the policy, because the welded units were inadequate to meet

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[5] See, *Farm Bureau Ins. Co. v. Martinsen*, 265 Neb. 770, 659 N.W.2d 823 (2003); 44A Am. Jur. 2d *Insurance* § 1974 (2013).

[6] 44A Am. Jur. 2d, *supra* note 5.

[7] See *Hamilton Cty. EMS Assn. v. Hamilton Cty.*, 291 Neb. 495, 866 N.W.2d 523 (2015).

[8] *F & H Const. v. ITT Hartford Ins. Co.*, 118 Cal. App. 4th 364, 12 Cal. Rptr. 3d 896 (2004).

contractual design specifications. The parties did not dispute that an occurrence took place within the "coverage territory" and during the "policy period."

The court held that the costs of remediation were not "property damage" under the policy.[9] The court stated the prevailing view was that incorporation of a defective component or product into a larger structure does not constitute property damage unless and until the defective component causes physical injury to tangible property in at least some other part of the system.[10] Property damage is not established by the mere failure of a defective product to perform as intended.[11]

The court explained that while the defective caps may have rendered the piles inadequate for their intended purpose, the insured was able to provide modifications to create an adequate structural unit such that the caps ultimately served their intended purpose.[12] It found that there was no physical injury and that there was no "loss of use," as that term is commonly understood; i.e., the rental value of similar property that the plaintiff can hire for use while deprived of the use of his or her own property.[13] The court noted the costs of modifying the pile caps was unrelated to rental value.[14]

[7-9] The court's conclusion in *F & H Const.* comports with the general principle that standard CGL policies provide coverage for accidents caused by faulty workmanship only if there is bodily injury or property damage to something other than the insured's work product.[15] The cost to repair and replace faulty workmanship is a business risk that is not covered

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[9] *Id.*

[10] *Id.* See, also, *Wisconsin Pharmacal v. Nebraska Cultures*, 367 Wis. 2d 221, 876 N.W.2d 72 (2016).

[11] *Id.*

[12] *F & H Const. v. ITT Hartford Ins. Co., supra* note 8.

[13] See *id.*

[14] *Id.*

[15] See *id.*

under a CGL policy.[16] Business risks are "normal, frequent, and predictable" and do not involve the kind of fortuitous events for which insurance is obtained.[17] As one commentator has explained:

> Replacement and repair costs are to some degree within the control of the insured. They can be minimized by careful purchasing, inspection of material, quality control and hiring policies. If replacement and repair costs were covered, the incentive to exercise care or to make repairs at the least possible cost would be lessened since the insurance company would be footing the bill for all scrap.[18]

[10] Where a product manufacturer is liable as a matter of contract to make good on or replace products that are defective or otherwise unsuitable because they are lacking in some capacity, the economic loss incurred because of the product or work is not what was bargained for as part of general liability coverage. It is a business risk within the insured's control and generally excluded from coverage.[19]

[11] There is a fundamental distinction between the noncovered business risk of having to correct faulty products or work and the covered risk of liability when faulty products or work cause damage to other property that cannot be corrected through the correction of the faulty products or work.[20] A CGL

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[16] See *id*. See, also, e.g., *LaMarche v. Shelby Mut. Ins. Co.*, 390 So. 2d 325 (Fla. 1980).

[17] Scott C. Turner, *Insurance Coverage of Construction Disputes* § 27:1 (2002). See, also, *American Family Mut. v. American Girl, Inc.*, 268 Wis. 2d 16, 673 N.W.2d 65 (2004).

[18] Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 Stan. L. Rev. 812, 825-26 (1961).

[19] See Michael J. Brady, *The Impaired Property Exclusion: Finding a Path Through the Morass. Exclusion M of the ISO CGL Policy Is a Complex and Intricate Provision, With Little and Disparate Case Law to Guide the Way*, 63 Def. Couns. J. 380 (1996).

[20] See *Zurich American Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487 (Tex. 2008).

policy is intended to cover an insured's tort liability for physical injury or property damages, not economic losses due to business risks.[21] As another commentator has noted:

> The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.[22]

Again, "Property damage" is defined by the policies at issue as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
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> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Concrete and the rebar were part of the integrated system of the pile caps. There was no "physical injury" to the rebar

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[21] *Federated Serv. Ins. Co. v. Alliance Constr., supra* note 1.

[22] Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971).

or the pile caps in which the rebar was cemented. The improperly bent rebar still performed a structural reinforcement but was not as strong as it would have been if bent correctly. Because the defective rebar was discovered before the arena was further constructed, there was no damage to other parts of the system.[23] And because the pile caps could be modified to meet the contractual requirements, rather than destroying and rebuilding the pile caps, there was no physical damage to the pile caps themselves. The pile caps could be modified without any physical damage to any other part of the Arena.

Furthermore, there was no claim by DWS for damages due to the temporary loss of use of the Arena during the period of remediation. Therefore, there was no "loss of use,"[24] as that phrase is understood in the context of "property damage."

The reinforcement of the pile caps was simply part of DWS' contractual obligation to make good on its work. In the purchase agreement, DWS warranted and guaranteed to furnish the rebar free from defects and in compliance with the contract documents. The agreement provided that without costs to the contractor or owner, DWS shall promptly remove or replace defective material and any other work affected by such correction. This liability is not what CGL policies are designed to protect against.[25] The costs of reinforcing the inadequately reinforced pile caps was a business risk and not the kind of fortuitous event for which a CGL policy is obtained.[26]

We do not say that any and all damage arising out of completed work performed by an insured and its subcontractors

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[23] See *Regional Steel v. Liberty Surplus Ins.*, 226 Cal. App. 4th 1377, 173 Cal. Rptr. 3d 91 (2014).

[24] See James Duffy O'Connor, *Construction Defects: "Property Damage" and the Commercial General Liability Policy*, 24-SPG Construction Law 11 (2004).

[25] See Henderson, *supra* note 22.

[26] See Turner, *supra* note 17.

is never "property damage" covered under a CGL policy. Depending upon the facts and the method used to correct the defect, there may or may not be coverage under the policy. For example, one method of correcting the existing problem in this case would have been to demolish and replace the pile caps. This would have resulted in damage to other property—the pile caps. But this option was rejected because of the significant cost of $5 to $6 million and its impact on the project schedule.

Other options were actually considered and rejected on the basis of viability, costs, or actual effectiveness of the proposed fix to the problem. Eventually, the solution agreed to by the parties was the installation of a concrete collar around the pile caps. This solution was the most cost effective and most likely to accomplish the goal of the modification. It was understood that the rebar itself was not repaired or replaced, but that instead, the pile caps were modified by way of a retrofit in order to provide the required structural support. We hold that this solution did not involve "property damage."

DWS argues that *Auto-Owners Ins. Co. v. Home Pride Cos.*[27] supports coverage under the policies. We disagree. In *Auto-Owners Ins. Co.*, the owner of an apartment complex contracted with the builder to install new shingles on a number of the buildings. The work was subcontracted. The owner noticed problems with the roof and brought suit against the subcontractor alleging faulty workmanship that had caused substantial damage to the roof structure and the buildings. The insurer filed a declaratory judgment, and the court entered summary judgment, concluding the insured was not covered under the general liability policy. On appeal, we reversed, concluding that the insurer had a duty to defend and that, to the extent the insured may be found liable for the resulting damage to the roof structures and the buildings, the insurer was obligated to provide coverage.

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[27] *Auto-Owners Ins. Co. v. Home Pride Cos.*, *supra* note 3.

In *Auto-Owners Ins. Co.*, we reasoned that damages to the roof structures and buildings represented an unintended and unexpected consequence of the contractor's faulty workmanship and went beyond damages to the contractor's own work product; therefore, the petition properly alleged an occurrence and stated a cause for physical injury to tangible property and, therefore, "property damage" under the policy. Once coverage was established, we then examined the policy's exclusions; and because the damages could not be repaired or restored by simply reshingling, they were not excluded by the policy.

The facts in the case at bar are distinguishable. Here, the insured's defective work product did not damage other property. And the inadequacies of the product could be remedied through modification of the integrated pile caps, so as to conform to the required specifications.

Unlike in *Auto-Owners Ins. Co.*, the amount that DWS seeks to recover is the costs incurred to make the pile caps conform to the work that DWS contracted to provide. To construe the CGL policies' definition of property damage to include the modification to the pile caps, which were inadequate due solely to DWS' failure to fulfill its duties under its contract with the general contractor, would convert the CGL policies into performance bonds insuring DWS' business risks. That is not the intent of the CGL policies in question.

VI. CONCLUSION

We affirm the order of summary judgment in favor of the Insurers, but on different grounds from those stated by the court below. Insofar as the court found there was "property damage," we find merit to the Insurers' cross-appeals. Because the costs for which DWS sought reimbursement were not derived from any physical damage to the pile caps or their temporary loss of use, there was no property damage, and thus no coverage, under the CGL policies.

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

State of Florida, ex rel. Department of Insurance of the State of Florida, receiver for United Southern Assurance Company, a Florida corporation authorized to transact an insurance business in Florida, appellee, v. Countrywide Truck Insurance Agency, Inc., a Florida corporation, et al., appellees, and William E. Gast, appellant.

883 N.W.2d 69

Filed August 5, 2016. No. S-15-515.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **Attorney and Client.** Persons not licensed to practice law in Nebraska are prohibited from prosecuting an action or filing papers in the courts of this state on behalf of another.
3. **Standing: Claims: Parties.** To have standing, a litigant must assert the litigant's own rights and interests.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a judgment, decree, or final order entered by the court from which the appeal is timely taken.
5. **Jurisdiction: Appeal and Error.** Where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
6. **Jurisdiction: Recusal.** Where an attorney pursues a motion for recusal that is frivolous or made in bad faith, the district court has jurisdiction to enter a sanction under Neb. Rev. Stat. § 25-824 (Reissue 2008) when it is timely requested, regardless of whether the district court lacked jurisdiction to adjudicate the merits of the underlying dispute.
7. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

William E. Gast, pro se.

Robert F. Craig and Anna M. Bednar, of Robert F. Craig, P.C., for appellee State of Florida.

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

Cassel, J.

I. INTRODUCTION

William E. Gast appeals from a district court order sanctioning him for filing a frivolous motion to recuse the trial judge. Gast challenges the district court's jurisdiction to enter the order. We conclude that the district court had jurisdiction to sanction Gast for a frivolous motion, regardless of whether it had jurisdiction over the underlying case. We therefore affirm the district court's order.

II. BACKGROUND

1. Procedural History

This case has a long and complicated procedural history, most of which is irrelevant in this appeal. Briefly summarized, this action began in 1998, when the State of Florida filed a complaint on the relation of the Department of Insurance of the State of Florida, which was appointed as receiver of United Southern Assurance Company, an insolvent insurance company. Florida named Countrywide Truck Insurance Agency, Inc. (Truck), Countrywide Insurance Agency, Inc. (Agency), and David L. Fulkerson as defendants. It alleged that Truck owed money to United Southern Assurance Company and that Fulkerson used Truck and Agency to convert that money to his personal use.

In the course of the litigation, this case reached this court at least three times—in 1999,[1] 2005,[2] and 2008.[3] In 2008, we reversed an order directing a verdict in favor of Florida. The state of the record makes it difficult to discern what happened next. Gast did not file a praecipe for a bill of exceptions in this appeal, and he does not cite to a bill of exceptions in his brief.

The parties' pleadings and the district court's orders in the transcript indicate that Fulkerson died in 2009 and that probate proceedings began. Diederike M. Fulkerson, Fulkerson's wife, became personal representative of Fulkerson's estate. And the estate was added as a defendant in this case. Through Diederike's filings in the probate proceeding, Florida discovered that Diederike was a partner or co-owner in Truck and Agency and that Fulkerson had transferred certain funds or assets to her before his death. Florida filed a motion for revivor in district court requesting that the court revive the action and allow it to substitute Diederike as a defendant. The district court sustained the motion for revivor, and Florida dismissed Fulkerson's estate as a party. At the conclusion of the probate proceedings, the probate court discharged Florida's cause of action against Fulkerson's estate.

2. Orders at Issue

(a) Judgment

On May 12, 2015, the district court entered an order against Truck, Agency, and Diederike. It concluded that Fulkerson fraudulently transferred the money Truck owed United

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[1] *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999).

[2] *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

[3] *State of Florida v. Countrywide Truck Ins. Agency*, 275 Neb. 842, 749 N.W.2d 894 (2008).

Southern Assurance Company to Agency and that he later transferred it to himself and Diederike.

Agency and Diederike, whom Gast was then representing, filed a notice of appeal on May 27, 2015, which stated their intention to prosecute an appeal from the May 12 order. The appeal was docketed in this court under case No. S-15-476 (first appeal). We later dismissed that first appeal for failure to file briefs.

(b) Sanctions

On May 29, 2015, the district court entered an order sanctioning Gast (sanctions order) for filing a frivolous motion to recuse. It concluded that Gast's motion to recuse "was groundless and frivolous," and it ordered Gast to personally pay Florida $15,000 in attorney fees.

Gast filed a notice of appeal on June 5, 2015, and the appeal was docketed in this court as case No. S-15-515 (second appeal). The notice of appeal stated that Gast, plus Agency and Diederike, intended to prosecute an appeal from the sanctions order. But by the time that Gast filed a brief in the second appeal, his license to practice law in the State of Nebraska had been suspended. Because it was not clear from the brief whether Gast filed it in his own behalf or in a representative capacity for Agency and Diederike, we issued an order to show cause why the brief should not be stricken as having been filed by a person not authorized to practice law. After Gast responded, we ordered that we would consider Gast's brief as filed in a pro se capacity on behalf of Gast only, and not in a representative capacity as an attorney for any other party. Agency and Diederike did not file a separate brief.

III. ASSIGNMENTS OF ERROR

Gast assigns that the district court erred in (1) "entertaining subject matter jurisdiction and entering judgment against . . . Diederike . . . and her attorney, . . . Gast"; (2) denying the motion to recuse; and (3) failing to sanction Florida.

IV. STANDARD OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.[4]

V. ANALYSIS

[2,3] First, we note that we cannot address Gast's second and third assignments of error, because they assert claims belonging to Agency and Diederike. Gast cannot assert these claims on their behalf, because at the time he filed the brief, his license to practice law had been suspended. Persons not licensed to practice law in Nebraska are prohibited from prosecuting an action or filing papers in the courts of this state on behalf of another.[5] And Gast has no standing to assert the second and third assigned errors in his own behalf. To have standing, a litigant must assert the litigant's own rights and interests.[6] As a nonparty in the underlying case, Gast has no personal right or interest related to the court's denial of the motion to recuse or its failure to sanction Florida.

We therefore turn to Gast's first assignment of error. Gast assigns that the district court erred in entering judgment against Diederike and against him, because it lacked subject matter jurisdiction. Again, we will not address Gast's claims regarding Diederike, because he cannot assert claims on her behalf. Therefore, we determine only whether the district court had jurisdiction to sanction Gast.

[4] Gast's argument does not contest the finality of the sanctions order. For an appellate court to acquire jurisdiction of an appeal, there must be a judgment, decree, or final order entered by the court from which the appeal is timely taken.[7] When the district court entered the sanctions order,

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[4] *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015).

[5] *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

[6] *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013).

[7] *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006).

the court had already disposed of all of the claims raised in the underlying litigation. Thus, the sanctions order was final and appealable.[8]

[5] Rather, Gast argues that the district court lacked jurisdiction of the underlying dispute. He premises the lack of the district court's jurisdiction on the probate court's discharge of Florida's claim against Fulkerson. He then argues that Fulkerson's estate was a necessary party. He does not make any argument regarding the sanctions order in his brief. But through his challenge to the district court's jurisdiction in the underlying case, he impliedly argues that the district court lacked jurisdiction to sanction him. And, of course, where the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.[9]

We conclude that whether the district court had jurisdiction in the underlying case is irrelevant, because the district court had jurisdiction to sanction Gast. We are persuaded by the U.S. Supreme Court's analysis in *Willy v. Coastal Corp.*,[10] where the Court held that a federal district court order sanctioning an attorney pursuant to Fed. R. Civ. P. 11 may stand, even where it is later determined that the district court lacked subject matter jurisdiction over the underlying case. The Court reasoned that attorney sanctions are authorized by the Federal Rules of Civil Procedure and that they are collateral to the merits of the case. It stated: "'[An] imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.'"[11] It also

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[8] See *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

[9] *Deuth v. Ratigan*, 256 Neb. 419, 590 N.W.2d 366 (1999).

[10] *Willy v. Coastal Corp.*, 503 U.S. 131, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992).

[11] *Id.*, 503 U.S. at 138 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)).

reasoned that "the maintenance of orderly procedure" justifies upholding the sanction.[12]

The Supreme Court's reasoning in *Willy* applies to sanctions imposed on attorneys pursuant to Neb. Rev. Stat. § 25-824 (Reissue 2008). This section authorizes district courts to assess attorney fees against an attorney "who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith."[13] Like Fed. R. Civ. P. 11, an award of attorney fees under § 25-824 does not adjudicate the merits of the case. Rather, it reflects the court's determination that the attorney abused the judicial process by pursuing a claim that is frivolous or made in bad faith.

[6] We hold that where an attorney pursues a motion for recusal that is frivolous or made in bad faith, the district court has jurisdiction to enter a sanction under § 25-824 when it is timely requested, regardless of whether the district court lacked jurisdiction to adjudicate the merits of the underlying dispute. Accordingly, we conclude that the district court had jurisdiction to sanction Gast.

[7] Gast does not question the factual basis for the sanction or the amount of the sanction imposed. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[14] Thus, we do not consider either of these matters.

VI. CONCLUSION

The district court had jurisdiction to sanction Gast for filing a frivolous motion. We therefore affirm the court's order.

Affirmed.

Connolly, J., not participating.

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[12] *Id.*, 503 U.S. at 137.

[13] § 25-824(2).

[14] *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015).

Nebraska Supreme Court
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Lawrence M. Bixenmann and Norma J. Bixenmann, appellants, v. Dickinson Land Surveyors, Inc., appellee.

882 N.W.2d 910

Filed August 5, 2016. No. S-15-695.

1. **Malpractice: Expert Witnesses: Presumptions: Words and Phrases.** Under the "common knowledge" exception, a party may make a prima facie case of professional negligence even without expert testimony in cases where the evidence and circumstances are such that recognition of the alleged negligence may be presumed to be within the comprehension of laypersons.
2. **Malpractice: Expert Witnesses: Words and Phrases.** The "common knowledge" exception for professional negligence purposes is limited to cases of extreme and obvious misconduct.
3. **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.
4. ____: ____. 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.
5. **Malpractice: Words and Phrases.** Whether a particular vocation is a profession for professional negligence purposes is a question of law that is determined independently of the trial court.
6. ____: ____. The requirement of a license to practice one's occupation, although not dispositive, strongly indicates that an occupation is a profession for professional negligence purposes.
7. ____: ____. Registered surveyors are professionals for purposes of professional negligence.

8. **Malpractice: Expert Witnesses: Proof.** The general rule is that expert testimony is required to identify the applicable standard of care in professional negligence cases.
9. **Malpractice: Liability: Fraud.** Absent proof of fraud or some other extraordinary facts that would override the general rule, professionals are not liable in negligence to third parties with whom they are not in privity of contract.
10. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

James R. Welsh and Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellants.

Albert M. Engles and Brock S.J. Hubert, of Engles, Ketcham, Olson & Keith, P.C., and, on brief, James C. Boesen for appellee.

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

Wright, J.

NATURE OF CASE

The appellants, Lawrence M. Bixenmann and Norma J. Bixenmann, brought a negligence action against Dickinson Land Surveyors, Inc. (Dickinson). Lawrence tripped and fell on a stake that the owner of Dickinson, a licensed surveyor, had placed on the Bixenmanns' property while performing a land survey. The district court for Douglas County dismissed the Bixenmanns' complaint with prejudice and granted summary judgment in favor of Dickinson. The court determined that surveyors are professionals and that the Bixenmanns were required to present expert testimony as to the standard of care required of surveyors in order to rebut the evidence presented by Dickinson. The court further concluded that the alleged negligence was not within the comprehension of laypersons

and that the "common knowledge" exception to the requirement of expert testimony did not apply.

BACKGROUND

The accident at issue in this case occurred on property which, at the time, was owned by the Bixenmanns, in Keith County, Nebraska. The property contained a large building which the Bixenmanns used for storage. During the summer of 2010, the Bixenmanns entered negotiations to sell the property to a third party. As a precondition of sale, the prospective buyers requested that a survey be conducted to identify the boundaries of the property. The Bixenmanns agreed to the survey so long as the prospective buyers paid for it.

In June 2010, the prospective buyers hired Dickinson to complete a basic boundary survey of the property. The owner of Dickinson located the boundaries and drove lengths of rebar flush into the ground. He then marked the four corners of the property with wooden stakes tied with ribbon, which were securely driven into the ground. The stakes extended approximately 12 inches above ground and were surrounded by 1 to 2 inches of grass but were visible, in plain sight. Lawrence was present during the surveying and witnessed Dickinson doing a portion of the survey.

On June 22, 2010, the Bixenmanns visited the property to retrieve two lawnmowers that were being stored in the building. They loaded the lawnmowers and left to complete yardwork at a different location. They returned later that evening to place the lawnmowers back into the storage building. Lawrence was in the process of unloading one of the lawnmowers from a trailer when he tripped on one of the survey stakes and fell, causing serious injuries to his left hip. The stake was located near the driveway that accessed the storage building.

The Bixenmanns brought an action against Dickinson for negligence and loss of consortium. Dickinson moved for summary judgment, which the district court granted. The district

court determined that Dickinson was a professional, noting that surveyors are licensed by the state and that their work is overseen by state agencies and a regulatory board. Given that Dickinson was a professional, the court found that any failure to exercise reasonable care must be proved by expert testimony. The owner of Dickinson submitted an affidavit stating that he is a licensed professional land surveyor in the State of Nebraska.

The owner of Dickinson averred that the purpose of marking and staking the boundaries was to clearly identify the boundaries for the benefit of the party commissioning the survey. It is his practice to leave markers and stakes on the property in order to clearly identify the boundaries for the customer. This practice is standard in the surveying industry and generally accepted in the State of Nebraska. Removing the boundary markers or stakes at the completion of the survey would defeat the purpose of surveying the property. The owner of Dickinson stated that he was familiar with the standard of care in the surveying industry in the State of Nebraska and that he complied with the applicable standard in completing the survey in this matter. Because the Bixenmanns failed to present expert testimony to rebut the owner's affidavit, the district court found that they could not prevail as a matter of law.

[1,2] The district court recognized that under the "common knowledge" exception, a party may make a prima facie case of professional negligence even without expert testimony in cases where the evidence and circumstances are such that recognition of the alleged negligence may be presumed to be within the comprehension of laypersons.[1] However, this common knowledge exception is limited to cases of extreme and obvious misconduct.[2] The district court determined that the exception did not apply in this case, due to the specialized nature

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[1] *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008).

[2] *Id.*

of the surveying work and because Dickinson's conduct was not extreme or obvious. The Bixenmanns appeal.

ASSIGNMENTS OF ERROR

The Bixenmanns assign that the district court erred in (1) finding that the owner of Dickinson was a professional, (2) holding that the Bixenmanns were required to present expert testimony as to the standard of care of a surveyor to rebut the owner's affidavit, (3) finding that the alleged negligence was not within the comprehension of laypersons so that the "common knowledge" exception could not be applied, and (4) entering summary judgment in favor of Dickinson.

STANDARD OF REVIEW

[3,4] 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] 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]

ANALYSIS

[5] This case initially presents a question of law which we have not previously decided: whether surveyors are professionals for purposes of professional negligence. Whether a particular vocation is a profession is a question of law that is determined independently of the trial court.[5]

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[3] *Sulu v. Magana*, 293 Neb. 148, 879 N.W.2d 674 (2016).

[4] *Id.*

[5] See *Churchill v. Columbus Comm. Hosp.*, 285 Neb. 759, 830 N.W.2d 53 (2013).

We have defined a "profession" as

> "'a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service.'"[6]

[6] Additionally, we have held that the requirement of a license to practice one's occupation, although not dispositive, "strongly indicates that an occupation is a profession."[7] However, the requirement of a license alone does not make an occupation a profession, as the preparation and training required to procure that license are also important factors.[8] Although we have held that a college degree indicates such preparation and training,[9] a college degree itself is not required.[10]

In *Churchill v. Columbus Comm. Hosp.*,[11] we determined that physical therapists are professionals, based largely on the requirements of the Physical Therapy Practice Act,[12] which requires that physical therapists be licensed and sets forth the requirements for licensure. Under that act, obtaining a license requires completing an approved educational program and an examination. We held that these requirements indicate

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[6] *Id.* at 765-66, 830 N.W.2d at 58, quoting *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987).

[7] *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 246, 583 N.W.2d 331, 335 (1998).

[8] See *Parks v. Merrill, Lynch*, 268 Neb. 499, 684 N.W.2d 543 (2004).

[9] See *Jorgensen v. State Nat. Bank & Trust, supra* note 7.

[10] See *Cooper v. Paap*, 10 Neb. App. 243, 634 N.W.2d 266 (2001).

[11] *Churchill v. Columbus Comm. Hosp., supra* note 5.

[12] Neb. Rev. Stat. § 38-2901 et seq. (Reissue 2008).

that physical therapists complete the "'long and intensive program of preparation'" that is required of professionals.[13] Additionally, we noted that physical therapists render a public service and are subject to both mandatory continuing education requirements and professional discipline for ethical violations and failure to follow professional practice.

The Nebraska Court of Appeals similarly concluded in *Cooper v. Paap*[14] that abstractors were professionals, based on the requirements of the Abstracters Act.[15] It reasoned that abstractors must be licensed, which requires that they pass a written examination and prove they have 1 year of verified land title-related experience. Once licensed, abstractors are subject to oversight and discipline by a board of examiners and must earn board-approved professional development credits. The court noted that although their education is not as long as that in some of the other professions, abstractors overwhelmingly satisfy the other factors used to judge professionals in that they have specialized knowledge requiring a license and provide a service to the public upon which the public relies, in addition to the other factors listed above.

On the other hand, in *Jorgensen v. State Nat. Bank & Trust*,[16] we determined that so-called retirement planners were not professionals because they did not have specialized knowledge requiring long and intensive preparation, did not hold licenses, did not regularly supplement their educations, and were not subject to an ethical code enforced by a disciplinary system.

Here, the evidence presented at the summary judgment hearing shows that the owner of Dickinson was a licensed surveyor in the State of Nebraska. In order to become registered

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[13] *Churchill v. Columbus Comm. Hosp., supra* note 5, 285 Neb. at 766, 830 N.W.2d at 58.

[14] *Cooper v. Paap, supra* note 10.

[15] Neb. Rev. Stat. § 76-535 et seq. (Reissue 2009).

[16] *Jorgensen v. State Nat. Bank & Trust, supra* note 7.

as a surveyor in this state, one must meet the requirements of the Land Surveyors Regulation Act,[17] which at the time of the incident in question provided in part:

> No person shall be eligible for registration unless:
>
> (1) He or she has successfully passed an examination, designed to determine his or her proficiency and qualification to engage in the practice of land surveying. No applicant shall be entitled to take such examination until he or she shows the necessary practical experience in land surveying work; and
>
> (2) He or she has not less than six years of surveying experience of which five years must be [certain surveying activities defined in the Land Surveyors Regulation Act]. Three of such five years must have been in a responsible position as a subordinate to a licensed land surveyor, and for the purpose of this section, responsible position shall mean a position that requires initiative, skill, and independent judgment; this term excludes chainman, rodman, instrument person, ordinary drafter, and others doing routine work, or has graduated, after a course of not less than four years in surveying, engineering, or other approved curriculum, with proportionate credit for lesser time, from a school or college approved by the examining board as of satisfactory standing, and an additional two years of practice in a responsible position.[18]

Once registered, surveyors continue to be required to complete 30 hours of "professional development" every 2 years.[19] In addition, surveyors are now subject to a code of practice established by the board to "govern their professional conduct"

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[17] See Neb. Rev. Stat. § 81-8,108 et seq. (Reissue 2014 & Supp. 2015).

[18] § 81-8,117 (Reissue 2003).

[19] § 81-8,119.01(1) (Reissue 2014).

and continue to be subject to discipline, including suspension or revocation of registration, for negligence, incompetency, or misconduct in the performance of their duties.[20]

[7] It is clear, based on these statutory requirements, that registered surveyors have specialized knowledge, complete long and intensive training and preparation, are subject to high standards of achievement and conduct, are committed to continued study, and perform work of which the primary purpose is the rendering of a public service. Thus, we conclude that registered surveyors are professionals for purposes of professional negligence. Because the evidence shows that the owner of Dickinson was a licensed or registered surveyor, we conclude that he is a professional.

[8] Having determined that he is a professional, we now turn to the second assignment of error regarding whether the Bixenmanns were required to present expert testimony as to the standard of care applicable to surveyors. The general rule is that expert testimony is required to identify the applicable standard of care in professional negligence cases.[21]

The Bixenmanns argue that expert testimony was not required in this case because the owner of Dickinson's act of placing the survey stakes in a manner in which they were not clearly visible by persons entering the property was not professional negligence, but, rather, was ordinary negligence. The Bixenmanns also assert that the common knowledge exception to the requirement of expert testimony applies in this case. Under the common knowledge exception, a party may make a prima facie case of professional negligence even without expert testimony in cases where the evidence and circumstances are such that the recognition of the alleged

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[20] § 81-8,111. Accord § 81-8,123 (Reissue 2014).

[21] See, *Thone v. Regional West Med. Ctr., supra* note 1; *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995); *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985).

negligence may be presumed to be within the comprehension of laypersons.[22]

[9,10] We need not decide these questions, because we hold that a surveyor's duty of reasonable care is to his or her client and generally does not extend to third parties absent fraud or other facts establishing a duty to them.[23] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.[24]

Although the accident at issue occurred on the land owned by the Bixenmanns, Dickinson was hired to conduct the survey by the prospective buyers, not by the Bixenmanns. In their brief, the Bixenmanns state they had no contractual relationship with Dickinson. Thus, there was no privity of contract claimed between the Bixenmanns and Dickinson and there were no facts establishing a duty to the Bixenmanns. The record contains no evidence of fraud or facts establishing a duty of Dickinson to the Bixenmanns. Accordingly, albeit for a different reason, we find that the district court did not err in granting summary judgment in favor of Dickinson.

CONCLUSION

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

Affirmed.

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[22] *Thone v. Regional West Med. Ctr., supra* note 1.

[23] See, *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010); *Swanson v. Ptak*, 268 Neb. 265, 682 N.W.2d 225 (2004); *Citizens Nat. Bank of Wisner v. Kennedy & Coe*, 232 Neb. 477, 441 N.W.2d 180 (1989).

[24] *Swanson v. Ptak, supra* note 23.

Nebraska Supreme Court
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Kyel Christine Hopkins, appellee, v. Robert Keith Hopkins, appellant.

883 N.W.2d 363

Filed August 19, 2016. No. S-14-790.

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. **Judgments: Evidence: Appeal and Error.** Despite de novo review, when credible evidence on material questions of fact is in irreconcilable conflict, an appellate court will, when determining the weight of the evidence, consider that the trial court observed the witnesses when testifying, and used those observations when accepting one version of the facts over the other.
3. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
4. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
5. **Modification of Decree: Child Custody: Proof.** In a child custody modification case, first, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.
6. **Child Custody: Convicted Sex Offender.** Neb. Rev. Stat. § 43-2933(1) (Reissue 2008) guides custody determinations when a person required to register under the Sex Offender Registration Act has access to a child.
7. ____: ____. Neb. Rev. Stat. § 43-2933(1)(b) (Reissue 2008) applies when a party seeking custody resides with a person required to register under the Sex Offender Registration Act and that person committed an

underlying offense that was either a felony in which the victim was a minor or an offense making the offender's access to a child contrary to the child's best interests. Subsection (1)(c) applies when a person required to register under the Sex Offender Registration Act has unsupervised contact with a child and the underlying crime was a felony involving a minor victim.

8. **Presumptions: Proof: Words and Phrases.** A presumption is the evidentiary assumption of one fact (the presumed fact) based upon proof of other facts (the predicate facts). The presumed fact is taken as true unless the opponent of the presumed fact meets a particular burden of proof.
9. ____: ____: ____. The "bursting bubble" presumption shifts only the burden of production, and if that burden is met, the presumption disappears.
10. ____: ____: ____. Under the "Morgan" theory of presumptions, a presumption shifts the burdens of both production and persuasion, and the presumption remains in evidence even if the opponent's burden is met.
11. **Statutes: Proof.** The plain language of Neb. Rev. Stat. § 43-2933(1)(c) (Reissue 2008) shifts only the burden of production.
12. **Child Custody: Convicted Sex Offender.** Neb. Rev. Stat. § 49-2933 (Reissue 2008) requires a trial court to consider whether, in its discretion, a sex offender poses a risk, sufficiently great or important to be worthy of attention, of committing a sexual offense against the child or children in question.
13. **Proof.** The determination that a party has met its burden of production can involve no credibility assessment; the burden-of-production determination necessarily precedes the credibility-assessment stage.
14. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Pirtle and Bishop, Judges, on appeal thereto from the District Court for Phelps County, Terri S. Harder, Judge. Judgment of Court of Appeals affirmed.

Kent A. Schroeder, Kenneth F. George, Mindy L. Lester, and D. Brandon Brinegar, of Ross, Schroeder & George, L.L.C., for appellant.

Nicholas D. Valle, of Langvardt, Valle & James, P.C., L.L.O., for appellee.

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

Heavican, C.J.

I. NATURE OF CASE

Robert Keith Hopkins seeks review of the Nebraska Court of Appeals' decision affirming the district court's denial of Robert's counterclaim for custody of his daughters. Robert, whose marriage to Kyel Christine Hopkins was dissolved in March 2004, asserts that under Neb. Rev. Stat. § 43-2933 (Reissue 2008), custody should be modified, because Kyel is now married to Thomas Rott (Thomas), a registered sex offender.

The question presented is whether Kyel has met her statutory burden to produce evidence that the girls are not at significant risk and, if so, whether the district court abused its discretion by finding that the girls were not at significant risk. Guided by the plain language of § 43-2933, we affirm the district court's denial of modification.

II. BACKGROUND

In 2004, Robert and Kyel divorced. The decree granted Kyel full custody of their two daughters, with regular visitation for Robert. The parties each also have children from other marriages not relevant to our review.

In January 2013, Kyel filed an application to modify visitation. Robert counterclaimed, seeking full custody. Robert asserts that he should be granted a modification of custody, because Kyel's current spouse, Thomas, resides with and has unsupervised access to the children and is a registered sex offender for reason of a felony involving a minor. Robert alleges he was not aware of Thomas' sex offender status until July 2013, after Kyel initiated modification proceedings.

1. Thomas' Offenses, Incarceration, and Rehabilitation Efforts

In 2002, Thomas sexually assaulted his minor stepdaughter from a prior marriage. The probable cause affidavit for Thomas'

arrest stated that the victim alleged that Thomas had rubbed her breasts and vaginal area 12 to 14 times over the course of 2 years, including digital penetration one time and penetration with a vibrator one time. But Thomas did not admit to these precise facts. According to the affidavit, Thomas admitted that he had touched the minor's breasts five to six times, penetrated her once digitally, and rubbed her with a vibrator. At trial on the application to modify, Thomas testified that the inappropriate touching lasted a period of 3 to 4 months, and not the 2 years alleged by the victim.

The State charged Thomas with two counts of first degree sexual assault, and one count of sexual assault of a child. Thomas eventually pled guilty to a modified count one, attempted sexual assault of a child, and the other charges were dismissed by the State. Thomas was incarcerated from 2003 to approximately 2007. He completed several voluntary rehabilitative programs while in prison. Among these was "GOLF 3," which was a program designed specifically for sex offenders. Thomas testified that after "he had done everything at that point that I could for what they had" and participating in individual counseling at the state penitentiary, he applied for and was admitted to an inpatient sex offender program at the Lincoln Correctional Center for more intensive rehabilitation. Thomas applied for this program after he had already been denied any opportunity for parole. At the trial on modification, Thomas testified that he participated in the inpatient program "to make sure that what happened would never ever happen again." Thomas testified that he has not been investigated for any sexual misconduct since his incarceration.

2. Thomas' Access to Children

A few years after Thomas' release, he and Kyel began dating in May 2010, and they moved in together that August. They married in 2012. Some evidence at trial revealed that initially, Kyel was reluctant to address Thomas' criminal history. Joan Schwan, the children's therapist, testified that Kyel

stated she preferred to put the thought of Thomas' history out of mind. At first, Kyel allegedly told Schwan that Thomas' conviction was the result of a bad divorce—a fact Schwan discovered to be untrue upon her own investigation. At trial, Schwan testified that she recommended the family be open about Thomas' criminal history and stated that Kyel's apparent denial of that history was concerning.

Other evidence in the record reveals that in 2004, Kyel dated, and had a child with, a different man who later pled guilty to a misdemeanor charge of attempted sexual assault of a child for digitally penetrating one of Kyel's other daughters.

Robert testified at the trial for modification that Kyel took no steps to investigate Thomas' background, but Robert also admitted to having no personal knowledge of this fact. In fact, Kyel and Thomas both testified that Thomas told Kyel everything about his sex offender status before they moved in together. Kyel also testified that before deciding to move in, she discussed Thomas' history with a Child Protective Services hotline and with family members, seeking their advice. Although Kyel initially concealed Thomas' sex offender status from the girls, under Schwan's direction, Kyel eventually told them during a therapy session.

The record shows that Thomas has unsupervised time with the children each day from 6 to 7 a.m. Thomas has also taken each of the girls hunting alone. The household takes precautions such as ensuring there is a lock on the bathroom door, adjusting shower schedules, establishing a dress code, having the girls change in private, and limiting Thomas' time alone with one child. Kyel and Thomas also informed other parents of his sex offender registration status before children came over to their house. Both girls testified they felt safe with Thomas, and neither girl reported any actions of a sexual nature.

Schwan testified at the trial for modification. She stated that the children have not reported any "grooming behaviors" (methods sexual abusers use to build a child's trust). Thomas has had angry outbursts in front of the girls—one time he

abruptly stopped his car during an argument with the girls and another time he threw a brick. Schwan additionally testified that the girls reported Thomas had once punched a grain bin. Robert contends that these incidents are red flags. Schwan, however, disagreed. Schwan described grooming behaviors as actions an offender takes to test whether a child is likely to keep inappropriate behavior secret. For example, if an offender were to give a child special treatment, and tell the child not to reveal that special treatment to a parent, that would be a red flag. Schwan's description of grooming behaviors did not include angry outbursts.

Schwan has never met Thomas, nor was she offered to the court as an expert witness in adult sex offenders. Although Schwan had reviewed some of Thomas' prison records (which are not part of the record on appeal), she testified that she had no basis to determine whether Thomas had actually been rehabilitated. Schwan related only her opinion, based upon contact with Kyel and the girls, that there was no risk to the girls. The district court found that Schwan's opinion was entitled to "considerable weight."

Other than Thomas' unsupervised access to the children, Robert presented no evidence of a material change in circumstances since the decree; Robert relies solely on § 43-2933 for modification.

3. Best Interests of Children

Aside from exploring Thomas' risk level as a sex offender, the parties also presented evidence generally concerning the best interests of the children. Both Robert and Kyel called character witnesses, who generally vouched for each of Robert and Kyel's credentials as good parents. Robert testified that on one occasion in or around 2010, Kyel's home was cramped and very messy, with food and items on the floor. Robert also expressed concern that Kyel apparently was not proactive about investigating Thomas' criminal history before moving in with him. However, this testimony was contradicted by Kyel's and Thomas' own testimony.

The children, by all accounts, love both of their parents and get along well with them. The girls seem to be generally happy and doing well in school. The younger daughter testified that she would like to live with Robert in order to spend more time with her father and half siblings there. But Schwan testified that the younger child probably does not understand what that would be like in the long term because she is somewhat emotionally delayed. The older daughter testified that she was unsure which parent she would like to live with and preferred not to make a decision.

4. Procedural History

The district court denied Kyel's application to modify, finding there was no material change in circumstances. Kyel did not appeal this determination, and we will not review it. The district court then assessed Robert's counterclaim under § 43-2933, which controls when a party to a custody suit is or resides with someone who is required to register under the Sex Offender Registration Act (SORA). The full statutory scheme of § 43-2933 is described below.

The district court found that the facts of this case triggered a presumption under § 43-2933(1)(c) against Kyel's having custody. But the district court held that Kyel had overcome that presumption based upon Schwan's testimony. It also discussed Thomas' successful completion of rehabilitative programs and the lack of any allegations of sexual misconduct since 2003.

The Court of Appeals affirmed as modified.[1] That court's modification is not relevant to the issues on appeal. It found that the presumption against custody had been overcome and affirmed the district court's continued award of custody to Kyel.

Robert filed a petition for further review, which we granted because the interpretation of § 43-2933(1)(c) is an issue of first impression.

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[1] *Hopkins v. Hopkins*, 23 Neb. App. 174, 869 N.W.2d 390 (2015).

III. ASSIGNMENTS OF ERROR

On further review, Robert assigns, consolidated and restated, that the Court of Appeals erred by (1) finding that Kyel had rebutted the § 43-2933(1)(c) presumption and (2) failing to award custody to Robert.

IV. 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.[2]

[2] Despite de novo review, when credible evidence on material questions of fact is in irreconcilable conflict, an appellate court will, when determining the weight of the evidence, consider that the trial court observed the witnesses when testifying, and used those observations when accepting one version of the facts over the other.[3]

[3] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.[4]

V. ANALYSIS

Robert asserts that if, as here, a person required to register under SORA because of a felony offense involving a minor victim resides with a party seeking custody and the person has unsupervised contact with a child, § 43-2933(1)(c) creates a very strong presumption against custody. Robert argues that the Court of Appeals failed to impose a strong enough burden upon Kyel.

We disagree with Robert's assessment of § 43-2933(1)(c). As discussed extensively below, the Legislature has chosen, with explicit language, precisely how courts should proceed in custody suits involving unsupervised contact by sex

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[2] *State v. Neisius*, 293 Neb. 503, 881 N.W.2d 572 (2016).

[3] *State ex rel. Medlin v. Little*, 270 Neb. 414, 703 N.W.2d 593 (2005).

[4] *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

offenders. Under the Legislature's instruction, and limited by our standard of review, we find that Kyel overcame the presumption of § 43-2933(1)(c) and that Robert subsequently failed to prove the girls were at significant risk. Therefore, we affirm the Court of Appeals' affirmance of the district court's judgment.

1. Presumption in § 43-2933(1)(c)

(a) Statutory Scheme for Custody Determinations

[4-6] Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.[5] First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.[6] However, § 43-2933(1) guides custody determinations when a person required to register under SORA (offender) has access to a child. Under § 43-2933(3), if there is a change in circumstances regarding § 43-2933(1) or (2), modification is warranted.

Section 43-2933, in pertinent part, provides:

> [(1)](b) No person shall be granted custody of, or unsupervised parenting time, visitation, or other access with, a child if anyone residing in the person's household is . . . a[n] offender . . . as a result of a felony conviction in which the victim was a minor or for an offense that would make it contrary to the best interests of the child for such access unless the court finds that there is no

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[5] *Schrag v. Spear*, 290 Neb. 98, 858 N.W.2d 865 (2015).

[6] *State on behalf of Jakai C. v. Tiffany M.*, 292 Neb. 68, 871 N.W.2d 230 (2015).

> significant risk to the child and states its reasons in writing or on the record.
>
> (c) The fact that a child is permitted unsupervised contact with a person who is required, as a result of a felony conviction in which the victim was a minor, to be registered as a sex offender under [SORA] shall be prima facie evidence that the child is at significant risk. When making a determination regarding significant risk to the child, the prima facie evidence shall constitute a presumption affecting the burden of producing evidence. . . .
>
> . . . .
>
> (3) A change in circumstances relating to subsection (1) or (2) of this section is sufficient grounds for modification of a previous order.

Speaking broadly, subsection (1)(a) applies in cases where the person seeking custody is an offender. Subsection (1)(b) governs custody determinations when a person seeking custody resides with an offender. Both subsections (1)(a) and (1)(b) state that custody shall not be granted "unless the court finds that there is no significant risk to the child." And subsection (1)(c) imposes a statutory presumption of significant risk in certain cases, explained further below.

[7] Subsection (1)(b) does not apply to every circumstance in which a person seeking custody resides with an offender. Rather, the subsection applies only if the offender committed an underlying offense that was either a felony offense in which the victim was a minor (felony) or an offense making the offender's access to a child contrary to the child's best interests (contrary-to-interest). Subsection (1)(c) applies when an offender has unsupervised contact with a child and the underlying crime was a felony-type offense. It imposes a presumption that there is a significant risk in these cases.

Thus, to reach subsection (1)(b), a court must ask whether a party seeking custody (or other access) resides with an offender who committed either an underlying felony or contrary-to-interest-type offense. If so, subsection (1)(b) applies and the

court shall not grant custody "unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record." Next, to reach the subsection (1)(c) presumption, the court must determine whether the offender committed an underlying felony-type offense and whether the offender is permitted unsupervised access to the child. If the answer to both of these questions is yes, then (with exceptions not relevant here) subsection (1)(c) provides that these facts "shall be prima facie evidence that the child is at significant risk. When making a determination regarding significant risk to the child, the prima facie evidence shall constitute a presumption affecting the burden of producing evidence."

Finally, subsection (3) states that "[a] change in circumstances relating to subsection (1) . . . is sufficient grounds for modification of a previous order." We read this to mean that if the circumstances described in subsection (1) or subsection (2) were to arise after entry of an order, that order can be modified. For example, if after an initial order a party with custody moves in with an offender who committed a felony or contrary-to-interest offense, and the child is at significant risk, then that is a change in circumstances sufficient to modify custody.

Thomas is an offender with an underlying felony or contrary-to-interest offense, and he lives with Kyel, who has custody, so subsection (1)(b) applies. Specifically, Thomas committed a felony-type offense and also has unsupervised contact with the children; therefore, the presumption of significant risk under subsection (1)(c) also applies in this case. Should the court determine that there has been a change in circumstances placing the girls at significant risk in the context of subsections (1)(b) and (c), then subsection (3) calls for modification in Robert's favor, unless other mitigating factors (not relevant here) warrant retaining custody with Kyel.

The nature of the subsection (1)(c) presumption is the central controversy for our review in this case. It is interpreted in detail below.

(b) Presumptions Generally

[8] Before proceeding to the merits of Robert's arguments, we take this opportunity to review presumptions generally. We have noted before that the term "presumption," though a term of art, is often conflated with other concepts.[7] Broadly, a presumption (sometimes called a rebuttable presumption) is the evidentiary assumption of one fact (the presumed fact) based upon proof of other facts (the predicate facts).[8] The presumed fact is taken as true unless the opponent of the presumed fact meets a particular burden of proof.

Burden of proof is another commonly confused term. It can mean, as relevant here, either the burden of persuasion or the burden of production.[9] The burden of persuasion requires the party bearing the burden to convince a fact finder to a particular standard of proof.[10] A burden of production requires parties to present particular evidence, regardless of whether that evidence actually persuades the finder of fact.[11]

[9,10] Generally, there are two types of presumptions. The "'bursting bubble'" presumption shifts only the burden of production, and if that burden is met, the presumption disappears.[12] As the U.S. Supreme Court explained in great depth in *St. Mary's Honor Center v. Hicks*,[13] "although the . . . presumption

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[7] *McGowan v. McGowan*, 197 Neb. 596, 250 N.W.2d 234 (1977).

[8] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

[9] See *id*.

[10] John T. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 Harv. L. Rev. 1382 (1955).

[11] *St. Mary's Honor Center, supra* note 8.

[12] Joel S. Hjelmaas, *Stepping Back From the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 Drake L. Rev. 427, 432 & n.27 (1993). See, also, R. Collin Mangrum, Mangrum on Nebraska Evidence 129 (2016).

[13] *St. Mary's Honor Center, supra* note 8, 509 U.S. at 507 (emphasis in original) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

shifts the burden of *production* to the defendant, '[t]he ultimate burden of persuading the trier of fact . . . remains at all times with the plaintiff.'" Under the competing "Morgan" theory of presumptions,[14] a presumption shifts the burdens of both production and persuasion, and the presumption remains in evidence even if the opponent's burden is met.[15]

Nebraska Evidence Rule 301[16] has adopted the Morgan theory of presumptions as the default rule: "In all cases not otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."

(c) Presumption in § 43-2933(1)(c)

Robert argues that § 43-2933(1)(c) is a Morgan presumption, shifting both the burden of production and the burden of persuasion. But § 43-2933(1)(c) "otherwise provides"[17] a bursting bubble presumption. In pertinent part, § 43-2933(1)(c) provides:

> The fact that a child is permitted unsupervised contact with a person who is required, as a result of a felony conviction in which the victim was a minor, to be registered as a sex offender under [SORA] shall be prima facie evidence that the child is at significant risk. When making a determination regarding significant risk to the child, the prima facie evidence shall constitute a *presumption affecting the burden of producing evidence*.

(Emphasis supplied.)

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[14] See Edmund M. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 Harv. L. Rev. 59 (1933).

[15] Hjelmaas, *supra* note 12. See, also, Mangrum, *supra* note 12.

[16] Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 2008). See, also, 28 U.S.C. app. rule 301, notes on Committee on the Judiciary, H.R. Rep. No. 93-650 (1974) (describing original draft using "more probable than its existence" language, now found in Nebraska's rule, altered burden of persuasion).

[17] See Neb. Evid. R. 301.

[11] Robert is technically correct that subsection (1)(c) does not expressly state that rule 301 does not apply. However, absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.[18] The plain language of § 43-2933(1)(c) shifts only the burden of production. We need not look beyond the scope of the statute, to rule 301, to determine the effect of the presumption, because the statute is unambiguous. The Legislature used clear and direct language. To read subsection (1)(c) as imposing the same presumption as rule 301 would render the statute's presumption language superfluous and meaningless.

Both Robert and Justice Connolly's dissent raise our per curiam decision in *Watkins v. Watkins*[19] to assert that under the rules of statutory construction, we are required to find that subsection (1)(c) does more than merely shift the burden of production. In *Watkins*, a father sought to modify custody of his children because the children's mother resided with a registered sex offender. In that case, however, the offender had committed an underlying misdemeanor contrary-to-interest offense—not a felony offense. Therefore, we assessed whether the offender in that case was a significant risk under subsection (1)(b) alone, without reference to the subsection (1)(c) presumption. However, we interpreted subsection (1)(b) to create a presumption of significant risk.

But, in retrospect, the language of subsection (1)(b) does not support the interpretation this court made in *Watkins*, and we now disapprove of our reasoning in that case to the extent it is inconsistent with the instant opinion. Section 43-2933(1)(b) reads:

> No person shall be granted custody of, or unsupervised parenting time, visitation, or other access with, a child

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[18] *State ex rel. Parks v. Council of City of Omaha*, 277 Neb. 919, 766 N.W.2d 134 (2009).

[19] *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

> if anyone residing in the person's household is required to register as a sex offender under [SORA] as a result of a felony conviction in which the victim was a minor or for an offense that would make it contrary to the best interests of the child for such access unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record.

Contrary to our decision in *Watkins*, we find the statute requires only that the court must make ***a*** factual finding, not that the court must find that there is a significant risk in the absence of rebutting evidence. Thus, while subsection (1)(b) and SORA indicate that the Legislature perceives a correlation between sex offender criminal history and the risk that offender poses to a child, subsection (1)(b) does not require any particular outcome based upon that criminal history alone.

Reading these subsections in the context of subsection (1)(c) supports this interpretation. Subsection (1)(c) explicitly establishes a presumption affecting the burden of production. As discussed extensively above, the only two types of presumptions are those shifting the burden of production and those shifting both the burden of production and the burden of persuasion.

Although we agree that the Legislature intended subsection (1)(c) to make it more difficult for a parent to obtain or retain custody in this situation, such intent causes us to reevaluate *Watkins*—not ignore the plain language of the statute. Justice Connolly urges us to ignore the explicit language of subsection (1)(c) and find that subsection (1)(b) is a presumption shifting the burden of production, and, therefore, subsection (1)(c) must be a presumption shifting the burden of persuasion. We find it more proper to implement the plain language of subsection (1)(c), imposing a presumption shifting the burden of production, and, therefore, we find subsection (1)(b) is not a burden-shifting presumption at all.

Justice Connolly's dissent attempts to support its contrary interpretation by emphasizing language from the statute

referring to the facts of subsection (1)(c) as "prima facie evidence." The dissent correctly notes, citing to Nebraska case law, that "once a noncustodial parent establishes a prima facie case, a custodial parent must produce evidence that, *if believed by the trier of fact, would rebut the presumption* that a plaintiff is entitled to judgment."[20] (Emphasis supplied.) But the dissent fails to note that we have done exactly that. As we explained in depth above, if a party presents evidence giving rise to a presumption that shifts only the burden of production, the opposing party may overcome that presumption with evidence that, if believed by a reasonable fact finder, tends to disprove the presumed fact, regardless of whether that evidence ultimately persuades the court. By assessing whether Kyel's evidence, if believed, would rebut the presumption that Thomas posed a significant risk, we have correctly applied precisely the standard which the dissent accuses the court of ignoring.

Next, Justice Connolly, citing to a Nebraska case, implies that the court is splitting hairs, and states that "we have previously reasoned that it serves no purpose to impose a technical understanding of a legal term in a statute when the Legislature obviously intended a different result."[21] But, as noted, *Watkins* does not actually express legislative intent; subsection (1)(b) was not meant to establish a presumption. Therefore, we do not find that the Legislature obviously intended the dissent's desired result. The language of the statute requires our interpretation, and we see no indication that the Legislature

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[20] See, *First Tennessee Bank Nat. Assn. v. Newham*, 290 Neb. 273, 859 N.W.2d 569 (2015); *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007); *Mefferd v. Sieler & Co.*, 267 Neb. 532, 676 N.W.2d 22 (2004); *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999); *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999).

[21] See *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved in part on other grounds, Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

intended a different outcome. We decline to exaggerate the impact of subsection (1)(c) based upon our erroneous interpretation of subsection (1)(b) in *Watkins*.

For these reasons, to overcome the presumption under § 43-2933(1)(c), Kyel was required only to produce evidence that the girls were not at significant risk.

2. Kyel's Evidence to Overcome § 43-2933(1)(c) Presumption

To determine whether Kyel produced evidence to overcome the presumption of § 43-2933(1)(c), we must identify what evidence might be relevant to prove or disprove that an offender poses a significant risk of harm. The Legislature has not defined "significant risk" in the context of § 43-2933, and we have never directly interpreted this part of the statute. Nor can this court locate legislative history to guide our reading of this term. This court has found similar statutes in other jurisdictions requiring a finding of no significant risk.[22] But we have not located case law discussing the meaning of the term thoroughly enough to be helpful here.

However, we note that the Legislature has found that sex offenders pose a high risk of recidivism.[23] And regulations formerly used by the Nebraska State Patrol, under authority granted by SORA, categorized "risk" to determine how likely an offender was to commit a repeat offense.[24] Therefore, we conclude that the harm contemplated in § 43-2933 refers to the probability that an offender will commit another sex offense, harming the child in question.

[12] The risk that an offender will reoffend need not be high or even probable in order to warrant a modification of custody under § 43-2933. The plain meaning of "significant,"

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[22] See, Ariz. Rev. Stat. Ann. § 25-403.05 (2007); Cal. Fam. Code §§ 3030 and 3030.5 (West Cum. Supp. 2016).

[23] See Neb. Rev. Stat. § 29-4002 (Reissue 2008).

[24] See 272 Neb. Admin. Code, ch. 19, attach. B (2003).

as relevant here, is "[s]ufficiently great or important to be worthy of attention."[25] Thus, § 43-2933 requires a trial court to consider whether, in its discretion, a sex offender poses a risk, sufficiently great or important to be worthy of attention, of committing a sexual offense against the child or children in question.

We have discovered little authority to clarify what evidence may be necessary in order to measure risk. And we do not presume to name an exhaustive list of circumstances which might indicate the presence or absence of a significant risk of harm. Nor do we limit the method by which the risk of harm may be established. Instead, we note that the trial court's discretion is integral to this analysis. A trier of fact benefits from the opportunity to hear and observe witnesses. Generally, therefore, it is in a better position than appellate courts to make credibility determinations essential to the assessment of significant risk.

As discussed, because Thomas is a sex offender with an underlying felony offense and because he has unsupervised contact with the girls, it is presumed that the girls are at significant risk, requiring modification. Subsection (1)(c) operates to shift the burden of production—in other words, it is a bursting bubble presumption. Thus, to overcome the presumption, Kyel was required only to present evidence tending to prove that Thomas was not a significant risk to the girls. If she presented such evidence, then the presumption disappeared and the district court, as trier of fact, was not required to find that Thomas was a significant risk. Instead, the court was called upon to weigh the evidence presented and come to its own conclusion.

Both the district court and the Court of Appeals found that Kyel overcame the presumption of significant risk. Both courts referenced Thomas' rehabilitative treatment, the lack of any reports or suspicion of sexual offenses since 2002, the

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[25] Oxford Dictionaries (Oxford Univ. Press), http://www.oxforddictionaries.com/definition/english/significant (last visited Aug. 3, 2016).

girls' testimony, and Schwan's testimony. Specifically, those courts considered Schwan's statements that the girls had not reported any "grooming behaviors" and that she had trained Kyel and the girls about red flags.

This evidence met Kyel's burden to produce evidence. Thomas' apparent commitment to rehabilitation, the substantial passage of time since his conviction, and the lack of any allegations against him since his release all tend to mitigate a risk of recidivism. Thus, the § 43-2933(1)(c) presumption disappeared and the district court was entitled to make factual findings free from any mandatory presumption.

[13] Robert argues that the presumption was not overcome, because the district court should not have given so much weight to Schwan's testimony. But, as noted, the credibility of Kyel's evidence should not impact its rebutting effect. "[T]he determination that a [party] has met its burden of production . . . can involve no credibility assessment[;] the burden-of-production determination necessarily *precedes* the credibility-assessment stage."[26]

We therefore conclude that Kyel overcame the presumption of subsection (1)(c), and Robert's first assignment of error is without merit.

3. Modification of Custody

In his second assignment of error, Robert argues that the district court erred by denying his counterclaim for modification. Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.[27] Under § 43-2933(1)(b) and (3), if Thomas was a significant risk, such would have been grounds for modification.

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[26] *St. Mary's Honor Center, supra* note 8, 509 U.S. at 509 (emphasis in original).

[27] *Caniglia, supra* note 4.

Once Kyel overcame the subsection (1)(c) presumption of significant risk, the district court was free to reach its own conclusion, within the bounds of its discretion, about whether Robert had proved sufficient grounds.[28] As in any other case, Robert, as the party seeking modification, bore the burden of persuasion. The subsection (1)(c) presumption had absolutely no impact on Robert's overall burden to prove that there were sufficient grounds to support his claim.[29]

[14] It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.[30] It is not for this court to overrule the Legislature's policy determinations. An appellate court does not sit as a superlegislature to review the wisdom of legislative acts.[31] Thus, we must apply the presumption scheme of § 43-2933 as the Legislature has written. We cannot replace the bursting bubble presumption of § 43-2933 with a Morgan presumption shifting the burden of persuasion, or with a conclusive rule that offenders like Thomas can never have access to a child.

Further, though we conduct a de novo review on the record in custody determinations, we will not disturb the district court's ruling unless the district court abused its discretion.[32] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result.[33] Thus, we must review this case to determine whether, without regard to the presumption

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[28] See *St. Mary's Honor Center, supra* note 8.

[29] See *id.*

[30] *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013).

[31] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

[32] *Caniglia, supra* note 4.

[33] *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003).

of subsection (1)(c), the district court abused its discretion in finding that Robert had not met his burden to prove that Thomas posed a significant risk and that modification was not warranted.

Robert presented little evidence about the risk Thomas allegedly poses. Aside from showing that Thomas had sexually assaulted a minor 12 years prior to the trial on modification, and some contested evidence that Kyel was not proactive about investigating Thomas' underlying offense, Robert produced no evidence tending to show that Thomas was a significant risk. We acknowledge that Thomas was charged with three counts of sexually assaulting a child—his stepdaughter at the time—(though he was convicted of one count of attempted sexual assault) and that the victim was the same gender as the two children in question. In addition, at the time of trial, one of the girls was about the same age as Thomas' prior victim had been. These facts tend to weigh against a finding of no significant risk.

On the other hand, Kyel presented substantial evidence that Thomas was not a risk to the girls. Thomas had volunteered for extensive rehabilitation during his incarceration, even after he became ineligible for parole. He had not been investigated for any sexual wrongdoing since his release. It had been over a decade since Thomas' offense. And further, Thomas expressed remorse and exhibited a highly positive response to treatment. Moreover, there was no evidence that Thomas had any other criminal history or that he had a psychological or psychiatric condition making him a high risk to reoffend.

In addition, we note that the girls testified they felt safe at home. Friends of Kyel and Thomas also testified that they did not feel he was a risk. Furthermore, Schwan, based upon her treatment of the girls, did not think Thomas was engaging in any grooming behaviors. Kyel and Thomas also testified about the precautions taken in the home to make everybody feel safe, and Thomas testified extensively about his personal

motivations to avoid any future offenses. By all accounts, the girls get along well living with Kyel and Thomas and appear to be happy and healthy.

Our de novo review, therefore, reveals considerable evidence that Thomas was not a significant risk to reoffend, and only limited evidence that Thomas was a risk. We cannot say, in light of Robert's failure to produce more convincing evidence to prove there was a significant risk, and Kyel's abundance of rebutting evidence, that the district court's finding was untenable.

The district court did not abuse its discretion in finding that Thomas was not a significant risk and denying modification of custody under § 43-2933. To come to a contrary conclusion would require a credibility assessment; to find for Robert, we would need to find that Kyel's evidence lacked credibility to such an extent that the district court's finding was untenable. But despite de novo review, when credible evidence on material questions of fact is in irreconcilable conflict, an appellate court will, when determining the weight of the evidence, consider that the trial court observed the witnesses when testifying, and used those observations when accepting one version of the facts over the other.[34] Thus, we decline to usurp the district court's role in this case.

Nor can Robert successfully argue that modification was warranted under any other theory. To be granted modification, Robert must prove that there has been a material change in circumstances making modification to be in the best interests of the children.[35] Robert attempted to prove this through the framework of § 43-2933 and did not produce evidence of any other changes in circumstances. Because Robert proved neither a material change in circumstances generally nor grounds for modification under § 43-2933(3), his second assignment of error is without merit.

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[34] See *State ex rel. Medlin, supra* note 3.

[35] *Schrag, supra* note 5.

VI. CONCLUSION

It is the province of the legislative branch, and not of this court, to create policy. The court is charged with neither the duty nor the power to question the wisdom of that policy. Robert asks us to place a burden upon Kyel higher than the burden legislatively imposed; essentially, Robert requests a de facto rule that a person residing with a felony offender can never retain custody. But the Legislature has not enacted such a policy. The plain language of § 43-2933(1)(c) establishes a presumption shifting only the burden of production. The Legislature could have created a presumption against custody with a more demanding burden. It is not within this court's power to expand the scope of the Legislature's policy.

Though Kyel presented significant evidence that Thomas was not a risk, she was not required to do so beyond her initial burden to produce *anything* to overcome the presumption. Thus, Robert incorrectly framed the issue by arguing that Kyel failed to prove that Thomas was not a risk. The burden to prove that modification was warranted remained at all times upon Robert. And the district court did not abuse its discretion by finding that Robert failed to meet that burden.

The decision of the Court of Appeals is affirmed.

Affirmed.

Connolly, J., dissenting.

Let me get this straight. The female children in this case are statutorily presumed to be at a significant risk of harm because their mother moved them in with a felony sex offender. The sex offender previously committed sexual assaults against a different female child, his former stepdaughter with whom he was living, and he now has unsupervised access to the children who are the subject of this appeal. The children's therapist, on whose opinion the trial court heavily relied, could not say whether Thomas Rott (Rott) presented a risk of reoffending. But according to the majority, all that the mother needs to do to overcome the statutory presumption that these circumstances warrant a change in custody is to present any

evidence—persuasive or not—that the sex offender does not present a risk of harm. As a south central Nebraska sage I knew would often say, "It just ain't right."

It "ain't right" because the majority's reasoning is contrary to both the Legislature's obvious intent in Neb. Rev. Stat. § 43-2933 (Reissue 2008) and common sense. It leaves the noncustodial father, who is willing and able to care for his children, feeling helpless to protect his children. And I do not believe the Legislature intended to create a "bursting bubble" presumption under § 43-2933(1)(c), as the majority concludes. Nebraska's statutes and the Legislature's public policy determinations are inconsistent with holding that unpersuasive evidence is sufficient to rebut a prima facie claim under § 43-2933(1)(c). I believe that when a custodial parent is living with a person who has committed a felony sex offense against a minor and giving that person unsupervised access to the parent's child, Neb. Evid. R. 301[1] should apply to require the parent to overcome the presumption of risk by a preponderance of the evidence.

Here, we have a custodial parent who is living with a felony sex offender and giving that person unsupervised access to her children. This court should require evidence of an assessment, by a qualified evaluator, to show that there is no significant risk that this sex offender will harm these children. These facts amply illustrate why the majority's statutory interpretation will lead to absurd results.

I. § 43-2933 ESTABLISHED A PRESUMPTION OF RISK TO PROTECT CHILDREN

1. § 43-2933 Contains Three Presumptions

Although the majority avoids this problem through a tortuous statutory analysis, in child custody disputes involving a sex offender, § 43-2933(1) sets out three fact patterns that trigger a statutory presumption that the offender presents a

[1] Neb. Rev. Stat. § 27-301 (Reissue 2008).

significant risk of harm to a child. The presumptions of risk apply to (1) persons who have committed an offense that requires them to register as a sex offender under the Sex Offender Registration Act (SORA)[2]; (2) persons who are living with a sex offender; and (3) persons who are giving a sex offender unsupervised access to a child who is the subject of the custody dispute.

The second and third fact patterns are present here. If any presumption controls under subsection (1), then under § 43-2933(3), a "change in circumstances relating to subsection (1) . . . of this section is sufficient grounds for modification of a previous order."

Under § 43-2933(1)(a), a court shall not grant a sex offender custody, unsupervised parenting time, visitation, or other access to a child if the offender has committed one of three types of SORA offenses—"unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record." By prohibiting the sex offender's access to a child—unless a court explicitly finds there would be no significant risk—the Legislature has presumed that the offender's access to the child presents a significant risk of harm. Under § 43-2933(1)(a), that presumption exists if the SORA offense (1) would make access to the child contrary to his or her best interests; (2) was committed against a minor; or (3) was a crime under "section 28-311, 28-319.01, 28-320, 28-320.01, or 28-320.02." Under § 43-2933(3), any of these circumstances is a sufficient reason to modify an existing custody order unless the court finds that there is no significant risk and states its reasoning.

Subsection (1)(b) is similar in construction to subsection (1)(a) but applies to persons who are residing with a sex offender. It provides that a court shall not grant such a person custody, unsupervised parenting time, visitation, or other

[2] See Neb. Rev. Stat. §§ 29-4001 to 29-4014 (Reissue 2008, Cum. Supp. 2014 & Supp. 2015).

access to a child if the cohabitating sex offender committed one of two types of SORA offenses—unless the court finds that there is no significant risk to the child and states its reasoning. The presumption of significant risk of harm applies if the cohabitating sex offender's SORA offense (1) was a felony offense against a minor or (2) would make access to the child contrary to the child's best interests.

2. An Opponent of the Subsection (1)(b) Presumption Has the Burden to Overcome It

Recently, in *Watkins v. Watkins*,[3] we unanimously held that when § 43-2933(1)(b) is read together with § 43-2933(3), the plain language of the statute created a presumption of risk that justifies a change in custody unless a court makes a finding of no significant risk:

> Thus, in applying § 43-2933, a district court must first determine whether there is an individual residing in the household who is required to register under [SORA] and, if so, whether the offense triggering the registration requirement is due to a felony conviction in which the victim was a minor, whether the offense triggering the registration would make it contrary to the best interests of the child whose custody is at issue, or whether the offense does not meet either of these two descriptions. If the district court finds the offense to be a felony involving a minor victim *or* an offense contrary to the best interests of the child, § 43-2933(1)(b), *there is a statutorily deemed change of circumstances*, § 43-2933(3), and custody shall not be granted to the person who resides with the sex offender unless there is a finding by the district court that the circumstances present no significant risk. In sum, *taken together, § 43-2933(1)(b) and (3) create a statutory presumption against custody being awarded to the person residing with a sex offender*

[3] *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

who committed the described offenses, but the presumption can be overcome by evidence. The foregoing analysis applies to this case, and the district court followed this framework.[4]

Our explanation of the statutory scheme in *Watkins* was obviously not limited to SORA offenses that would make a custodial parent's access to his or her child contrary to the child's best interests because he or she was living with the sex offender. Unless a trial court makes a finding of no significant risk, a party's evidence that a cohabitating sex offender committed *either type* of specified SORA offense is a sufficient reason to modify a custody order—without presenting any further evidence of the offender's risk of reoffending. This is a legislative presumption that a person who committed the specified crime poses a recidivism risk unless the court finds otherwise.

In *Watkins*, we did not specify the type of evidence or standard of proof required to overcome the presumption. But the burden of production clearly fell on the custodial mother. And we did not treat the statutory presumption as a bursting bubble presumption. There, the mother was living with a registered sex offender and had custody of her two children from Sunday to Wednesday of each week. But she "testified that she had not allowed unsupervised contact between [her boyfriend] and the children and that she would not allow unsupervised contact in the future."[5] We noted that the mother's boyfriend had not committed a felony SORA offense against a minor. Yet, we agreed with the court's implicit finding that he had committed an offense that would make the mother's custody or unsupervised access to the children contrary to their best interests unless the presumption was overcome by evidence.

We set out the trial court's extensive factfinding, including the mother's prohibition of unsupervised contact between her

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[4] *Id.* at 700-01, 829 N.W.2d at 649 (emphasis supplied).

[5] *Id.* at 702, 829 N.W.2d at 650.

boyfriend and the children when she had custody. We specifically noted that the court ordered no unsupervised contact in the future. Under those facts, we upheld the court's decision to not modify the custody arrangement, based on its finding that the children were not at significant risk.

But *Watkins* illustrates that a parent living with a sex offender must produce evidence that is sufficient to rebut the presumption of significant risk and support a court's finding of no significant risk. And *Watkins* is not distinguishable because the boyfriend had not committed a felony sex offense against a minor. Had he done so, § 43-2933's requirement that the mother rebut the presumption of significant risk of harm would have been even more commanding. And here, Rott did commit a felony sex offense against a minor.

3. *Watkins* Requires a Party to Overcome the Subsection (1)(c) Presumption

Our reasoning in *Watkins* applies here because § 43-2933(1)(c) imposes a stronger presumption than the ones created under (1)(a) or (1)(b). Subsections (1)(a) and (b), when read together with § 43-2933(3), both create a statutory presumption that a court should modify a custody order unless the court finds no significant risk. But subsection (1)(c) creates *a prima facie case* that a child is at significant risk of harm if a parent is permitting a sex offender to have unsupervised access to a child and the offender committed a felony SORA offense against a minor:

> The fact that a child is permitted unsupervised contact with a person who is required, as a result of a felony conviction in which the victim was a minor, to be registered as a sex offender under [SORA] shall be prima facie evidence that the child is at significant risk. When making a determination regarding significant risk to the child, the prima facie evidence shall constitute a presumption affecting the burden of producing evidence. However, this presumption shall not apply if there are factors mitigating

> against its application, including whether the other party seeking custody, parenting time, visitation, or other access is also required, as the result of a felony conviction in which the victim was a minor, to register as a sex offender under [SORA].

By creating a prima facie case, the Legislature intended to create a stronger presumption than the ones under subsections (1)(a) and (b), which can be rebutted solely by a court's findings of no significant risk. The Legislature would have reasonably concluded that once a noncustodial parent establishes a prima facie case, a custodial parent must produce evidence that, if believed by the trier of fact, would rebut the presumption that the noncustodial parent is entitled to judgment.[6]

And the mere fact that the Legislature also provided that the prima facie evidence shall affect the burden of producing evidence does not show it intended to create a bursting bubble presumption. The majority acknowledges that the distinction between the burden of production and the burden of persuasion can be confusing. And we have previously reasoned that it serves no purpose to impose a technical understanding of a legal term in a statute when the Legislature obviously intended a different result.[7]

Here, the Legislature could not have intended to create a weaker presumption under subsection (1)(c) than the presumption under subsection (1)(b) that we recognized in *Watkins*.

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[6] See, e.g., *First Tennessee Bank Nat. Assn. v. Newham*, 290 Neb. 273, 859 N.W.2d 569 (2015); *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007); *Mefferd v. Sieler & Co.*, 267 Neb. 532, 676 N.W.2d 22 (2004); *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999); *Father Flanagan's Boys' Home v. Agnew*, 256 Neb. 394, 590 N.W.2d 688 (1999). Compare, *Siouxland Ethanol v. Sebade Bros.*, 290 Neb. 230, 859 N.W.2d 586 (2015); *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

[7] See, *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved in part on other grounds, Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

Under subsection (1)(b), the sex offender must be residing with the custodial parent. But the (1)(b) presumption applies even if the sex offender did not commit a felony sex offense against a minor and even if the custodial parent is not giving the sex offender unsupervised access to his or her child. And under *Watkins*, a custodial parent living with a sex offender must rebut that presumption by producing evidence sufficient to support a finding of no significant risk.

In contrast, the presumption under subsection (1)(c) applies only if both of these conditions are present: i.e., (1) the sex offender previously committed a felony sex offense against a minor and (2) the custodial parent is giving the offender unsupervised access to the child. And because these two conditions raise greater concerns about a child's safety, the presumption in subsection (1)(c) applies even if the sex offender is not living with the custodial parent. For example, it would apply if a custodial parent were allowing a felony sex offender to take his or her child on unsupervised hunting trips. Because subsection (1)(c) raises greater concerns about a child's safety, *Watkins* should minimally require an opponent of the presumption to present sufficient evidence to support a reasonable finding that a child is not at significant risk of harm because a felony sex offender, who committed a sex offense against a minor, has unsupervised access to the child.

4. Majority's Overruling of *Watkins* Is Contrary to the Legislature's Intent

(a) Majority Misconstrues § 43-2933 as Creating Only One Presumption of Risk

Applying *Watkins* here would avoid an interpretative inconsistency *and* a conflict with rule 301 by giving effect to the obvious requirement in § 43-2933 that someone produce evidence to support a court's finding of "no significant risk." But *Watkins* also presents a serious obstacle to the result that the majority wants to reach: i.e., that § 43-2933(1)(c) creates

only a bursting bubble presumption of risk that can be overcome with unpersuasive evidence. The majority's solution to this analytical hurdle is to overrule *Watkins*' holding that § 43-2933(1)(b) creates a presumption of significant risk. Yet, it concedes that the Legislature intended to make it more difficult for a parent to obtain or retain custody if one of the specified fact patterns under subsection (1)(c) exists. So, it comes to the illogical conclusion that because subsection (1)(c) creates merely a bursting bubble presumption, subsection "(1)(b) is not a burden-shifting presumption at all."

This statement can only be interpreted to mean that subsection (1)(b) creates no presumption. And the majority's reasoning necessarily extends to subsection (1)(a) because it contains the same language as subsection (1)(b). If either of these subsections created a presumption of risk, that presumption would undermine the majority's conclusion that subsection (1)(c) creates only a bursting bubble presumption. The majority's attempt to square a circle has distorted the legislative intent beyond recognition, and it has done so solely to justify an incorrect and unconvincing interpretation of subsection (1)(c). Yet, everything about the construction of § 43-2933 and the statutory scheme of the Parenting Act supports our interpretation in *Watkins* and refutes the majority's interpretation.

(b) Majority's Interpretation Conflicts With the Structure of § 43-2933

The structure of § 43-2933 supports the conclusion that subsection (1) creates three presumptions of significant risk. The codified description of the statute explains that it deals with presumptions: "Registered sex offender; other criminal convictions; limitation on or denial of custody or access to child; *presumption*; modification of previous order." (Emphasis supplied.) And the three statutory presumptions are grouped together as subsections (1)(a), (b), and (c). If the Legislature had not intended to give the specified fact patterns

in subsections (1)(a) and (b) presumptive effect, it would not have grouped them with subsection (1)(c). That all three fact patterns trigger a presumption of significant risk is further shown by § 43-2933(3).

Section 43-2933(3) provides that a "change in circumstances relating to subsection (1) . . . is sufficient grounds for modification of a previous order." This provision cannot be squared with the majority's statement that "while subsection (1)(b) and SORA indicate that the Legislature perceives a correlation between sex offender criminal history and the risk that offender poses to a child, subsection (1)(b) does not require any particular outcome based upon that criminal history alone." This statement ignores the limitations in both subsections (1)(a) and (b) on custody and visitation orders unless the court finds no significant risk to a child. And why would the Legislature conclude that all of the fact patterns set out in subsections (1)(a), (b), and (c) were sufficient grounds for a modification if they did not *all* trigger a presumption of significant risk?

(c) Majority's Interpretation Conflicts With Presumption Principles

I disagree with the majority's statement that regardless of whether a rebutting party's evidence would ultimately persuade a court, that party can overcome the presumption of a significant risk with evidence that "tends to disprove the presumed fact." Contrary to the majority's reasoning, I do not believe that evidence which is unpersuasive, and therefore insufficient to support a reasonable finding contrary to the presumed fact, can rebut a presumption—even if that presumption is characterized as a bursting bubble presumption.[8] Even if unpersuasive evidence could be sufficient to rebut a statutorily presumed fact in some cases, that rule should not apply here. Here, there

[8] See 2 McCormick on Evidence § 344 (Kenneth S. Broun et al. eds., 7th ed. 2013).

is no fact finder besides the trial court, and the court makes its decision at the close of all the evidence. So, there is no distinction between evidence that would "ultimately" persuade the court that the presumed fact (Rott presents a significant risk to these children) does not exist and evidence that is sufficient to rebut the presumption.

More important, courts generally give a presumption an effect that reflects the underlying social policy and the probability that proof of the basic fact supports an inference of the presumed fact, and to correct an imbalance in light of one party's superior access to the evidence.[9] Here, the Legislature created the presumption to protect children, a policy consideration that normally weighs heavily for a strong presumption.[10] A sex offender or person living with a sex offender has superior access to the relevant evidence regarding the recidivism risk to which a child is exposed. And as I discuss more later, Nebraska's SORA statutes presume that a sex offender presents a recidivism risk. All of these policy considerations weigh against concluding that unpersuasive evidence can rebut the presumption under § 43-2933(1)(c).

(d) Majority's Interpretation Conflicts With Statutory Construction Principles

Contrary to bedrock statutory construction principles, the majority's interpretation renders part of the statutory language of § 43-2933(1)(a) and (b) meaningless and adds a requirement that does not exist. The requirement that a court find no significant risk under subsections (1)(a) and (b) is meaningless, because under the majority's interpretation of § 43-2933, only subsection (1)(c) creates a presumption of risk. If no presumption of risk is triggered under subsections

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[9] See *id.*, § 343.

[10] See, *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012); 2 McCormick on Evidence, *supra* note 8, § 343.

(1)(a) and (b), why would a court need to find the absence of a significant risk?

Worse, because the majority concludes that any unpersuasive evidence will rebut its bursting bubble presumption, there will always be no risk presented by a sex offender's access to a child unless the court finds that a significant risk exists. The majority explicitly states, "*Should the court determine that there has been a change in circumstances placing the girls at significant risk* in the context of subsections (1)(b) and (c), then subsection (3) calls for modification in Robert's favor, unless other mitigating factors (not relevant here) warrant retaining custody with Kyel." (Emphasis supplied.) To conclude that a court must find a sex offender's access to a child presents a significant risk, the majority necessarily determines that our reasoning in *Watkins* was wrong. It states that "[c]ontrary to our decision in *Watkins*, we find [§ 43-2933(1)(b)] requires only that the court must make ***a*** factual finding, not that the court must find that there is a significant risk in the absence of rebutting evidence." (Emphasis in original.)

But the statute does not require a court to find that there *is* a significant risk absent rebutting evidence, and we did not hold that in *Watkins*. We held that the risk is presumed precisely because there is no requirement that a court find a sex offender's access to a child presents a significant risk when the offender committed a specified offense under § 43-2933(1)(b). Subsections (1)(a) and (b) required a court to find only that a child is *not* at significant risk. Adding a requirement that a trial court find a significant risk—instead of finding the absence of a significant risk—is contrary to the plain language of the statute, which apparently bears repeating:

> (b) No person shall be granted custody of, or supervised parenting time, visitation, or other access with, a child if anyone residing in the person's household is required to register as a sex offender under [SORA] for [one of the described offenses] *unless the court finds that*

> *there is no significant risk to the child and states its reasons in writing or on the record*.[11]

And if the court does not make that finding, the specified facts are a "change in circumstances [that] is sufficient grounds for modification of a previous order."[12] The statutory language could not be plainer. Our analysis in *Watkins* is not wrong, much less manifestly wrong.[13] And our analysis in *Watkins* is entirely consistent with the Legislature's intent in overhauling the Parenting Act in 2007.

(e) Majority's Interpretation Conflicts With Scheme of the Parenting Act

Section 43-2933 was enacted as part of the 2007 legislative bill amending the Parenting Act.[14] One of the stated purposes for L.B. 554 was to recognize "the importance of maintaining parent-child relationships *while at the same time protecting victims of abuse and neglect*."[15] In the legislative findings, the Legislature clarified that protecting children was one of the act's purposes:

> Given the potential profound effects on children from witnessing child abuse or neglect or domestic intimate partner abuse, as well as being directly abused, the courts shall recognize the duty and responsibility to keep the child or children safe when presented with a preponderance of the evidence of child abuse or neglect or domestic intimate partner abuse . . . .[16]

Accordingly, every parenting plan must include "[p]rovisions for safety when a preponderance of the evidence establishes

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[11] § 43-2933(1)(b) (emphasis supplied).

[12] § 43-2933(3).

[13] See *Potter v. McCulla*, 288 Neb. 741, 851 N.W.2d 94 (2014).

[14] See 2007 Neb. Laws, L.B. 554, § 14.

[15] Introducer's Statement of Intent, L.B. 554, Judiciary Committee, 100th Leg., 1st Sess. (Mar. 8, 2007) (emphasis supplied).

[16] Neb. Rev. Stat. § 43-2921 (Reissue 2008).

child abuse or neglect, domestic intimate partner abuse, unresolved parental conflict, or criminal activity which is directly harmful to a child."[17] And L.B. 554 enacted specific procedures to carry out the purpose of protecting children. These Parenting Act provisions also apply to modification proceedings commenced on or after January 1, 2008.[18]

When parties contest temporary custody and visitation orders, they must file a "child information affidavit" that includes "any circumstances of child abuse or neglect . . . that are likely to pose a risk to the child."[19] After a hearing, a court's temporary parenting order must include "provisions for safety and a transition plan, consistent with any court's finding of child abuse or neglect."[20]

Similarly, when a court must develop a parenting plan because the parties have not presented one for approval,[21] it must impose limitations to protect a child from harm if it finds by a preponderance of the evidence that a parent has committed specified acts, including child abuse or neglect.[22] The many possible limitations include changing the custody allocation, requiring supervised visitation and parenting time, and restraining a parent from communicating with a child.[23]

Significantly, § 43-2932, the statute immediately preceding the statute at issue here, sets out the burden of proof requirement when a court finds that a parent has engaged in a specified act: "The parent found to have engaged in the behavior specified in subsection (1) of this section has the burden of proving that legal or physical custody, parenting time,

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[17] Neb. Rev. Stat. § 43-2929(1)(b)(ix) (Supp. 2015).

[18] See Neb. Rev. Stat. § 43-2924(1) (Reissue 2008). See, also, Neb. Rev. Stat. § 42-364(6) (Cum. Supp. 2014).

[19] Neb. Rev. Stat. § 43-2930(1) (Cum. Supp. 2014).

[20] § 43-2930(2)(d).

[21] See § 43-2929.

[22] See Neb. Rev. Stat. § 43-2932(1) (Cum. Supp. 2014).

[23] See § 43-2932(1)(b).

visitation, or other access to that parent will not endanger the child or the other parent."[24] So, § 43-2932 also sets out statutory presumptions that a child is placed at risk by a parent's previous wrongdoing unless the parent proves otherwise.

Sections 43-2932 and 43-2933 were both created as part of the 2007 amendments to the Parenting Act.[25] Section 43-2933 does not set out a separate procedure from the one created by § 43-2932. It sets out separate and stronger presumptions of risk and limitations on what a court can order in a parenting plan when a custody dispute involves a sex offender. Therefore, the procedural requirements for determining a final parenting plan under § 43-2932 should govern. That is, consistent with our holding in *Watkins*, the court must first find that a parent engaged in one of the specified activities under § 43-2933: (1) The parent committed a specified sex offense, (2) the parent is living with a person who committed a specified sex offense, or (3) the parent is giving a person who committed a specified sex offense unsupervised access to his or her child. If the court finds that a parent committed a specified act by a preponderance of the evidence, then the parent found to have engaged in the conduct should have the burden of proving that the child will not be endangered by the parent's access to the child.

Section 43-2932 and its sister statute, § 43-2933, should be read consistently so that § 43-2932 governs the general procedures and burdens of proof. Otherwise, under § 43-2932, if a court finds that a parent has been convicted of child abuse, for that reason alone, the parent has the burden of proving that his or her access to the child will not endanger the child. But under the majority's implicit interpretation of § 43-2933(1)(a), if the evidence shows that a parent has been convicted of first degree sexual assault of a child, this fact does not necessitate a judicial finding that the parent's access to a child

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[24] § 43-2932(3).

[25] See L.B. 554, §§ 13 and 14.

presents no significant risk—because no meaningful statutory presumption of risk arises. This absurdity should be sufficient to show that the majority's interpretation could not be the Legislature's intent.

(f) Majority's Interpretation Conflicts With the Presumption of Risk Under the Amended SORA Statutes

As explained, the probability that proof of the basic fact supports an inference of the presumed fact is a factor courts consider in determining the effect to give a presumption.[26] For this basic fact—proof of a felony sex offense against a minor—the Legislature has implicitly determined that there is a significant probability that the sex offender will reoffend for an extended period.

Before 2009, the Nebraska State Patrol determined the registration and notification requirements for sex offenders based on its individualized assessments of their high, moderate, or low recidivism risk.[27] In 2009, the Legislature abandoned that requirement and enacted an offense-based system of sex offender registration and notification rules.[28] The new registration and reporting requirements rely solely on the type of "registrable offense" that a sex offender committed.

Section 29-4005 now sets out three different registration periods for sex offenders, depending on the severity of the offense. As relevant here, if the registrable offense was punishable by imprisonment for more than 1 year, the registration and reporting period is for 25 years.[29] The record shows the court accepted Rott's guilty plea to a reduced count of attempted

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[26] See 2 McCormick on Evidence, *supra* note 8, § 343.

[27] See *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

[28] See, 2009 Neb. Laws, L.B. 285, § 11 (codified at § 29-4013 (Cum. Supp. 2014)); Introducer's Statement of Intent, L.B. 285, Judiciary Committee, 101st Leg., 1st Sess. (Mar. 18, 2009).

[29] § 29-4005(1)(b)(ii) (Cum. Supp. 2014).

sexual assault under a plea agreement. It sentenced him to 5 to 8 years' imprisonment, and attempted sexual assault is a registrable offense under § 29-4003.[30] So, if Rott were convicted today, his conviction would minimally require him to register as a sex offender for 25 years.

Under L.B. 285, the presumed risk represented by the severity of a sex offense is the public policy of this state and should certainly apply when a person who has committed a felony sex offense against a minor has unsupervised access to a child. I believe it is inconsistent with the unrebuttable presumption of risk under the SORA statutes to conclude that a party can rebut the presumption of risk under § 43-2933(1)(c) with unpersuasive evidence.

(g) Nebraska Evidence Rule 301 Should Apply

In child custody modification appeals, we normally conduct a de novo review of the record to determine whether the trial court abused its discretion.[31] But the effect to be given a statutory presumption and the standard of evidence required to overcome it present questions of law that we independently review.[32]

All of the considerations for determining the effect of a presumption weigh for applying evidence rule 301 to the presumption under § 43-2933(1)(c). The Legislature's social policy is to protect children. It has statutorily determined that the fact of a felony sex offense against a minor has a strong correlation to the risk of reoffense. And a custodial parent living with a sex offender will have superior access to the relevant evidence. As I explain later, the noncustodial parent cannot

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[30] § 29-4003(1)(a)(i)(C) and (N) (Cum. Supp. 2014).

[31] See *Watkins, supra* note 3.

[32] See, *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005); *Variano v. Dial Corp.*, 256 Neb. 318, 589 N.W.2d 845 (1999).

obtain it. So I believe that the Legislature obviously meant that if the (1)(c) presumption is triggered *and* the noncustodial parent is a suitable person to have custody, then the noncustodial parent is entitled to judgment in a custody dispute unless the custodial parent overcomes the presumed fact by a preponderance of the evidence. Any other conclusion lessens the significance of the sex offender's previous conduct, which is the point of the stronger presumption.

II. MAJORITY OPINION WILL CREATE ARBITRARY JUDGMENTS

To recap, I believe the majority misconstrues § 43-2933(1)(c) to create a meaningless presumption of risk that bursts upon a custodial parent's production of unpersuasive evidence. Therefore, a noncustodial parent will always have the burden to prove that a sex offender's unsupervised access to his or her child presents a significant risk of harm. And whether a noncustodial parent has met this burden is a matter for a trial court's unguided discretion.

But the majority ignores two significant problems with its approach. First, the noncustodial parent does not have access to the information relevant to assessing a sex offender's recidivism risk. So, a custodial parent's claim that a sex offender presents no risk to a child can prevail even on unpersuasive evidence—as in this case. Upon that meager showing, the noncustodial parent has the burden to present unavailable evidence. Second, a trial court cannot make that assessment without the input of a qualified evaluator. The majority would presumably not hold that a trial court has discretion to determine whether a person suffers from a mental disorder absent an expert's opinion. I see no reason to treat this issue differently.

1. Only Law Enforcement Agencies Have the Relevant Information

In concluding that Kyel's evidence burst the statutory presumption, the majority relies, in part, on the lack of allegations

against Rott since his release from prison in 2007. But Kyel, of course, did not produce evidence showing there were no other allegations of sex offenses against Rott. So a reader must wonder how the lack of evidence supports the majority's conclusion that Kyel rebutted the presumption. This confusion would not be surprising because the majority actually implies that Robert had the burden to produce evidence of other sex offense allegations to prevent this factor from weighing for rebuttal of the presumption. Leaving aside that this implicit reasoning turns the concept of presumptions on its head, noncustodial parents will usually not have access to such information unless they happen to know about other victims.

Similarly, in concluding that Robert failed to prove Rott posed a significant risk to these children, the majority states that Rott has not been investigated for any sexual wrongdoing since his release from prison and that the evidence failed to show he has any other criminal history. These statements also impliedly impose a burden on noncustodial parents to present such evidence once a custodial parent presents unpersuasive evidence that a child is not at risk.

But Nebraska's statutes prevent a noncustodial parent from obtaining such evidence. In 2002, when the Nebraska State Patrol still performed individualized risk assessments for sex offenders, the Legislature enacted a measure to ensure that the State Patrol had access to the relevant information for determining a sex offender's recidivism risk under its assessment instrument.[33] Specifically, under the 2002 enactment, the State Patrol's personnel for the sex offender and community notification division have access to

> all documents that are generated by any governmental agency that may have bearing on sex offender registration and community notification. This may include, but is not limited to, law enforcement reports, presentence

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[33] See 2002 Neb. Laws, L.B. 564, § 10 (codified at § 29-4013(2)(f) (Reissue 2008) and § 29-4013(5) (Cum. Supp. 2014)).

> reports, criminal histories, birth certificates, or death certificates. . . . Access to such documents will ensure that a fair determination of what is an appropriate registration period is completed using the totality of all information available.[34]

The State Patrol still has access to this information, although it no longer performs individualized risk assessments. Instead, it provides this information to the Office of Parole Administration, which must perform an individualized risk assessment before releasing a sex offender who is subject to a lifetime registration requirement.[35]

But § 29-4009(1) restricts access to information in the sex offender registry if a sex offender's arrests did not result in a conviction. Such information can only be disclosed to "law enforcement agencies, including federal and state probation or parole agencies, if appropriate."[36] Both § 29-4009 and § 29-4013(4) impose restrictions on who can access information in the sex offender registry, and these statutes do not include courts or private parties to a custody dispute. Likewise, Neb. Rev. Stat. § 29-3523 (Supp. 2015) limits the information that a member of the public can obtain about an individual's criminal record, particularly for dismissed charges.

In short, unlike statutorily authorized agents, noncustodial parents cannot discover from official records whether a felony sex offender has a criminal history, other than the offense that resulted in the public notification, or whether there are other allegations of sex offenses. That lack of access illustrates the obvious reason for creating a statutory presumption. Contrary to that legislative intent, the majority's conclusion that Robert failed to produce persuasive evidence of Rott's

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[34] § 29-4013 (Cum. Supp. 2014).

[35] See, Neb. Rev. Stat. § 29-4019 (Reissue 2008); Neb. Rev. Stat. §§ 83-174.02 and 83-174.03 (Reissue 2014); 272 Neb. Admin. Code, ch. 19, § 13 (2010).

[36] § 29-4009(1) (Cum. Supp. 2014).

recidivism risk will place a formidable, if not impossible, burden on noncustodial parents to prove their child is at a significant risk. Sex offender registration and notification laws exist specifically because sex offenders are presumed to pose a risk of reoffense and have no incentive to reveal their criminal histories.

2. Courts Are Not Equipped to Evaluate a Sex Offender's Recidivism Risk

For various methodological reasons, commentators have noted that actuarial risk assessment instruments, like the one that the Nebraska State Patrol formerly used, underestimate a sex offender's long-term recidivism risk.[37] As we noted in *Slansky v. Nebraska State Patrol*,[38] studies have shown that sex offenders continue to present a risk for reoffending for up to 20 years after release or supervision. Nonetheless, research has shown that the accuracy of different approaches to predicting the long-term risk posed by sex offenders, in the aggregate, can be ranked in the following order: (1) actuarial assessments, like the one that the State Patrol used; (2) guided clinical assessments that rely on the systematic professional judgment of qualified professionals based on empirically derived instruments; and (3) unstructured clinical judgment.[39]

But a court presiding over a child custody dispute cannot perform an actuarial assessment because it does not have access to the relevant information or the training to use the instrument. And if a mental health professional's unstructured clinical judgment is the least effective approach to predicting a sex offender's recidivism risk, then an untrained trial judge obviously cannot determine that risk except through guesswork.

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[37] See Andrew J. Harris, *Risk Assessment and Sex Offender Community Supervision: A Context-Specific Framework*, 70 Fed. Probation 36 (Sept. 2006).

[38] See *Slansky, supra* note 27.

[39] See Harris, *supra* note 37.

The majority's reasoning illustrates the problem. It casts the issue as a matter of determining credibility. But the noncustodial parent does not have access to information that would permit an effective cross-examination of that credibility. The majority emphasizes the lack of evidence showing Rott suffers from a mental health condition, his remorse for his offense, and his positive response to treatment. But despite Rott's sex offender treatment while in prison, this record contains no evidence of his treatment evaluation or whether he was diagnosed with a mental health condition that would exacerbate his recidivism risk. Similarly, the majority points to the lack of allegations that he committed other sexual acts without explaining how a noncustodial parent should obtain this information.

These problems show that interpreting § 43-2933 as imposing a bursting bubble presumption is not only contrary to the Legislature's intent but will result in custody decisions in which the risk to a child is unknown. Instead, the custodial parent, as the party living with the sex offender, should be the one who bears the burden of proving his or her child is not at risk, as the party who has access to the relevant information.

III. KYEL FAILED TO REBUT THE PRESUMPTION OF A SUBSTANTIAL RISK

The majority reduces Robert's evidence to a concern that Kyel had not investigated Rott's criminal history. It concludes that Robert's concern was contradicted by Rott's and Kyel's testimonies.

Not so. The majority incorrectly states that Robert presented no other evidence of a material change in circumstances other than Rott's unsupervised access to the children. Kyel's failure to investigate Rott's offense was only part of the evidence supporting Robert's claim that Rott presented a significant risk to his daughters *and* that Kyel would not protect them. Robert showed that Kyel had previously failed

to protect her daughters from a sex offender and had willfully refused to face the risk posed to her daughters by giving another sex offender unsupervised access to them. Moveover, the majority omits the contradictions in Kyel's and Rott's testimonies about her knowledge of his conduct before moving in with him. And it emphasizes Rott's remorse about his previous sex offense, while diminishing evidence that he minimized his conduct.

I also disagree that the issue is whether Robert showed a material change in circumstances under our case law. The issue is whether Kyel rebutted the presumption that Rott presented a substantial risk to her children to avoid the statutorily mandated change in circumstances under § 43-2933(3). But Robert's evidence was relevant to whether Kyel had rebutted that presumption. And our decision in *Watkins* requires that analysis.

Robert presented evidence of the basic fact—Rott's conviction of a felony sex offense against a minor—that triggered the Legislature's presumption that his children were at a substantial risk because Rott had unsupervised access to them. Kyel presented no evidence of Rott's recidivism risk, despite being the party with access to this information. So, there was no conflicting evidence on Rott's recidivism risk. And if this evidence was sufficient to rebut the presumption of risk, there is no case in which the evidence would be insufficient. All a custodial parent needs to say is that a sex offender who has unsupervised access to his or her child has not yet harmed the child or taken steps to do so. The majority has set a low bar for custodial parents to circumvent the will of the Legislature.

Moreover, leaving aside the majority's bursting bubble presumption theory, I believe it misreads the record to conclude that Robert failed to show a material change in circumstances. First, it ignores evidence that Kyel has previously failed to protect her children from a sex offender. Second, it ignores the requirements of § 29-4013 when Rott was released from custody in 2007. The pre-2009 version of § 29-4013 required

the Nebraska State Patrol to assess Rott's recidivism risk.[40] So Rott's individualized risk assessment was available to Kyel—but not to Robert. Third, it emphasizes Rott's participation in sex offender treatment programs while ignoring statutes that show this emphasis is overstated. Rott had to participate in those treatment programs or face a civil commitment evaluation before he was released.[41] And if Rott was rehabilitated or given a low risk assessment in 2007, Kyel could have produced that proof. Fourth, the majority notes that there is no evidence of disciplinary actions taken against Rott in prison, no evidence of his criminal history, and no evidence that he had mental health disorders. But this evidence was also available to Kyel and not Robert. Finally, the majority ignores the admissions of the girls' therapist, Schwan, that she could not say whether Rott presented a risk of reoffense.

Instead, the trial court and the majority have relied on weak evidence that amounts to proof that because nothing has happened so far, the children are not at risk. But Rott and Kyel both have a history of minimizing their conduct. And of course, they had every incentive to do so. Having to take their word for the children's safety only emphasizes the need for a more reliable opinion about Rott's recidivism risk. That evidence did not exist. And I believe that the record shows that the majority's conclusion is unsupportable.

1. Summary of Kyel's Evidence Shows Why Majority Incorrectly Concludes the Presumption of Risk Was Rebutted

Contrary to the majority's conclusions, the evidence did not show that these children were not at significant risk of harm. During these proceedings in July and August 2014, Robert and Kyel's daughters were ages 15 and 13. Kyel also had two

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[40] See § 29-4013 (Reissue 2008 & Supp. 2007).

[41] See 2006 Neb. Laws, L.B. 1199, § 26 (codified at § 29-4014 (Reissue 2008)).

other daughters from other relationships who lived with her. The youngest one was age 8, and the oldest daughter was age 16.

(a) Factual Basis for Rott's Criminal Conviction and Rott's Testimony About His Conduct

As the U.S. Supreme Court has explained, a sex offender's minimizing of his or her past conduct is a serious impediment to rehabilitation.[42] And the record shows that Rott and Kyel omitted or glossed over significant facts relevant to Rott's rehabilitation to minimize the risk that his unsupervised access to the children presented. It is not pleasant to set out the following facts. But I believe it is necessary, because Kyel did not produce evidence of Rott's treatment evaluation or his actuarial risk assessment.

Significant discrepancies existed between Rott's testimony and the facts underlying his sex offense conviction. As stated, in 2003, the State charged Rott with two counts of first degree sexual assault and one count of sexual assault of a child for conduct occurring from May 1, 2000, to February 28, 2002. A police officer's probable cause affidavit stated that in November 2002, Rott's former stepdaughter, who was then age 14, reported that Rott had sexually assaulted her for the past 2 years. She reported that he had touched or rubbed her breasts and vaginal area about 12 to 14 times in the previous 2 years. She said that he had also digitally penetrated her vagina on one occasion and penetrated her vagina with a vibrator on one occasion. The officer further stated that in a recorded interview, Rott admitted that he had touched and kissed his stepdaughter's breasts five to six times in the past 2 years, rubbed her vagina with a vibrator, and observed her as she masturbated.

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[42] See *McKune v. Lile*, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002).

But at trial, Rott minimized and contradicted his statements to the investigator about his conduct with his stepdaughter: "Over about a three to four month period I had inappropriately touched my stepdaughter, had sexual contact with her five or six times. It started with touching of her breast to using my finger on her vagina to using a vibrator on her vagina or clitoris." Rott said that he gave this account of his conduct to Kyel before she and her daughters moved in with him.

Rott said he and his stepdaughter had talked about her masturbating, but that he had never watched her. He said he did not deny this allegation in court because it was petty and he wanted to accept responsibility for his conduct. In contrast to his recorded statements to an officer in 2002, on cross-examination, he explicitly denied having sexual contact with his stepdaughter over a 2-year period. He said that the sexual contact occurred over a 3- to 4-month period. Later, he was asked why the threat of prison had not been a deterrent with his stepdaughter when he clearly knew that penetrating her was a crime. He denied penetrating her and said that when he committed those crimes, he did not think he could go to jail for his conduct.

Contrary to the majority's statements, in the recorded interview with an officer, Rott did *not* admit to digitally penetrating his stepdaughter. And the majority fails to mention that he did admit to touching and *kissing* his stepdaughter's breasts five to six times *over a 2-year period*. Additionally, contrary to his denial at trial, Rott admitted to the officer that he had watched his stepdaughter masturbate. Finally, the probable cause affidavit shows that his stepdaughter accused him of penetrating her vagina with a vibrator, not simply rubbing her with a vibrator as Rott stated.

We cannot know from this record whether Rott's stepdaughter gave a sworn statement about his conduct. But we have previously stated that a Nebraska State Patrol evaluator can consider a sex offender's sexual assault behavior as reflected in a victim's statement that supports a charged crime, even if

the charge did not result in a conviction: "[T]he prosecutor's decision to file the charge[s] and the absence of an acquittal or outright dismissal afford some basis for concluding that the facts reflected in the official documentation are true."[43] We have also observed that experts testifying in a sex offender's civil commitment case can rely on a sex offender's voluntary statements against interest.[44]

The majority opinion downplays both the significance of Rott's previous sexual assault behavior and his minimizing of his previous conduct. But these are factors that an expert would consider in assessing a sex offender's rehabilitation. And the evidence showed that both Rott and Kyel had concealed or minimized his previous conduct. Moreover, they contradicted each other regarding Kyel's knowledge of his conduct.

(b) Rott and Kyel Minimized or Concealed Rott's Sexual Assault Behavior

Kyel began dating Rott in May 2010, about 3 years after he was released from prison. Kyel said that Rott told her his criminal history and had been honest about what he had done. She said that she knew he was a registered sex offender and that the crime involved his stepdaughter. Kyel testified that she "called the hot line for the child protective services" and spoke with her family members before deciding to move in with Rott in September 2011. They married in June 2012. But on cross-examination, Kyel admitted that she moved in with Rott about 3 months after she started dating him in 2010. Rott's testimony confirmed that Kyel and her children moved in with him in August 2010 after they had dated for 3 months.

In July 2013, Robert told one of his daughters not to trust Rott after he saw Rott's sex offender status online. The

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[43] *McCray v. Nebraska State Patrol*, 271 Neb. 1, 15, 710 N.W.2d 300, 311 (2006).

[44] See *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011).

daughter's anger at learning this information caused problems in Kyel's home. Robert's daughters both started therapy with Schwan in August 2013, shortly after his daughter found out about Rott's status.

During Schwan's pretreatment assessment, Kyel reported that the sexual assault allegations against Rott resulted from his going through a bad divorce. In contrast, Rott testified that by June 2010, Kyel knew that he had had sexual contact with his 14-year-old stepdaughter and that the charges against him were not the result of a messy divorce. Kyel told Schwan that she did not want to think about Rott's sex offender status and had pushed it to the back of her mind. Kyel admitted on cross-examination that she did not know the details of what Rott had done until after she started therapy sessions with Schwan.

In fact, the truth about Rott's previous conduct came to light only because Kyel's statements prompted Schwan to investigate. Schwan obtained Rott's prescreening report for inpatient sex offender treatment at the Lincoln Regional Center. This treatment occurred before Rott was released from custody in 2007. Schwan said at the time of the prescreening assessment that Rott had admitted to teaching his stepdaughter "how to French kiss," touching her vaginal area twice, and having sexual contact with her six to eight times.

Because Kyel had minimized Rott's conduct, Schwan went over this information with her. She encouraged Kyel to tell her daughters about Rott's past for their own protection because keeping things a secret "increases the risk." Kyel told her daugthers about Rott's past during a September 2013 therapy session. This was more than 3 years after Kyel had moved her daughters in with Rott. One daughter said that Kyel told her something happened with Rott's daughter when he was married to another woman but that no one had told her the whole story.

But on cross-examination, Schwan said that Kyel only reported to her what Rott had told Kyel about his going

through a bad divorce. Schwan was concerned that Rott had minimized his conduct. Yet, she did not know whether his minimizing was indicative of a risk to reoffend, because she was not his therapist and had not met with him. She said that she could see only what the Lincoln Regional Center report said. It is not clear why Schwan could not obtain information about Rott's treatment evaluation or his risk assessment if she could access his pretreatment assessment. The majority acknowledges that Schwan reviewed some of Rott's prison records that were not presented at trial. But the crucial point is that Schwan specifically stated that she could not personally say whether Rott had been rehabilitated *or whether he presented a risk to reoffend*. Rott said he had successfully completed the inpatient sex offender treatment program and had received documentation to show it. But Kyel did not produce that documentation.

In addition, Kyel's personal history raised concerns that she would not protect her daughters from sexual abuse. Schwan's pretreatment assessment showed that Kyel had minimized her former boyfriend's sexual abuse of her oldest daughter. Kyel reported to Schwan that one of her daughters had been in counseling when she was about age 5 or 6 because Robert's father and mother had alleged that Kyel's former boyfriend might have sexually abused her oldest daughter and that the other daughter might have witnessed it. Kyel reported to Schwan that after a law enforcement interview, the boyfriend was asked to leave the house.

But Schwan testified that the former boyfriend had sexually assaulted Kyel's oldest daughter. The evidence showed that the State had originally charged the former boyfriend with first degree sexual assault. But under a plea agreement, the court convicted him of attempted sexual assault on a child. Schwan acknowledged that Kyel's relationship with another sex offender created concern that she might "have blinders on for what was going on" and not set appropriate boundaries. Schwan admitted that she was concerned that Kyel had

not told her daughters about Rott's past until Schwan encouraged her to do so and that she was reluctant to acknowledge the seriousness of his conduct. And she admitted that Kyel's conduct in moving her daughters in with Rott without knowing the extent of what he had done was concerning. But she said that she was not Kyel's therapist when Kyel made that decision and could only give Kyel suggestions for dealing with the current situation.

Nevertheless, Schwan encouraged Kyel to see a therapist for herself, in part because Kyel had also been sexually abused as a child. She said that research has shown this history creates a risk that a woman might not recognize red flags when her children are at risk for sexual abuse. Schwan believed Kyel was working on recognizing warning signs, but she said that working on her own issues in therapy would help. Schwan did not know whether Kyel had complied.

The fact remains that Kyel did not tell her daughters about Rott until one daughter learned about his status from Robert. Kyel's excuse was that she did not want her daughters to be stigmatized if it got around school that their stepfather was a sex offender. But she also said that if one of her daughters invited a friend over, she would tell the parent that Rott was a registered sex offender. Kyel also did not tell Robert about Rott's history.

(c) Household Precautions

The majority emphasizes that the "household takes precautions such as ensuring there is a lock on the bathroom door, adjusting shower schedules, establishing a dress code, having the girls change in private, and limiting [Rott's] time alone with one child." But Kyel said that she and Rott had taken precautions around the house because the girls were not used to living with a male, not because of Rott's history. Rott similarly said he and Kyel took precautions to make the children and their friends feel safe, not because he was a risk to them.

More troubling, Rott had significant unsupervised access to the children. Kyel acknowledged that two safety precautions she had discussed in therapy were avoiding secrets and avoiding her daughters' spending time alone with Rott. Nonetheless, she said that one daughter had gone hunting with Rott alone "a couple of times." Rott said he did not spend time alone with just one child "unless you want to call going hunting for two hours" time alone. Kyel's working hours were usually from 6 a.m. to 2:15 p.m. Rott said he was home alone with the children from about 6 to 7 a.m. when he left for work.

(d) Schwan Offers No Opinion on Rott's Risk of Reoffense

Despite Schwan's stated concerns about Kyel's judgment and past conduct and despite Schwan's inability to assess whether Rott presented a recidivism risk, she opined that the children were not at risk living with Kyel. She said she had worked with the children to determine if appropriate boundaries were in place in the home and whether any red flags indicating a risk were present, particularly grooming behaviors. She had not perceived any and did not see any need for a safety plan. Her focus was on the family's not having secrets. And she said that the children had not reported anything to make her think that they would be unsafe living with Rott.

But on cross-examination, Schwan acknowledged that the children had not told Kyel about incidents involving Rott's explosive temper until she encouraged them to do so in therapy. Once, while driving very fast on a gravel road, Rott had slammed on his car's brakes when he became angry with the children for not doing their chores. Another time, he had thrown a brick at a Quonset building when he was angry with one of the children, who had also seen him punch a grain bin and did not tell Kyel. But these incidents did not cause Schwan to think that Rott presented a significant risk of harm. This same child said Rott had never hit her and denied feeling endangered by him. But she did not talk to him much

and said that his anger was a factor that weighed against her living with Kyel.

2. Evidence Was Insufficient to Show No Significant Risk

Rott's and Kyel's testimonies were inconsistent on why Kyel minimized Rott's conduct to Schwan. Was it because Rott had minimized his account to Kyel? Or did Kyel minimize his conduct to Schwan, despite knowing the full extent of what he had done? Schwan believed that Rott had minimized to Kyel his previous sexual assaults. But contrary to the majority's opinion, Rott's and Kyel's testimonies did not refute Robert's claim that Kyel took no steps to investigate Rott's criminal history before moving her children in with him. Schwan specifically testified that she was concerned by Kyel's moving in with Rott without knowing the full extent of what he had done.

The record shows that Schwan's investigation into Rott's criminal history is the only reason that Kyel ever provided any information to her daughters about Rott's past. Her excuse that she did not want to stigmatize them at school cannot be reconciled with her testimony that she told their friends' parents about Rott's sex offender status. Kyel also refused to tell Robert about Rott's status, thus concealing her poor judgment—because Robert would have known that this was the second time that Kyel and her daughters had lived with a sex offender. Minimally, the evidence strongly suggested that because of Kyel's desire to maintain an emotional attachment to Rott, she would resist an honest assessment of evidence that Rott posed a risk to her daughters.

Unsurprisingly, Rott's criminal history, coupled with Kyel's history of living with a different sex offender who had sexually assaulted her oldest daughter, caused Schwan to question Kyel's judgment and ability to protect her daughters. And Schwan was concerned about Rott's minimizing of his sexual assault behavior, a known impediment to rehabilitation.

Yet, despite Schwan's investigation into Rott's sex offender treatment, she could not opine whether he presented a recidivism risk.

The majority, like the lower courts, relied, in part, on Rott's participation in sex offender treatment programs to conclude that Kyel had rebutted the presumption of risk. But Rott's treatment evaluation would be significant evidence of his risk, and Kyel did not produce it. So Rott's statement that he had satisfactorily completed the treatment did not show that he had been rehabilitated or rebut the presumption of significant risk absent evidence of his treatment evaluation showing that he did not present such a risk.

In the light of Schwan's concerns about Kyel's poor judgment and her admission that she did not know whether Rott had been rehabilitated or presented a recidivism risk, Schwan's opinion that these children were not at risk was unpersuasive. The supposed household precautions did not allay concerns about Kyel's judgment or Rott's recidivism risk. Schwan would not have asked Kyel to take precautions if there was no risk. And Schwan was curiously unconcerned about evidence that Rott could not control his anger impulses around the children. Research has shown that apart from a sexual interest in children, the second strongest predictive factor of sexual recidivism is an "antisocial lifestyle and orientation, as characterized by . . . 'reckless, impulsive behavior.'"[45] Lifestyle impulsivity has a well-established correlation with sexual recidivism.[46]

Schwan's failure to evaluate Rott's recidivism with known risk factors may be consistent with her statements that she was not his therapist. But her testimony failed to show that the

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[45] Harris, *supra* note 37 at 37.

[46] See, Cortney E. Lollar, *Child Pornography and the Restitution Revolution*, 103 J. Crim. L. & Criminology 343 (2013); Robert A. Prentky et al., *Recidivisim Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law & Hum. Behav. 635 (1997).

children were not at risk. And the "considerable weight" that the trial court placed on Schwan's testimony was contrary to Schwan's acknowledgment that she could not opine whether Rott had been rehabilitated or presented a recidivism risk.

Moreover, all the evidence—if it existed—to rebut the presumption of a significant risk of harm was available to Kyel through Rott. She could have presented his risk assessment, the length of his required registration, and his treatment evaluation to prove that he did not have a significant risk of reoffense. Because she failed to present any of this evidence, the record suggests the documentation would not have been favorable to her. Alternatively, she could have obtained the opinion of a professional qualified to assess Rott's recidivism risk. As stated, an individualized psychological assessment is another means of showing no significant risk of recidivism.

But any sex offender and any custodial parent choosing to live with a felony sex offender will have incentive to claim that the offender is rehabilitated and that the parent's child is not at risk—even if the sex offender has actually been assessed with a high recidivism risk. As noted, sex offenders can present a recidivism risk up to 20 years after release or supervision.[47] So, no matter how credible such testimony appears, a trial court will not know the real risk a child is exposed to absent a valid risk assessment. I believe that concluding that the presumption of risk is rebutted by self-serving testimony and the opinion of a witness who has not performed a valid risk assessment will lead to absurd results that place children at risk.

Robert did not have access to the information for a reliable risk assessment. And under *Watkins*, he was not required to present it. Nor did the court have the information or expertise needed to assess Rott's recidivism risk. So the burden fell on Kyel, as the party living with a sex offender, to rebut the presumption of a significant risk by obtaining the relevant information from Rott or obtaining a risk assessment from someone

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[47] See *Slansky, supra* note 27.

qualified to make it. Because she failed to do so, the evidence did not support a reasonable finding that the children were not at significant risk of harm, much less rebut the presumption by a preponderance of the evidence.

As stated, the effect to be given a statutory presumption and the type of evidence required to overcome it present questions of law that we independently review.[48] When a child is living with a person who has previously committed a felony sex offense against a minor and has unsupervised access to the child, I would hold that evidence of a valid risk assessment is required to rebut the presumption of significant risk. Absent a valid risk assessment, a court's conclusion that the offender poses no significant risk to the child is unsupportable and untenable. I conclude that Kyel failed to rebut the presumption under § 43-2933(1)(c) as a matter of law and that the trial court abused its discretion in concluding otherwise.

Because the presumption controls, Robert has met his burden of showing that a statutorily mandated change of circumstances exists to support a change of custody, regardless of whether the evidence would be sufficient to show a material change in circumstances under our case law. I would reverse, and remand with instructions for the Nebraska Court of Appeals to instruct the district court to modify the custody disposition to make Robert the primary custodian and to consider the circumstances under which Kyel would be permitted visitation.

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[48] See *Dawes, supra* note 32.

Miller-Lerman, J., dissenting.

For purposes of this dissent, I accept and apply the legal framework adopted by the majority, but I respectfully dissent from the majority's assessment of the evidence. Upon my review de novo on the record, I believe that the district court erred when it denied Robert's counterclaim for modification and that the Nebraska Court of Appeals erred when it

affirmed that decision. I would reverse, and award custody to Robert.

Taken as a whole, the evidence shows that the environment surrounding Thomas' prior felony sexual assault crime bears a strong resemblance to the current domestic setup. Kyel remains largely in denial, and the therapist who testified as to the risk Thomas may pose had never interviewed Thomas.

In my view, the record contains convincing evidence that Thomas posed a significant risk of harm. Thomas was convicted of a felony count of attempted sexual assault, after being originally charged with two counts of sexual assault in the first degree and one count of sexual assault of a child. The assault victim was a minor who was Thomas' teenaged stepdaughter, similar to the children at issue in this case.

Thomas admitted to fondling and digitally penetrating the victim, but minimized the seriousness of his actions by claiming there were fewer instances over a shorter period of time than that alleged by the victim.

The evidence shows that Kyel is reluctant to acknowledge the extent of Thomas' criminal behavior, and she admits that she would prefer to ignore Thomas' sex offender history. Kyel has previously failed to recognize warning signs, exposing another of her daughters to alleged molestation by a previous love interest. It is not in the girls' best interests to entrust their safety to an individual who does not comprehend the hazards posed by their situation.

The record shows that therapist Schwan never met with Thomas and was not an expert in treating adult sex offenders; she evidently based her assessment of Thomas on her conversations with the girls and Kyel. The basis for Schwan's opinion is thin; Schwan's opinion itself is not robust or convincing.

Given that Thomas' criminal history is so concerning, and that even Kyel's evidence demonstrates avoidance and denial, I would find that the evidence satisfies Robert's burden under the statute and shows that the girls are at significant risk. Robert met his burden to show that modification was warranted.

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

State of Nebraska, appellee, v. Erica A. Jenkins, appellant.

883 N.W.2d 351

Filed August 19, 2016. No. S-15-169.

1. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014), and the trial court's decision will not be reversed absent an abuse of discretion.
2. **Trial: Photographs: Appeal and Error.** An appellate court reviews a trial court's admission of photographs of a victim's body for abuse of discretion.
3. **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.
4. **Rules of Evidence: Other Acts.** The purpose of Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014), is that evidence of other acts, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.
5. **Rules of Evidence: Other Acts: Proof.** Under Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Cum. Supp. 2014), before a court can admit evidence of an extrinsic act in a criminal case, the State must prove by clear and convincing evidence, outside the presence of the jury, that the defendant committed the extrinsic act.
6. **Rules of Evidence: Other Acts.** Direct evidence of a charged crime is not an extrinsic act that is subject to exclusion under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014).
7. **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.

8. **Trial: Evidence: Appeal and Error.** Generally, erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
9. **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.
10. **Homicide: Photographs.** If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome.
11. ____: ____. In a homicide prosecution, a court may receive photographs of a victim into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
12. **Constitutional Law: Witnesses.** The Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her. The main and essential purpose of confrontation is to secure the opportunity for cross-examination.
13. **Evidence: Appeal and Error.** 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.
14. ____: ____. An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Beau G. Finley, of Finley & Kahler Law Firm, P.C., L.L.O., and Sean M. Conway, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

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

Heavican, C.J.

I. NATURE OF CASE

Erica A. Jenkins directly appeals from her convictions for murder in the first degree, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. A jury found that Jenkins killed Curtis Bradford on or about August 19, 2013. Jenkins challenges several evidentiary rulings by the district court and also asserts there was insufficient evidence to support her convictions. We affirm.

II. BACKGROUND

1. Crime Scene

On the morning of August 19, 2013, a body, later identified as Bradford, was discovered outdoors near a garage in the vicinity of 18th and Clark Streets in Omaha, Nebraska. Although no one called emergency services until approximately 7 a.m. on August 19, residents later reported hearing gunshots the night of August 18. Some of these residents reported they heard the gunshots as early as 10:30 p.m., some as late as midnight.

At the scene on August 19, 2013, investigators observed Bradford's body slumped over, face down. Bradford was wearing sneakers, black pants, a pair of gloves, and a black hoodie with the hood over his head. There were holes in the back of Bradford's hood, surrounded by apparent gunshot residue. Investigators turned over Bradford's body and observed massive head trauma. A shotgun slug was found in an area of loose ground a couple inches from where Bradford's head had been. An autopsy later revealed a second, smaller caliber bullet in Bradford's brain.

2. Events Leading up to and Including August 18 and 19

At trial, Bradford's mother testified that Bradford either had friends in or had been personally affiliated with a gang known as Camden Block. Several witnesses connected Jenkins'

brother, Nikko Jenkins, with the same gang. In addition, a person known as P-Dough was a member of the gang. Two witnesses—Melonie Jenkins and Lori "Lolo" Sayles (Lolo), sisters of Jenkins and Nikko—identified Bradford as a "duck" or puppet of P-Dough's, meaning that Bradford would do what P-Dough told him to do. Lolo and Melonie each testified to conversations with Jenkins in which Jenkins told them she believed P-Dough was responsible for a shooting at Jenkins' home in February 2013. The State's theory of motive at trial was that Jenkins sought retaliation for that shooting by killing P-Dough's puppet—Bradford.

Lolo testified at trial that on the evening of August 18, 2013, she and Jenkins were at a house belonging to their mother, Lori Jenkins. At some point, Nikko came to the house with Bradford, whom Lolo had not previously met. Nikko and Bradford were wearing black clothes. After Lolo let Nikko and Bradford into the house, she saw them in the kitchen looking at an assault rifle. Shortly thereafter, Lori came home. To hide the rifle from Lori, Bradford wrapped it in a jacket and placed it behind the couch. According to Melonie's testimony at trial, Jenkins later told her that while at Lori's house, Jenkins had a conversation with Nikko about planning to kill Bradford.

Lolo testified at trial that soon after Lori came home, around 11:30 p.m. to midnight, Lolo, Nikko, and Bradford left the house and Jenkins chased after them. Bradford was carrying the rifle, still wrapped in the jacket, when they left. At trial, Lolo said she was not sure where they were going at the time. They got into a car belonging to Nikko's girlfriend. Nikko drove, with Bradford in the front passenger seat and Lolo and Jenkins in the back seat.

Nikko drove the car toward an area referred to as "16th Street" or "the bottoms," which was known to several witnesses at trial as a rival gang neighborhood. According to Lolo's testimony at trial, Nikko told them all to turn off their cell phones as they approached the bottoms. During the

drive, Nikko and Bradford allegedly discussed performing a robbery.

Nikko backed the car into a driveway area on the north side of Clark Street, between Florence Boulevard and 18th Street, near a group of townhome-style residences. Jenkins, Nikko, and Bradford then exited the car, and Nikko told Lolo to get into the driver's seat. Nikko was carrying a sawed-off shotgun, and Bradford was carrying the rifle. Lolo testified that she did not see Jenkins with a gun that night.

Lolo testified that about 30 to 45 seconds after the others left the car, she heard a gunshot. About 15 seconds after the first, she heard a second, louder, "boom" and saw a flash in the car's rearview mirror.

Lolo got out of the car and then saw Jenkins and Nikko come running back. Nikko was carrying the shotgun. In an interview with police, Lolo initially stated that Nikko was also carrying the rifle at this time. But when pressed further during that interview, and then again at trial, Lolo admitted that she was trying to protect Jenkins and that Jenkins was actually carrying the rifle.

Lolo testified that Nikko told her to drive the car but that she refused, so Nikko drove the car. They drove to a house belonging to Brian Easterling, a cousin of Jenkins and her siblings. Nikko had been staying at Easterling's house after being released from incarceration in late July 2013. Lolo testified at trial that Nikko went downstairs, where Easterling was watching a movie with a friend.

During his testimony at trial, Easterling corroborated the fact that at approximately 1 a.m. on August 19, 2013, Jenkins and Nikko both came into his home. Easterling testified that he never saw Lolo that night, but that she could have been upstairs. He further testified that while Jenkins and Nikko were downstairs, they washed blood and brain matter off of an assault rifle. He identified the rifle as the same one Lolo identified as the weapon Bradford carried that night. Easterling also testified that Jenkins removed a revolver from

her purse. Easterling said that Nikko and Jenkins seemed excited and that Jenkins was upset with Nikko. Jenkins expressed disappointment because she had shot Bradford first and then Nikko shot Bradford. At trial, Melonie testified to a similar exchange.

According to Melonie's testimony at trial, Jenkins later gave Melonie an account of the events of August 18 and 19, 2013, very similar to the facts above. According to Melonie, Jenkins said that when she, Nikko, and Bradford got out of the car that night, they were walking along the garage single file. Jenkins then shot Bradford in the back of the head with her revolver, and after Bradford fell, Nikko shot Bradford in the head with the shotgun.

3. Evidence Concerning Jenkins' Revolver and Argument With Lori

At trial, the State also introduced evidence of other incidents in which Jenkins allegedly wielded a revolver. First, Lolo testified that in February 2013, she had seen Jenkins with a revolver. Second, Melonie testified that sometime after Bradford's death, she had gone over to Lori's house and Jenkins opened the door with a black revolver in her hand. Third, Melonie said she had also seen Jenkins with the same gun in June 2013.

Fourth, both Lolo and Melonie testified at trial that sometime after Bradford's death, Jenkins was at Lori's home with a number of other family members present when she got into a heated argument with Lori. According to Lolo, Jenkins and Lori fought about a niece of Jenkins' ripping the leaf off a plant. As the argument escalated, Nikko took Jenkins into another room and Lolo heard Jenkins yelling, "I'll pop that bitch like I popped that nigga." According to witnesses at trial, to "pop" somebody means to shoot them. Nikko then exited the room, carrying the revolver. Lolo testified that Jenkins did not say whom she had shot or when.

Melonie, on the other hand, testified that Jenkins and Lori fought specifically about a murder. According to Melonie, Lori

was telling Jenkins that she had been stupid to "d[o] it to an innocent person" and that Jenkins "shoulda went [sic] after . . . the very people that shot in [her] house." Melonie said that Jenkins yelled, "[T]hat's why he's dead and that's why I killed that . . . ." Melonie also testified that during this argument, Nikko took away Jenkins' revolver, which was black with a wooden handle.

Finally, Easterling also testified at trial that he had seen Jenkins on two or three occasions with a revolver that was black with a wooden handle. He stated that the revolver "looked like a .357."

4. Physical Evidence

The slug found in the ground near Bradford was a Brenneke brand bullet. Brenneke is an uncommon brand in the Omaha metropolitan area. The lead detective investigating Bradford's death was able to find only one store selling the model of Brenneke shotgun shell found at the scene. Police released an image from that store's surveillance video showing the most recent purchaser of the shotgun shells; the purchaser was later identified as Lori.

This information eventually led to Nikko's arrest on or about August 29, 2013. Jenkins, Melonie, and Lori were also arrested around that time period.

When police searched Nikko's apartment on Birch Street in Omaha on August 29, 2013, they discovered a shotgun with a shortened barrel and an assault rifle in a gym bag partially under the bed. These weapons were identified by Lolo at trial as the guns Nikko and Bradford had on the evening of August 18. There was no evidence connecting Jenkins to the apartment.

There was no ballistic evidence at the crime scene near Clark Street, aside from the shotgun slug; the smaller bullet was recovered from Bradford's brain during the autopsy. A firearms and toolmark examiner at the Omaha Police Department crime laboratory testified that the smaller bullet was consistent with

a 9 mm, a .38-, or a .357-caliber bullet. A search of an FBI database containing about 14,000 weapons returned 26 different possible guns that could have fired the bullet. Of those 26, 19 were revolvers and 7 were handguns; 18 were .38's, and 4 were .357's.

DNA analysis matched Bradford as the major contributor among at least three contributors of DNA on the grip and trigger areas of the assault rifle. Bradford also matched the single source of DNA found on the front rail and on the front and rear bolt hole on the right side of the rifle. In addition, Jenkins, Lori, Nikko, Lolo, and Melonie could not be excluded as minor contributors of DNA found on the grip and trigger areas of the assault rifle.

The chances of a person unrelated to Jenkins being a minor contributor of DNA to the grip and trigger areas of the rifle were 1 in 4 for Caucasians, 1 in 5 for African-Americans, and 1 in 5 for American Hispanics. DNA testing on the shotgun could not exclude Nikko as a partial contributor, but tests attempting to match Jenkins, Lori, Melonie, Bradford, and Lolo were inconclusive. According to the forensic DNA analyst's testimony at trial, these statistics are so insignificant that prior to a change in policy in 2010, the laboratory at which she works might not have considered the results informative enough to use in a criminal case.

Swabs from the front rail and from the front and rear bolt hole on the right side of the assault rifle matched Bradford. At trial, Ashley Paggen, a Douglas County Sheriff's Department crime scene investigator who had searched Nikko's girlfriend's car, testified about blood evidence she found. Blood on the front passenger-side floormat also matched Bradford. The DNA expert at trial testified that the chances of a person unrelated to Bradford being the source of these samples was 1 in 11.4 quintillion for Caucasians, 1 in 12.6 quintillion for African-Americans, and 1 in 5.35 quintillion for American Hispanics.

5. Excluded Cross-Examination of Paggen

During cross-examination, Jenkins attempted to question Paggen about Omaha Police Department and Douglas County Sheriff's Department crime laboratory personnel. At an evidentiary hearing outside the presence of the jury, Jenkins attempted to elicit information about former laboratory director David Kofoed, laboratory director Tracey Ray, and the alleged mishandling of fingerprint evidence by an employee of the Omaha Police Department crime laboratory. The district court excluded the evidence.

III. ASSIGNMENTS OF ERROR

Jenkins assigns, renumbered and restated, that the district court erred by (1) admitting evidence that Jenkins made a threat to Lori after August 2013, (2) admitting evidence that Jenkins possessed a firearm before and after August 2013, (3) admitting several allegedly gruesome and cumulative photographs of the victim, and (4) excluding testimony by Paggen concerning alleged misconduct by crime laboratory personnel. Jenkins also alleges (5) there was insufficient evidence to support her conviction because of a lack of physical evidence and the credibility of the witnesses.

IV. STANDARD OF REVIEW

[1] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014) (Rule 404), and the trial court's decision will not be reversed absent an abuse of discretion.[1]

[2,3] An appellate court reviews a trial court's admission of photographs of a victim's body for abuse of discretion.[2] In reviewing a sufficiency of the evidence claim, whether the

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[1] *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

[2] *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

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]

V. ANALYSIS

1. Alleged Improper Character Evidence

Jenkins' first two assignments of error concern the admissibility of testimony under Rule 404. Specifically, Jenkins challenges the district court's admission of testimony that on occasions other than August 18 and 19, 2013, Jenkins possessed a revolver and that during an argument she threatened to "pop" Lori while in possession of a revolver.

[4] Rule 404(2) states:

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

The purpose of Rule 404(2) is that evidence of other acts, despite its relevance, creates the risk of a decision by the trier of fact on an improper basis.[4]

[5] Under Rule 404(3), before a court can admit evidence of an extrinsic act in a criminal case, the State must prove by clear and convincing evidence, outside the presence of the jury, that the defendant committed the extrinsic act.[5] The proponent of evidence offered pursuant to Rule 404(2) is, upon objection to its admissibility, required to state on the

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[3] *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

[4] *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

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

record the specific purpose or purposes for which the evidence is being offered, and the trial court is required to state on the record the purpose or purposes for which such evidence is received.[6]

(a) Jenkins' Threats Toward Lori

In Jenkins' first assignment of error, she argues that the district court improperly admitted evidence—without a hearing—that Jenkins threatened Lori. We do not agree that Rule 404(2) applies in this instance.

Lolo and Melonie both testified about an argument during which Jenkins yelled about shooting or killing somebody. Lolo testified at trial that Jenkins said she would "pop that bitch like I [Jenkins] popped that nigga." The district court overruled Jenkins' continuing relevance and Rule 404 objections to both Melonie's and Lolo's testimonies about the incident.

Here, the State offered Jenkins' statement to prove that Jenkins had killed Bradford. The testimony was evidence of the very crime with which Jenkins was charged. Jenkins made reference to a person she had "popped" or shot. Given the context provided by witnesses, a rational trier of fact could have easily interpreted the statement as an admission by Jenkins that she shot Bradford.

[6] Direct evidence of a charged crime is not an extrinsic act that is subject to exclusion under Rule 404(2).[7] For example, courts treat a jailhouse confession as direct evidence of guilt, not an extrinsic bad act.[8] Similarly, in *State v. Canbaz*,[9] the defendant told his neighbors and coworkers before he

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[6] *Glazebrook, supra* note 4.

[7] See, e.g., *U.S. v. Adkins*, 743 F.3d 176 (7th Cir. 2014); *U.S. v. Hsu*, 669 F.3d 112 (2d Cir. 2012); *U.S. v. Washington*, 12 F.3d 1128 (D.C. Cir. 1994).

[8] See, e.g., *U.S. v. Williams*, 612 F.3d 417 (6th Cir. 2010).

[9] *State v. Canbaz*, 259 Neb. 583, 611 N.W.2d 395 (2000).

killed the victim that he wanted to kill the victim and her family members and that he intended to do so. But at trial, his defense was that he did not premeditate the murder. We held that the evidence was relevant to prove the intent and premeditation elements of first degree murder and not an extrinsic bad act. In other words, his statements were direct evidence of these two elements of the charged crime.

Jenkins made this statement while she was in possession of a handgun, and her possession of the gun was itself a crime. But the prosecutor could not extricate her admission to shooting Bradford from the facts explaining why she would have made the statement. Jenkin's admission was highly probative of her identity as the perpetrator of this crime, and the proof did not depend on showing that she acted in conformity with a character trait.

On these facts, there is no risk that the jury rested its determination on an improper basis; instead, the jury was merely presented with evidence that Jenkins committed the crime charged. We decline to exclude such a probative admission by the accused merely because the admission was clothed in threatening language.

(b) Jenkins' Alleged Possession of Revolver

In Jenkins' second assignment of error, she claims the court should have excluded certain testimony that she had possessed a revolver before and after Bradford's death. In the second assignment of error, we also consider evidence that Jenkins possessed a revolver during the argument with Lori discussed above. Jenkins alleges that as with her first assignment of error, this testimony was inadmissible prior acts evidence. Even if this evidence might arguably be offered to prove propensity, we find that any error in its admission was harmless.

[7,8] 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.[10] Generally, erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.[11]

At trial, Jenkins objected to testimony by Lolo and Melonie concerning Jenkins' possession of a revolver during an argument with Lori. In addition, Jenkins objected when Melonie testified about two other occasions on which she saw Jenkins with a revolver. However, Easterling testified at trial that he had seen Jenkins with a revolver on two or three occasions. Jenkins did not object to Easterling's testimony.

Assuming without deciding that it was error for the district court to overrule Jenkins' objections to the testimony by Lolo and Melonie, the error was harmless. Had Lolo's and Melonie's allegations been excluded, the jury still would have heard Easterling's testimony about Jenkins' possession of the revolver. Therefore, we conclude that the jury's findings cannot be attributed to the admission of Lolo's and Melonie's testimonies about the revolver.

Jenkins' second assignment of error lacks merit.

2. Crime Scene and Autopsy Photographs

In Jenkins' third assignment of error, she challenges the admission of seven photographic exhibits of Bradford's body. At trial, Jenkins objected to exhibit 8 as prejudicial under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008) (Rule 403), and to exhibits 26, 31, 32, 95, 96, and 97 as both prejudicial and cumulative under Rule 403.

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[10] *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

[11] *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[9-11] Under Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[12] In addition, a trial court may exclude evidence if it is needlessly cumulative. The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[13] If a photograph illustrates or makes clear some controverted issue in a homicide case, a proper foundation having been laid, it may be received, even if gruesome.[14] In a homicide prosecution, a court may receive photographs of a victim into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[15]

Exhibits 8, 26, 31, and 32 depict, from different angles, Bradford's wounds at the crime scene. Exhibits 95, 96, and 97 are photographs from Bradford's autopsy. Jenkins claims that the photographs are extremely gruesome and therefore prejudiced her with the jury. In addition, she asserts that exhibits 26, 31, 32, 95, 96, and 97 are cumulative because the jury could have guessed what Bradford's injuries were based upon testimony and other exhibits that depicted the position of Bradford's body, blood spatter, and ballistic evidence at the crime scene. Finally, Jenkins argues that these exhibits were not probative, because Jenkins did not challenge cause of death at trial.

The contested exhibits were highly probative and properly admitted, despite their gruesome nature. We acknowledge that the injuries Bradford suffered, particularly the hollow, gaping exit wound in his forehead, are difficult to view.

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[12] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[13] *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

[14] *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

[15] *Bauldwin, supra* note 12.

However, gruesome crimes produce gruesome photographs.[16] The fact that a defendant stands accused of a gruesome crime should not limit the State's ability to prove the nature of the crime committed.

Further, each photograph presented at trial served to assist witnesses in their testimony, and also tended to prove cause of death, Bradford's identity, and Jenkins' intent. No two photographs were the same. Other exhibits depicting the crime scene do not show Bradford's wounds—leaving essential information to the imagination of the jury. Thus, the exhibits were not cumulative.

Nor are we persuaded by Jenkins' argument that the district court should have excluded these exhibits because Jenkins did not contest the cause of Bradford's death. There was no stipulation in the record to this fact, and, as such, the State was required to prove, beyond a reasonable doubt, that Bradford was murdered and, for purposes of the weapons charges against Jenkins, that Bradford was killed with firearms. The State chose to admit these noncumulative photographs to meet that burden. For these reasons, Jenkins' third assignment of error is without merit.

3. Evidence Allegedly Discrediting Crime Laboratory

In Jenkins' fourth assignment of error, she argues that the district court erred by prohibiting Jenkins from pursuing a particular line of questioning during cross-examination of Paggen. Jenkins claims that this line of questioning was impeachment and that by excluding the evidence, the district court infringed upon her constitutional right to cross-examine witnesses under the Sixth Amendment to the U.S. Constitution.

[12] The Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her. The main and essential

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[16] *Dubray, supra* note 2.

purpose of confrontation is to secure the opportunity for cross-examination.[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 witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.[18]

In the case at bar, Jenkins attempted to question Paggen about the credibility of the Douglas County Sheriff's Department's investigation. Specifically, in an offer of proof outside the presence of the jury, Paggen testified that she had read an article about an Omaha Police Department employee—not affiliated with the Douglas County Sheriff's Department—misidentifying a fingerprint. Additionally, Paggen stated that she heard a rumor that her former supervisor at the Douglas County Sheriff's Department crime laboratory was on investigatory leave for an unknown reason. Finally, Paggen had learned that a former employee of the Douglas County sheriff's office, who did not work there at the same time as Paggen, had been convicted of a crime relating to the collection of blood evidence from a vehicle.

But we find that the jury would not have received a significantly different impression of Paggen's credibility if Jenkins were permitted to present this evidence. Jenkins' line of cross-examination questioning was not a proper impeachment, because it had nothing to do with Paggen's credibility or that of another witness. Instead, Jenkins sought to discredit Paggen by weak associations to people with whom she was either barely familiar or did not know at all. All of Jenkins' questions called for Paggen to testify about events beyond her personal knowledge. This testimony was speculative and

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[17] *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

[18] *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

irrelevant to Paggen's credibility. Therefore, we cannot say that the district court abused its discretion by excluding this immaterial line of questioning.

For these reasons, Jenkins' fourth assignment of error is without merit.

4. Sufficiency of Evidence

Finally, in Jenkins' fifth assignment of error, she claims the evidence at trial was insufficient to support her convictions. Jenkins' argument, in essence, is that none of the witnesses against her were credible because the witnesses had criminal histories. Further, Jenkins claims that the relatively inconclusive DNA evidence in this case should have precluded conviction. We disagree.

[13,14] 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.[19] An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition.[20]

Viewed in the light most favorable to the State, without evaluating witness credibility, we hold that there was sufficient evidence to support Jenkins' convictions. Testimony at Jenkins' trial could have led a rational juror to find, beyond a reasonable doubt, every element of the crimes for which Jenkins was convicted. Therefore, Jenkins' final assignment of error is without merit.

VI. CONCLUSION

The judgment of the district court is affirmed.

Affirmed.

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[19] *Hale, supra* note 3.

[20] *State v. Lee*, 290 Neb. 601, 861 N.W.2d 393 (2015).

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

State of Nebraska, appellee, v. James M. Saylor, appellant.

883 N.W.2d 334

Filed August 19, 2016. No. S-15-329.

1. **Postconviction: Evidence: Appeal and Error.** In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. An appellate court upholds the trial court's findings unless they are clearly erroneous. In contrast, an appellate court independently resolves questions of law.
2. **Effectiveness of Counsel: Appeal and Error.** With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Effectiveness of Counsel: Proof: Appeal and Error.** 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 his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.
4. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To show prejudice under the prejudice component of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
5. **Records: Appeal and Error.** The party appealing has the responsibility of including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review.

6. ____: ____. A bill of exceptions is the only vehicle for bringing evidence before the Supreme Court; evidence which is not made part of the bill of exceptions may not be considered.
7. **Trial: Prosecuting Attorneys: Words and Phrases.** Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.
8. **Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition.
9. **Stipulations: Pleas: Evidence.** A stipulation entered by a defendant can be tantamount to a guilty plea. But this is true only when the defendant stipulates either to his or her guilt or to the sufficiency of the evidence.
10. **Effectiveness of Counsel: Proof: Words and Phrases.** 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. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.
11. **Effectiveness of Counsel.** The effectiveness of counsel is not to be judged by hindsight.
12. **Effectiveness of Counsel: Time: Appeal and Error.** Claims of ineffective assistance of counsel raised on direct appeal by the same counsel who represented the defendant at trial are premature and will not be addressed on direct appeal.
13. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed.

Joshua D. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Wright, Miller-Lerman, Cassel, and Kelch, JJ., and Moore, Chief Judge.

Kelch, J.

INTRODUCTION

Lena Saylor (Lena) was found dead in her home on April 27, 1984. The State charged James M. Saylor (Saylor), Lena's grandson, with first degree murder, based upon evidence that Saylor had hired Michael Sapp to kill Lena. After a stipulated bench trial, the district court for Lancaster County found Saylor guilty of second degree murder and sentenced him to life in prison. This court affirmed on direct appeal. See *State v. Saylor*, 223 Neb. 694, 392 N.W.2d 789 (1986). Now, 30 years later, Saylor appeals the district court's 2015 order that denied his motion for postconviction relief, following a limited evidentiary hearing. We reject Saylor's claims of, inter alia, ineffective assistance of counsel, prosecutorial misconduct, and prejudicial conduct by the trial judge, and we affirm.

BACKGROUND

Pretrial Proceedings

Sometime in 1984, the State charged Saylor with first degree murder. The original information is not in the record for this appeal. At that time, hiring the killing of another person was an aggravating factor supporting the death penalty. Neb. Rev. Stat. § 29-2523(1)(c) (Reissue 1979) (repealed 2015 Neb. Laws, L.B. 268, § 35).

Police had arrested Saylor in April 1984, immediately after he made tape-recorded statements about Lena's death to his friends David Timm and Jeffrey Menard. On July 12, 1984, Saylor filed a motion to dismiss, which was denied. On December 7, Saylor filed a motion to suppress the tape recordings. On February 6, 1985, the district court conducted a hearing on that motion. Patrick Healey and Susan Jacobs represented Saylor. Michael Heavican, the county attorney at that time, had declared a conflict because he anticipated

that he may be called as a witness, and Terry Dougherty was appointed special prosecutor for the case.

While the motion to suppress was still under advisement, Dougherty proposed that the parties resolve the matter by agreement, and the parties negotiated. Ultimately, the parties agreed to a stipulated trial to allow Saylor to contest the district court's ruling on his motion to suppress. We recount additional details regarding the parties' negotiations in the analysis section below. On April 2, 1984, the district court denied the motion to suppress.

On April 5, 1985, Saylor waived his right to a jury trial. The district court confirmed that Saylor did so freely, voluntarily, and knowingly. Next, Dougherty summarized the parties' agreement for the record, which summary we quote in the analysis portion of this opinion. Saylor's counsel acknowledged that Dougherty had correctly described the agreement, and neither Saylor nor his counsel contradicted it.

Stipulated Bench Trial and Direct Appeal

On May 10, 1985, the State amended the charge to second degree murder. The district court advised Saylor that he had the right to be served with the amended copy of the information and to wait 24 hours before appearing for arraignment, and Saylor waived those rights. The district court proceeded with the arraignment, and Saylor pled not guilty to the amended charge. The district court then conducted the stipulated bench trial. We summarize those proceedings in part here and provide additional relevant details in other portions of this opinion.

The 20-page written stipulation, signed by Dougherty, Healey, and Saylor, set forth evidence that Saylor had hired Sapp to kill Lena. In that document, the parties stipulated that all items of evidence discussed and offered had an adequate chain of custody. Along with the written stipulation, the parties submitted other evidence by stipulation, including the tape

recordings of the conversation between Saylor, Timm, and Menard in April 1984. Saylor's counsel renewed his motion to suppress, which the district court again overruled.

Healey argued to the district court that the matter was submitted with stipulated facts, but that this left "to the court the question of whether the stipulated matter proves [Saylor's] guilt and if so, what offense."

On May 20, 1985, the district court found Saylor guilty of second degree murder. Saylor filed a motion for new trial. On August 7, the district court overruled Saylor's motion for new trial and sentenced him to life in prison.

On direct appeal to this court, Saylor claimed that the district court erred in overruling his motion to suppress the recorded conversation. *State v. Saylor*, 223 Neb. 694, 392 N.W.2d 789 (1986). Healey and Jacobs represented Saylor on appeal. This court described the recordings as including "incriminating" and "inculpatory" statements in which Saylor "indicated that he had hired someone to kill his grandmother." See *id*. at 697, 392 N.W.2d at 792. We affirmed.

Postconviction Proceedings

On August 22, 2012, Saylor filed a pro se motion for postconviction relief; his new counsel filed a lengthy amended motion for postconviction relief on February 7, 2013.

The district court granted an evidentiary hearing, but limited its scope to ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and prejudicial conduct of the trial judge. Saylor's remaining claims were not permitted to proceed to the evidentiary hearing. The district court specifically noted that Saylor had addressed the ruling on the motion to suppress on direct appeal and could not relitigate it.

Sometime prior to November 20, 2014, Saylor gave notice of his intent to call an attorney to give expert testimony at the evidentiary hearing regarding whether Saylor's trial counsel's performance was deficient and whether Saylor was prejudiced by such alleged deficiencies. The State responded

with a motion to preclude the attorney's testimony. After reviewing the attorney's proposed testimony, the district court precluded it, finding that it would not have assisted the trier of fact in understanding the evidence or determining a factual issue.

The district court conducted the evidentiary hearing on December 1 through 4, 2014, and January 6, February 17, and March 11, 2015.

Saylor offered the clerk's transcript from the stipulated bench trial, which the district court received. The record contains a photocopy of the front page of the clerk's transcript, with a notation that the original would be furnished by the reporter upon request. The remainder of the clerk's transcript is not in the record.

Saylor testified that immediately before he entered his jury waiver, Healey had advised him that the stipulated trial format was the best way to resolve the matter because Saylor could try the case and "not be found guilty of anything more than second degree and would not receive the death sentence." Saylor said he understood that Healey would be able to include facts in the stipulation that challenged the State's case. Saylor denied that either of his attorneys informed him that he could withdraw his jury waiver if the parties could not agree on the stipulation.

According to Saylor, between the jury waiver and the stipulated trial, his counsel did not discuss the contents of the stipulation with him. Saylor further testified that he did not see any written version of the stipulation until immediately before the stipulated bench trial and that he had less than 10 minutes to review it. Saylor denied understanding the stipulation because it was "very, very complicated."

Dougherty testified that he waited to amend the charge until after Saylor had waived the jury trial because he did not want Saylor to receive the benefit of the bargain until after the parties had agreed on the stipulated facts and submitted them to the district court. Dougherty testified that had the parties not

reached such agreement, he would have joined in Saylor's request to withdraw his jury waiver.

Healey, who acted as lead defense counsel, had died before the postconviction proceedings. Cocounsel Jacobs testified that defense counsel would have requested a jury trial if Saylor had requested it at any time after waiving the jury trial and before the verdict. She denied that Saylor ever told her he did not want to enter into the stipulation. She admitted that she did not recall many things about Saylor's case, but she testified that if he had indicated that he did not want to enter into the stipulation, she thought she would remember, because "[t]hat's critical." Jacobs testified that had she believed the stipulation contained a material misrepresentation, she would have informed the district court, but that she did not. Jacobs did not recall requesting any discovery documents from the prosecution that Saylor's counsel did not receive.

Jacobs testified that the possibility of the death penalty in Saylor's case "always loomed large" and that Saylor's recorded statements to Timm and Menard would be very persuasive evidence of Saylor's guilt in the event of a trial and would likely have been admitted. Saylor admitted that he expressed concern about the death penalty to Healey and Jacobs and that he agreed to the stipulated trial to avoid the death penalty. Dougherty testified that had Saylor gone to trial, he would have sought the death penalty, but that he was willing to forgo the possibility in exchange for Saylor's agreement to the stipulated trial.

The record contains timesheet evidence that Dougherty had contact with the county attorney's office through short telephone conferences throughout the case. In his 1984 deposition, Gary Lacey, the chief deputy county attorney, testified that he consulted with Dougherty on moving Saylor and Sapp, witnesses for their cases, and the death qualification issue. Lacey testified that Heavican and Dougherty met with the director of the parole board about an inmate who wanted work release in exchange for information he had received from

Sapp. Dougherty testified that he communicated with Lacey and Heavican, in part, because he did not have the authority to make a binding deal with the inmate. Dougherty denied having ex parte communications with the district court, and he denied that Heavican was actively involved in directing him in the prosecution of the case.

At the time of the postconviction proceedings, the tape recordings of Saylor's conversation with Timm and Menard were inaudible, and the district court did not admit their verbatim transcript due to authentication issues. However, the district court received a synopsis of the tape recordings contained in the deposition of Jim Peschong, who was one of the detectives involved in the case. According to Peschong's synopsis, Saylor admitted to hiring someone to kill Lena. Peschong documented that Saylor told Timm and Menard that the person hired was someone they knew.

The stipulation had stated that Dr. Reena Roy, an expert in forensic serology, tested a pillow obtained from the scene and detected a substance that could have come from Lena's saliva on the pillow. According to the stipulation, Roy received the pillow from the property room custodian of the Lincoln Police Department. At the postconviction hearing, Dougherty acknowledged that the property room custodian had given the pillow to a third person who then gave it to Roy. Dougherty testified that rather than recount the entire chain of custody, he phrased the stipulation to show that the pillow "got from the custodian in the property room to the person who tested it and there was a chain of custody and this is the pillow." He denied attempting to mislead the district court in this regard or with any facts in the stipulation and testified that he had drafted the stipulation in good faith, believing the facts were accurate.

The stipulation had included evidence attributed to Dr. David Kutsch, who performed an autopsy on Lena on the morning of her death. According to the stipulation, it was Kutsch's opinion that injuries to Lena's face could have been

caused by someone placing a hand or other object over Lena's face to smother her. Kutsch opined that Lena died at approximately 5 a.m.

The stipulation had stated that based on Kutsch's examination of the scene, the autopsy, and the information supplied by police, Kutsch would testify at trial within a reasonable degree of medical certainty that (1) the injuries occurred approximately at the time of Lena's death, (2) respiratory arrest caused Lena's death, and (3) although Lena could have died of natural causes, smothering most likely caused respiratory arrest.

The stipulation had noted that Kutsch also testified in a deposition on October 9, 1984, that it was "indeterminate as to whether her demise was from natural causes or from smothering," but that he rendered that opinion before he knew the definition of "'reasonable degree of medical certainty.'"

At the postconviction hearing, Saylor presented the testimony of two forensic pathologists. Upon a review of the records in the case, they opined that Lena's death was consistent with chronic obstructive pulmonary disease and that she died of natural causes. One pathologist opined that neither smothering nor lung disease could be ruled out, but that based on the autopsy alone, lung disease was the more probable cause of death. The other pathologist agreed with Kutsch's 1984 deposition opinion, cited in the stipulation, that it was "indeterminate as to whether [Lena's] demise was from natural causes or from smothering." Saylor presented additional evidence attempting to call into question Kutsch's qualifications, conclusions, and handling of the evidence in Saylor's case. To further support the theory that Lena, age 83, was in poor health and died of natural causes, Saylor presented evidence from the scene of the crime, the autopsy, and Lena's medical history.

The district court also received evidence that on May 19, 1984, Saylor attempted to solicit the murders of Timm and Menard via a letter to his brother, in an effort to prevent the use of their recorded conversation with Saylor.

Motion to Reopen

On December 17, 2014, Saylor filed a pro se "Verified Motion to Reopen Case and Present Additional Evidence," which Saylor's counsel later adopted. Saylor sought to present exculpatory medical evidence of a scab and ecchymosis, or bruising, near Lena's right eye, which Kutsch opined were incurred several hours to a day before Lena's death. Saylor further asserted that "incomplete, untrue, or outright false" evidence in the stipulation was not brought to the district court's attention at the postconviction hearing. Saylor's motion challenged the same evidence and made similar claims as he had at the postconviction hearing.

On January 8, 2015, the district court overruled Saylor's "Verified Motion to Reopen Case and Present Additional Evidence."

District Court's Order Denying Postconviction Relief

On March 17, 2015, the district court entered a detailed order denying Saylor's motion for postconviction relief. The district court rejected Saylor's claims that he had received ineffective assistance of trial and appellate counsel. Further, it found no prosecutorial misconduct and no improper conduct by the trial court. The district court found that even if Saylor had established improper or deficient conduct by any of the participants involved in his case, he did not prove any resulting prejudice. It stated, "[Saylor] has not presented objective evidence showing a reasonable probability that he would have insisted on going to trial or that the result would have been different absent the claimed failings of his trial counsel, the prosecutor and the trial judge." The district court observed that "significant facts" overwhelmed evidence of prejudice, namely that Saylor had admitted to hiring someone to kill Lena, that Sapp would likely testify against Saylor, and that evidence that Saylor attempted to solicit the murders of Timm and Menard may well have been admissible at

trial under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1985).

ASSIGNMENTS OF ERROR

Saylor assigns, condensed and restated, that the district court erred in (1) determining that Saylor was not prejudiced; (2) precluding expert testimony by an attorney; (3) considering in its prejudice analysis: (a) Saylor's taped admissions, (b) a letter to Saylor's brother, and (c) possible testimony by Sapp; (4) determining the benefits secured to Saylor by the agreement; (5) making erroneous findings regarding medical evidence; (6) finding that Saylor's right to a speedy trial had not been violated; (7) finding that Saylor had failed to prove prosecutorial misconduct; (8) finding Saylor was not coerced in agreeing to the stipulation; (9) finding that the trial court did not err in failing to advise Saylor of his right to confrontation; and (10) denying Saylor's motion to reopen.

Saylor further assigns that the district court erred in (11) failing to find that Saylor had received ineffective assistance of trial and appellate counsel in that counsel either made the following errors at trial or failed to raise them on appeal: (a) failed to seek withdrawal of Saylor's jury waiver, (b) prematurely allowed Saylor's jury waiver, (c) failed to include exculpatory medical evidence regarding Lena in the stipulation, (d) failed to object to portions of the stipulation and to insist on evidentiary rulings, (e) failed to investigate Kutsch's change in testimony, (f) failed to consult an independent medical expert, (g) failed to require production of medical evidence, (h) failed to inquire as to the consequences of taking or not taking prescribed medications, (i) failed to interview or depose stipulation witnesses, (j) failed to invoke Saylor's right to a speedy trial, and (k) failed to raise ineffectiveness issues on appeal.

STANDARD OF REVIEW

[1] In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves

conflicts in the evidence and questions of fact. An appellate court upholds the trial court's findings unless they are clearly erroneous. In contrast, an appellate court independently resolves questions of law. See *State v. Poe*, 292 Neb. 60, 870 N.W.2d 779 (2015).

[2] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. Branch*, 290 Neb. 523, 860 N.W.2d 712 (2015).

ANALYSIS

Ineffective Assistance of Counsel

[3,4] Saylor assigns that the district court erred in failing to find that he received ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington, supra*, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015). To show prejudice under the prejudice component of the *Strickland* test, the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *State v. Thorpe, supra*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The majority of Saylor's assignments of error relate to his premise that he received no benefit when the State reduced his charge from first degree murder to second degree murder and that a stipulated trial meant he would be able to contest every factual issue. However, the record shows that this argument is not well founded.

Initially, Dougherty sent a letter to Healey advising that the State would reduce the charge of first degree murder to second degree murder and that Saylor would plead guilty to second degree murder but also testify against his codefendant, Sapp. Ultimately, this initial offer morphed into the agreement whereby the parties would compromise on a stipulated trial to allow Saylor to contest the district court's ruling on his motion to suppress. In fact, in a letter to Healey dated May 7, 1985, Dougherty advised:

> Enclosed is a revised proposed stipulation for use in . . . Saylor's trial to the court. In getting your client's approval for this stipulation, please ask him to keep a couple of things in mind.
>
> My intention in having a stipulated trial was in effect to allow your client to plead guilty without giving up his right to appeal the Judge's ruling on the motion to suppress. I certainly did not intend to lower the charge from first to second degree murder with the idea of agreeing to a stipulation with facts that would not result in a finding of guilty on the reduced felony. The stipulation should be thought of as the equivalent of a factual basis which would be recited by a prosecutor to support a guilty plea by a defendant. Although I remain available for discussion of some minor changes, if the basic format of the revised document is not agreeable to your client, we should consider petitioning the court to set aside his jury waiver, and proceed to trial on first degree murder.

Dougherty outlined the agreement to the trial court on April 5, 1985, at the hearing wherein Saylor waived his right to a jury trial:

> DOUGHERTY: Well, I think perhaps we should make a record on the fact that this waiver of [the] jury is in response to an agreement which the State has made with . . . Saylor and his counsel that we will file an Amended Information alleging the crime of murder in the second

> degree. That the counsel for the State and the counsel for . . . Saylor will submit a stipulated set of facts to the court. In essence, what we will do, we will have a stipulated trial so that in the event at the conclusion of that stipulated trial, . . . Saylor is found guilty, he can preserve his rights to appeal and question the court's ruling on the motion to suppress.
>
> I guess that is in the nature of some type of promise that he has received as a result, that has been induced to waive his right to jury trial.

Saylor's counsel showed approval for this statement of the agreement.

Saylor argues that, because the prosecutor did not agree to a contested stipulated trial, he "exploited" Saylor's counsel into accepting "false testimony and other incriminating evidence." Brief for appellant at 81.

First, Saylor apparently bases this argument on a position that he did not have to agree to any conditions in order for the State to reduce the charge. In other words, he contends that the State was locked into the charge of second degree murder and that therefore, Saylor would still have the opportunity to participate in a contested trial on that charge. Dougherty's letter reflects otherwise. If Saylor wanted the benefit of avoiding the first degree murder charge, then he had to agree to sufficient facts to support a conviction for second degree murder. Naturally, such facts would be incriminating. Moreover, Dougherty's letter also allowed Saylor the option of withdrawing his waiver and proceeding to trial on the charge of first degree murder. Clearly, the parties attempted to compromise in order to achieve the mutually beneficial resolution of a serious criminal matter. Notably, Saylor does not argue that trial counsel was ineffective in getting the charge reduced from first degree murder to second degree murder. Nor does he explain how his counsel could have forced the State to reduce the charge to second degree murder and still agree to a contested stipulated trial.

Second, Saylor contends that his counsel were forced into allowing Dougherty to set forth false evidence in the stipulation. Again, this overlooks the benefit of the reduced charge. But even ignoring that fact, Saylor has not shown there was false evidence presented in 1985 nor that this allegedly false evidence has the significance that Saylor attributes to it.

For example, Saylor points to the fact that Dougherty did not include each person in the chain of custody of the pillow tested by Roy. However, Dougherty expressly denied attempting to mislead the district court and testified that he deliberately phrased the stipulation to show that the pillow went from the property room to the intended recipient without including the entire chain of custody. Instead, the parties stipulated that all items of evidence discussed and offered had an adequate chain of custody. There is no support for Saylor's contention that the portion of the stipulation pertaining to the pillow was somehow false or deceptive.

Additionally, Saylor claims that the stipulation attributed false testimony to Kutsch, the pathologist. As the district court noted, the stipulation set forth that Kutsch's deposition opinion differed from the opinion relied upon by the stipulated facts.

Saylor's brief is replete with examples such as these, but they do not reflect falsified evidence. Rather, they involve issues of fact and credibility, which were the province of the district court to resolve. See *State v. Lee*, 290 Neb. 601, 861 N.W.2d 393 (2015) (conflicts in evidence, credibility of witnesses, explanations, and weight of evidence presented are within fact finder's province for disposition). As such, Saylor's contentions in this regard do not support his claims of prosecutorial misconduct or ineffective assistance of counsel.

Turning again to the benefit of the reduced charge, the record does not support Saylor's assertion that his counsel was forced into accepting the stipulation. Instead, the evidence shows that Saylor's counsel carried out a calculated strategy by agreeing to it. Rather than contest every issue, the record

reflects that Healey preserved the ruling on the motion to suppress for appeal and at the same time ensured that Saylor did not face the death penalty, which, based on the record and the timing of Saylor's trial, was a realistic possibility. See § 29-2523(1)(c). See, also, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982); *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *disapproved on other grounds, State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). Thus, contrary to Saylor's assigned error, the district court did not err in determining that extinguishing the possibility of the death penalty was a major benefit of the agreement.

Even with a stipulated trial, Healey still was able to contest the evidence on Saylor's behalf. For example, Healey argued to the court, at trial, that the matter was submitted with stipulated facts but that this left "to the court the question of whether the stipulated matter proves [Saylor's] guilt and if so, what offense." Healey further showed his strategy in the following exchange after Dougherty offered the stipulation, exhibit 8 of the 1985 trial:

> HEALEY: Your Honor, I indicated that I had no objection to the reception of Exhibit 8 and that is true. I would just note in an abundance of caution that Exhibit 8, however, does contain with it some objections to some of the material offered by the State as reflected therein and I do not waive those objections and will speak to those.
>
> THE COURT: Perhaps I should ask . . . Saylor whether he has read and is familiar with Exhibit 8, the stipulation?
>
> [Saylor]: Yes, sir, Your Honor, I have.
>
> THE COURT: And you have signed that stipulation?
>
> [Saylor]: I did sign it, Your Honor. I agree with the admissibility of most of the things there. However,

obviously not on the things considered in the motion to suppress . . . .

THE COURT: But you agree with the stipulation and you have signed the stipulation?

[Saylor]: Yes, sir.

THE COURT: As I said, Exhibit 8 is received.

. . . DOUGHERTY: At this time, I would offer what has been marked as Exhibit No. 6 [the recordings of Saylor's conversation with Timm and Menard] as the stipulation Exhibit 8 reflects.

. . . HEALEY: We have no foundational objections but we do, as reflected by Exhibit 8 and for the record, do at this time renew the motion to suppress previously filed and briefed and argued to the court in relation to Exhibit 6. We at this time, as the Exhibit 8 states, object to the introduction of the recording for the reason stated in that motion to suppress filing 19, but which will be marked as an exhibit in this proceeding for each and every reason set forth in the exhibit.

We further contend and allege and object that those tapes and the conversations reflected therein were not in fact or in law, voluntary but were the product of unlawful and unconstitutional deprivation of [Saylor] in the respect previously argued and briefed and as stated in Exhibit No. 6.

We have the further agreement as Exhibit 8 states that the evidentiary record which was made on the motions to suppress that evidentiary record having been made I believe on February 6, 1985, shall be incorporated by reference in these proceedings and shall be considered to be the basis for the ruling of the court upon the motion to suppress renewal and the objections that [Saylor] is making at this time.

We would ask that the court affirmatively direct that the evidence presented at that motion to suppress hearing be considered to be before the court at this proceeding

> for the purpose of the ruling on the Exhibit No. 6, in relation to [Saylor's] objection and motion to suppress, on the grounds stated.

The record shows that Saylor's counsel acted strategically and not only preserved the issues in regard to the motion to suppress, but also contested other evidence. Contrary to Saylor's contention, we find that his counsel performed effectively in this respect.

Saylor also cites *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), for the proposition that prejudice will be presumed where counsel fails to subject the prosecution's case to meaningful testing. *Cronic* further states: "'The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" 466 U.S. at 655, quoting *Herring v. New York*, 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). Saylor alleges, "Omitting exculpatory evidence, especially as to whether Lena['s] death was natural, was presumptively prejudicial." Brief for appellant at 28. Saylor's authority does not fit the situation at hand, where a stipulated trial was conducted. Again, trial counsel's strategy to focus on the motion to suppress and avoid the death penalty does not automatically equate to "fail[ing] to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. at 659.

Saylor claims that he received ineffective assistance of counsel in several other ways: (a) failing to seek withdrawal of his jury waiver, (b) prematurely allowing Saylor's jury waiver, (c) failing to include exculpatory medical evidence regarding the victim in the trial stipulation, (d) failing to object to portions of the stipulation and to insist on evidentiary rulings, (e) failing to investigate the change in Kutsch's testimony, (f) failing to consult an independent medical expert, (g) failing to require production of medical evidence, (h) failing to inquire as to the consequences of taking or not taking

prescribed medications, and (i) failing to interview or depose stipulation witnesses. However, these contentions either rely on the assumption that the parties participated in a contested trial or imply that a stipulated trial was not a prudent strategy. We have concluded that Saylor's counsel was not ineffective by agreeing to a stipulated trial in an attempt to reduce the first degree murder charge, avoid the possibility of the death penalty, and preserve Saylor's motions for appeal. Therefore, we decline to consider the foregoing contentions because they depend on a contested trial format that did not occur and because the stipulated trial that did occur did not result from ineffective assistance of counsel.

Right to Speedy Trial

Saylor contends that the district court erred in rejecting his claims that his right to speedy trial was violated and that trial counsel was ineffective for not raising that issue. Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2014), then as now, requires discharge of a defendant whose case has not been tried within 6 months after the filing of the information. Therefore, to determine whether trial counsel should have raised the issue, we must review the record. The bill of exceptions reflects that although Saylor offered and the district court received the clerk's transcript from the original trial, only a photocopy of the front page is before us. Otherwise, the clerk's transcript is not part of the record.

[5,6] The party appealing has the responsibility of including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review. Neb. Rev. Stat. § 25-1140 (Reissue 2008); *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991); *State v. Schaneman*, 235 Neb. 655, 456 N.W.2d 764 (1990); *State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 783 (1986). A bill of exceptions is the only vehicle for bringing evidence before the Supreme Court; evidence which is not made part of the bill of

exceptions may not be considered. *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983); *State v. Gingrich*, 211 Neb. 786, 320 N.W.2d 445 (1982). Without the benefit of a proper record, we will not consider this alleged error.

Prosecutorial Misconduct

[7] Saylor claims that the district court erred in finding no prosecutorial misconduct. Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial. *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015).

Saylor contends that he "proved" Dougherty misrepresented Kutsch's testimony. Brief for appellant at 47. The stipulation acknowledged Kutch's 1984 deposition opinion that Lena's cause of death was respiratory arrest but that it was indeterminate as to whether such respiratory arrest resulted from natural causes or from smothering. But the stipulation states that at the time of the stipulation, dated May 10, 1985, Kutsch had the opinion that "[a]lthough [Lena] could have died of natural causes, the cause of her respiratory arrest was most probably smothering." This last statement was supported by a letter from Kutsch to Dougherty dated May 6, 1985.

Saylor argues this was false testimony, because in Kutsch's deposition in 2014, he stated that he could not say that the cause of death was "most probably smothering." However, Kutsch further testified that he could not recall the letter in 1985, because 30 years had passed. The district court found it should give more weight to Kutsch's statements in 1985 than to his testimony 30 years later.

Saylor contends that Dougherty failed to turn over all discovery. However, the record establishes otherwise. Jacobs did not recall having the impression that she had requested evidence she did not receive. Saylor failed to supply evidence that the requested discovery was not provided.

Saylor also claims the Lancaster County Attorney's office had continued contact with Dougherty after that office had recused itself. His argument is based upon timesheets from Dougherty and testimony by Lacey. However, Dougherty advised that he contacted the Lancaster County Attorney's office with questions about the death penalty issues and in regard to potential witnesses. And Lacey confirmed that the county attorney's office had contact with Dougherty concerning moving Saylor and Sapp, witnesses for their cases, and the death qualification issue. The district court concluded that normal contact had occurred and that Saylor had not proved this claim.

[8] Like many of his other arguments, Saylor bases his allegations concerning prosecutorial misconduct on determinations of credibility. However, as we have already observed, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh the evidence presented, which are within a fact finder's province for disposition. *State v. Lee*, 290 Neb. 601, 861 N.W.2d 393 (2015).

Additionally, Saylor asserts and assigns that the prosecutor committed misconduct by coercing him into accepting the stipulation. We have thoroughly examined this issue above, and we reject Saylor's assertion.

Based on the record before us, we conclude that the district court was not clearly erroneous in finding no prosecutorial misconduct.

Stipulated Bench Trial

[9] Saylor assigns that the district court failed to inquire regarding his right to confrontation before proceeding with the stipulated trial, which he argues was tantamount to a guilty plea. As pointed out by the district court, we settled this issue in *State v. Howard*, 282 Neb. 352, 371-72, 803 N.W.2d 450, 467-68 (2011):

> A stipulation entered by a defendant can be tantamount to a guilty plea. But this is true only when the defendant

> stipulates either to his or her guilt or to the sufficiency of the evidence. [The defendant] did not do so. Instead, he merely stipulated to the admission of certain evidence, and then the district court determined whether that evidence was sufficient to convict him of the crime charged. Simply stipulating to the admission of evidence is not tantamount to a guilty plea. Moreover, it is clear from the record that [the defendant] preserved all of the defenses and arguments he raised in his motion to suppress. Where the defendant has presented or preserved a defense, such as the suppression of evidence, a stipulated bench trial is not tantamount to a guilty plea.

(Citations omitted.)

In the instant matter, Saylor did not enter a plea of guilty or no contest. Instead, he preserved his defense for appeal and affirmatively agreed to the stipulated facts. In addition, as discussed, he had the opportunity to proceed to trial on the first degree murder charge if he disagreed with the stipulation. The district court's findings on this issue were not clearly erroneous.

Prejudice

[10] Saylor contends that the district court erred in finding that he had not shown how he was prejudiced by the performance of his trial counsel. 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. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *State v. Armstrong,* 290 Neb. 991, 863 N.W.2d 449 (2015). As previously discussed, Saylor is now second-guessing a strategy to which he agreed to in 1985 in order to avoid the possibility of the death penalty. Saylor agreed to the waiver of jury trial and, at a later hearing, agreed to the

stipulated facts on the record and even advised the district court as to what facts he contested. What Saylor has shown is that 30 years later, he and new counsel would have taken a different approach. Saylor cannot show prejudice as to the stipulated trial, because his alternative was a trial on the first degree murder charge. No such trial occurred, therefore, at best, he speculates he would have been found not guilty on a charge of first degree murder.

Accordingly, we find no merit to any of Saylor's assigned errors pertaining to prejudice.

Expert Attorney Testimony

[11] Saylor contends that the district court erred in denying his request that an expert attorney testify at the postconviction hearing regarding allegedly deficient performance by counsel. We reject this contention. As we have concluded, the record shows that Saylor's counsel was not ineffective. Moreover, while Saylor's present counsel and/or his expert counsel would have chosen a different strategy, i.e., go to trial on a first degree murder charge, they use hindsight to evaluate the approach of Saylor's attorneys. The effectiveness of counsel, however, is not to be judged by hindsight. *State v. Bartlett*, 210 Neb. 886, 317 N.W.2d 102 (1982); *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977); *State v. Phillips*, 186 Neb. 547, 184 N.W.2d 639 (1971).

Ineffective Assistance of Appellate Counsel

[12,13] Saylor assigns that his appellate counsel, who were the same as his trial counsel, provided ineffective assistance by failing to raise claims of ineffectiveness of trial counsel on appeal. However, claims of ineffective assistance of counsel raised on direct appeal by the same counsel who represented the defendant at trial are premature and will not be addressed on direct appeal. *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009). Moreover, when analyzing a claim of ineffective

assistance of appellate counsel, courts usually begin by determining whether appellate counsel actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel failed to raise. *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015). We have already concluded that Saylor did not receive ineffective assistance of trial counsel as he alleges. Therefore, we find no merit to this assigned error.

Motion to Reopen Postconviction Hearing

Saylor assigns that the district court erred in overruling the pro se "Verified Motion to Reopen Case and Present Additional Evidence" he filed after the close of evidence. The motion simply set forth additional evidence to challenge the evidence at the stipulated trial. Again, the parties participated in a stipulated trial and not a contested trial. Accordingly, the district court did not err in denying the motion to reopen, because the additional evidence amounted to a repetition of his postconviction claims.

CONCLUSION

For the reasons set forth above, we hold that the district court did not err in denying Saylor's motion for postconviction relief.

Affirmed.

Heavican, C.J., and Connolly and Stacy, JJ., not participating.

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

John J. Malone, Sr., appellant, v. City of Omaha, appellee.

883 N.W.2d 320

Filed August 19, 2016. No. S-15-676.

1. **Ordinances: Appeal and Error.** Interpretation of a municipal ordinance is a question of law, on which an appellate court reaches an independent conclusion irrespective of the determination made by the court below.
2. **Courts: Statutes: Ordinances.** When reviewing preemption claims, a court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.
3. **Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law which an appellate court reviews de novo.
4. **Ordinances: Presumptions: Proof.** Courts generally presume that legislative or rulemaking bodies, when enacting ordinances or rules, are acting within their authority. The burden to show otherwise rests on the party challenging the validity of the ordinance or rule.
5. **Municipal Corporations: Ordinances.** To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.
6. **Municipal Corporations: Ordinances: Presumptions.** In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.
7. **Municipal Corporations: Legislature.** In the exercise of police power delegated by the state Legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people and as to when and how such police power should be exercised.

8. **Legislature: Statutes: Municipal Corporations: Ordinances.** Preemption of municipal ordinances by state law is based on the fundamental principle that municipal ordinances are inferior in status and subordinate to the laws of the state. Municipal laws are inferior to state law, because a municipal corporation derives all of its powers from the state and has only such powers as the Legislature has seen fit to grant to it; as such, in the case of a direct conflict between a statute and a city ordinance, the statute is the superior law.
9. **Statutes: Legislature: Intent.** There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption. In all three cases, the touchstone of preemption analysis is legislative intent.
10. **Political Subdivisions: Statutes: Legislature: Intent.** Express preemption occurs when the Legislature has expressly declared in explicit statutory language its intent to preempt local laws.
11. ____: ____: ____: ____. Field preemption and conflict preemption arise in situations where the Legislature did not explicitly express its intent to preempt local laws, but such can be inferred from other circumstances.
12. ____: ____: ____: ____. In field preemption, legislative intent to preempt local laws is inferred from a comprehensive scheme of legislation.
13. **Statutes: Political Subdivisions.** When there is not comprehensive legislation on a subject, local laws may cover an authorized field of local laws not occupied by general laws, or may complement a field not exclusively occupied by the general laws.
14. **Political Subdivisions: Statutes: Legislature.** The mere fact that the Legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted. But where the state has occupied the field of prohibitory legislation on a particular subject, there is no room left for local laws in that area and a political subdivision lacks authority to legislate with respect to it.
15. **Political Subdivisions: Statutes: Legislature: Intent.** In conflict preemption, legislative intent to preempt local laws is inferred to the extent that a local law actually conflicts with state law.
16. **Constitutional Law.** The liberty to contract, the right to acquire and sell property in a lawful manner, and the right to conduct lawful business are constitutionally protected rights.
17. **Statutes: Constitutional Law.** A regulatory statute adopted by virtue of the police power which has no reasonable relation to the public health, safety, and welfare is invalid. The test of validity is the existence of a real and substantial relationship between the exercise of the police power and the public health, safety, and welfare.

18. ____: ____. A statute, under the guise of a police regulation, which does not tend to preserve the public health, safety, and welfare is an unconstitutional invasion of the personal and property rights of the individual.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

Brian J. Koenig and Eric A. Nanfito, of Koley Jessen, P.C., L.L.O., for appellant.

Alan M. Thelen, Deputy Omaha City Attorney, and Jennifer J. Taylor for appellee.

Heavican, C.J., Wright, Cassel, Stacy, and Kelch, JJ., and Inbody and Riedmann, Judges.

Heavican, C.J.

I. INTRODUCTION

The City of Omaha (City) enacted ordinance No. 39090, which required contractors doing work within the City to obtain a license. John J. Malone, Sr., challenged the ordinance on various grounds. Most of the grounds were dismissed following the City's motion for summary judgment; the last was dismissed following a bench trial. At issue on appeal is the City's authority to enact this ordinance. We affirm.

II. FACTUAL BACKGROUND

Ordinance No. 39090 was placed on the Omaha City Council agenda for a first reading on May 3, 2011. The original ordinance provided that it was for "the licensing and regulation of general contractors."

A second reading was on the agenda for a meeting held on May 10, 2011, and the public was invited to testify. Notice of this hearing was published and indicated that the ordinance concerned licensing and regulation of general contractors. In response to opposition, the ordinance was laid over and revised.

The ordinance was eventually enacted on August 16, 2011. The agenda for that meeting noted that the ordinance concerned licensing and regulation of general contractors and that amendments to the ordinance would be considered. Those amendments were eventually incorporated into the ordinance as enacted.

Generally speaking, the changes from the proposed to the adopted versions of the ordinance were (1) a change throughout of the term "general contractor" to "contractor" and (2) the removal from the definition of contractor, and thus from the reach of the ordinance, (a) "landlords and property owners performing work on property that they own but do not reside in," (b) persons performing routine maintenance and handyman services, and (c) certain organizations using a volunteer labor force. The adopted ordinance, with changes to the proposed ordinance as noted by underscores and strikethroughs, provided:

> Sec. 43-273. ~~General c~~ Contractor defined.
>
> (a) For purposes of this article, a "~~general~~ contractor" is defined as any person or entity who contracts with the owner or tenant of property to build, construct, alter, repair, add to, subtract from, or otherwise improve any building or structure upon the said property, within the city or its three-mile extraterritorial jurisdiction. ~~The term also applies to landlords and property owners performing work on property that they own but do not reside in.~~ The term "~~general~~ contractor" shall not include any of the following:
>
> (1) ~~a~~A tradesman licensed by the city who performs work within his or her licensed trade, or any subcontractor performing work under a contract with a licensed ~~general~~ contractor.
>
> (2) A person performing work defined as routine maintenance in section 43-72.
>
> (3) A person performing work under the definition of "handyman services" in section 43-72.

> (4) Any organization that constructs new or renovates existing structures with a mostly volunteer labor force. Such organization shall have at least one of the following: (a) at least one person on [its] staff who is a licensed contractor holding a Class "C" or above license, (b) a licensed contractor holding a Class "C" or above license serving as a board member acting as [its] license holder, or (c) a volunteer licensed contractor holding a Class "C" or above license working on the building site providing oversight and mentoring for the work crew.

On June 25, 2013, Malone filed suit challenging the ordinance. As relevant on appeal, the complaint alleged that the passage of ordinance No. 39090 did not comply with the procedural requirements of the Omaha City Charter, art. II, § 2.12 (1984); that the ordinance placed an unfair restriction on and monopolized the contracting industry in the City; and that the ordinance violated Malone's constitutional rights.

The district court granted the City's motion for summary judgment on all but one of Malone's claims. That claim, identified in the complaint as "Injuries to Business and Property," proceeded to a bench trial. Following trial, the district court found for the City, concluding that the City was within its power to enact the ordinance and that the ordinance did not prevent Malone from working on his own property.

Malone appealed. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket.[1]

III. ASSIGNMENTS OF ERROR

Malone assigns, restated and consolidated, that the district court erred in (1) not finding that the ordinance was enacted in violation of § 2.12 of the City's charter; (2) finding that the City was empowered under its charter to enact the ordinance; (3) not finding that the ordinance was monopolistic and failed

[1] See Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

to further the public health, safety, or welfare; (4) not finding that the ordinance was unlawful because it was preempted by the Legislature's occupation of the fields of the licensing of the health, safety, and welfare of the public, the construction industry, and the lead abatement industry; (5) finding that the ordinance did not violate Malone's constitutional right to conduct a lawful business; (6) granting the City's motion for summary judgment; and (7) not granting permanent injunction and instead dissolving the temporary injunction.

IV. STANDARD OF REVIEW

[1] Interpretation of a municipal ordinance is a question of law, on which we reach an independent conclusion irrespective of the determination made by the court below.[2]

[2] When reviewing preemption claims, a court is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.[3]

[3] The interpretation of statutes and regulations presents questions of law which we review de novo.[4]

V. ANALYSIS

1. § 2.12

In his first assignment of error, Malone contends that the district court erred when it failed to find that the ordinance was passed in violation of § 2.12 of the City's charter.

That section provides:

> Every legislative act of the Council shall be by ordinance, and other acts, if so required by law, shall also be by ordinance. Every ordinance shall be offered in writing and signed by the elected official introducing

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[2] *State ex rel. Parks v. Council of City of Omaha*, 277 Neb. 919, 766 N.W.2d 134 (2009).

[3] *Butler County Dairy v. Butler County*, 285 Neb. 408, 827 N.W.2d 267 (2013).

[4] See *id.*

> it. The enacting clause of every ordinance shall be as follows: "Be it ordained by the City Council of the City of Omaha:". No ordinance shall contain more than one subject, and the same shall be clearly expressed in the title. No ordinance, except emergency ordinances enacted pursuant to section 2.13, shall be passed earlier than two weeks after its introduction or go into effect before fifteen days from the time of its passage, but in the case of ordinances not of a legislative character, the Council may provide by rule for an earlier effective date. There shall be three readings of every ordinance, which may be satisfied by the title being published on the printed agenda, at separate meetings and, if not read or considered at consecutive meetings, any postponement shall be to a date certain. There shall be opportunity provided for a public hearing at the same time as the second reading unless a different time shall be fixed at the first reading. *At least three days before the public hearing, the title of the ordinance and a notice of the time and place of the public hearing shall be published at least once in the official newspaper.* Every ordinance enacted shall, not later than ten days after its effective date, be published in the official newspaper, unless the Council shall waive this requirement and in lieu thereof direct the publication of only the title and a summary of the ordinance's contents.[5]

On appeal, Malone asserts that when the City amended the title from "licensing and regulation of general contractors" to "licensing and regulation of contractors," it was required to provide notice anew of that change in order to comply with § 2.12. Malone bases this argument on his perception of the distinction between "general contractor" and "contractor."

We disagree that the City was required to recommence the notice process on these facts. As Malone notes, § 2.12

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[5] § 2.12 (emphasis supplied).

provides that the title be published along with the public hearing information in order to provide notice that the ordinance would be discussed. There is no dispute that this notice was sufficient at the outset and that a hearing on the ordinance was held.

But the record shows that after this initial public hearing, amendments were made to the proposed ordinance in response to the feedback received at the hearing. There is nothing in § 2.12 that requires that after holding a public hearing, the notice process begins anew when changes are made to the ordinance. Indeed, the purpose behind the title is to provide notice; once it has performed that function, the title no longer serves any useful purpose.

We disagree with Malone's contention that the change widened the scope of the ordinance because "general contractor" is a narrower term than "contractor." The amendment of the term "general contractor" to "contractor" did not change the original meaning of the term as expressed in the initial draft, and in fact, the changes acted to remove certain individuals from the definition of the term "contractor."

Finally, the amendment to the ordinance's title was purely stylistic in nature as it simply changed the title to comport with the amendments to the ordinance.

We conclude that Malone's first assignment of error is without merit.

2. Power to License

(a) City's Authority

Malone next argues that the City lacked the authority to pass the ordinance, because the City has no authority to license contractors. Malone makes several arguments as to why the City lacks this power: (1) The power is not granted by the City's charter, (2) case law limits the power to license, and (3) the power to license has been preempted by the Legislature. We note that there is conflicting authority regarding the nature of

the City's charter. But we need not reach Malone's argument on this point, because we conclude that, in fact, case law and Nebraska statutes support the conclusion that the Legislature has authorized the City to pass this ordinance and that the ordinance is not preempted by the Legislature. We therefore find Malone's arguments to be without merit.

[4-7] Courts generally presume that legislative or rulemaking bodies, when enacting ordinances or rules, are acting within their authority.[6] The burden to show otherwise rests on the party challenging the validity of the ordinance or rule.[7] To overturn a city ordinance on the ground that it is unreasonable and arbitrary or that it invades private rights, the evidence of such facts should be clear and satisfactory.[8] In determining the validity of a city ordinance regularly passed in the exercise of police power, the court will presume that the city council acted with full knowledge of the conditions relating to the subject of municipal legislation.[9] In the exercise of police power delegated by the state Legislature to a city, the municipal legislature, within constitutional limits, is the sole judge as to what laws should be enacted for the welfare of the people and as to when and how such police power should be exercised.[10]

The Legislature has passed several different statutes empowering cities to regulate building construction. To begin, Neb. Rev. Stat. § 71-6406(1) (Supp. 2015) of the Building Construction Act provides that "[a]ny political subdivision may enact, administer, or enforce a local building or construction code if or as long as such political subdivision adopts the state building code." Both the City and the State have

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[6] See *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005).

[7] *Id.*

[8] *Wolf v. City of Omaha*, 177 Neb. 545, 129 N.W.2d 501 (1964).

[9] *Id.*

[10] *Id.*

adopted the appropriate building codes.[11] Section 71-6406(3) also allows a political subdivision, such as the City, to collect fees which monitor a builder's application of codes.

Still other relevant grants of power are enumerated in Nebraska law. Neb. Rev. Stat. § 14-102 (Supp. 2015) sets forth the powers of a city of the metropolitan class. Section 14-102(32) empowers the City "[t]o prescribe fire limits and regulate the erection of all buildings and other structures within the corporate limits . . . ." Section 14-102(33) grants the City the power "[t]o regulate the construction, use, and maintenance of party walls, to prescribe and regulate the thickness, strength, and manner of constructing stone, brick, wood, or other buildings and the size and shape of brick and other material placed therein . . . ." That subsection also allows the regulation of other specific elements of building construction, including, among others, fire escapes, elevators, plumbing, pipefitting, chimneys, fireplaces, and stairways.

The City also has been granted the following broad powers:

> To make and enforce all police regulations for the good government, general welfare, health, safety, and security of the city and the citizens thereof in addition to the police powers expressly granted herein; and in the exercise of the police power, to pass all needful and proper ordinances and impose fines, forfeitures, penalties, and imprisonment at hard labor for the violation of any ordinance, and to provide for the recovery, collection, and enforcement thereof; and in default of payment to provide for confinement in the city or county prison, workhouse, or other place of confinement with or without hard labor as may be provided by ordinance.[12]

We therefore conclude that the City has the power to regulate contractors.

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[11] Neb. Rev. Stat. § 71-6403 (Supp. 2015); Omaha Mun. Code, ch. 43, art. II, § 43-121 (2008).

[12] § 14-102(25). See, also, § 14-102(3) and (5).

Still, Malone contends that the power to regulate does not include the power to license. He cites to *State v. Wiggenjost*[13] and *Gray v. City of Omaha*[14] in support of this assertion. In *Gray*, this court held that the City of Omaha did not have the authority to license a person engaged in the occupation of installing sidewalks. And in *Wiggenjost*, we held that the city of Lincoln did not have the authority to license a sign painter.

We disagree with this assertion. These cases do not suggest that licensure may never be permitted; rather, both simply suggest that licensure on the facts of those cases did not affect the public's health, morals, safety, or welfare.

And indeed, in *State v. Phillips*,[15] we held that the city of Lincoln did have the authority to license a person engaged in the business of house moving. We noted:

> It may be stated as a broad proposition that there are some occupations which every citizen may engage in as a matter of right and which are not subject to regulation by public authorities. *Such occupations, however, as may in their performance affect public health, morals, safety or welfare are proper subjects of regulation under the police power* . . . .[16]

This raises another of Malone's assertions—that the health, safety, and welfare of the citizenry was not affected by this ordinance. Malone argues that public health, safety, and welfare would be better served if more individuals obtained permits for work done within the City's limits, because that work would then be inspected. Malone also notes that virtually all work that is inspected eventually passes that inspection and that a contractor who would not pull a permit will also not get licensed.

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[13] See *State v. Wiggenjost*, 130 Neb. 450, 265 N.W. 422 (1936).

[14] *Gray v. City of Omaha*, 80 Neb. 526, 114 N.W. 600 (1908).

[15] *State v. Phillips*, 133 Neb. 209, 274 N.W. 459 (1937).

[16] *Id*. at 211, 274 N.W. at 460 (emphasis supplied).

Malone is correct insofar as his argument goes. But there is nothing that requires the licensing ordinance at issue here to be perfect; it just has to impact public health, safety, and welfare. And there is little doubt but that it does. A witness for the City testified that the purposes behind licensing contractors were to decrease the number of reinspections and to ensure that contractors working in the field understood what inspectors expected of them and their work. Yet another reason was to keep closer watch on the contracting community. The witness testified that those goals had been met. And more generally, one stated purpose behind requiring a building code is that such standards are necessary to "safeguard life, health, property, and the public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, and maintenance of buildings and structures within this state."[17]

The City has the authority under state law to enact such an ordinance. Malone's arguments to the contrary are without merit.

(b) Monopoly

Malone also asserts that the ordinance is monopolistic because it is more difficult for individual and small firm contractors to obtain licensure than it is for larger contracting firms. Malone states that the court in *Gray* specifically noted that the sidewalk licensing ordinance at issue did not "'creat[e] a monopoly'" but that it was "'monopolistic in its tendency, and would incline to lessen competition.'"[18]

We disagree with Malone. The requirements for licensure are the same under the ordinance regardless of who is applying for the license, and the record shows that one licensed contractor per job is generally sufficient regardless of the number of individuals also working that same job.

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[17] Neb. Rev. Stat. § 71-6402(2) (Reissue 2009).

[18] Brief for appellant at 32, quoting *Gray v. City of Omaha, supra* note 14.

Gray is inapplicable, because there the court also noted simply that even if something might be monopolistic, it might still be necessary for a city to exercise its power to regulate, for reasons of public safety.[19] And we have concluded that public safety is at issue here.

It is true that licensing contractors will not catch every instance of poor contracting work, because some contractors will simply not obtain a license, but licensure nevertheless impacts the public's health, safety, and welfare. Malone's argument to the contrary is without merit.

(c) Legislative Preemption

Malone next argues that the district court erred in not finding that the ordinance was preempted by state law. Malone contends that contractor licensing is preempted by (1) the Building Construction Act,[20] (2) the Contractor Registration Act,[21] and (3) the Residential Lead-Based Paint Professions Practice Act.[22]

[8] "'[P]reemption of municipal ordinances by state law is based on the fundamental principle that "municipal ordinances are inferior in status and subordinate to the laws of the state."'"[23] Further, we have explained that municipal laws are inferior to state law, because "'a municipal corporation derives all of its powers from the state and . . . has only such powers as the Legislature has seen fit to grant to it,'" concluding from this fact that "'in the case of a direct conflict between a statute and a city ordinance, the statute is the superior law.'"[24]

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[19] See *Gray v. City of Omaha, supra* note 14.

[20] Neb. Rev. Stat. § 71-6401 et seq. (Reissue 2009, Cum. Supp. 2014 & Supp. 2015).

[21] Neb. Rev. Stat. § 48-2101 et seq. (Reissue 2010).

[22] Neb. Rev. Stat. § 71-6318 et seq. (Reissue 2009).

[23] *Butler County Dairy v. Butler County, supra* note 3, 285 Neb. at 431, 827 N.W.2d at 286.

[24] *Id*. at 431, 827 N.W.2d at 286-87.

[9-11] There are three types of preemption: (1) express preemption, (2) field preemption, and (3) conflict preemption.[25] In all three cases, "'[t]he touchstone of preemption analysis is legislative intent.'"[26] Express preemption occurs when the Legislature has "'expressly declare[d] in explicit statutory language its intent to preempt' local laws."[27] Field preemption and conflict preemption arise in situations where the Legislature did not explicitly express its intent to preempt local laws, but we can infer such intent from other circumstances.

[12-14] In field preemption, legislative intent to preempt local laws is "'inferred from a comprehensive scheme of legislation.'"[28] When there is not comprehensive legislation on a subject, local laws "'"may cover an authorized field of local laws not occupied by general laws, or may complement a field not exclusively occupied by the general laws."'"[29] Indeed, "'"[t]he mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted."'"[30] But "'"where the state has occupied the field of prohibitory legislation on a particular subject,"'" there is no room left for local laws in that area and a political subdivision "'"lacks authority to legislate with respect to it."'"[31] Because a comprehensive scheme of legislation effectively keeps localities from legislating in that area, we infer from such a scheme that the Legislature intended to preempt local laws.

[15] In conflict preemption, legislative intent to preempt local laws is inferred "'to the extent that [a local law]

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[25] *Id.*

[26] *Id.* at 431, 827 N.W.2d at 287.

[27] *Id.*

[28] *Id.* at 432, 827 N.W.2d at 287.

[29] *Id.*

[30] *Id.*

[31] *Id.*

actually conflicts with state law.'"[32] As this court has previously explained, "'"[t]hat which is allowed by the general laws of the state cannot be prohibited by ordinance, without express grant on the part of the state. Conversely, without express legislative grant, an ordinance cannot authorize what the statutes forbid."'"[33] Nonetheless, when a court considers preemption claims, it "'is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.'"[34]

(i) Building Construction Act

Malone first argues that the licensing ordinance is preempted by the Building Construction Act. The purposes of that act are to (1) adopt a state building code, (2) provide standards with respect to building construction, and (3) provide for the use of innovation in building construction.[35] This act also requires cities to adopt a building code.[36]

Malone argues that the Building Construction Act does not allow for the licensing of contractors and neither does the State Building Code and that as such, the City cannot license them. We note that Malone is making field and conflict preemption arguments. As there is no express language dealing with contractor licensing, express preemption has no applicability here.

As noted above, legislative intent to preempt local laws is inferred from a comprehensive scheme of legislation.[37] When there is not comprehensive legislation on a subject, local laws may cover an authorized field of laws not occupied by general

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] § 71-6402.

[36] *Id.*

[37] *Id.*

laws, or may complement a field not exclusively occupied by the general laws. Only where there is no room left for local laws in that area does a political subdivision lack authority to legislate with respect to it.

The primary purposes of the Building Construction Act are to adopt a building code to govern the "construction, reconstruction, alteration, and repair of buildings" and to control the "design, construction, quality of materials, use and occupancy, and maintenance of buildings."[38] Thus, the reason for this act is to ensure that buildings are built safely and correctly. This act does not control in any way who builds the building, only that the person involved in the construction do so safely. Moreover, as we found above, this act forms part of the basis of the City's statutory authority to enact this ordinance. As such, we conclude that the ordinance is not preempted by the Building Construction Act.

(ii) Contractor Registration Act

Malone also argues that the Contractor Registration Act preempts the City's ordinance. The purpose of the Contractor Registration Act is to require contractors doing business in the state to be registered with the state's Department of Labor. Section 48-2102 expressly provides that "[i]t is not the intent of the Legislature to endorse the quality or performance of services provided by any individual contractor."

Malone argues that the fact of registration, along with the statement that the State is not endorsing the quality or performance of a contractor, acts to preempt the ordinance. But this argument is not persuasive.

The mere fact that the Legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.[39] There is nothing in the Contractor

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[38] *Id.*

[39] *Butler County Dairy v. Butler County, supra* note 3.

Registration Act to suggest that a city cannot regulate contractors simply because the State also requires them to register. When deciding issues of preemption, an appellate court is required to try to harmonize the state and local law.[40] Here, the state law requires contractors to have their names entered into a state database. The local ordinance requires testing and licensing at the local level. The two can exist together, and the ordinance is not preempted by this act.

(iii) Residential Lead-Based Paint Professions Practice Act

Finally, Malone argues that the Residential Lead-Based Paint Professions Practice Act preempts the ordinance. The purpose of this act is to set forth procedures and requirements for accreditation of training programs, licensure, and work practice standards for performing lead-based paint activities.

We cannot conclude that this act preempts the ordinance at question here. This is particularly true when the act specifically notes that

> abatement does not include renovation, remodeling, landscaping, or other activities when such activities are not designed to permanently eliminate lead-based paint hazards but instead are designed to repair, restore, or remodel a structure or dwelling even if such activities may incidentally result in a reduction or elimination of lead-based paint hazards.[41]

This act, then, controls the removal of the lead-based paint hazards; the ordinance controls the licensure of activities that are expressly excluded from the definition of lead-based paint abatement.

There is no merit to Malone's second through fourth assignments of error.

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[40] *Id.*

[41] § 71-6319.02.

3. Right to Conduct Lawful Business

Malone next argues that the district court erred in concluding that the ordinance did not violate his constitutional right to conduct a lawful business and his right to privacy and property. Malone argues that the ordinance does not increase public safety in any way, yet it requires him to be licensed to engage in his contracting business, and that such is unconstitutional.

[16-18] The liberty to contract, the right to acquire and sell property in a lawful manner, and the right to conduct lawful business are constitutionally protected rights.[42] A regulatory statute adopted by virtue of the police power which has no reasonable relation to the public health, safety, and welfare is invalid.[43] The test of validity, then, is the existence of a real and substantial relationship between the exercise of the police power and the public health, safety, and welfare.[44] A statute under the guise of a police regulation, which does not tend to preserve the public health, safety, and welfare, is an unconstitutional invasion of the personal and property rights of the individual.[45]

Malone is correct that he has a constitutional right to conduct a lawful business. But so long as the regulation adopted by the City bears a reasonable relationship to the public health, safety, and welfare, the regulation of that right is permissible.

We have already concluded that the ordinance in this case operated to improve the health, safety, and welfare of the City's residents. That the regulation could have gone further, or that other regulatory methods might also be effective, does

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[42] *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987), *abrogated on other grounds, State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

[43] *United States Brewers' Assn., Inc. v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974).

[44] *Id.*

[45] *Id.*

not affect our conclusion that this ordinance bears a reasonable relationship to the public's health, safety, and welfare.

There is no merit to Malone's fifth assignment of error.

4. Remaining Assignments of Error

Having concluded that the district court did not err as explained above, we find no merit to Malone's sixth and seventh assignments of error.

VI. CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Connolly and Miller-Lerman, JJ., not participating.

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

Jeremy L. Klein and Kimberly J. Klein, husband and wife, and Robert D. Lynch and Elaine M. Lynch, husband and wife, appellees, v. Oakland/Red Oak Holdings, LLC, a Nebraska limited liability company, appellant.

883 N.W.2d 699

Filed August 26, 2016. No. S-15-380.

1. **Trusts: Equity.** An action to set aside a trustee's sale sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries 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 conclusion reached by the trial court, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Evidence: Stipulations: Appeal and Error.** In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
4. **Trusts: Deeds: Sales.** The Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 2009), authorizes a trust deed to be used as a security device in Nebraska and provides that real property can be conveyed by trust deed to a trustee as a means to secure the performance of an obligation.
5. ____: ____: ____. The Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 2009), includes detailed procedures that, in the event of a breach of the underlying obligation, permit the trust property to be sold without the involvement of any court.
6. ____: ____: ____. The Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 2009), allows a trust deed to expressly confer upon a trustee the power of sale.

7. ____: ____: ____. Pursuant to the power of sale, a trustee can sell the property conveyed by a trust deed without any court's authorization or direction, though the trustee must comply with procedural requirements contained in the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 2009).
8. **Trusts: Deeds: Foreclosure: Mortgages: Words and Phrases.** Because the Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 2009), allows the property securing an obligation to be sold without the judicial involvement that would be required to foreclose upon a mortgage, the proceedings surrounding a trustee's sale pursuant to the act are sometimes referred to as "nonjudicial foreclosure" or "trustee foreclosure."
9. **Trusts: Deeds: Statutes.** Because trust deeds do not exist at common law, the trust deed statutes are to be strictly construed.
10. **Real Estate: Notice.** A purchaser of real estate is required to take notice of instruments properly placed of record in the office of the register of deeds.
11. **Deeds: Warranty: Title.** Increased diligence, alertness, and scrutiny in searching for the facts are expected of a purchaser who accepts a deed that is less than a general warranty with full covenants of ownership and title.
12. **Title.** Fundamental to the law of registry is the principle of establishing priority of title.
13. **Judicial Sales: Negligence: Fraud.** The doctrine of caveat emptor applies to all judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or fraud, where the purchaser is free from negligence.
14. **Trusts: Sales.** The doctrine of caveat emptor applies in trustee's sales.
15. **Taxes: Deeds: Title: Liens.** A treasurer's tax deed, issued pursuant to Neb. Rev. Stat. § 77-1837 (Cum. Supp. 2012) and in compliance with Neb. Rev. Stat. §§ 77-1801 to 77-1863 (Reissue 2009 & Cum. Supp. 2012), passes title free and clear of all previous liens and encumbrances.

Appeal from the District Court for Phelps County: Stephen R. Illingworth, Judge. Reversed and remanded with directions.

Mark J. LaPuzza and Ashley Dieckman, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellant.

Natalie G. Nelsen, of Dier, Osborn, Cox & Nelsen, P.C., L.L.O., for appellees.

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

Miller-Lerman, J.

NATURE OF CASE

Jeremy L. Klein and Kimberly J. Klein, husband and wife, and Robert D. Lynch and Elaine M. Lynch, husband and wife, (both couples collectively the appellees) purchased a trust deed at a trustee's sale for certain real estate. Prior to the trustee's sale, treasurer's tax deeds for the same real estate had been issued to a third party. By operation of law, a treasurer's tax deed passes title free and clear of all previous liens and encumbrances, and therefore, the treasurer's tax deeds had divested the trust deed of title. The treasurer's tax deeds were recorded prior to the trustee's sale, but the appellees failed to examine the record prior to the trustee's sale. The appellees brought this action in equity against Oakland/Red Oak Holdings, LLC (Oakland), the appellant, which was the beneficiary of the trust deeds, seeking to set aside the sale and to be reimbursed the purchase price of $40,001. The district court determined that the trustee's sale was void and ordered that Oakland return the purchase price to the appellees. Oakland appeals. For the reasons set forth below, we determine that the district court erred in its determination, and we reverse, and remand with directions.

STATEMENT OF FACTS

Our statement of facts is taken from the parties' stipulated statement of facts on which the case was tried to the district court. The parties' stipulated statement of facts provided as follows:

> 1. Oakland State Bank was the beneficiary under five deeds of trust from David Sickels and Debra Sickels. The Deeds of Trust are attached hereto as Exhibits 1 through 5.
>
> 2. Larry Jobeun was named as Trustee under each deed of trust and T. Randall Right was substituted as Trustee

on May 20, 2004. The substitution of Trustee is recorded with the Register of Deeds of Phelps County and is attached hereto as Exhibit 6.

3. The Deeds of Trust were recorded against the following real estate owned by David Sickels and Debra Sickels: Lot Seven (7) and Eight (8), Einsel's Second Addition to Holdrege, Phelps County, Nebraska (such property being hereinafter called the "real estate").

4. Oakland State Bank was merged into Great Western Bank in November of 2004, pursuant to Articles of Merger filed with the Nebraska Secretary of State's office attached hereto as Exhibit 7. Great Western Bank assigned the Deeds of Trust to the Defendant, Oakland . . . on December 5, 2005, and such assignment is attached hereto as Exhibit 8. Neither the merger of Oakland State Bank with Great Western Bank nor the assignment from Great Western Bank to Oakland . . . were recorded with the Phelps County Register of Deeds or indexed against the real estate at issue.

5. On or about March 1, 2010, the real estate taxes on the property had become delinquent to such an extent that the Phelps County Treasurer offered the taxes for sale pursuant to Neb. Rev. Stat. §77-1801 et.seq. [(Reissue 2009).] Situs, LLC purchased a Phelps County Treasurer's Certificate of Tax Sale for the real estate which was subsequently assigned to Vandelay Investments, LLC on February 13, 2013. On or about April 18, 2013, Vandelay Investments, LLC provided notice in accordance with Neb. Rev. Stat. §77-1801 et.seq. Vandelay Investments, LLC subsequently applied for a Treasurer's Tax Deed and a Treasurer's Tax Deed was issued by the Phelps County Treasurer to Vandelay Investments LLC, on July 25, 2013. Said deed was filed in the office of the Register of Deeds on August 1, 2013. A second Treasurer's Tax Deed was issued by the Phelps County Treasurer to Vandelay Investments, LLC on August 28, 2013 and filed in the

office of the Register of Deeds on September 9, 2013. The Treasurer's Tax Deeds are attached hereto as Exhibits 9 and 10.

6. The parties do not dispute the validity of the Treasurer's Tax Deed. The parties agree that the delinquent real estate taxes, notice of sale, and Treasurer's Tax Deed were matters of public record at the time of the Trustee's sale of the real estate.

7. Michael C. Klein was named Substitute Trustee on or about July 31, 2013, for the five (5) deeds of trust assigned to the Defendant, Oakland . . . . The Notice of Default and Notice of Sale associated with the Trustee's sale are attached hereto as Exhibits 11 and 12, respectively.

8. On October 2, 2013, Defendant, Michael C. Klein conducted a trustee's sale for the real estate. [The appellees] were the highest bidder at the Trustee's sale and [the appellees] paid to . . . Michael C. Klein as Trustee the sum of $40,001.00. A copy of the Tellers Check given to the Trustee is attached hereto as Exhibit 13. None of the Defendants [sic] gave notice to the [appellees] or any other bidders that a Treasurer's Tax Deed had been issued with respect to the property. On or about October 3, 2013, . . . Michael C. Klein as Trustee, executed a Trustee's deed conveying to the [appellees] the following described property: Lot Seven (7) and Eight (8), Einsel's Second Addition to Holdrege, Phelps County, Nebraska.

The Trustee's Deed is attached hereto as Exhibit 14.

9. Prior to the Trustee's sale, neither [the appellees] nor Defendants [sic] received actual knowledge of the Treasurer's Tax Deed.

10. Following the Trustee's Sale, the [appellees] became aware of competing claims to the title of the Property, specifically the Treasurer's Tax Deed issued to Vandelay Investments.

On January 21, 2014, the appellees filed their complaint against Oakland and the substitute trustee, Michael C. Klein. In their complaint, the appellees alleged that at the time of the trustee's sale, Oakland had no interest in the trustee's deed and, therefore, no interest in the real property. The appellees alleged that they were owed $40,001 plus interest. The appellees did not allege in their complaint a specific basis for recovery, such as rescission due to mistake or unjust enrichment because of a failure of consideration; accident; inadvertence; mutual mistake; relief from caveat emptor based on fraud, misrepresentation, or mistake; or constructive fraud. Nor was the case prosecuted on a specific theory. Compare, *French Energy, Inc. v. Alexander*, 818 P.2d 1234 (Okla. 1991); *First Nat. Bank v. Board of Managers*, 252 Ill. App. 3d 139, 625 N.E.2d 79, 192 Ill. Dec. 119 (1993).

On February 18, 2014, Oakland filed its answer in which it generally denied the allegations set forth in the appellees' complaint. Michael filed a motion to dismiss, and on May 2, the district court filed an order in which it sustained Michael's motion to dismiss. The court allowed the appellees 14 days to amend their complaint to state a cause of action against Michael, and the court stated that if no amended complaint was filed, the matter would proceed with Oakland as the only defendant. The appellees did not file an amended complaint. Accordingly, Michael is not a party to this appeal.

On April 3, 2015, the district court filed an order in which it found in favor of the appellees and against Oakland. With respect to whether Oakland had an obligation to notify bidders at the trustee's sale of the treasurer's tax deeds, the court stated that the parties were in equal positions prior to the trustee's sale and that both parties could have examined the public records. Thus, the court determined that Oakland "did not have an obligation to disclose the tax deeds and there was no implied warranty to do so."

With respect to whether the trustee's deed contained a representation or warranty that was breached by Oakland,

the district court cited Neb. Rev. Stat. § 76-1010(2) (Reissue 2009), which provides in part:

> The trustee's deed shall operate to convey to the purchaser, without right of redemption, the trustee's title and all right, title, interest, and claim of the trustor and his or her successors in interest and of all persons claiming by, through, or under them, in and to the property sold, including all such right, title, interest, and claim in and to such property acquired by the trustor or his or her successors in interest subsequent to the execution of the trust deed.

Based on § 76-1010(2), the district court determined that the trustee's deed contained "no representations or warranty as to the quality of title granted by the" trust deed.

With respect to whether the trustee's deed served to convey any rights to the appellees, the district court determined that the trustee's deed did not convey any rights to the appellees because the trustee had no rights to convey. Therefore, the district court determined that the trustee's sale was "improper and a nullity." In making this determination, the district court noted that the parties had stipulated that the treasurer's tax deeds were valid and that the treasurer's tax deeds were recorded on August 28 and September 9, 2013, which was prior to the trustee's sale on October 2. Citing *Knosp v. Shafer Properties*, 19 Neb. App. 809, 820 N.W.2d 68 (2012), the district court stated that a treasurer's tax deed passes title free and clear of all previous liens and encumbrances. Therefore, the district court stated that "[a]ll of [Oakland's] right, title and interest in the real estate was extinguished by issuance of the tax deeds and therefore [Oakland] had no interest to convey. The trustees [sic] sale should be voided and the money returned to [the appellees]." The district court ordered that Oakland pay the appellees $40,001 plus interest. The court also ordered that costs be taxed to Oakland and that each party pay their own attorney fees.

Oakland appeals.

ASSIGNMENT OF ERROR

Oakland assigns, restated, that the district court erred when it determined that the trustee's sale was void and that the appellees are entitled to a return of the purchase price of $40,001.

STANDARDS OF REVIEW

[1] An action to set aside a trustee's sale sounds in equity. See *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003).

[2] On appeal from an equity action, an appellate court tries 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 conclusion reached by the trial court, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *RGR Co. v. Lincoln Commission on Human Rights*, 292 Neb. 745, 873 N.W.2d 881 (2016).

[3] In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002).

ANALYSIS

Oakland argues that the district court erred when it determined that the trustee's sale was void and ordered Oakland to return the $40,001 purchase price to the appellees. Oakland generally argues that caveat emptor should apply and that when the appellees purchased the trustee's deed, they were on record notice of the treasurer's tax deeds that were issued to Vandelay Investments and recorded prior to the trustee's sale. We agree, and we reverse the decision of the district court.

The Nebraska Trust Deeds Act, Neb. Rev. Stat. § 76-1001 et seq. (Reissue 2009) (the Act) governs this case. A "[t]rust deed" is defined as "a deed executed in conformity with

sections 76-1001 to 76-1018 and conveying real property to a trustee in a trust to secure the performance of an obligation of the grantor or other person named in the deed to a beneficiary." § 76-1001(3). The parties to a trust deed are the trustor, the trustee, and the beneficiary. The "[t]rustor" is defined as "the person conveying real property by a trust deed as security for the performance of an obligation." § 76-1001(2). The "[b]eneficiary" is defined as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest." § 76-1001(1). A "[t]rustee" is defined as "a person to whom title to real property is conveyed by trust deed, or his successor in interest." § 76-1001(4).

[4-8] With respect to the Act, we stated in *First Nat. Bank of Omaha v. Davey*, 285 Neb. 835, 838, 830 N.W.2d 63, 66 (2013):

> The Act authorizes a trust deed to be used as a security device in Nebraska and provides that real property can be conveyed by trust deed to a trustee as a means to secure the performance of an obligation. The Act includes detailed procedures that, in the event of a breach of the underlying obligation, permit the trust property to be sold without the involvement of any court. Specifically, the Act allows a trust deed to expressly confer upon a trustee the power of sale. Pursuant to this power of sale, a trustee can sell the property conveyed by a trust deed without any court's authorization or direction, though the trustee must comply with procedural requirements contained in the Act. Because the Act allows the property securing an obligation to be sold without the judicial involvement that would be required to foreclose upon a mortgage, the proceedings surrounding a trustee's sale pursuant to the Act are sometimes referred to as "nonjudicial foreclosure" or "trustee foreclosure."

[9] We further stated in *First Nat. Bank of Omaha v. Davey* that

> [t]he Act . . . "authorizes the use of a security device which was not available prior to its enactment." Because the Act made a change in common law, we strictly construe the statutes comprising the Act, as have previous courts interpreting the Act. Thus, because trust deeds did not exist at common law, the trust deed statutes are to be strictly construed.

285 Neb. at 840-41, 830 N.W.2d at 68. In the absence of any indication to the contrary, we also give the language of the statutes of the Act their plain and ordinary meaning. See *First Nat. Bank of Omaha v. Davey, supra*.

We have noted that Nebraska's recording act, set forth in Neb. Rev. Stat. § 76-238 (Cum. Supp. 2014), is intended to impart to a prospective purchaser notice of instruments which affect the title of land in which such a purchaser is interested. Section 76-238(1) provides:

> Except as otherwise provided in sections 76-3413 to 76-3415, all deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering such instruments to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice. All such instruments are void as to all creditors and subsequent purchasers without notice whose deeds, mortgages, or other instruments are recorded prior to such instruments. However, such instruments are valid between the parties to the instrument.

[10-12] Section 76-238(1) is a "'race-notice recording statute.'" *Westin Hills v. Federal Nat. Mortgage Assn.*, 283 Neb. 960, 965, 814 N.W.2d 378, 383 (2012). We have stated that

> "[a] purchaser of real estate is required to take notice of instruments properly placed of record in the office of the register of deeds. . . . Increased diligence, alertness, and scrutiny in searching for the facts are expected of a

> purchaser who accepts a deed that is less than a general warranty with full covenants of ownership and title."

Ihde v. Kempkes, 228 Neb. 433, 436, 422 N.W.2d 788, 790 (1988), quoting *Campbell v. Ohio National Life Ins. Co.*, 161 Neb. 653, 74 N.W.2d 546 (1956). Fundamental to the law of registry is the principle of establishing priority of title. *Westin Hills v. Federal Nat. Mortgage Assn., supra*.

Within the Act, with respect to instruments that are entitled to be recorded and put parties on notice of such instruments, § 76-1017 provides:

> Any trust deed, substitution of trustee, assignment of a beneficial interest under a trust deed, notice of default, trustee's deed, reconveyance of the trust property and any instrument by which any trust deed is subordinated or waived as to priority, when acknowledged as provided by law, shall be entitled to be recorded, and shall, from the time of filing the same with the register of deeds for record, impart notice of the contents thereof, to all persons, including subsequent purchasers and encumbrancers for value, except that the recording of an assignment of a beneficial interest in the trust deed shall not in itself be deemed notice of such assignment to the trustor, his heirs or personal representatives, so as to invalidate any payment made by them, or any of them, to the person holding the note, bond or other instrument evidencing the obligation by the trust deed.

[13] In Nebraska, we have long held that the doctrine of caveat emptor applies to judicial sales. See, *Enquist v. Enquist*, 146 Neb. 708, 21 N.W.2d 404 (1946); *Norton v. Neb. Loan & Trust Co.*, 35 Neb. 466, 53 N.W. 481 (1892). With respect to the application of caveat emptor to judicial sales, we have stated:

> "It is a well-settled rule that the doctrine of *caveat emptor* applies to all judicial sales, subject to the qualification that the purchaser is entitled to relief on the ground of after-discovered mistake of material facts or

> fraud, where he is free from negligence. He is bound to examine the title, and not rely upon statements made by the officer conducting the sale, as to its condition. If he buys without such examination, he does so at his peril, and must suffer the loss occasioned by his neglect."

Enquist v. Enquist, 146 Neb. at 714, 21 N.W.2d at 407, quoting *Norton v. Neb. Loan & Trust Co., supra*.

We have not previously stated that the doctrine of caveat emptor applies to nonjudicial sales, such as a trustee's sale. However, other jurisdictions have applied caveat emptor in nonjudicial sales. See, e.g., *McPherson v. Purdue*, 21 Wash. App. 450, 585 P.2d 830 (1978); *Michie v. National Bank of Caruthersville*, 558 S.W.2d 270 (Mo. App. 1977); *Feldman v. Rucker*, 201 Va. 11, 109 S.E.2d 379 (1959).

Regarding the application of caveat emptor in the context of trustee's sales, it has been recognized that

> many courts apply a *caveat emptor* approach to title or physical defects in the real estate. As one court stated: "[T]o the bidders [the trustee] owes no duty except to refrain from doing anything to hamper them in their search for information or to prevent the discovery of defects by inspection. He is under no duty to make representations or to answer questions; but if questions are asked and he undertakes to answer, then such answers must be full and accurate—nothing must then be concealed." Some jurisdictions have somewhat modified this approach by requiring the trustee to disclose material facts within his knowledge that would not otherwise "be readily observable upon reasonable inspection by the purchaser."

1 Grant S. Nelson et al., *Real Estate Finance Law* § 7.22 at 979 (6th ed. 2014).

[14] In *Michie v. National Bank of Caruthersville*, the court stated in a trustee's deed case that "[a] purchaser at a foreclosure sale buys under the doctrine of caveat emptor . . . and the purchaser is required to take notice of everything in

the recorded chain of title." 558 S.W.2d at 275. In discussing caveat emptor, the U.S. Supreme Court has stated:

> The doctrine [of caveat emptor], substantially as we have stated it, is laid down in numerous adjudications. Where the means of information are at hand and equally open to both parties, and no concealment is made or attempted, the language of the cases is, that the misrepresentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claim for relief.

Slaughter's Administrator v. Gerson, 80 U.S. (13 Wall.) 379, 385, 20 L. Ed. 627 (1871). In accordance with these other jurisdictions and authorities noted above, just as we have applied the doctrine of caveat emptor in judicial sales, we now hold that the doctrine of caveat emptor applies in trustee's sales.

The instant case was tried in equity, and accordingly, we try factual questions de novo on the record and, as to questions of both fact and law, we are obligated to reach a conclusion independent of the conclusion reached by the trial court. See *RGR Co. v. Lincoln Commission on Human Rights*, 292 Neb. 745, 873 N.W.2d 881 (2016). Our de novo review of the record shows that in March 2010, prior to the date of the trustee's sale, the real estate was sold at a public tax sale to Situs, LLC, for delinquent taxes pursuant to § 77-1801 et seq. Situs received a certificate of tax sale, which Situs subsequently assigned to Vandelay Investments in February 2013. After providing notice, Vandelay Investments filed applications for tax deeds. On July 25, 2013, the county treasurer issued a tax deed to Vandelay Investments, and the treasurer's tax deed was recorded on August 1. A second treasurer's tax deed was issued to Vandelay Investments on August 28, and the second treasurer's tax deed was recorded on September 9.

All of this occurred prior to the trustee's sale, which occurred on October 2.

[15] In *Knosp v. Shafer Properties*, 19 Neb. App. 809, 817, 820 N.W.2d 68, 74 (2012), the Nebraska Court of Appeals held that "a treasurer's tax deed, issued pursuant to § 77-1837 and in compliance with §§ 77-1801 to 77-1863, passes title free and clear of all previous liens and encumbrances." The parties in this case stipulated that they "do not dispute the validity of" the treasurer's tax deeds that were issued to Vandelay Investments. Accordingly, pursuant to *Knosp*, the treasurer's tax deeds that were issued to Vandelay Investments passed title free and clear of all previous liens and encumbrances, including the trust deed at issue in this case. Therefore, at the time of the trustee's sale on October 2, 2013, the trust deed had been divested of title due to the issuance of the treasurer's tax deeds.

As set forth above, the record shows that both treasurer's tax deeds issued to Vandelay Investments were recorded prior to the trustee's sale. The parties stipulated that neither party had "received actual knowledge" of the issuance of the treasurer's tax deeds; however, the parties further agreed that the treasurer's tax deeds "were matters of public record at the time of the [t]rustee's sale of the real estate." Because the treasurer's tax deeds were recorded before the trustee's sale was held, the appellees were on record notice of the treasurer's tax deeds. See §§ 76-238(1) and 76-1017.

The appellees in this case sought relief from entering into a deal with an unfavorable outcome. The district court focused on the outcome of the transaction and determined that because the trust deed had been divested of title, the trustee's sale was void, and ordered Oakland to return the purchase price to the appellees. The district court's determination does not comport with the doctrine of caveat emptor, which we have determined applies in this case. Under the doctrine of caveat emptor, the purchaser "'is bound to examine the title'" and if the purchaser "'buys without such examination, he does so at

his peril, and must suffer the loss occasioned by his neglect.'" *Enquist v. Enquist*, 146 Neb. 708, 714, 21 N.W.2d 404, 407 (1946), quoting *Norton v. Neb. Loan & Trust Co.*, 35 Neb. 466, 53 N.W. 481 (1892). In this case, had the appellees examined the title, they would have realized that the treasurer's tax deeds had been issued and that the trust deed had been divested of title. In taking such steps to examine the chain of title, the appellees would have protected themselves from entering into an unfortunate deal. We have stated that a purchaser of real estate is required to take notice of instruments properly placed of record in the office of the register of deeds. See *Ihde v. Kempkes*, 228 Neb. 433, 422 N.W.2d 788 (1988). However, because the appellees failed to examine title before bidding at the trustee's sale, they "'must suffer the loss occasioned by [their own inattention].'" *Enquist v. Enquist*, 146 Neb. at 714, 21 N.W.2d at 407.

We have stated that "[e]quity will not relieve a purchaser of his own negligence." *Norton v. Neb. Loan & Trust Co.*, 35 Neb. at 471, 53 N.W. at 482. See, also, *Slaughter's Admistrator v. Gerson*, 80 U.S. (13 Wall.) 379, 383, 20 L. Ed. 627 (1871) (stating that "[a] court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness"). Therefore, we determine that the district court erred when it relieved the appellees of the consequences of their inattention, determined that the trustee's sale was void, and ordered that Oakland return the purchase price to the appellees. We reverse the decision of the district court and remand the cause with directions that the district court enter judgment in favor of Oakland and dismiss the appellees' complaint.

CONCLUSION

In this case, prior to the trustee's sale, the treasurer's tax deeds were issued to Vandelay Investments. Our law is clear that a treasurer's tax deed passes title free and clear of all previous liens and encumbrances, and accordingly, the

treasurer's tax deeds issued to Vandelay Investments divested the trust deed of title. The treasurer's tax deeds were recorded prior to the trustee's sale, but the appellees failed to examine the record.

We conclude that the doctrine of caveat emptor applies to a trustee's sale, and in this case, the appellees must suffer the consequence of their own inattention. In this case, the trust deed had previously been divested of title by issuance of the treasurer's tax deeds to Vandelay Investments which tax deeds were recorded. The appellees purchased the trust deed without examining the record, but they are nevertheless deemed to be on record notice. Despite the appellees' failure, the district court determined that the trustee's sale was void and ordered Oakland to return the purchase price to the appellees. These rulings were error. We reverse the decision of the district court and remand the cause with directions that the district court enter judgment in favor of Oakland and dismiss the appellees' complaint.

Reversed and 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. Tracy N. Parnell, appellant.

883 N.W.2d 652

Filed August 26, 2016. No. S-15-684.

1. **Motions for Continuance: Appeal and Error.** An appellate court reviews a judge's ruling on a motion to continue for an abuse of discretion.
2. **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.
3. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014), and the trial court's decision will not be reversed absent an abuse of discretion.
4. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
5. **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 was the defendant prejudiced by counsel's alleged deficient performance?
6. **Trial: Evidence: Prosecuting Attorneys: Due Process.** The nondisclosure by the prosecution of material evidence favorable to the defendant, requested by the defendant, violates due process, irrespective of the good faith or bad faith of the prosecution. But due process is not violated where the evidence is disclosed during trial.

7. **Expert Witnesses: Evidence.** An expert's oral, unrecorded opinions do not fall within the scope of Neb. Rev. Stat. § 29-1912(1)(e) (Cum. Supp. 2014).
8. **Judgments: Words and Phrases.** 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.
9. **Motions for Continuance: Appeal and Error.** There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the party seeking the continuance suffered prejudice as a result of that denial.
10. **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 have probably produced a substantially different result.
11. **Rules of Evidence: Other Acts.** Under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014), 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.
12. ____: ____. Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2014), does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime.
13. ____: ____. Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.
14. **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.
15. **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 evidence, there is no prejudicial error necessitating reversal.

16. **Criminal Law.** To constitute one an accomplice, he must take some part in the crime, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough to constitute one an accomplice. The knowledge that a crime is being committed cannot be said to constitute one an accomplice.
17. **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.
18. **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.
19. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
20. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
21. **Effectiveness of Counsel: Time: Appeal and Error.** Claims of ineffective assistance of counsel raised on direct appeal by the same counsel who represented the defendant at trial are premature and will not be addressed on direct appeal.
22. **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.
23. **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.
24. ____: ____. 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.
25. ____: ____. 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.
26. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing claims of alleged ineffective assistance of counsel, an

appellate court affords trial counsel due deference to formulate trial strategy and tactics.

27. **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.
28. **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: Gary B. Randall, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Allyson A. Mendoza, and Mary Mullin Dvorak for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, and Kelch, JJ., and Bishop, Judge.

Cassel, J.

I. INTRODUCTION

In this direct appeal, Tracy N. Parnell challenges his convictions, pursuant to jury verdict, for first degree murder, attempted first degree murder, two counts of use of a deadly weapon to commit a felony, and possession of a weapon by a prohibited person. His two primary arguments attack denials of his motions to continue the trial and for a new trial. These arguments are premised upon untimely disclosure of opinions of a cellular analyst and rely on *Brady v. Maryland*[1] and a discovery statute.[2] He also complains that his earlier threats toward one of the victims were admitted in evidence,

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[1] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[2] Neb. Rev. Stat. § 29-1912 (Cum. Supp. 2014).

his requested instruction on accomplice testimony was refused, and his trial counsel provided ineffective assistance. Finding no merit in his arguments, we affirm.

II. BACKGROUND

1. Shooting

On October 30, 2012, at around 8:14 p.m., Eriana Carr and Nakia Johnson were shot outside of Carr's residence in Omaha, Nebraska. Carr was shot twice and died from her injuries. Johnson was shot 11 times and survived. Johnson told investigators that the shots came from "a blue Nissan Altima with a messed up front bumper." She did not see the shooter.

2. Threat

During a pretrial hearing, Johnson explained how she met Parnell. This occurred at a September 2012 birthday party for one of Johnson's friends, who was involved with Parnell. Johnson knew Parnell only by his nickname, "Laylow." At that birthday party, Johnson had a short conversation with Parnell regarding his car, a blue Nissan Altima. She told him that a Nissan Altima was her favorite car, and Parnell responded, "'That's what's up.'" Then Parnell left.

Johnson told investigators that Parnell threatened her 2 days before the shooting. Johnson testified that the threat occurred on October 28, 2012, after "a little get-together" at her friend's apartment, where she sometimes stayed overnight. Parnell and several other people attended the get-together. A man with whom Johnson was involved, Ryan Fraiser, attended and later left. Fraiser is from another "hood" and a different gang than the others at the party. Johnson went to bed after the party and was awoken by Parnell and three others. They were yelling at Johnson because "they felt like [she] had brought someone into the house from another side," or "[a]nother hood."

Eventually the others left, but Parnell remained. He paced back and forth in front of Johnson's door and was "saying all kind[s] of stuff . . . indirectly to [Johnson]." Johnson

told Parnell to "[s]hut the [expletive] up talking to me," and Parnell left. He returned with a gun in his hand. Parnell stared at Johnson while holding the gun. Johnson grabbed her cell phone, and Parnell told her to call Fraiser and tell him that Parnell would "be outside waiting for him." Johnson was scared and called the 911 emergency dispatch service because Parnell "was blocking [her] way to the door" and she did not know "what was about to happen." When Johnson ended the call, Parnell left.

Parnell was eventually prosecuted for the threat, but not until after the shooting. At that point, the State filed an information charging Parnell with committing terroristic threats. He pled no contest and received a sentence of 20 to 24 months' imprisonment.

3. Nissan Altima

Detectives investigated the Nissan Altima involved in the shooting. They discovered that Parnell had been stopped while driving a blue Nissan Altima several months earlier. The registered owner of the car was Jasmine Nero, who was also the mother of Parnell's child.

An investigator testified that she interviewed Parnell and asked him about the Altima. Parnell claimed that he only drove his aunt's car and that he never drove any of Nero's vehicles. He denied any knowledge of an Altima.

In a call from jail, Parnell spoke to Nero about the Altima. Nero testified at trial that she understood from that call that Parnell wanted her "to get rid of" the car. Nero moved the car to a garage, where investigators later found it. The car's front bumper was damaged, and it contained a box with Parnell's thumbprint on it.

4. Pretrial Motions

The State filed an information charging Parnell with five counts: murder in the first degree, two counts of use of a deadly weapon to commit a felony, attempted first degree murder, and possession of a deadly weapon by a prohibited

person. The district court ordered mutual and reciprocal discovery "pursuant to statute."

Before trial, the State filed a notice under rule 404[3] of its intent to offer evidence of Parnell's terroristic threat against Johnson to show motive, intent, and plan. Parnell filed a motion in limine requesting to exclude the State's cellular analyst pursuant to the standards of *Daubert*/*Schafersman*.[4] The district court held a joint hearing on the motions. Later, Parnell filed a motion to continue the trial.

(a) Rule 404

In the portion of the joint hearing related to rule 404, Johnson testified regarding Parnell's threatening behavior before the shooting. The State introduced Johnson's 911 call, a certified copy of Parnell's conviction and sentence for terroristic threats, and police reports about the threat.

In a written order, the district court concluded that Parnell's threatening behavior was inextricably intertwined with the crime charged and therefore not subject to rule 404. It reasoned that it "forms part of the factual setting of the murder. It is evidence that explains an integral part of the immediate context of the crime charged." The district court concluded further that even if the threat was subject to rule 404, it would still be admissible, because it "demonstrates [Parnell's] motive and that the subsequent shooting was gang related; thus it is admissible to show intent."

(b) *Daubert*/*Schafersman*

In the *Daubert*/*Schafersman* portion of the joint hearing, the State's expert, William Shute, testified regarding his qualifications and methods. Shute is a special agent with the Federal Bureau of Investigation (FBI) and a member of the

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[3] Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014).

[4] See *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).

FBI's "Cellular Analysis Survey Team." He performs "historical cell site analysis" using call detail records provided by cellular carriers.

Shute explained that call detail records show the "first serving cell site," which is the tower a particular cell phone used, and the "first serving cell face," which is the sector of the tower used. Cell towers usually have three sectors. The FBI's survey team members use call detail records to determine "what tower and sector of the tower was being utilized for service" and then plot the towers and sectors on a map. They then look for patterns and "come up with a geographical plot as to where [they] believe that individual is at that particular time."

Shute also testified regarding the locations of Parnell's cell phone around the time of the shooting. He prepared a PowerPoint presentation that included Parnell's call detail records. The records showed that Parnell's cell phone connected to tower: (1) 201 at 7:52 p.m., (2) 729 at 8:07 p.m., (3) 201 at 8:11 p.m., (4) 729 at 8:20 p.m., and (5) 201 at 8:20 p.m. Shute plotted the towers and their coverage areas on a map. The map showed the coverage areas as shaded "pie wedges."

Shute testified that the coverage areas for towers 201 and 729 overlap. He said that the way that Parnell's cell phone switched between towers 201 and 729 showed that it was definitely located within the overlapping coverage area at the time of the shooting. A map in his PowerPoint presentation depicted the crime scene within the overlapping area.

The court overruled Parnell's motion in limine. It concluded that Shute was qualified to testify as an expert and that his methods were reliable.

(c) Motion for Supplemental Discovery

In March 2015, Parnell filed a motion requesting supplemental discovery from the State. The motion is not in our record. Parnell's counsel, Daniel Stockmann, filed an affidavit with the motion. This affidavit is in our record. In it,

Stockmann states that he learned that certain undisclosed discovery materials existed after he attended a March 6, 2015, seminar where cellular analyst Michael O'Kelly presented. In the discovery process, the State had shared a police report and maps showing that O'Kelly had performed basic cell phone mapping services for the Omaha Police Department.

After the seminar, Stockmann e-mailed O'Kelly and asked whether he had performed services for the department which were not disclosed in the police report. O'Kelly's counsel responded and said that although O'Kelly could not disclose what work he had performed for the department, he could confirm that O'Kelly performed more services than were disclosed in the report. Parnell then filed the motion for supplemental discovery regarding O'Kelly's services, which the district court granted.

After the court ordered supplemental discovery, O'Kelly provided Parnell's counsel with an affidavit detailing his interactions with the State, and the State disclosed a series of e-mails between O'Kelly, Det. Sherry King of the Omaha Police Department, and Deputy Douglas County Attorney Brenda Beadle.

In his affidavit, O'Kelly stated that he "reviewed the . . . call detail records and concluded that [Parnell's cell phone] appeared to travel from the west side of Omaha [where Parnell lived] to the east side, then north and south and then traveling back to the general area on the west side." O'Kelly said that he "began processing and mapping the individual cell site registrations. The handset transition west to east, north/south and east to west activities were confirmed." He then "provided Detective King with multiple maps depicting handset movements consistent with cell site registrations that supported physical movement from Omaha's west side to the east side and possible travel movements north and south on the east side."

O'Kelly also stated that he informed King that "it is impossible to identify a specific location stop(s), specific surface

roadway travels based upon the existing cellular data." He told her that "drawing circles and other shapes with defined boundaries is unreliable and at best simple guessing with an agenda. The 'guessing' may be based upon experience and training but will still have no foundation and/or credible support that is rooted with existing electronic wireless data." And he told her that "in order to possibly place the subject [cell phone] in the immediate area of the crime scene . . . it will be necessary to conduct an RF Signal Field Survey." He "provided an explanation of the FBI's RF Signal mapping approach versus the O'Kelly approach." And he explained that his approach to performing such a survey, or drive test, "is time consuming and labor intensive covering days if not weeks." He said that after performing the survey, the tower coverage areas would "appear similar to that of an amoeba and will be unique to each cell site."

In the e-mails, King asked O'Kelly whether he had a formal report to present to the county attorney's office. O'Kelly responded that a report in writing would be "[d]iscoverable" and that he "would recommend the county attorney and I visiting and then letting them decide." Although the documents do not contain a record of a call, they do contain a followup e-mail that indicates that O'Kelly spoke with Beadle.

(d) Motion to Continue or Exclude

On March 23, 2015, Parnell filed a motion asking the court to exclude Shute's testimony or continue the trial, which was scheduled to begin March 30. The motion was based on the State's "belated disclosure of discovery materials" related to O'Kelly. In the motion, Parnell acknowledged that the State had previously disclosed that O'Kelly worked on the case. He argued that the State violated its duty under § 29-1912 and *Brady v. Maryland*[5] to disclose O'Kelly's opinions that a drive test was necessary and that the FBI's methods were not reliable.

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[5] *Brady v. Maryland, supra* note 1.

At the hearing on the motion to continue, Parnell offered O'Kelly's affidavit. He did not offer the series of e-mails between O'Kelly, King, and Beadle. Stockmann argued:

> [T]he second that . . . Shute . . . provided the opinions to the government, the government, whether through law enforcement or the county attorney, was aware that an exculpatory opinion from . . . O'Kelly existed. [It had] an obligation to tell me about . . . O'Kelly's exculpatory opinion. [It] didn't tell me about it; I had to find it out on my own because I went to a seminar . . . .

The State responded that O'Kelly's opinion was not exculpatory and that he placed Parnell's cell phone in the same area as had Shute, although he was not as specific.

The court noted that because the State planned to take a week to present its evidence at trial, Parnell had "12 days," and it said that "O'Kelly can get his stuff together in 12 days" in order to testify. It also stated that "[i]f [Parnell] wanted to hire a cell tower expert, [he] could have done it at any time in the last two years."

In its written order, the district court found that the evidence relating to O'Kelly was not exculpatory and that it "[h]ad been provided to [Parnell] at an early date." Therefore, it was not a valid reason for a continuance. The court also entered an order permitting Parnell to retain O'Kelly as an expert witness.

Before trial, Parnell renewed his motion to continue the trial. At that time, he offered an exhibit containing the e-mail exchanges between O'Kelly, King, and Beadle. He said that he "neglected to offer" it at the earlier hearing. The court overruled the renewed motion.

5. Trial

(a) Testimony

At trial, Johnson testified and described the shooting, the blue Nissan Altima, and the threatening incident days earlier. Shute's testimony was consistent with his testimony at the

Daubert/*Schafersman* hearing—he stated that towers 201 and 729 form an overlap area and that Parnell must have been within the overlap area at the time of the shooting. O'Kelly was present throughout the trial but did not testify.

Nero testified regarding the Altima and her relationship with Parnell. She stated that on the night of the shooting, she left Parnell at home with her children while she took her niece to ballet class. She left the Altima at home and drove another vehicle. When Nero returned at 8 p.m., Parnell, her children, and the Altima were not there. Parnell and the children returned in the Altima later that night.

Nero also testified that she lied to police for Parnell and was charged with being an accessory to a felony as a result. She said that when detectives asked her about the Altima, she lied and told them that it was not working. She admitted that she did so "[t]o protect [Parnell]" because "he asked [her] to lie."

(b) Jury Instruction

Parnell requested a jury instruction regarding accomplice testimony based on NJI2d Crim. 5.6. The requested instruction read as follows:

> There has been testimony from . . . Nero, a claimed accomplice of [Parnell]. You should closely examine her testimony for any possible motive she might have to testify falsely. You should hesitate to convict [Parnell] if you decide that . . . Nero testified falsely about an important matter and that there is no other evidence to support her testimony.
>
> In any event, you should convict [Parnell] only if the evidence satisfies you beyond a reasonable doubt of his guilt.

The district court refused the instruction and gave a general instruction regarding witness credibility. The jury found Parnell guilty on all counts.

6. Motion for New Trial

Parnell filed a timely motion for a new trial and submitted another affidavit from O'Kelly as support. He argued that O'Kelly's statements in this second affidavit constitute newly discovered evidence, which could not have been discovered and produced at trial.

In O'Kelly's affidavit, he averred that after his initial work on Parnell's case, he "informed the government that additional field testing by means of a 'drive test' would be required in order to move from speculation to accuracy in the cell tower connection plotting." A drive test involves making cell phone calls while driving and then obtaining call detail records to see which towers the cell phone used. Shute did not perform such a drive test. O'Kelly was extremely critical of Shute's methods and conclusions.

O'Kelly began a drive test on the last day of the trial. In his affidavit, he stated that the drive test revealed that the crime scene was "situated in a valley between Cell Sites 729 and 201" and that towers 201 and 729 are 1.84 miles apart. The drive test showed that the coverage areas for towers 201 and 729 do not overlap or border each other, as Shute claimed. Instead, they are separated by five other towers, which provide coverage in the overlap area that Shute identified. O'Kelly said that Parnell would have had to leave the crime scene area in order to connect to tower 729. However, he also said that the data showed that Parnell's cell phone "was in the general vicinity (1 - 2 miles of the crime scene) before, during and after the shooting."

The district court overruled Parnell's motion for a new trial. In a written order, it first concluded that Parnell could have discovered and produced O'Kelly's opinions using reasonable diligence, or, he could have at least "diminished the weight of . . . Shute's conclusions by calling O'Kelly as a witness." The court noted that Parnell was "at least partially at fault for the late discovery," because the State disclosed that O'Kelly worked on the case early in the discovery process.

Second, the court concluded that O'Kelly's opinions were not material, because they would not have affected the outcome of the trial. It reasoned that O'Kelly's drive test results "seem to incriminate [Parnell]," because Parnell made several calls around the time of the shooting that connected to tower 201, and O'Kelly's test showed that the signals from tower 201 "permeate the area immediately surrounding the crime scene."

III. ASSIGNMENTS OF ERROR

Parnell assigns, reordered, that the district court erred in (1) overruling his motion to continue or exclude Shute's testimony, (2) overruling his motion for a new trial, (3) determining that Parnell's threat against Johnson was inextricably intertwined with the shooting, and (4) refusing his proposed jury instruction regarding accomplice testimony. Parnell also claims that his trial counsel was ineffective because he did not have O'Kelly testify as an expert witness at trial.

IV. STANDARD OF REVIEW

[1-3] Several issues are controlled by an abuse of discretion standard. An appellate court reviews a judge's ruling on a motion to continue for an abuse of discretion.[6] 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.[7] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[8]

[4,5] The other issues present legal questions. Whether a jury instruction is correct is a question of law, which an

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[6] *Moreno v. City of Gering*, 293 Neb. 320, 878 N.W.2d 529 (2016).

[7] *State v. Cardeilhac*, 293 Neb. 200, 876 N.W.2d 876 (2016).

[8] *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

appellate court independently decides.[9] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[10] 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 was the defendant prejudiced by counsel's alleged deficient performance?[11]

V. ANALYSIS

1. Motion to Continue or Exclude

Parnell assigns that the district court abused its discretion in overruling his motion to continue the trial or exclude Shute's testimony. His arguments are premised on *Brady v. Maryland*[12] and § 29-1912. Regarding *Brady*, he argues that the timing of the State's disclosure of O'Kelly's opinions violated his constitutional right to due process. Regarding § 29-1912, he argues that the State should have disclosed O'Kelly's opinions, because that section "require[s] 'more than the constitutional minimum' with respect to disclosure of exculpatory information."[13]

[6] First, we conclude that the timing of the State's disclosure of O'Kelly's opinions did not violate Parnell's right to due process. Under *Brady*, the nondisclosure by the prosecution of material evidence favorable to the defendant, requested by the defendant, violates due process, irrespective of the good faith

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[9] *State v. Duncan*, 293 Neb. 359, 878 N.W.2d 363 (2016).

[10] *Id.*

[11] *Id.*

[12] *Brady v. Maryland, supra* note 1.

[13] Brief for appellant at 15 (quoting *State v. Kula*, 252 Neb. 471, 562 N.W.2d 717 (1997)).

or bad faith of the prosecution.[14] Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule.[15] But *Brady* is not violated where the evidence is disclosed during trial.[16] And here, the State disclosed the pertinent evidence 1 week *before* trial. Clearly, Parnell's right to due process was not violated by the timing of the disclosure.

Second, we must determine whether the timing of the disclosure violated § 29-1912. That section governs discovery in criminal cases in Nebraska.[17] It sets out specific categories of information that a defendant may request the court to order the State to disclose. Of § 29-1912's categories, only subsection (1)(e) is potentially applicable to O'Kelly's late-disclosed opinions. Section 29-1912(1) provides that a defendant may request permission to "inspect and copy or photograph": "(e) The results and reports of physical or mental examinations, and of scientific tests, or experiments made in connection with the particular case, or copies thereof." Parnell filed a motion for discovery in July 2013, which included a request for this information. The district court ordered "Mutual and Reciprocal Discovery pursuant to statute."

At first blush, it might seem that O'Kelly's opinion (that a drive test was required to place Parnell with certainty near the crime scene) could be considered to be a result or report of a physical examination or scientific test, because it was based on his examination of the data provided by the State. But careful consideration of our precedents and the federal courts' interpretation of similar language persuade us otherwise.

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[14] *Brady v. Maryland, supra* note 1; *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016).

[15] *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014).

[16] *U.S. v. Gonzales*, 90 F.3d 1363 (8th Cir. 1996); *State v. Smith, supra* note 14.

[17] *State v. Smith, supra* note 14.

We conclude that O'Kelly's opinion did not fall within the scope of § 29-1912(1)(e) for two reasons. First, it was unrecorded. Second, it was not a result or report. We explain each reason in more detail.

Section 29-1912(1)(e) did not require the State to disclose O'Kelly's oral, unrecorded opinions. Although we have never considered this issue, federal courts have. We may rely upon federal court decisions for guidance, because discovery in criminal cases, as authorized by § 29-1912, is patterned on the Federal Rules of Criminal Procedure.[18] Like § 29-1912(1)(e), Fed. R. Crim. P. 16(a)(1)(F) provides that the government must permit a defendant "to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment."

Several federal circuit court decisions illustrate this reasoning. In *United States v. Shue*,[19] an expert examined a photograph the evening before he testified and he gave the government his opinion regarding similarities between the subject of the photograph and the defendant. The defendant claimed that the government was required to disclose the expert's conclusions under an earlier version of the corresponding federal rule. The Court of Appeals for the Seventh Circuit disagreed. It reasoned that "[a]lthough the phrase 'any results or reports' does not exclude oral reports, the language 'the government shall permit the defendant to *inspect and copy or photograph*' . . . suggests that [the rule] refers only to written reports."[20] It also noted that the defendant had access to the photographs the expert examined and only contended that the government was required to disclose "the contents of oral statements made by the expert after comparing the photographs."[21] The court

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[18] See *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983).

[19] *United States v. Shue*, 766 F.2d 1122 (7th Cir. 1985).

[20] *Id.* at 1135 (emphasis in original).

[21] *Id.*

concluded that disclosure was not required by the corresponding federal rule. Similarly, in *U.S. v. Smith*,[22] the government did not reveal that a ballistics expert had test-fired a weapon and reached conclusions based upon the test-firing. The defendant claimed that the government violated its discovery obligations under the federal rule by failing to inform him about the test. The Court of Appeals for the First Circuit disagreed. It observed that "the words 'inspect and copy or photograph' logically suggest that the items to be disclosed be tangible enough to be susceptible to inspection, copying or photographing."[23] It held that "where the test result in question consisted of the expert's unrecorded comparison of the test-firing casings with those at the crime scene, [the federal rule] did not obligate the government to produce in advance the expert's conclusions."[24] And in *U.S. v. Peters*,[25] the Court of Appeals for the Ninth Circuit concluded that the federal rule "refer[s] only to information recorded in some tangible form."[26]

[7] We reach the same conclusion. Under the plain language of § 29-1912(1), the defendant may request the court to order the State to permit him to "*inspect and copy or photograph*" the results and reports of physical or mental examinations and scientific tests or experiments. (Emphasis supplied.) Inspecting, copying, or photographing clearly require a tangible item. Oral, unrecorded opinions do not fall within the scope of this language.

Turning to the second reason, we conclude that O'Kelly's opinion did not constitute a result or report of an examination or test. In *State v. Brown*,[27] we addressed whether experts'

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[22] *U.S. v. Smith*, 101 F.3d 202 (1st Cir. 1996).

[23] *Id.* at 209.

[24] *Id.* at 210.

[25] *U.S. v. Peters*, 937 F.2d 1422 (9th Cir. 1991).

[26] *Id.* at 1425.

[27] *State v. Brown, supra* note 18.

opinions constituted reports of examinations. There, the defendant learned through notes contained in a presentence report that the police had obtained certain opinions from experts, which had not been disclosed. The notes revealed that during the investigation, the police contacted a psychologist and a pathologist. The psychologist opined that based upon the officers' descriptions of the victim, the victim might be a pathological liar. The pathologist examined photographs depicting the victim's injuries and concluded that the injuries were not consistent with the victim's version of events. The defendant claimed that the State should have disclosed the notes, because they contained results or reports of physical or mental examinations or scientific tests under § 29-1912(1)(e).

We drew a distinction between the opinions of the psychologist and the pathologist. We concluded that the State was not required to disclose notes containing the psychologist's opinions, because

> [t]he information from the psychologist was based upon subjective data supplied by one of the investigating officers, which apparently included the officer's impressions and conclusions concerning [the victim]. The response by the psychologist may have been a commentary on the data supplied by the police, but the psychologist's response did not constitute a report of an examination under the circumstances.[28]

By contrast, we concluded that the pathologist's opinions did constitute a report of an examination. We reasoned that

> after his examination of [the victim's] photographs, the pathologist expressed an opinion to the police regarding both the means used and the manner in which wounds were inflicted upon the victim . . . . The pathologist's opinion concerning causation of the wounds was a report within the purview of § 29-1912(1)(e), and the State

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[28] *Id.* at 675, 335 N.W.2d at 548.

should have disclosed those parts of the detective's notes containing the report from the pathologist.[29]

While our conclusion in *Brown* turned on the fact that the psychologist had not performed an "examination," at least one federal court has focused instead on whether the information at issue constituted a "result" or "report." In *U.S. v. Iglesias*,[30] the defendant claimed that "'log notes'" and other documents from the drug testing laboratory constituted results or reports. The Court of Appeals for the Ninth Circuit disagreed. It characterized the log notes as "internal documents" and concluded that they "do not have the requisite formality or finality to be considered as either a 'report' or a 'result.'"[31] It reasoned that while defendants have "rights to inspect and copy the actual results or reports of scientific tests, we are not willing to force the government to disclose every single piece of paper that is generated internally in conjunction with such tests."[32]

Taken together, *Brown* and *Iglesias* convince us that O'Kelly's late-disclosed opinions were not results or reports of examinations or scientific tests. Like the psychologist's opinions in *Brown*, O'Kelly's opinion that more testing was required to place Parnell with certainty near the crime scene was akin to commentary on the data supplied by the police; he was commenting on the need for more data, rather than reporting results or conclusions of an examination. His reports and results were contained in the maps that he provided to King, which were disclosed to Parnell early in discovery. And like the log notes in *Iglesias*, O'Kelly's opinions did not have the requisite formality to be considered results or reports. His opinions regarding the need for more testing were more akin to an internal, informal document.

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[29] *Id.* at 675-76, 335 N.W.2d at 548.

[30] *U.S. v. Iglesias*, 881 F.2d 1519, 1521 (9th Cir. 1989).

[31] *Id.* at 1523.

[32] *Id.* at 1524.

Because O'Kelly's opinions do not fall within the scope of § 29-1912(1)(e), the State had no duty to disclose them pursuant to that section.

Having concluded that *Brady* and § 29-1912 were not violated, we must now determine whether the district court abused its discretion in overruling Parnell's motion to continue the trial or exclude Shute's testimony.[33] Parnell argues that the district court abused its discretion because O'Kelly did not have enough time to perform a drive test before trial. We disagree.

[8,9] 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.[34] And there is no abuse of discretion by the court in denying a continuance unless it clearly appears that the party seeking the continuance suffered prejudice as a result of that denial.[35]

Parnell did not make it clear to the district court that O'Kelly could not perform a drive test before trial. O'Kelly stated in his affidavit that a drive test would take him "days if not weeks" to complete. And the court noted at the hearing that because the State planned to take more than a week to present its case, O'Kelly would have 12 days to prepare to testify. It reasoned that O'Kelly could prepare within that time. Parnell's counsel did not state that O'Kelly would need more than 12 days to perform a drive test. Considering the evidence presented, it was not unreasonable for the court to overrule the motion to continue. We therefore conclude that the district court did not abuse its discretion in overruling Parnell's motion to continue the trial or exclude Shute's testimony.

2. New Trial

Parnell asserts that the district court erred in overruling his motion for a new trial, because O'Kelly's opinions constituted

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[33] See *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[34] *Id.*

[35] *Id.*

newly discovered evidence. He argues that he could not have discovered and presented O'Kelly's testimony at trial with reasonable diligence. And he argues that O'Kelly's testimony would have been material, because "Shute's testimony was instrumental in placing [Parnell] near the crime scene."[36]

[10] A new trial can be granted on grounds materially affecting the substantial rights of the defendant, including "'newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial.'"[37] 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 have probably produced a substantially different result.[38] We review the ruling denying a motion for new trial in a criminal case for an abuse of discretion.[39]

This assignment fails. We assume that O'Kelly's opinions constituted newly discovered evidence. Nevertheless, they did not warrant a new trial, because they did not create a reasonable probability of a substantially different result. We reach this conclusion for two reasons—first, O'Kelly's conclusions regarding the records would not have placed in doubt Parnell's presence at the location of the crime, and second, Johnson's and Nero's testimonies against Parnell were powerful and compelling.

As the district court noted, O'Kelly's opinions would not have been particularly helpful to Parnell. O'Kelly was critical of Shute's methods of analysis and his conclusions regarding the overlap area. But he also acknowledged that the crime scene was "situated in a valley between Cell Sites 729 and 201" and that Parnell's cell phone connected to tower 201

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[36] Brief for appellant at 20.

[37] *State v. Nelson*, 282 Neb. 767, 782, 807 N.W.2d 769, 782 (2011) (quoting Neb. Rev. Stat. § 29-2101(5) (Reissue 2008)).

[38] *State v. Nelson, supra* note 37.

[39] *Id.*

around the time of the shooting. And he placed Parnell's cell phone "in the general vicinity (1 - 2 miles of the crime scene) before, during and after the shooting." Thus, although O'Kelly critiqued Shute's methods, he reached conclusions similar to Shute's. O'Kelly's opinions did not create a reasonable probability of a substantially different outcome of Parnell's trial.

The State presented powerful and compelling evidence against Parnell in the testimonies of Johnson and Nero. Johnson testified that Parnell threatened her with a gun just 2 days before the shooting. And her description of the shooter's car—"a blue Nissan Altima with a messed up front bumper"—matched the Altima Parnell drove. Additionally, Nero's testimony established that Parnell drove the Altima on the evening of the shooting and that Parnell wanted her to hide the car following the shooting. Furthermore, a detective testified that Parnell lied and claimed that he had no knowledge of an Altima, despite the fact that he had been stopped while driving an Altima months earlier. This evidence substantially diminishes the importance of the precision of the cell phone information.

Because O'Kelly's opinions did not create a reasonable probability of a substantially different result, the district court did not abuse its discretion in overruling Parnell's motion for a new trial.

3. Rule 404

Parnell assigns that the district court erred in concluding that the evidence of his terroristic threat against Johnson was inextricably intertwined with the crimes charged. He argues that the evidence should have been excluded pursuant to rule 404. We disagree.

[11] Rule 404 provides:

> (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, identify, or absence of mistake or accident.
>
> (3) When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury.

[12,13] Rule 404(2), however, does not apply to evidence of a defendant's other crimes or bad acts if the evidence is inextricably intertwined with the charged crime.[40] Inextricably intertwined evidence includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.[41]

We have previously concluded that a defendant's threatening behavior was inextricably intertwined with charged crimes. In *State v. Smith*,[42] the defendant was charged with first degree murder and second degree assault in connection with the shooting of several victims. The State introduced testimony that the defendant had threatened two of the victims twice in the month before the shooting. The testimony indicated that the defendant had previously been friends with the victims and that he threatened them because he believed they were "'snitches.'"[43] The defendant claimed that the evidence of his threats was subject to rule 404(2). We disagreed and

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[40] *State v. Cullen, supra* note 8.

[41] See *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013).

[42] *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[43] *Id.* at 860, 839 N.W.2d at 343.

concluded that the evidence of the threats "was part of the factual setting of the instant crimes and was necessary to present a coherent picture."[44] We noted that without the evidence of the threats, it would have "appear[ed] to the jury that [the defendant], who was a friend of [the victims], . . . aided and abetted in the random shooting of five people."[45]

Like *Smith*, the evidence of Parnell's threat against Johnson was necessary to present a coherent picture of the shooting. The evidence of the threats established that Parnell was upset with Johnson just 2 days before the shooting, because she brought a person from a rival gang to a party. Without this evidence, it would have appeared to the jury that Parnell randomly shot Carr and Johnson, because the only other interaction between Johnson and Parnell was at the birthday party where Johnson complimented Parnell's car.

The evidence was not used to establish that Parnell had the propensity to shoot Carr and Johnson. It was used to establish that Parnell threatened Johnson and acted upon that threat 2 days later.[46] Accordingly, the evidence was inextricably intertwined with the shooting and not subject to rule 404. The district court did not abuse its discretion in admitting this evidence.

4. Jury Instruction

Parnell assigns that the district court erred in refusing his proposed jury instruction regarding accomplice testimony. We disagree. The proposed jury instruction was not warranted by the evidence.

[14,15] 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

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[44] *Id.* at 881, 839 N.W.2d at 355.

[45] *Id.* at 881, 839 N.W.2d at 355-56.

[46] See *State v. Smith, supra* note 42.

evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[47] 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 evidence, there is no prejudicial error necessitating reversal.[48]

We addressed whether an accomplice jury instruction was warranted by the evidence in *State v. Mason*.[49] There, the defendant argued that two witnesses constituted accomplices because they were present when the defendant shot the victim and because they later lied to the police about their involvement. Like the instant case, the defendant requested a jury instruction based upon NJI2d Crim. 5.6, and the court rejected it and gave a more general credibility instruction.

[16] We concluded in *Mason* that the evidence did not warrant an accomplice instruction. We noted that an accomplice

> "'"must take some part in the crime, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime. Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice. . . ."'"[50]

And we reasoned that the witnesses were not accomplices, because there was no evidence that they were involved in a plan to shoot the victim. We also rejected the defendant's claim that their attempts to cover up the crime rendered them accomplices. We said "such evidence point[ed] to their

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[47] *State v. Duncan, supra* note 9.

[48] *Id.*

[49] *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

[50] *Id.* at 29, 709 N.W.2d at 650-51 (quoting *State v. Sutton*, 231 Neb. 30, 434 N.W.2d 689 (1989)).

possibly being 'accessories after the fact.'"[51] We concluded that the more general instruction regarding witness credibility was sufficient.

Like *Mason*, Parnell's proposed instruction was not warranted by the evidence. Parnell argues that Nero could have been considered an accomplice, because she provided Parnell with access to the Altima and because she lied to the police. But those actions did not render her an accomplice. The evidence established that Parnell always had access to Nero's Altima. There was no evidence that Nero provided him access on the night of the shooting for the purpose of helping with the crime or that she was even aware of the crime. And Nero's lies to investigators, like the lies in *Mason*, happened after the crime. They point to her being an accessory after the fact, not an accomplice.

Because the accomplice instruction was not warranted by the evidence, the general credibility instruction was sufficient to address Nero's testimony. Therefore, the district court did not err in refusing the proposed jury instruction.

5. Ineffective Assistance

Parnell claims that his counsel was ineffective because he did not call O'Kelly to testify at trial. He argues that even though O'Kelly had not completed the drive test, his counsel should have called O'Kelly to critique Shute's methods and conclusions.

(a) Different Counsel on Claims of Ineffective Assistance

[17,18] We must first determine whether Parnell may raise this claim in this direct appeal. Ordinarily, 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

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[51] *Id.* at 30, 709 N.W.2d at 651. See, also, *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.[52] Otherwise, the issue will be procedurally barred.[53] But 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.[54]

[19,20] These legal rules are driven by a fundamental principle: The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[55] The purpose of affording postconviction relief is to correct errors of constitutional proportion which otherwise could not have been raised on direct appeal.[56] It naturally follows that a motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal or which were known to the defendant and counsel at the time of the trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.[57]

(b) Appellate Rules of Procedure

We have several appellate rules governing counsel of record. These rules are intended to ensure orderly proceedings.[58] And failure to follow them could not only disrupt the proceedings, but also deprive a defendant of his or her constitutional right to counsel.[59] Where ineffective assistance of

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[52] *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

[53] *Id.*

[54] *State v. Abdulkadir*, 293 Neb. 560, 878 N.W.2d 390 (2016).

[55] *State v. DeJong*, 292 Neb. 305, 872 N.W.2d 275 (2015).

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

[57] *Id.*

[58] See *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

[59] See, e.g., *State v. Agok*, 22 Neb. App. 536, 857 N.W.2d 72 (2014).

counsel is urged, these rules have another substantive component—they enable us to easily distinguish trial counsel from appellate counsel. If these rules are not strictly followed, then our review of ineffectiveness claims could be frustrated or unnecessarily complicated.

One rule ensures that appointed counsel will take the necessary steps to perfect an appeal. "Counsel appointed in district court to represent a defendant in a criminal case other than a postconviction action shall, upon request by the defendant after judgment, file a notice of appeal and continue to represent the defendant unless permitted to withdraw by this court."[60]

Another rule ensures continuity of counsel from the trial court to the appellate court.

> The attorneys of record . . . of the respective parties in the court below shall be deemed the attorneys . . . of the same parties in this court, until a withdrawal of appearance has been filed . . . . Counsel in any criminal case pending in this court may withdraw only after obtaining permission of this court.[61]

Yet another rule requires the trial court clerk to certify to the appellate court the names and contact information regarding the attorneys of record in the court below.[62] Together, these rules ensure that the appellate court has been provided with accurate and up-to-date identification of counsel representing a defendant in a criminal case.

But noncompliance with the rules can thwart the reliability of the process and add unnecessary complexity. If an attorney fails to file a written motion seeking, and obtain a written order granting, leave to withdraw, the record may continue to reflect the appearance of a lawyer who is no longer representing a

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[60] Neb. Ct. R. App. P. § 2-103(A).

[61] Neb. Ct. R. App. P. § 2-101(F)(1) (rev. 2015).

[62] See § 2-101(B)(5)(b).

party. And this can easily lead to an incorrect certification of counsel by the trial court clerk. If an attorney purports to obtain permission to withdraw from a trial court but fails to ensure that an order memorializing the withdrawal is timely filed in the trial court, he or she has not fulfilled this duty. If new counsel has been appointed for an appeal but the former counsel has not withdrawn before an appeal is perfected, the former counsel must promptly withdraw in the appellate court. And if the trial court clerk fails to diligently and accurately certify the counsel of record at the time of the taking of an appeal, needless corrections will be required.

Because of the unnecessary disruption to orderly appellate procedure, the appellate courts will strictly enforce the requirements of these rules.

(c) Identification of Parnell's Counsel

The trial court initially certified four counsel of record for Parnell: three private attorneys and one member of the Douglas County public defender's office, Kelly Steenbock. An amended certificate deleted one of the private attorneys and substituted Allyson Mendoza, another member of the public defender's office. Mendoza appeared on behalf of Parnell at a pretrial hearing, and she was also one of the counsel designated on Parnell's appellate brief. Thus, the amended certificate showed two members of the public defender's office and two private attorneys, Stockmann and Stephanie S. Shearer. The bill of exceptions shows the same four attorneys as counsel for Parnell.

As of the date of oral argument, none of these four attorneys had sought leave to withdraw in this court. But Steenbock, Stockmann, and Shearer were not listed as counsel on Parnell's appellate brief. And there was no other filing in this court suggesting that Steenbock, Stockmann, or Shearer played any role as counsel for Parnell on appeal.

[21] The certification of Steenbock as counsel on appeal may be erroneous, but poses no difficulty on direct appeal.

Claims of ineffective assistance of counsel raised on direct appeal by the same counsel who represented the defendant at trial are premature and will not be addressed on direct appeal.[63] And because Steenbock and Mendoza work for the same public defender's office, they are considered as the same counsel for purposes of that rule.[64] Thus, we would not address an ineffectiveness claim directed at Steenbock in this direct appeal. It is clear from our record that Steenbock participated in several pretrial proceedings. But it is also clear from the record that she did not participate in any of the proceedings pertinent to the claim of ineffective assistance raised in this appeal.

As to Stockmann and Shearer, the situation differs. They were certified as counsel of record and did not initially file a withdrawal in this court. And the bill of exceptions shows their participation at trial on the precise matter raised—failure to call O'Kelly as a witness. Because Parnell's previous attorneys were still counsel of record, the State was "unsure whether Parnell can raise ineffective assistance of counsel claims on direct appeal."[65]

In order to resolve the uncertainty regarding Stockmann and Shearer's status as counsel on appeal, we issued an order to show cause regarding their apparent failure to withdraw as counsel for Parnell in this court. Stockmann, Shearer, and Mendoza filed affidavits in response.

Mendoza explained that she and Steenbock were the initial attorneys appointed to represent Parnell. They represented him in "several pretrial matters, including the preliminary hearing and plea in abatement." When they became aware of a conflict, the trial court removed the public defender's office and appointed Stockmann and Shearer to represent Parnell.

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[63] *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

[64] See *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

[65] Brief for appellee at 38.

Mendoza stated that Stockmann and Shearer represented Parnell for the remainder of the case in the trial court. After trial, the public defender's office was reappointed to represent Parnell because "the original conflict of interest . . . no longer existed." Mendoza and another attorney from the office were assigned to represent Parnell on appeal.

Regarding their participation in this appeal, Stockmann and Shearer stated that they represented Parnell throughout trial and sentencing. After sentencing, they had no further contact with Parnell and did not participate in this appeal. Mendoza confirmed in her affidavit that Stockmann and Shearer did not act as Parnell's counsel at any time in this appeal.

Regarding their apparent failure to withdraw, Stockmann and Shearer explained that Shearer asked the trial court to allow them to withdraw after Parnell's sentencing. The trial judge informed Shearer that they were allowed to withdraw and that he would appoint attorneys from the public defender's office to represent Parnell on appeal. Stockmann and Shearer both stated that they did not comply with our rules requiring formal withdrawal because they "did not consider [themselves] to be the attorney of record when the notice of appeal in [Parnell's] case was filed in the court below." Neither claimed that they requested a formal order reflecting their withdrawal in the trial court. And Shearer noted in her affidavit that she "receiv[ed] notices from the Supreme Court concerning [Parnell's] case." She said that she "contacted the Clerk of the Supreme Court" and "was informed that the case was certified indicating I was representing [Parnell]."

It is apparent that Stockmann and Shearer intended to withdraw in the trial court. But our record does not contain an order memorializing their withdrawal. If such an order existed and if it was filed before Parnell's appeal was perfected, it was error for the clerk to certify them as counsel on appeal. But without an order memorializing their withdrawal, Stockmann and Shearer remained counsel of record and were properly certified

as appellate counsel to this court. Once certified, they had a duty to file a request to withdraw in this court. They did not do so.

We digress to urge attorneys not to ignore notices received from this court or the Nebraska Court of Appeals. It does not matter whether an attorney believes that he or she is no longer counsel of record. Notices from this court's clerk are sent only to counsel of record; notices are not sent to counsel unless counsel was certified as such by the trial court. If an attorney receives a notice from our clerk but believes that he or she has withdrawn, the attorney should promptly communicate with the clerk's office to resolve his or her status. Then, the attorney should take the steps necessary to either (1) ensure that a corrected certificate is transmitted by the trial court clerk to the appellate court or (2) file and serve a motion to withdraw as counsel in the appellate courts.

In light of the responses to our order to show cause, we conclude that we can address this ineffectiveness claim on direct appeal. Although Parnell was technically still represented by his previous attorneys when the appeal was perfected, they were not involved in this appeal. And Parnell is aware of his ineffectiveness claim and capable of raising it here. Delaying review of this claim to the postconviction stage would not serve the purpose of postconviction review. We therefore turn to the merits of Parnell's ineffectiveness claim.

(d) Merits of Ineffectiveness Claim

[22] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[66] The determining factor is whether the record is sufficient to adequately review the question.[67]

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[66] *State v. Duncan, supra* note 9.

[67] *Id.*

[23-25] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[68] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[69] 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.[70] 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.[71]

[26-28] When reviewing claims of alleged ineffective assistance of counsel, an appellate court affords trial counsel due deference to formulate trial strategy and tactics.[72] 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.[73] Deficient performance and prejudice can be addressed in either order.[74] If it is more appropriate to dispose of an ineffectiveness claim due to lack of sufficient prejudice, that course should be followed.[75]

Parnell's ineffectiveness claim fails because there is no reasonable probability that but for his counsel's failure to call O'Kelly, Parnell would have been acquitted. As we explained above, there was compelling evidence against Parnell. At most, O'Kelly's opinions would have degraded the precision

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

[69] *State v. Duncan, supra* note 9.

[70] *Id.*

[71] *Id.*

[72] *State v. Huston*, 291 Neb. 708, 868 N.W.2d 766 (2015).

[73] *State v. Duncan, supra* note 9.

[74] *Id.*

[75] *Id.*

accorded to the cell phone testimony. O'Kelly ultimately concluded that Parnell's cell phone was near the crime scene when the shooting occurred. The outcome would not have been different had O'Kelly testified and criticized Shute's methods. Therefore, the record conclusively refutes that Parnell was prejudiced by his counsel's conduct.

VI. CONCLUSION

We conclude that the district court did not abuse its discretion in overruling Parnell's motions to continue the trial and for a new trial. We also conclude that the court did not abuse its discretion in admitting evidence of Parnell's threats against Johnson. We conclude further that the district court did not err in rejecting Parnell's jury instruction and that Parnell did not receive ineffective assistance of counsel. We therefore affirm Parnell's convictions.

Affirmed.

Connolly, J., not participating.

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

Wilmer Interiano-Lopez, appellant, v. Tyson Fresh Meats, Inc., self-insured employer, appellee.

883 N.W.2d 676

Filed August 26, 2016. No. S-15-722.

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: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Workers' Compensation: Jurisdiction: Statutes.** The Workers' Compensation Court, as a statutorily created court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in statute.
6. **Workers' Compensation: Dismissal and Nonsuit.** The right of a plaintiff to dismiss his or her workers' compensation action under Neb. Rev. Stat. § 48-177 (Cum. Supp. 2014) is not a matter of judicial grace or discretion.

7. ____: ____. Neb. Rev. Stat. § 48-177 (Cum. Supp. 2014) gives a workers' compensation plaintiff the explicit right to dismiss the cause without prejudice so long as the plaintiff is represented by counsel and requests dismissal before the final submission of the case to the court.
8. **Workers' Compensation: Rules of Evidence.** The Nebraska Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure.
9. **Workers' Compensation: Legislature: Intent: Employer and Employee.** The Nebraska Workers' Compensation Act was intended by the Legislature to simplify legal proceedings between injured employees and their employers.
10. **Workers' Compensation: Legislature: Courts.** Changes in the workers' compensation laws, and in the public policies recognized in those laws, must emanate from the lawmaking powers of the Legislature and not from the courts.
11. **Pleadings: Dismissal and Nonsuit.** An answer which merely alleges defenses to a petition and prays for the inverse of the relief sought by the petition does not survive after the petition is dismissed.
12. **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.
13. **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.
14. ____: ____: ____. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
15. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.

Appeal from the Workers' Compensation Court: Daniel R. Fridrich, Judge. Vacated and remanded with directions.

Laura L. Pattermann, T.J. Pattermann, and Harry A. Hoch III, of Gallner & Pattermann, P.C., for appellant.

Joshua J. Schauer, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellee.

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

Stacy, J.

NATURE OF CASE

This is an appeal from a decision of the Nebraska Workers' Compensation Court. Appellant, Wilmer Interiano-Lopez, filed a petition seeking benefits, and appellee, Tyson Fresh Meats, Inc. (Tyson), filed an answer which included a purported counterclaim. Shortly thereafter, Interiano-Lopez moved to dismiss the action. The compensation court dismissed the petition but proceeded to trial on Tyson's counterclaim and found Interiano-Lopez had failed to prove a workplace injury. Interiano-Lopez appeals. Because we conclude the compensation court acted without authority and in excess of its powers by proceeding to trial rather than dismissing the cause, we vacate the judgment of the court and remand the cause with directions to dismiss.

FACTUAL BACKGROUND

In 2013, Interiano-Lopez was living in Sioux City, Iowa, and working for Tyson at a meatpacking plant in Dakota City, Nebraska. One of his jobs involved cutting the stomach or "paunch" of cows to allow the contents to fall out as they were processed on the "dump paunch line."

On October 7, 2013, Interiano-Lopez was working with a trainee. According to Interiano-Lopez, the trainee was hanging meat incorrectly and it was falling off the hooks as it passed down the dump paunch line. Interiano-Lopez had to lift and place the meat back on the hooks to complete his work, and his hands and arms became increasingly fatigued. At one point, a paunch fell from the hook and hit Interiano-Lopez on the right shoulder. He felt a pop in his shoulder and began experiencing severe pain and loss of strength in his arm. Interiano-Lopez

was taken to the plant infirmary and thereafter to a hospital emergency room. He was diagnosed with a shoulder separation and was referred for orthopedic evaluation and treatment.

In March 2014, Interiano-Lopez, through counsel, filed a petition in the Nebraska Workers' Compensation Court seeking a determination of the rights and liabilities of the parties regarding the accident of October 7, 2013. Interiano-Lopez sought to be declared permanently and totally disabled or, in the alternative, to be awarded temporary total disability benefits, ongoing medical benefits, and vocational rehabilitation training.

In April 2014, Tyson filed an answer which included what it characterizes as a counterclaim. Tyson's answer denied liability, alleged Interiano-Lopez' physical problems were caused by a preexisting condition, and alleged Interiano-Lopez had "received some workers' compensation benefits for which [Tyson] is entitled to a credit." In its counterclaim, Tyson reiterated allegations set forth in the answer and included a request that "the Court determine [Tyson's] liabilities, if any, and rights with respect to the alleged October 7, 2013 accident at issue in this matter."

Two weeks after Tyson filed its answer, the attorney for Interiano-Lopez filed a motion to dismiss the action without prejudice. The court subsequently entered an order of dismissal which provided "[Interiano-Lopez'] Petition is dismissed without prejudice." After the dismissal was entered, Interiano-Lopez filed a claim with the Iowa Workers' Compensation Commissioner regarding the October 7, 2013, injury. The record indicates both parties considered Iowa's workers' compensation law regarding shoulder injuries to be more favorable to Interiano-Lopez than Nebraska's law.

Despite the dismissal, Tyson proceeded with discovery on its counterclaim and, when Interiano-Lopez did not answer the discovery, Tyson filed a motion to compel in the Nebraska Workers' Compensation Court. Interiano-Lopez opposed the motion to compel, arguing the Nebraska action had been

dismissed without prejudice and the discovery being sought did not pertain to any issues being litigated in Nebraska. The Nebraska Workers' Compensation Court sustained Tyson's motion to compel and ordered Interiano-Lopez to respond to the discovery, adding that the failure to comply would subject him to possible sanctions. Interiano-Lopez subsequently answered Tyson's discovery. Tyson was dissatisfied with the responses and filed a second motion to compel, which the court also sustained, again referencing the possibility of sanctions for noncompliance.

In July 2014, the Nebraska Workers' Compensation Court issued notice that "a trial in the above cause" was set for October 29, 2014. The court subsequently continued trial to January 12, 2015, and ordered the parties to exchange witness and exhibit lists and file pretrial statements.

In December 2014, Interiano-Lopez filed a motion seeking to stay the Nebraska proceedings pending resolution of the Iowa proceedings. Interiano-Lopez again argued that his motion to dismiss without prejudice had been granted by the court and also alleged:

> The remaining proceedings in this action are for a claim by [Tyson] for repayment of overpaid benefits. This can only be determined once Iowa has determined if the injury was work related and the appropriate benefits to be paid to . . . Interiano-Lopez. The action here is for the same accident and injury pending in Iowa and . . . justice would dictate these proceedings be stayed without prejudice, pending resolution of the Iowa action.

Tyson resisted the motion to stay, alleging:

> Tyson is entitled to a determination of [Interiano-Lopez'] rights and liabilities pursuant to the Nebraska Workers' Compensation Act [and Interiano-Lopez] should not be allowed to claim prejudice or controversy by subsequently initiating proceedings in the state of Iowa in an attempt to disgorge Tyson of its right to a determination under the Nebraska Workers' Compensation Act.

The Nebraska court treated Interiano-Lopez' motion to stay as a motion to continue trial and granted it. Tyson then filed a motion to reconsider, which the court denied, explaining:

> The Court granted [Interiano-Lopez'] motion because the Court believed [Interiano-Lopez] presented sufficient reason to continue the trial scheduled for January 12, 2015. [Interiano-Lopez] seeks to try this matter in Iowa and is concerned that a judgment rendered in Nebraska could be used as a weapon to prevent a decision being rendered in Iowa pursuant to Iowa Code § 85.72. It is clear that there is concurrent jurisdiction between both Iowa and Nebraska. Each state could render a decision on the merits of the case but only Iowa has a statute that would prevent a decision being rendered in Iowa if a decision is first rendered in Nebraska. This Court could still render a decision in this case if Iowa were to render a decision first. That being the case, the Court sees no reason it should not at least grant [Interiano-Lopez] an opportunity to try this case first in Iowa. That opportunity will continue not in *ad infinitum*.

The Nebraska Workers' Compensation Court then continued the matter and set trial for May 27, 2015.

In March 2015, Interiano-Lopez filed a second motion to continue trial. He asserted his Iowa workers' compensation claim was scheduled to be tried approximately 2 months after the Nebraska matter. The Nebraska court overruled the motion to continue trial, reasoning that the matter already had been continued twice already and that "[t]he progression of litigation here in Nebraska cannot be unduly dependent upon the progression of the litigation in Iowa."

Trial was held on May 27, 2015. At the start of trial, Interiano-Lopez renewed his motion to dismiss, arguing that pursuant to Neb. Rev. Stat. § 48-177 (Cum. Supp. 2014), nothing survived the dismissal of the cause without prejudice. The compensation court overruled the renewed motion to dismiss,

and the matter proceeded to trial on Tyson's counterclaim. Both parties presented evidence, and the court took the matter under advisement.

On July 15, 2015, the Nebraska Workers' Compensation Court entered a written "Order on [Tyson's] Counterclaim." Before addressing the merits, the court made an express finding that "[Tyson's] counterclaim survived the dismissal of [Interiano-Lopez'] petition." The court reasoned:

> [Tyson] has a right to file an action to adjudicate the rights and liabilities of the parties under the Nebraska Workers' Compensation Act. *See* Neb. Rev. Stat. § 48-173. Importantly, Neb. Rev. Stat. § 25-603 provides that "[i]n any case where a setoff or counterclaim has been presented, the defendant shall have the right of proceeding to the trial of his claim, although the plaintiff may have dismissed the action or failed to appear." Based upon the clear language of § 25-603, [Interiano-Lopez'] motion to dismiss is hereby overruled.

The court then proceeded to the merits of Tyson's counterclaim. It observed, "The central issue in this case is whether [Interiano-Lopez] suffered an accident and resulting injury to his right shoulder in an accident on October 7, 2013 that arose out of and in the course of his employment with [Tyson]." The court noted the "operative pleading" was Tyson's counterclaim "and not a petition for benefits filed by [Interiano-Lopez]," but it nevertheless concluded "the burden of proof lies with [Interiano-Lopez]." After summarizing the evidence, the court concluded Interiano-Lopez had failed to meet his burden of proving a work-related accident on October 7, 2013, and concluded Tyson "owe[d] no benefits under the Nebraska Workers' Compensation Act." Interiano-Lopez timely appeals.

ASSIGNMENTS OF ERROR

Interiano-Lopez assigns, restated, that the Workers' Compensation Court erred in (1) failing to dismiss the cause,

including Tyson's counterclaim, when Interiano-Lopez filed a motion to dismiss without prejudice; (2) finding Interiano-Lopez had the burden of proof in the trial on Tyson's counterclaim; and (3) finding Interiano-Lopez did not suffer a workplace injury.

STANDARD OF REVIEW

[1] 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.[1]

[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.[2]

ANALYSIS

[3,4] Interiano-Lopez' first assignment of error concerns the court's ruling on his motion to dismiss without prejudice and requires interpretation of the workers' compensation statute governing such dismissals.[3] The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[4] Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation

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[1] *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015).

[2] *Id.*

[3] See § 48-177.

[4] *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007).

to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[5]

Section 48-177 governs when a workers' compensation plaintiff may dismiss a case without prejudice and provides in relevant part:

> (1) At the time a petition or motion is filed, one of the judges of the Nebraska Workers' Compensation Court shall be assigned to hear the cause. . . .
>
> (2) Any such cause may be dismissed without prejudice to a future action (a) by the plaintiff, if represented by legal counsel, before the final submission of the case to the compensation court or (b) by the compensation court upon a stipulation of the parties that a dispute between the parties no longer exists.

The Legislature has amended § 48-177 several times over the years, and we begin our analysis with an overview of the governing statute and our cases interpreting it.

In *Grady v. Visiting Nurse Assn.*,[6] we considered language in § 48-177 which had been in effect since 1949. At that time, § 48-177 permitted a workers' compensation plaintiff to dismiss his or her case without prejudice only upon an affirmative showing that no dispute existed between the parties.[7] The plaintiff in *Grady* argued that her right to dismiss a workers' compensation case should be governed by the general civil statute which allows plaintiffs to dismiss an action without prejudice any time before final submission of the case.[8] We rejected that suggestion, noting the Nebraska

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[5] *Id.*

[6] *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994).

[7] § 48-177 (Reissue 1993) (providing that "[u]pon a motion for dismissal duly filed by the plaintiff, showing that a dispute between the parties no longer exists, the compensation court may dismiss any such cause without a hearing thereon").

[8] See Neb. Rev. Stat. § 25-601(1) (Reissue 2008).

Workers' Compensation Court is not "'bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure . . . .'"[9] We further explained that if general civil procedure statutes "were deemed applicable in the Workers' Compensation Court unless specifically excluded, then §§ 48-163 and 48-168, which specifically exempt that court from formal rules of procedure, would be without meaning."[10] *Grady* held that § 25-601 did not apply to dismissals in the Workers' Compensation Court.[11]

In 2005, the Legislature amended § 48-177 to insert the language relevant to the instant appeal: "An action may be dismissed by the plaintiff, if represented by legal counsel, without prejudice to a future action, before final submission of the case to the compensation court."[12] In *Knapp v. Village of Beaver City*,[13] we interpreted this amended language to grant workers' compensation plaintiffs a statutory right to dismiss the action without prejudice, even when a dispute still existed between the parties. And we expressly rejected the employer's suggestion that the natural delay resulting from a dismissal, or the added expense of employing attorneys in further litigation over the same matter, were reasons that justified imposing limitations on a plaintiff's statutory right to dismiss under § 48-177.[14]

In 2011, the Legislature again amended § 48-177. As it regards the issues in this case, the 2011 amendments did not change the substance of a plaintiff's statutory right to dismiss,

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[9] *Grady, supra* note 6, 246 Neb. at 1016, 524 N.W.2d at 561 (quoting Neb. Rev. Stat. § 48-168 (Reissue 1988)).

[10] *Id.* at 1017, 524 N.W.2d at 562.

[11] *Id.*

[12] § 48-177 (Reissue 2010).

[13] *Knapp, supra* note 4.

[14] *Id.*

but merely altered the words used to describe the proceedings before the compensation court.[15]

Interiano-Lopez argues it was error for the court to dismiss his petition but proceed to trial on Tyson's counterclaim. He contends that under § 48-177, the trial court did not have authority to dismiss only part of the cause before it.

[5,6] Before addressing the contentions of the parties, we emphasize the familiar proposition that the Workers' Compensation Court, as a statutorily created court, has only such authority as has been conferred upon it by statute, and its power cannot extend beyond that expressed in statute.[16] We also note generally that the right of a plaintiff to dismiss his or her workers' compensation action under § 48-177 is not a matter of judicial grace or discretion.[17] The central question presented here is whether the Workers' Compensation Court had the authority to continue litigating any aspect of the cause before it once the attorney for Interiano-Lopez requested dismissal without prejudice. We conclude, based on a plain reading of the operative statute, that it did not.

[7] Section 48-177 gives a workers' compensation plaintiff the explicit right to dismiss the cause without prejudice so long as the plaintiff is represented by counsel and requests dismissal before the final submission of the case to the court. It is undisputed that Interiano-Lopez was represented by counsel and that he filed his motion to dismiss before the final submission of the case to the compensation court. He therefore

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[15] Compare § 48-177(2) (Cum. Supp. 2014) (providing that "[a]ny such cause may be dismissed without prejudice to a future action . . . by the plaintiff, if represented by legal counsel, before the final submission of the case to the compensation court"), with § 48-177 (Reissue 2010) (providing that "[a]n action may be dismissed by the plaintiff, if represented by legal counsel, without prejudice to a future action, before final submission of the case to the compensation court").

[16] *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011).

[17] *Knapp, supra* note 4.

was entitled as a matter of law to have the cause dismissed without prejudice.[18]

But after granting Interiano-Lopez' motion to dismiss, the compensation court proceeded to trial on what Tyson characterized as a counterclaim. The compensation court relied on Neb. Rev. Stat. § 25-603 (Reissue 2008) as authority for doing so, but that reliance was misplaced, because, as we clearly held in *Grady*, the general civil statutes governing pleadings and dismissal do not apply in Workers' Compensation Court.[19] Moreover, there is nothing in the plain language of § 48-177 which gives the compensation court authority to dismiss something less than the entire cause in response to a motion to dismiss.

Tyson presents several arguments in support of its contention that the Workers' Compensation Court had the statutory authority to proceed to trial on Tyson's counterclaim despite Interiano-Lopez' repeated requests to dismiss the entire cause. First, Tyson argues that counterclaims are permitted in civil cases and should be permitted in workers' compensation cases as well. Next, Tyson argues that its counterclaim was a permissible pleading because it was made part of its answer. Finally, Tyson argues its counterclaim was permissible because it was the functional equivalent of a petition under § 48-177. We address each argument in turn.

Civil Pleading Rules Do Not Apply

[8,9] Tyson devotes a significant portion of its brief on appeal to arguing that counterclaims are statutorily permitted in civil cases and so should be permitted in workers' compensation cases too. It is true that the Legislature has expressly authorized counterclaims, cross-claims, and third-party claims

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[18] *Id.*

[19] See § 48-168(1) (Cum. Supp. 2014).

in civil cases.[20] But the Nebraska Workers' Compensation Court is not "'bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure . . . .'"[21] The Nebraska Workers' Compensation Act was intended by the Legislature to simplify legal proceedings between injured employees and their employers.[22] The streamlined statutory pleading rules in workers' compensation cases permit the filing of a petition,[23] an answer,[24] and various motions, including but not limited to motions for judgment on the pleadings and motions for summary judgment.[25]

[10] Tyson's argument to this court that counterclaims should be permitted under the Nebraska Workers' Compensation Act is a recommendation more appropriately presented to the Legislature. Changes in the workers' compensation laws, and in the public policies recognized in those laws, must emanate from the lawmaking powers of the Legislature and not from the courts.[26] We decline the invitation to judicially expand the basic pleading structure enacted by the Legislature in workers' compensation cases.

Tyson's Counterclaim Was Not Answer

Tyson argues the compensation court had authority to proceed to trial on its counterclaim because it was asserted as

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[20] Neb. Ct. R. Pldg. § 6-1113 (as authorized by Neb. Rev. Stat. § 25-801.01(1) and (2)(a) (Reissue 2008)).

[21] *Grady, supra* note 6, 246 Neb. at 1016, 524 N.W.2d at 561 (quoting § 48-168 (Reissue 1988)).

[22] See *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.*, 291 Neb. 278, 865 N.W.2d 105 (2015).

[23] Neb. Rev. Stat. § 48-173 (Reissue 2010).

[24] Neb. Rev. Stat. § 48-176 (Reissue 2010).

[25] Neb. Rev. Stat. § 48-162.03 (Cum. Supp. 2014).

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

part of Tyson's answer. Neb. Rev. Stat. § 48-176 (Reissue 2010) sets forth the requirements of an answer in workers' compensation cases and provides in relevant part that "the party at interest . . . shall file an answer to such petition, which shall admit or deny the substantial averments of the petition, and shall state the contention of the defendant with reference to the matters in dispute as disclosed by the petition."

[11] Even if we construe Tyson's pleading as an answer under § 48-176, the outcome does not change. An answer which merely alleges defenses to a petition and prays for the inverse of the relief sought by the petition does not survive after the petition is dismissed.[27] If Tyson's pleading was an answer, it did not survive the dismissal of Interiano-Lopez' petition and there was nothing for the compensation court to rule upon.

Tyson's Counterclaim Was Not Functional Equivalent of Petition Under § 48-173

Finally, Tyson argues the Workers' Compensation Court was acting within its authority to proceed to trial on Tyson's counterclaim, because the counterclaim was the functional equivalent of a petition under § 48-173. It is true the Nebraska Workers' Compensation Act permits a petition to be filed by "either party at interest" when there is a dispute over a workers' compensation injury.[28] And there is no dispute that if the

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[27] See *Giesler v. City of Omaha*, 175 Neb. 706, 123 N.W.2d 650 (1963) (stating that it is error to dismiss only petition and retain case for trial on answer where allegations of answer were merely inverse statement of relief plaintiff sought and stated no separate cause of action; entire action should have been dismissed).

[28] § 48-173. See, also, *Fidelity & Casualty Co. v. Kennard*, 162 Neb. 220, 75 N.W.2d 553 (1956) (permitting employer-initiated workers' compensation case over objections of employee).

court here had dismissed the entire cause—as it was required to do under § 48-177—Tyson could have filed its own petition if it desired to litigate the dispute over the compensability of the October 7, 2013, injury in Nebraska.

In light of this, Tyson asks this court to conclude as a matter of statutory construction that an employer's right to file a petition under § 48-173 can also be exercised by bringing a counterclaim when answering an employee's petition. Tyson argues its counterclaim "meets the elements" required of a petition under § 48-173 and suggests the court was correct in treating the counterclaim as the functional equivalent of a petition and allowing it to proceed to trial even after Interiano-Lopez exercised his right to dismiss the cause under § 48-177.[29]

[12-14] In considering Tyson's argument, we are guided by familiar rules of statutory construction. 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.[30] 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.[31] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[32]

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[29] Brief for appellee at 18.

[30] *State v. Warriner*, 267 Neb. 424, 675 N.W.2d 112 (2004); *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

[31] *State v. Mucia*, 292 Neb. 1, 871 N.W.2d 221 (2015); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[32] *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012).

We reject Tyson's statutory construction argument. The invitation to construe a counterclaim as the functional equivalent of a petition under § 48-173 is not warranted by a plain reading of the statute and is unsupported by the existing statutory scheme. Construing § 48-173 to provide that an employer's right to file a petition can also be exercised by bringing a counterclaim would not only expand the statutory pleading scheme enacted by the Legislature, it would also necessitate creation of a procedure by which a plaintiff could answer the counterclaim. As mentioned previously, the workers' compensation statutes authorize a petition[33] and an answer.[34] Because counterclaims are not part of the pleading scheme, there is no procedure enabling a plaintiff to admit or deny the substantial averments of a counterclaim, and no procedure by which a plaintiff can state his or her contention with reference to any additional matters in dispute as disclosed by the counterclaim. As such, the averments in Tyson's counterclaim went unanswered, because no procedural filing authorized by the relevant statutes would facilitate it.

Moreover, construing § 48-173 to permit counterclaims in lieu of petitions would effectively nullify a workers' compensation plaintiff's statutory right to dismiss the cause without prejudice under § 48-177. Tyson explained during oral argument that it began filing counterclaims asking for a determination of the rights and liabilities of the parties as a way to protect itself against any last-minute dismissals by plaintiffs under § 48-177. As such, this pleading practice was designed to interfere with a plaintiff's statutory right of dismissal. We will not construe an employer's right to file a petition under § 48-173 in a manner which negates a plaintiff's right to dismiss the cause under § 48-177.

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[33] § 48-173.

[34] § 48-176.

Interiano-Lopez Did Not Waive His Objection to Compensation Court's Authority

For the sake of completeness, we address Tyson's argument that Interiano-Lopez waived any objection to the court's authority to proceed to trial on Tyson's counterclaim by participating in the trial and asking the court to find in his favor. We conclude Interiano-Lopez did not waive his objection to the court's authority. Rather, the record clearly shows he consistently challenged the compensation court's authority to proceed to trial after dismissing his petition. Moreover, we reject the suggestion that the authority of the Workers' Compensation Court can be expanded by waiver or agreement.

[15] Even if Interiano-Lopez' participation in the trial could be viewed as voluntary, his participation cannot confer authority on the Workers' Compensation Court if it did not otherwise exist. As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.[35] Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.[36] As such, the voluntary participation of the parties is immaterial to the central question on appeal—whether the Workers' Compensation Court had the authority to proceed to trial after a represented plaintiff asked to dismiss the action without prejudice.

CONCLUSION

Through a variety of arguments, Tyson urges this court to construe § 48-173 to authorize not only the filing of a petition

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[35] *Cruz-Morales v. Swift Beef Co.*, 275 Neb. 407, 746 N.W.2d 698 (2008).

[36] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

by an employer, but also to authorize the employer to file a counterclaim which recites the statutory pleading elements of the petition. We decline Tyson's invitation, because doing so would judicially expand the statutory pleading procedure set out by the Legislature and, as is demonstrated by the present case, it would have the effect of nullifying a plaintiff's statutory right to dismiss the cause without prejudice under § 48-177.

We conclude the Workers' Compensation Court acted without authority and in excess of its powers in proceeding to trial after Interiano-Lopez exercised his right to dismiss the cause without prejudice. Accordingly, we vacate the decision of the Workers' Compensation Court and remand the cause with directions to dismiss the cause without prejudice.[37]

Vacated and remanded with directions.

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[37] See, § 48-185; *Hynes, supra* note 1.

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

City of Springfield, Nebraska, a Nebraska municipal corporation, appellant, v. City of Papillion, Nebraska, a Nebraska municipal corporation, and County of Sarpy, Nebraska, a body corporate and politic, appellees.

883 N.W.2d 647

Filed August 26, 2016. No. S-15-882.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
2. **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.
3. **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. The alleged injury in fact must be distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.
4. **Annexation: Proof.** To challenge an annexation, the plaintiff must show (1) a personal, pecuniary, and legal interest that has been affected by the annexation and (2) the existence of an injury to that interest that is personal in nature.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Reversed and remanded for further proceedings.

William E. Seidler, Jr., of Seidler & Seidler, P.C., for appellant.

Karla R. Rupiper, Papillion City Attorney, and Jessica E. Thomas for appellee City of Papillion.

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

Heavican, C.J.

NATURE OF CASE

The City of Springfield, Nebraska, filed this action against the City of Papillion, Nebraska, and the County of Sarpy, Nebraska (County), seeking to enjoin Papillion from annexing land which had been indicated as Springfield's area of future growth in a map adopted by the County in 1995. The district court for Sarpy County found that Springfield lacked standing and Springfield appeals.

BACKGROUND

In 1994, the Nebraska Legislature passed the County Industrial Sewer Construction Act (Act).[1] The Act's legislative findings indicate that the Legislature intended to attract commercial and industrial development by sharing costs of sewer development across counties and by giving counties the authority to manage construction of these sewers.[2] As part of this program, certain municipalities were granted new authority to prevent counties from expanding the use of sewers for residential development in areas of the municipality's predicted future growth and development.[3] These municipalities were also given authority to appoint members of urbanizing area planning commissions.[4]

Under procedures outlined in the Act, a 1995 resolution passed by the County identified a parcel of land south of Highway 370 as part of Springfield's area of future growth and

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[1] See Neb. Rev. Stat. §§ 23-3601 to 23-3637 (Reissue 2012).

[2] § 23-3602.

[3] § 23-3614.

[4] § 23-3632.

development. However, in July 2015, Papillion enacted ordinances Nos. 1715 and 1716, annexing some of this area.

Springfield filed suit, claiming the annexation was invalid under Neb. Rev. Stat. §§ 16-117 to 16-130 (Reissue 2012). It sought temporary and permanent injunctive relief against Papillion and the County. The district court initially granted a temporary restraining order, but after a hearing, the district court dismissed the case for lack of standing. The district court agreed with the defendants' contention that the "Act is in place primarily for [the] County's planning and construction of sewer systems, and [the] County's associate Future Growth Map is an ever evolving tool." Therefore, the district court found the Act did not grant Springfield standing.

ASSIGNMENT OF ERROR

Springfield assigns, consolidated into one assignment of error, that the district court erred by dismissing the suit for lack of standing.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.[5]

ANALYSIS

The sole issue on appeal is whether the Act grants Springfield an interest sufficient to give Springfield standing to challenge Papillion's allegedly illegal annexation of that land, even though that land is outside of Springfield's boundaries and its extraterritorial jurisdiction for purposes of zoning and platting. The validity of Papillion's annexation is not at issue on appeal. On appeal, Springfield asserts that it has standing because the annexation would interfere with Springfield's governmental functions under §§ 23-3614, 23-3633, and 23-3635, discussed further below. We agree.

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

Standing to Challenge Annexation Generally.

[2,3] As a general rule, 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] 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. The alleged injury in fact must be distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.[7]

[4] To challenge an annexation, the plaintiff "must show (1) a personal, pecuniary, and legal interest that has been affected by the annexation and (2) the existence of an injury to that interest that is personal in nature."[8] We have held that residents, property owners, taxpayers, and voters of an area sought to be annexed—as well as municipalities sought to be annexed—have standing to challenge annexation.[9] In *Sullivan v. City of Omaha*,[10] we extended this rule to residents, property owners, and taxpayers outside of the area sought to be annexed, but within the annexing power's new extraterritorial jurisdiction. Generally, landowners outside of the annexing municipality's new territory and extraterritorial jurisdiction do not have standing.[11]

In *County of Sarpy v. City of Gretna*,[12] this court stated that the enumerated list of persons with standing from *Sullivan v. City of Omaha* was not exclusive. In *County of Sarpy v. City*

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

[7] *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012).

[8] *County of Sarpy v. City of Gretna*, 267 Neb. 943, 948, 678 N.W.2d 740, 744 (2004).

[9] *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952).

[10] *Sullivan v. City of Omaha*, 183 Neb. 511, 162 N.W.2d 227 (1968).

[11] *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004).

[12] *County of Sarpy v. City of Gretna, supra* note 8.

of Gretna, we held that a county has standing to challenge a city's allegedly unlawful annexation of property within the county's boundaries. We cited numerous cases from other jurisdictions that have held that a county does have standing to challenge annexation. We found these authorities persuasive and reasoned that

> an annexation alters the normal relationship, i.e., power structure, between the two governmental entities. Stated otherwise, these courts have recognized that when a city annexes land within a county's borders, the city infringes upon, in a variety of ways, a county's governmental function. Obviously, this is an intended consequence of annexation. . . . However, this does not mean a county is without a legally protectable interest.[13]

The case now before this court presents an issue of first impression. Though we have held that a county may challenge an allegedly illegal annexation that infringes upon the county's governmental function and that parties within the newly annexed territory or extraterritorial jurisdiction may do so, we have not considered whether a city may challenge an annexation that infringes on the city's powers over areas of future growth and development.

The Act Grants Standing.

To determine whether the Act grants an interest to municipalities sufficient to give Springfield standing in this case, we must identify the rights or powers bestowed by the Act. The Act requires counties to send formal notice to certain municipalities within a county whenever the county board adopts a resolution to develop, improve, or extend a sewerage system.[14] Section 23-3607, then, gives each municipality 45 days to file "a map clearly delineating the proposed boundaries of the area of future growth and development of the city or village." The municipalities may include areas outside

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[13] *Id.* at 949-50, 678 N.W.2d at 745-46.

[14] § 23-3606.

their current extraterritorial jurisdiction if they reasonably anticipate that based upon population and growth trends, those areas will come under their jurisdiction in the future.[15] The county board then reviews the proposed maps and after public hearing, resolves any conflicts based upon predicted growth patterns.[16]

We find that three rights associated with a municipality's area of future growth and development give rise to standing in this case. First, a map delineating areas of future growth and development may only be amended by procedures listed in § 23-3611, which states:

> (2) When the county board is notified that the area over which a city or village formally exercises jurisdiction for purposes of zoning or platting has been extended so as to include a portion of the area of future growth and development of another city or village, the board shall promptly amend the map so as to place the territory that is in the jurisdiction of the city or village for zoning or platting purposes within the area of future growth and development of the same city or village.
>
> (3) Upon the request of a city or village . . . the county board shall review the territories specified in the request as requiring reallocation and make such changes as it deems warranted. The review shall be carried out in the same manner as prescribed in sections 23-3609 and 23-3610 for dealing with disputed territory [requiring notice be given and a public hearing be held].

In this case, the method in subsection (2) applied, because Papillion extended its jurisdiction into Springfield's area of future growth and development. However, if Papillion had requested a revision to the map rather than proceeding with annexation, Springfield would have been entitled to notice and a public hearing under subsection (3). Papillion's allegedly invalid annexation deprived Springfield of this process.

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[15] § 23-3608.

[16] § 23-3610.

Second, once the property at issue in this case was identified as Springfield's area of future growth and development, the county was required to give Springfield notice of any plans for sewerage system development in that property—even though the property was outside of Springfield's extraterritorial jurisdiction.[17] If the County had proposed any development, it would not have been permitted to proceed without an authorizing vote by Springfield's governing body.[18]

Third, under § 23-3632, Springfield was able to appoint three of the six members on the urbanizing area planning commission with jurisdiction over the municipalities' areas of future growth and development. The planning commission has veto power over applications for residential connections to sewerage systems in those areas, including issues of zoning, adjustment appeals, replatting, building codes, and permitting as may arise out of an application for connection.[19]

The fact that Springfield was not actively exercising each of these rights under the Act does not deprive Springfield of standing. The right to exercise these powers was a personal, legal interest of Springfield's, regardless of whether it was actively exercising these rights at the time Papillion annexed the disputed territory.

Furthermore, though the Act contemplates that territory in one municipality's area of future growth and development may be subsumed by another municipality's jurisdiction, Springfield may nevertheless bring suit. The fleeting nature of a right should not render that right indefensible. In *County of Sarpy v. City of Gretna*, this court noted that the expectation that annexations will occur does not preclude injured parties from bringing suit. Following this logic, it is irrelevant that Springfield's governmental functions could have been legally infringed upon by a proper annexation. Our only inquiry is

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[17] See § 23-3612.

[18] See § 23-3614.

[19] § 23-3633.

whether Springfield suffered an injury to a personal, pecuniary, and legal interest. The standing inquiry does not proceed to question whether the interest injured was absolute.

We hold that the Act grants Springfield standing to challenge Papillion's annexation. The reasoning of *County of Sarpy v. City of Gretna* applies here. In that case, we considered whether a county may challenge an annexation of territory under its authority and held that because the annexation limited that authority, the county's interest was sufficient to give it standing. Here, although we consider the interest of a city over property only partially under the city's authority, the annexation of that property still limits the city's authority. Springfield has statutory power to approve or reject development plans in its area of future growth and development, and three of the six seats on a planning commission with veto power over residential connections in that area. Papillion's annexation of that area infringes upon Springfield's power to do so. Further, the annexation deprived Springfield of the notice and hearing that would have been required in the alternative method for amending maps under § 23-3611(3).

Springfield has asserted an infringement of its statutory governmental functions and rights under the Act. As in *County of Sarpy v. City of Gretna*, that infringement is sufficient to grant standing.

For these reasons, we find merit to Springfield's assignment of error.

CONCLUSION

The decision of the district court is reversed, and the cause is remanded for further proceedings.

Reversed and remanded for
further proceedings.

Connolly and Kelch, 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. Bruce V. Rask, appellant.

883 N.W.2d 688

Filed August 26, 2016. No. S-15-1009.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
2. **Criminal Law: Juries: Evidence: Appeal and Error.** 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.
3. **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.
4. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. 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.
5. **Blood, Breath, and Urine Tests: Evidence: Proof: Probable Cause.** As a general rule, preliminary breath test evidence is inadmissible as proof that a defendant was impaired or intoxicated; the admissibility of the results of a preliminary breath test is limited to the purpose of showing probable cause either for an arrest or for administering a chemical test.
6. **Drunk Driving: Blood, Breath, and Urine Tests: Implied Consent.** Chemical test results are admissible in all legal proceedings, even if that chemical test was administered without the advisement required under Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2014).

7. ____: ____: ____. Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2014) permits evidence of refusal to prove driving under the influence charges, even when the defendant was not properly informed that refusal is a separate crime.
8. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
9. **Blood, Breath, and Urine Tests: Evidence.** A defendant's refusal to submit to a chemical test is evidence of the defendant's conduct, demeanor, statements, attitudes, and relation toward the crime.
10. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.
11. **Motor Vehicles.** Where a person sits in the driver's seat of a motor vehicle with the engine running, parked on a public road, that person has actual physical control of that motor vehicle.
12. **Words and Phrases.** The word "or," when used properly, is disjunctive.
13. **Motor Vehicles: Words and Phrases.** Actual physical control of a motor vehicle may be adequately defined as directing influence, dominion, or regulation of a motor vehicle.
14. **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.
15. **Self-Defense.** The choice of evils defense requires that a defendant (1) acts to avoid a greater harm; (2) reasonably believes that the particular action is necessary to avoid a specific and immediate harm; and (3) reasonably believes that the selected action is the least harmful alternative to avoid the harm, either actual or reasonably believed by the defendant to be certain to occur.

Appeal from the District Court for Kearney County, Terri S. Harder, Judge, on appeal thereto from the County Court for Kearney County, Michael P. Burns, Judge. Judgment of District Court affirmed.

Kevin K. Knake, of Law Office of Richard L. Alexander, for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

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

Heavican, C.J.

I. NATURE OF CASE

In the early morning hours of January 17, 2014, Officer Jarvis Kring of the Minden, Nebraska, police department discovered Bruce V. Rask asleep in the cab of his running pickup truck. Rask was charged, among other offenses, with driving under the influence (DUI), third offense, in the county court for Kearney County. A jury convicted Rask of DUI, and, on appeal, the district court for Kearney County affirmed. Rask appeals to this court. We affirm.

II. BACKGROUND

According to evidence presented at trial, on January 16, 2014, Rask got off work around 11:30 p.m. to midnight. He procured a 12-pack of Bud Light beer before leaving work. Rask then picked up his friend, Carson Corr. They drove to the home of another mutual friend, where Rask and Corr each had one or two beers. Rask and Corr stayed at the friend's house until approximately 1 a.m.

Afterward, Rask drove Corr back to Corr's residence. Rask and Corr testified at trial that Rask was not impaired during the drive back to Corr's house. However, Kring testified that Rask had admitted that he got drunk before returning to Corr's home.

Rask testified that he left the engine of his pickup truck running because it was cold outside. He claims he did not pull into Corr's driveway, because he did not want to wake Corr's dogs and parents. Rask and Corr then sat in the vehicle until about 3 a.m., talking and drinking. Rask and Corr testified that they finished all but one beer out of the 12-pack of Bud Light. There is conflicting evidence in the record, but

it appears that Rask had between four and six beers. Corr allegedly took the last bottle into his home when he left, along with all the empty bottles. Rask testified that he did not touch any controls of the truck while sitting in front of Corr's residence.

After Corr left, Rask decided to sleep in his truck. He alleges that he believed sleeping in his truck was the right thing to do because he did not want to get in trouble for driving drunk. Additionally, Rask testified that even though he was friends with Corr's parents, he did not go into Corr's home because he did not want to wake anybody. However, Kring testified that Rask later stated he did not go inside because he had had an argument with Corr. In any event, according to Rask, he had no feasible alternatives to sleeping in his running truck.

Around 4:40 a.m. on January 17, 2014, Kring was on duty and drove past Rask's truck while on patrol. At about 5:25 a.m., Kring drove past again and this time noticed an elbow visible through the window, so he stopped to investigate. He saw Rask, whom Kring recognized, asleep in the driver's seat. Eventually Kring was able to rouse Rask by yelling his name through the partially open passenger-side window.

Rask admitted to Kring that he was drunk. Additionally, Kring noticed a "koozie" between Rask's feet, containing what was later discovered to be a mostly empty Miller Lite beer can. Corr testified at trial that he left this can in Rask's truck sometime before January 16, 2014. Kring did not find any other alcohol containers in or around the truck.

Kring administered three field sobriety tests, each of which Rask was unable to successfully complete. Kring testified at trial that Rask also smelled of alcohol. Kring also administered a preliminary breath test (PBT). The results of the PBT were not offered at trial. After the PBT, Kring asked Rask whether he would submit to a chemical blood test; Rask refused. Kring testified at trial that during this interaction, Rask became angry, kicking his truck and using expletives.

The State charged Rask with three offenses: DUI, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010); refusal to submit to a chemical test, in violation of Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2014); and possession of an open alcohol container. The second count, refusal to submit to a chemical test, was dropped by the State after a "problem" was discovered. In his brief, Rask asserts the "problem" was that Kring failed to give Rask a proper advisement required under § 60-6,197. The record does not explicitly indicate the nature of the so-called problem, but there is no evidence that Kring gave the advisement.

A jury found Rask guilty of the DUI charge, for which the county court sentenced Rask to 180 days' imprisonment, a $1,000 fine, and a 15-year suspension of his driver's license. The county court also found Rask guilty of possession of an open alcohol container and fined Rask $100 for that infraction—a conviction from which Rask does not appeal.

III. ASSIGNMENTS OF ERROR

Rask assigns, restated and renumbered, that (1) the county court erred by admitting evidence that Kring performed a PBT, (2) the county court erred by admitting evidence that Rask refused to submit to a chemical blood test, (3) the State committed prosecutorial misconduct by introducing evidence of the PBT and the refusal, (4) the county court erred in denying Rask's motion for a mistrial, (5) the county court erred by giving a misleading jury instruction on the definition of "actual physical control of a motor vehicle," and (6) the county court erred by failing to give the jury instruction on choice of lesser harm.

IV. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[1]

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[1] *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

[2] 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.[2]

[3] 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.[3]

[4] Whether jury instructions given by a trial court are correct is a question of law. 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.[4]

V. ANALYSIS

1. Motion in Limine

Rask's first four assignments of error concern the admission of evidence that Kring performed a PBT and that Rask refused to submit to a chemical blood test. Before trial, Rask filed a motion in limine to exclude all evidence concerning the PBT and his refusal. The county court partially granted the motion, excluding only the results of the PBT. Rask objected to all evidence concerning the tests at trial, and also moved for a mistrial on this basis.

(a) Evidence of PBT

[5] In Rask's first assignment of error, he argues that evidence he performed a PBT was inadmissible. As a general rule, PBT evidence is inadmissible as proof that a defendant

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[2] *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013).

[3] *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

[4] *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013).

was impaired or intoxicated; this court has repeatedly limited the admissibility of the results of a PBT to the purpose of showing probable cause either for an arrest or for administering a chemical test.[5] Neither of these issues is contested in this case.

In *State v. Green*,[6] as in the present case, the State had offered evidence that a PBT was administered and that the defendant was arrested after taking the test. This court questioned whether it was error to admit evidence that a PBT was administered, as distinct from the results of that PBT.[7]

But without answering that question, we found harmless error. In *Green*, the State had also presented the arresting officer's testimony that the defendant failed field sobriety tests.[8] Therefore, the verdict was not attributable to the fact that a PBT was administered.

We also find that any error in this case was harmless. At trial in this case, Rask did not contest that he was drunk at the time Kring administered the PBT. There was ample evidence to support this fact. Rask and Corr both testified that Rask had consumed approximately five to seven beers between 1 and 3 a.m., Rask admitted to Kring that he was drunk, Rask failed three different sobriety tests, and he smelled of alcohol. Considering all of this undisputed testimony, the jury's verdict is unattributable to the admission of the mere fact that Rask took a PBT, and any error by the district court in admitting such evidence is harmless.

Rask's first assignment of error is without merit.

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[5] See, e.g., *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010) (concerning defendant's challenge to probable cause for arrest); *State v. Green*, 223 Neb. 338, 389 N.W.2d 557 (1986); *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986).

[6] *Green, supra* note 5.

[7] *Id.*

[8] *Id.* See, also, *Klingelhoefer, supra* note 5; *State v. Smith*, 218 Neb. 201, 352 N.W.2d 620 (1984).

(b) Evidence of Refusal

In Rask's second assignment of error, he argues the county court erred by admitting evidence that Rask refused to submit to a chemical blood test. Rask alleges that Kring did not advise Rask refusal was a separate crime and, therefore, that his refusal was inadmissible for any purpose. Upon our de novo review, interpreting § 60-6,197, we find no error.

Under § 60-6,197(1), "[a]ny person who operates or has in his or her actual physical control a motor vehicle . . . shall be deemed to have given his or her consent to submit to a chemical test . . . ." Refusal to submit to a chemical test is a crime. Section 60-6,197 also states:

> (5) Any person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged. Failure to provide such advisement shall not affect the admissibility of the chemical test result in any legal proceedings. However, failure to provide such advisement shall negate the state's ability to bring any criminal charges against a refusing party pursuant to this section.
>
> (6) Refusal to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be admissible evidence in any action for a violation of section 60-6,196 . . . .

Though Rask was convicted of DUI under § 60-6,196, he asks us to find that subsection (6) is limited to properly advised, informed refusals.

In *State v. Christner*,[9] this court found that chemical test ***results***—not refusals—should be excluded when the defendant was not properly advised of the consequences of refusal. The version of § 60-6,197 then applicable had language

[9] *State v. Christner*, 251 Neb. 549, 557 N.W.2d 707 (1997), *overruled on other grounds, State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000).

nearly identical to the language of subsection (6) now in effect, but did not include the portion of subsection (5) stating that the "[f]ailure to provide [an] advisement shall not affect the admissibility of the chemical test result in any legal proceedings."[10]

[6,7] In light of this revision, we find that our holding in *Christner* does not apply to the present version of § 60-6,197. The plain language of subsection (5) contradicts our holding in *Christner*; chemical test results are admissible in all legal proceedings, even if that chemical test was administered without the proper advisement. Furthermore, based upon subsections (5) and (6), as well as public policy, we hold that § 60-6,197 permits evidence of refusal to prove DUI charges, even when the defendant was not properly informed that refusal is a separate crime.

[8] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.[11] And the plain language of the statute supports this finding. While § 60-6,197 clearly bars prosecution for the crime of refusal if the defendant was not properly informed, the statute does not specifically address the admissibility of uninformed refusals in DUI cases. Instead, subsection (6) is a broad rule, without exception—it states only that a refusal is admissible to prosecute a DUI. We hold that under this broad rule, even uninformed refusals to submit to a chemical test are admissible for the purpose of proving DUI charges.

Further, subsection (5), permitting the admission of uninformed chemical test ***results***, suggests that whether a refusal or submission to a chemical test was informed bears only upon the ability of the State to bring charges against the defendant for said refusal; those results are still admissible to prove the elements of a DUI charge. It is illogical to admit the results of a chemical test to prove a DUI where the defendant was

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[10] See § 60-6,197(10) (Reissue 1993).

[11] *State v. Loyd*, 275 Neb. 205, 745 N.W.2d 338 (2008).

uninformed, but to exclude the defendant's refusal to take that same, uninformed, chemical test.

[9] Public policy bolsters this reading. This court considered the relevance of refusals in DUI cases in *State v. Meints*.[12] In that case, we determined that a defendant's refusal to submit to a chemical test was evidence of circumstances surrounding the DUI charge—it showed the "defendant's conduct, demeanor, statements, attitudes, and relation toward the crime."[13] These facts are equally relevant where a defendant's refusal is informed.

In the present case, Kring testified about Rask's refusal to submit to a chemical test in the context of Rask's behavior and attitude at the time of his arrest. This information was relevant to the DUI charge against Rask.

For these reasons, Rask's second assignment of error is without merit.

(c) Prosecutorial Misconduct and Mistrial

In Rask's third and fourth assignments of error, he argues that as a result of the evidence of the PBT and his refusal to submit to a chemical test, the State committed prosecutorial misconduct and the county court erred by denying his motion for a mistrial. Finding no merit to Rask's contention that this evidence was wrongly admitted, we decline to further address his third and fourth assignments of error.

2. Jury Instructions

In Rask's fifth and sixth assignments of error, he asserts that two of the given jury instructions were incorrect. After the close of evidence at trial, Rask objected to jury instructions Nos. 3 and 4. Specifically, he argued that instruction No. 4

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[12] *State v. Meints*, 189 Neb. 264, 202 N.W.2d 202 (1972).

[13] *Id.* at 266, 202 N.W.2d at 203.

incorrectly defined "actual physical control of a motor vehicle" and that instruction No. 3 should have required the State to prove that Rask was not avoiding greater harm by choosing to sleep in his truck.

[10] It is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.[14] Whether jury instructions given by a trial court are correct is a question of law. 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.[15]

In his brief, Rask also asserts that the county court's instructions on the definitions of "intoxication" and "under the influence of alcoholic liquor" were "confusing and contradictory."[16] He further argues that the definition of "operate" was irrelevant and confusing to the jury. 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] Because Rask does not assign as error the giving of these instructions, we need not discuss this argument further.

(a) Actual Physical Control of Motor Vehicle

In Rask's fifth assignment of error, he argues that the county court erred by instructing the jury that "actual physical control of a motor vehicle" means "one present in a

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[14] *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[15] *Edwards, supra* note 4.

[16] Brief for appellant at 11.

[17] *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015).

motor vehicle directing influence, dominion or regulation thereof." We find that the definition provided to the jury was adequate.

[11] This court has not defined "actual physical control of a motor vehicle." Rask cites no case law holding that the definition in instruction No. 4 was incorrect or offers an alternative instruction. The entirety of his argument on appeal is that the definition was "conclusory and nonsensical" because it permitted the jury to believe that sleeping in the driver's seat of a parked, running vehicle constitutes actual physical control.[18] We now hold that on these facts, where a person sits in the driver's seat of a motor vehicle with the engine running, parked on a public road, that person has actual physical control of that motor vehicle.

[12] Among jurisdictions with similar DUI statutes, there does not appear to be a bright-line rule for what constitutes actual physical control. However, a number of these jurisdictions have held that the use of the phrase "actual physical control" exhibits a legislative intent to prevent persons under the influence of drugs or alcohol from creating dangerous conditions on public roadways.[19] The word "or," when used properly, is disjunctive.[20] Therefore, these courts have determined that to have "actual physical control" must mean something other than to "operate." Thus, they interpret "actual physical control" broadly to address the risk that a person not yet operating a motor vehicle might begin operating that vehicle with very little effort or delay.

We agree with the reasoning of these jurisdictions. Section 60-6,196(2) states that "[a]ny person who operates ***or*** is in the actual physical control of any motor vehicle while [under the

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[18] Brief for appellant at 11.

[19] See, e.g., *Atkinson v. State*, 331 Md. 199, 627 A.2d 1019 (1993); *State v. Smelter*, 36 Wash. App. 439, 674 P.2d 690 (1984) (citing *State v. Schuler*, 243 N.W.2d 367 (N.D. 1976)).

[20] *State v. Thacker*, 286 Neb. 16, 834 N.W.2d 597 (2013).

influence of drugs or alcohol] shall be guilty of a crime . . . .” (Emphasis supplied.) The acts of starting or driving a vehicle fall within the definition of “operate”; thus, we determine that the Legislature intended “actual physical control” to describe acts short of starting or driving a vehicle.

[13] Considering the policy purpose and disjunctive language of the statute, we hold that “actual physical control of a motor vehicle” may be adequately defined as “directing influence, dominion, or regulation of a motor vehicle.” Other jurisdictions have accepted similar definitions.[21] We do not suggest that this is the only correct definition of the term, or that it is most correct; rather, we find that in this case, the district court did not err in giving that definition.

In other jurisdictions, courts have looked to a number of factors to determine whether a defendant was in actual physical control of a motor vehicle, including: whether the key was in the ignition or in the defendant’s possession, whether the engine was running, whether the vehicle was parked away from traffic, and whether the defendant was awake or asleep.[22]

Looking to the factors used in other jurisdictions, and the preventative nature of the statute, we find that Rask was in actual physical control of a motor vehicle. Rask admits that he became intoxicated while sitting in the driver’s seat of his truck, with the keys in the ignition and the engine running, while parked on a public roadway. Rask could have easily and nearly instantaneously begun operating the truck, placing any surrounding people and property in peril. These facts

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[21] See, e.g., *Griffin v. State*, 457 So. 2d 1070, 1072 (Fla. App. 1984) (“‘[d]efendant must have had the capability and power to dominate, direct or regulate the vehicle, regardless of whether or not he is exercising that capability or power at the time of the alleged offense’”); *State v. Ruona*, 133 Mont. 243, 248, 321 P.2d 615, 618 (1958) (“[u]sing the term in ‘actual physical control’ in its composite sense, it means ‘existing’ or ‘present bodily restraint, directing influence, domination or regulation’”).

[22] See, e.g., *State v. Robison*, 281 Mont. 64, 931 P.2d 706 (1997); *Atkinson, supra* note 19; *Schuler, supra* note 19; *Griffin, supra* note 21.

fall within the purpose and language of § 60-6,196. Numerous jurisdictions would concur with this result.[23]

Rask's fifth assignment of error is without merit.

(b) Choice of Lesser Harm

Finally, Rask asserts the county court erred by refusing his request to add an element to the DUI instruction requiring the State to prove Rask was not acting to avoid greater harm. We find no error in the county court's failure to so instruct the jury.

[14] 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.[24]

Although Rask requested the instruction as a negative element of the DUI charge, choice of lesser harm, or "justification," is an affirmative defense; the defendant bears the initial burden of going forward with evidence of the defense.[25] Where the record shows there is no legally cognizable defense of justification, the issue will not be submitted to the finder of fact.[26] Therefore, we consider whether Rask produced sufficient evidence to warrant presentation of a choice of evils instruction to the jury.

[15] The choice of evils defense requires that a defendant (1) acts to avoid a greater harm; (2) reasonably believes that the particular action is necessary to avoid a specific and immediate harm; and (3) reasonably believes that the selected

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[23] See, e.g., *State v. Godfrey*, 137 Vt. 159, 400 A.2d 1026 (1979); *State v. Woolf*, 120 Idaho 21, 813 P.2d 360 (Idaho App. 1991); *Richfield City v. Walker*, 790 P.2d 87 (Utah App. 1990); *Griffin, supra* note 21.

[24] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

[25] See *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999).

[26] *Id.*

action is the least harmful alternative to avoid the harm, either actual or reasonably believed by the defendant to be certain to occur.[27]

Rask claims that he acted to avoid the greater harm of freezing to death while walking across town to get home. Even assuming that there was a real risk that Rask might die or become seriously injured from the cold, his argument fails.

Even if Rask had no less harmful alternative to sleeping in his truck, he had already committed DUI before falling asleep. As discussed above, Rask was in actual physical control of a motor vehicle when he sat in the driver's seat of his truck with the keys in the ignition and the engine running, parked on a public street. The crime, then, took place before Rask resorted to sleeping in the truck. Rask chose to get drunk in his truck, rather than deciding to remain sober or arrange to drink in another location. Thus, the instruction was not warranted by the evidence and Rask suffered no prejudice from its omission.

Rask's final assignment of error is without merit.

VI. CONCLUSION

We affirm the decision of the district court affirming Rask's conviction.

Affirmed.

Connolly, J., not participating.

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[27] *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Raymond Frank Gonzales, Jr., also known as Raymond Frank Gonzalez, appellant.

884 N.W.2d 102

Filed September 2, 2016. No. S-15-149.

1. **Motions for Mistrial: Appeal and Error.** An appellate court will not disturb a trial court's decision whether to grant a motion for mistrial unless the court has abused its discretion.
2. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.
4. **Trial: Prosecuting Attorneys: Convictions: Due Process.** Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.
5. **Motions for Mistrial: Prosecuting Attorneys: Proof.** Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.
6. **Trial: Prosecuting Attorneys.** When a prosecutor's comments rest on reasonably drawn inferences from the evidence, the prosecutor is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense.
7. **Attorneys at Law.** The limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument.
8. **Prosecuting Attorneys.** Language must be reviewed in its entire context to determine whether the prosecutor was expressing a personal opinion or merely submitting to the jury a conclusion that the prosecutor is arguing can be drawn from the evidence.

9. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
10. **Trial: Juries.** Hyperbole in closing arguments is hardly rare, and juries should be given credit for the ability to filter out oratorical flourishes.
11. **Trial: Prosecuting Attorneys: Due Process.** The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.
12. **Jury Instructions: Proof: Appeal and Error.** In reviewing a claim of prejudice from jury instructions given or refused, the appellant has the burden to show that the allegedly improper instruction or the refusal to give the requested instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
13. ____: ____: ____. 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.
14. **Criminal Law: Homicide: Evidence: Jury Instructions.** It is the duty of the trial court, in homicide cases, to instruct only on those degrees of homicide that find support in the evidence.
15. **Homicide: Words and Phrases.** Sudden quarrel manslaughter is distinguished from second degree murder by the fact that the killing, even if intentional, was the result of a legally recognized provocation, i.e., the sudden quarrel, as that term has been defined by Nebraska jurisprudence.
16. **Homicide: Intent.** In determining whether a killing constitutes murder or sudden quarrel manslaughter, the question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.
17. **Homicide.** A passion for revenge will not mitigate murder to manslaughter.
18. **Homicide: Intent.** It is not the provocation alone that reduces the grade of the crime; it is also the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.
19. **Homicide: Intent: Time.** If there was enough time between the provocation and the killing for a reasonable person to reflect on the intended course of action, then the mere presence of passion does not reduce the crime below murder.
20. **Homicide: Lesser-Included Offenses.** The legal assumption in a sudden quarrel manslaughter determination is that a reasonable person

would never be so greatly provoked as to intentionally strike out in anger at an innocent person.

21. **Criminal Law: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, 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 Dakota County: Paul J. Vaughan, Judge. Affirmed.

Todd W. Lancaster, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

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

Wright, J.

I. NATURE OF CASE

Raymond Frank Gonzales, Jr., also known as Raymond Frank Gonzalez, appeals his convictions of first degree murder and use of a firearm to commit a felony in connection with the death of Bonnie Baker. Gonzales claims prosecutorial misconduct when, during closing arguments, the prosecutor indicated that Gonzales had lied when he denied during law enforcement interrogations that he was involved in the murder. The prosecutor also called the defense's theory of a different shooter "make believe." Gonzales further argues that the trial court erred by failing to instruct the jury, in the definition of sudden quarrel, that provocation negates the element of malice. And he claims the court erred by failing to include in the first degree murder instruction that the State must prove the killing was not the result of a sudden quarrel.

II. BACKGROUND

On Sunday, December 15, 2013, Bonnie died at her trailer in the Atokad Trailer Park in South Sioux City, Nebraska,

of multiple gunshot wounds. Bonnie was shot 16 times with 9-mm bullets that came from the same firearm. The firearm was never found. In connection with Bonnie's death, Gonzales was convicted of murder in the first degree and use of a firearm to commit a felony. He was sentenced to life imprisonment on the murder conviction and to a consecutive term of 30 to 40 years' imprisonment on the use of a weapon conviction.

1. Party

The evidence at trial demonstrated that prior to her death, Bonnie spent the weekend in her trailer, which she shared with her brother, Elmer Baker, and her niece, Kaylynn Whitebear. Numerous people partied at the trailer over the weekend, beginning on Friday night, December 13, 2013, and continuing until Sunday morning, December 15. The guests drank beer and spirits excessively. Gonzales was one of the guests; he was brought to the party by Whitebear around 4 a.m. on Saturday. During the weekend, Elmer, Gonzales, and two other guests smoked methamphetamine in Elmer's bedroom. Bonnie kept mostly to herself in her bedroom.

Sometime around 3 a.m. on Sunday, Gonzales woke up from sleeping on the floor of the living room. He began acting erratically—yelling, falling, "flopping around on the ground," and flipping over the furniture. Elmer pushed Gonzales toward his bedroom, "because there was nothing [Gonzales could] break in there." Gonzales fell back asleep, and Elmer returned to the living room to talk for a couple of hours with another person.

2. Sexual Encounter

At approximately 5 a.m., Elmer went to his room to sleep. He lay sideways at the head of the bed, since Gonzales was sleeping sideways at the foot of the bed. According to Elmer, he awoke when Gonzales initiated sexual contact. Elmer testified that he rebuffed Gonzales' advances and fell back asleep. Elmer stated that he awoke again to similar sexual contact. This led to what Elmer described as mutual and consensual

sexual activity. This sexual activity apparently did not last very long, and Elmer and Gonzales fell asleep again. Elmer was openly homosexual. Gonzales was not.

3. Gonzales Upset and Teased

On Sunday morning, between 8 and 10 o'clock, Gonzales awakened and became very agitated. Elmer described that while he was sleeping, Gonzales had apparently placed Elmer's hand so that it was touching Gonzales' penis. Elmer testified that when he, Elmer, woke up to find his hand in that position, Gonzales jumped up and started "flipping out," accusing Elmer of "raping him or something." Elmer and Gonzales exited Elmer's bedroom. They engaged in a heated conversation in front of other guests, including Gonzales' friend Ira Rave. Gonzales was making accusations against Elmer that the encounter was nonconsensual, and Elmer denied the accusations.

Whitebear, Rave, and the other guests teased Gonzales, saying he was homosexual. Gonzales appeared angry. Rave teased Gonzales the most. There was no evidence that Bonnie teased Gonzales. Gonzales and Rave eventually engaged in an argument, and they pushed each other. Somebody soon intervened and broke up the fight.

Elmer testified that at one point, Gonzales told him, "I'm going to go get a gun and come back and shoot you." But when Elmer suggested that they "go outside . . . and deal with it right now," Gonzales said he was just kidding. Another witness testified similarly that Gonzales had said he "was going to go get a gun and come back and do a show or something," but that afterward, Gonzales said he was just kidding. A third witness heard Gonzales say something about guns.

The teasing and arguing continued until 10 or 11 a.m., when Bonnie asked all the guests to leave. Elmer described Bonnie as mad and stated that she was tired of everyone drinking there. Elmer thought that by the time he left, Gonzales no longer seemed angry.

Whitebear drove Gonzales to his mother's apartment. Gonzales was accompanied by Rave and two other passengers. Gonzales was mumbling to himself. One passenger testified that everyone else in the car was quiet during the ride, but Whitebear testified that the giggling and teasing of Gonzales continued in the car.

One passenger testified that Gonzales was "so calm," stating that she "g[o]t no expression from him," but Whitebear described Gonzales as "[s]till pissed off" during the car ride. Two witnesses heard Gonzales say in the car something along the lines of, "[W]hen I hit that place up, it's going to be like a fireworks show." Nobody thought at the time that Gonzales was serious.

When he exited the car, Gonzales was still wearing what he had worn the night before, although there was some evidence he had left his coat at the trailer. A photograph taken at a store on December 14, 2013, captured what Gonzales was wearing the weekend of Bonnie's murder. He had on black pants and shoes, a cobalt blue hoodie pullover sweatshirt with a large white logo on the front, a gray and black beanie hat, and a dark gray zip-up overcoat. His clothing was generally loose fitting.

After dropping off her passengers, Whitebear went to a friend's house.

4. Eyewitness Descriptions of Shooter

At some point after Whitebear and all the guests had gone, Elmer left to give someone a ride. When Elmer arrived back home 20 minutes later, Bonnie was dead. The shooting occurred at approximately 1:20 p.m.

After she was shot, Bonnie ran outside to her front porch and yelled for help. Several residents of the trailer park heard Bonnie's cries and briefly saw the shooter. Six eyewitnesses testified at trial.

The eyewitnesses described the shooter as male, young, and thin. Several witnesses described the shooter as either

Native American or Hispanic. At the time of trial, Gonzales was 23 years old and described as being 5 feet 10 inches tall and weighing 160 pounds; he apparently has both Native American and Hispanic heritage.

The witnesses described the shooter as wearing a hoodie pullover sweatshirt. One witness described the shooter's clothing as baggy. The color of the sweatshirt was described by various witnesses as either gray with some blue on it, turquoise, or light blue. One witness said the shooter may have been wearing a black beanie, and another said he could have been wearing a hat. Some witnesses said the shooter's hood was up. One witness described the shooter's pants as being gray. Another described his pants as khaki.

One witness described watching the shooter fire shots at Bonnie while outside the trailer and then run to a parked car some distance away. This witness saw the shooter holding what appeared to be a small firearm in the shooter's right hand while he ran away.

The witness described the vehicle as being a four-door tan Saturn, explaining that he knew a lot about cars. The witness saw the shooter enter the Saturn in the back seat. In addition to the driver, a passenger was in the front seat. The shooter rode away in the Saturn.

5. Gonzales' Whereabouts on Day of Shooting

Testimony was adduced concerning Gonzales' whereabouts at the time of the shooting. Gonzales' sister and mother confirmed that Gonzales had arrived at his mother's apartment sometime in the morning of December 15, 2013. Gonzales' sister testified that she could tell Gonzales was still drunk from the night before even though he may have slept a few hours. Gonzales was crying and told her that a man may have taken advantage of him, though he was not sure. Gonzales' mother testified that Gonzales was weeping and that he told his sister that "somebody might have touched him when he was passed out."

About 20 minutes after Gonzales arrived at his mother's apartment, his three older cousins, David Rodriguez, Anthony Housman, and Louis Housman, came to the apartment. Gonzales' sister testified that Gonzales had told her he wanted to talk to their older cousins because "he didn't know if his manhood was taken or not." The cousins and Gonzales spoke in the kitchen.

According to Gonzales' sister, Rodriguez, Anthony, and Gonzales went outside sometime around 2 p.m. She was unsure whether they had gone for a walk or a ride, as she showered after they went outside. According to Gonzales' sister, Louis had already gone home. Rodriguez, Anthony, and Gonzales were back in the apartment by the time Gonzales' sister got out of the shower. She believed the three men had been gone around 15 to 20 minutes.

According to Gonzales' mother, Louis stayed at the apartment while Rodriguez, Anthony, and Gonzales left for a while. It was sometime between noon and 2 p.m. when they left. She did not believe they were gone more than 15 or 20 minutes, because they were back before the end of a 30-minute cartoon that another of her sons was watching.

Anthony testified that he did not go to Gonzales' mother's apartment and then leave with Gonzales. Rather, Anthony testified that he picked up Gonzales at the Atokad Trailer Park on December 15, 2013, after learning that Gonzales needed a ride. He said Rodriguez accompanied him to pick up Gonzales. Anthony could not say what time this occurred; he believed it was daytime. Anthony testified that when they picked Gonzales up, he was on the road, walking.

Rodriguez similarly testified that Gonzales called him and asked him to pick him up at the Atokad Trailer Park. Rodriguez was unclear what time this occurred, other than that it was before 1 or 2 p.m. Rodriguez testified he accompanied Anthony to pick up Gonzales. They met Gonzales on a road in the Atokad Trailer Park. Rodriguez testified

that after picking Gonzales up, they took him to Gonzales' mother's apartment.

Louis testified that he had no recollection of seeing Gonzales or visiting Gonzales' mother's apartment on December 15, 2013.

Gonzales' mother's apartment is an approximately 14-minute drive from Bonnie's trailer. Rodriguez' and Anthony's residences are located between Bonnie's trailer and Gonzales' mother's apartment. Rodriguez' residence is 9 minutes' drive from Bonnie's trailer, and Anthony's residence is 11 minutes' drive from Bonnie's trailer.

6. Tan Saturn

It is undisputed that Anthony owned a tan, four-door Saturn. In the morning on December 16, 2013, law enforcement inspected the Saturn with Anthony's permission, but did not seize it. At the time of this initial inspection, the officers observed that the floormats were tan.

A warrant was obtained, and the Saturn was seized around 5 p.m. on the following day, December 17, 2013. The officers immediately noticed that the floormats were different. They were black and appeared to be new. Also, the Saturn appeared to have been emptied of any paper, cans, wrappers, or other items that law enforcement expected to find, based on their initial inspection. Anthony told law enforcement that he had washed the Saturn earlier that day. The tan floormats were never recovered.

Though samples were taken from the Saturn for DNA testing, none tested positive for hemoglobin, and no other forensic evidence was found in the Saturn.

7. Gun

Law enforcement officers searched Gonzales' residence, as well as his mother's apartment, Rodriguez' residence, and Anthony's residence. The officers found a .357-caliber revolver at Anthony's residence. That revolver was traced as having been stolen during a home invasion robbery. The

victim of the robbery reported the theft of two 9-mm handguns in addition to the .357-caliber revolver, although no 9-mm handguns were found during the searches. The bullets used to shoot Bonnie were consistent with 33 different makes and models of 9-mm firearms.

8. Gonzales' Interview

Gonzales was arrested at approximately 9:40 p.m. on December 15, 2013. The arresting officer observed that Gonzales appeared to have showered and to have on clean clothes. Gonzales agreed to be interviewed, and he was interviewed three times. When asked about the clothes he had worn on the weekend, Gonzales said they were at home. He explained that there was blood on the blue sweatshirt he had been wearing, because he had accidentally cut himself the night before.

Concerning his whereabouts at the time of the shooting, Gonzales said in one interview that he was at his mother's apartment and then left with Rodriguez and Anthony to go to Anthony's residence. Gonzales said that he stayed there 2 to 3 hours and then went home.

Throughout the three interviews, Gonzales repeatedly and consistently denied being involved in Bonnie's shooting or being at the Atokad Trailer Park at the time of the shooting. Indeed, as characterized by counsel, he denied being involved in the shooting "dozens of times."

When law enforcement officers told Gonzales that they were just trying to give Gonzales an opportunity to tell his side of the story, Gonzales told law enforcement that he already had. When the officers continued to press Gonzales, he said, "I got my story, I'm sticking to my story."

Defense counsel emphasized that Gonzales' consistent and repeated denial of any involvement in the shooting was in the face of hours of interrogation by officers trained on how "to get people to open up and make statements if they have incriminating evidence."

9. Gunshot Residue on Gonzales' Hand

On December 16, 2013, after law enforcement's first interview with Gonzales, a police identification technician collected samples from Gonzales' hands to analyze for gunshot residue. The technician testified that there are three ways gunshot residue can get on a subject's hands; either the subject discharged a firearm, the subject was in the vicinity of a firearm being discharged, or the subject came into contact with a surface that had gunshot residue on it.

Tests on scanning electron microscope "stub" samples revealed the presence of 1 three-component particle, 1 two-component particle, and 11 one-component particles on Gonzales' right hand. On Gonzales' left hand, the tests of those samples revealed 0 three-component particles, 2 two-component particles, and 13 one-component particles. A swab sample, which is a presumptive field test, revealed 0 three-component particles, 0 two-component particles, and 1 one-component particle.

The technician explained that gunshot residue consists of lead, barium, and antimony. Three-component particles are composed of all three elements; furthermore, the shape of the particle demonstrates whether the elements were exposed to a very-high-heat reaction. Three-component particles are highly specific to the discharge of a firearm.

Two-component particles do not have very many other sources besides the discharge of a firearm. But they are also consistent with sources such as brake pad linings, fireworks, or a deployed airbag.

One-component particles, in addition to being consistent with the discharge of a firearm, are consistent with a number of other sources such as car batteries, paint, stained glass windows, and certain paper products.

When he was arrested, Gonzales' hands were not bagged to avoid possible contamination by touching something that might have gunshot residue on it. Because Gonzales' hands

were not bagged, the technician admitted that it was possible Gonzales' hands could have become contaminated by gunshot residue if it was present in the police vehicle that transported him to the station or present in the room where he was interrogated. The technician stated that bagging the hands is recommended both in order to avoid contamination and to eliminate particle loss due to wiping or washing one's hands.

10. Gonzales' Clothes Never Found

The law enforcement officers investigating Bonnie's death were never able to locate the clothing that Gonzales wore during the weekend of December 15, 2013, including his shoes. Elmer eventually found Gonzales' coat that had been left in the trailer.

11. State's Closing Arguments

In both opening statements and closing argument, the prosecutor characterized the case as being about "embarrassment" and "rage." The prosecutor argued that the encounter with Elmer was Gonzales' motive for shooting whoever he found at the trailer. He argued that Gonzales' "stunt double" did not "jump[] into" a car matching the description of Anthony's Saturn and that any defense theory that this was a random act by an "anonymous drug dealer" was "make believe" and "science fiction."

The State argued that any theory by defense counsel that the shooter was Louis or one of Gonzales' other cousins was "just make believe." The State argued further, "That's just making things up. That's a red herring." The State, after reminding the jury that it was not to base its decision on speculation and conjecture, said, "[W]hen the gentleman there made that fact up that's exactly what that was. That wasn't the evidence. That was just mere speculation, that was just creating something."

The prosecutor reviewed with the jury the fact that during interviews with law enforcement, Gonzales, in denying

shooting Bonnie, repeatedly said that was his story and he was sticking with it. The prosecutor then argued, "I suggest to you that that's exactly what it is, it's a story." The State then argued that Gonzales was acting evasive during the interviews with law enforcement and that he was minimizing how much he was upset by the encounter with Elmer.

The prosecutor utilized an analogy of "Johnnie" who denies having eaten a slab of chocolate cake. Johnnie blames his circumstances on aliens who beamed down and put chocolate cake all over Johnnie's hands and face. The State asked rhetorically whether Johnnie's denial would have more weight if he denied eating the cake 15 times. The State reminded the jury, "I think everybody agreed [in voir dire] that once a lie, always a lie. You can repeat that lie, it doesn't change it."

The prosecutor displayed a checklist to the jury. The checklist included items such as "Fits general description of shooter," "Was at the party at Lot #4 preceding the shooting," "Felt was taken advantage of by a man from that party," "Was crying and upset about being taken advantage of," "Said he would light Lot #4 up like the 4th of July," "Had the motive to kill EB [sic]," and "Had the rage to kill anyone in the trailer/BB."

The list also included the statement, "Was in the vicinity of Lot #4 ATP at the time of the shooting." In placing a checkmark by this item in the list, the prosecutor argued that the shooter had to have known Anthony. And, again, in referring to the possibility that the shooter was Louis, the "[m]an on the moon," or a "[r]andom drug dealer," the prosecutor said, "That's just make believe."

Another item on the list was, "Lied about [being] in the vicinity of Lot #4 at time of the shooting." The prosecutor placed a checkmark by that statement on the list, reading it out loud to the jury.

Defense counsel had not objected at the time the prosecutor originally commented about the defense's theory's being "make believe," "science fiction," and based on speculation,

nor at the time the prosecutor said that Gonzales' "story" or statements to law enforcement were "exactly [t]hat[,] a story." Defense counsel did object when the State placed a checkmark next to "Lied about [being] in the vicinity of Lot #4 at time of the shooting."

The court sustained defense counsel's objection that the prosecutor was improperly commenting on the credibility of a witness. The prosecutor then scribbled over "Lied about" and wrote above the scribble: "Denied Dozens of times."

Then the prosecutor said:

> Denied dozens of times. That's a big one, isn't it?
>
> All right. If I'm the shooter, I ain't — I ain't — No way I'm putting myself in that — in that vicinity of the Trailer Park; right? . . . Rodriguez does. Yeah, I was there, picking a guy up.
>
> I'm not doing it. I'm not within miles of that Trailer Park. Not miles? No. Not miles at the time of the shooting. I never went back there. Never. That's what I'd say. I'm not going to put myself right back in that spot after I did it.

The prosecutor closed with a summary of the events of December 15, 2013, and how a shooter killed Bonnie and ran into a car to escape the scene of the crime. The prosecutor then said, "That's the man (indicating), right there. That's the man that killed Bonnie . . . ."

12. Motion for Mistrial

Defense counsel moved for a mistrial based on the prosecutor's statements during closing arguments. Particularly, defense counsel objected to the statements by the prosecutor about Gonzales' "story" or account's being "exactly [t]hat[,] a story"; the prosecutor's comments analogizing Johnnie's denial of eating the cake several times to Gonzales' repeated denial and asserting, "once a lie, always a lie"; and the prosecutor's use of a checklist wherein he checked off a statement that Gonzales had "[l]ied" about being in the vicinity at the time of the shooting.

The judge denied the motion for mistrial but instructed the jury as follows:

> [D]uring the closing statement the prosecutor made some comments which were in reference to the credibility of [Gonzales] or to the credibility of witnesses, it's improper for Counsel to make arguments regarding their belief that someone lied or their credibility.
>
> And so I'm going to ask you to disregard the comments regarding [Gonzales'] statement that it was his story and he was sticking to it or once a lie always a lie. Those type of comments are improper and you should disregard those.
>
> As I had reminded you in the instructions, comments of Counsel is not evidence. This is just their inference of the — of the evidence submitted.
>
> So with that notation, though, I want you to disregard [the prosecutor's] comments regarding [Gonzales'] credibility.

13. Defense Counsel's Closing Arguments

During trial, defense counsel had pointed out that Louis and Gonzales were of similar build and had similar features. Defense counsel suggested that Louis could have been the shooter. Defense counsel also pointed out the consistency of Gonzales' denials to law enforcement despite being interrogated over several hours by "experienced law enforcement officers, with training in techniques to get people to open up and make statements." And defense counsel generally pointed out the "holes" in the State's case. Defense counsel reminded the jury that the State's arguments were not evidence.

14. Jury Instructions

At the jury instruction conference, defense counsel had asked the court that the jury be instructed on the "negative element" of first degree murder that Gonzales did not kill Bonnie upon a sudden quarrel. Additionally, defense counsel had asked that the jury be instructed as follows: "In your

preliminary deliberations on Count I, you may consider the crimes of first degree murder, second degree murder, and manslaughter in any order." (Emphasis supplied.)

Finally, defense counsel asked that the jury be instructed on the definition of sudden quarrel as

> a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control. It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim. The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment. It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent. Provocation negates the element of malice found in the crime of first degree murder.

The court generally denied these requested instructions. Instead, instruction No. 5 was given. Instruction No. 5 first summarized that as to count I, the jury could find Gonzales guilty of first degree murder, second degree murder, or manslaughter or could find Gonzales not guilty.

Instruction No. 5 then set forth an "Elements" section and an "Effects of Findings" section. The Elements section was presented first.

Under the Elements section, the jury was instructed that to find Gonzales guilty of first degree murder, the jury must find that the State proved beyond a reasonable doubt that Gonzales killed Bonnie purposely and with deliberate and premeditated malice.

To find Gonzales guilty of second degree murder, the jury was instructed that it must find the State proved beyond a reasonable doubt that Gonzales killed Bonnie and that he did so intentionally and not as a result of a sudden quarrel.

To find Gonzales guilty of manslaughter, the jury was instructed that it must find the State proved beyond a reasonable doubt that Gonzales killed Bonnie either intentionally upon a sudden quarrel or unintentionally in the commission of an unlawful act, to-wit, by Gonzales' knowingly, intentionally, or recklessly causing bodily injury to Bonnie.

The Effect of Findings section followed. That section explained in detail how the jury must consider each of the crimes listed under count I "in sequence, beginning with First Degree Murder, then Second Degree Murder, and then Manslaughter, until you unanimously find the defendant guilty of one of these three crimes or until you unanimously find him not guilty of all three of the crimes listed in Count I."

A separate instruction contained the definitions generally applicable to the case. "Deliberate" was defined as "not suddenly or rashly. Deliberation requires that one considered the probable consequences of his or her actions before acting." "Malice" was defined as the "intentional doing of a wrongful act without just cause or excuse."

"Sudden quarrel" was defined as

> a legally recognized and sufficient provocation causing a reasonable person to lose normal self-control; or passion suddenly aroused which clouds reason and prevents rational action. It does not necessarily require an exchange of angry words or an altercation contemporaneous with the killing and does not require a physical struggle or other combative bodily contact between the defendant and the victim.

III. ASSIGNMENTS OF ERROR

Gonzales assigns that the trial court erred in (1) not granting a mistrial based on prosecutorial misconduct during

closing argument, (2) finding sufficient evidence to support a verdict of first degree murder, and (3) instructing the jury concerning the elements of first degree murder without instructing the jury that the State had to prove the killing was not a result of a sudden quarrel brought about by sufficient provocation.

IV. STANDARD OF REVIEW

[1] We will not disturb a trial court's decision whether to grant a motion for mistrial unless the court has abused its discretion.[1]

[2,3] Whether the jury instructions given by a trial court are correct is a question of law.[2] When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.[3]

V. ANALYSIS

1. Prosecutorial Misconduct

[4,5] We begin by addressing Gonzales' assignment of error alleging prosecutorial misconduct. When considering a claim of prosecutorial misconduct, we first consider whether the prosecutor's acts constitute misconduct.[4] A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[5] But if we conclude that a prosecutor's acts were misconduct, we consider whether the misconduct prejudiced the defendant's right to a fair trial.[6] Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting

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[1] See *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

[2] *State v. Casterline*, 293 Neb. 41, 878 N.W.2d 38 (2016).

[3] *Id.*

[4] *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016).

[5] *Id.*

[6] *Id.*

conviction violates due process.[7] Before it is necessary to grant a mistrial for prosecutorial misconduct, the defendant must show that a substantial miscarriage of justice has actually occurred.[8]

(a) Were Statements Misconduct?

Public prosecutors are charged with the duty to conduct criminal trials in such a manner that the accused may have a fair and impartial trial.[9] While a prosecutor should prosecute with "earnestness and vigor" and "may strike hard blows, he is not at liberty to strike foul ones."[10]

[6] Gonzales points out that according to the American Bar Association, "[t]he prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant,"[11] and that the Nebraska Rules of Professional Conduct state that a lawyer shall not, in trial, "state a personal opinion as to . . . the credibility of a witness . . . or the guilt or innocence of an accused."[12] But we have explained that when a prosecutor's comments rest on reasonably drawn inferences from the evidence, the prosecutor is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense.[13] Thus, in cases where

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[7] *Id.*

[8] *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014).

[9] *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[10] *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

[11] 1 ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-5.8(b) (3d ed. 1993).

[12] Neb. Ct. R. of Prof. Cond. § 3-503.4(e).

[13] See *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

the prosecutor comments on the theory of defense, the defendant's veracity, or the defendant's guilt, the prosecutor crosses the line into misconduct only if the prosecutor's comments are expressions of the prosecutor's personal beliefs rather than a summation of the evidence.[14]

The principle behind the prohibition of expressing personal opinions on the defendant's veracity and guilt is that when a prosecutor asserts his or her personal opinions, the jury might be persuaded by a perception that counsel's opinions are correct because of his position as prosecutor, rather than being persuaded by the evidence.[15] The prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence.[16] Moreover, the jury is aware that the prosecutor has prepared and presented the case and consequently may have access to matters not in evidence; thus, the jury may infer that such matter precipitated the prosecutor's personal opinion.[17]

[7] Some courts appear to hold that it is per se misconduct to say that the defendant lied or is a liar.[18] While there is authority that discourages prosecutors from using terms such as lied or liar in arguments to the jury, we are unpersuaded that a per se rule is appropriate. After all, closing

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[14] See, *U.S. v. Iacona*, 728 F.3d 694 (7th Cir. 2013); *U.S. v. Stover*, 474 F.3d 904 (6th Cir. 2007); *State v. Graves*, 668 N.W.2d 860 (Iowa 2003).

[15] See, *Beaugureau v. State*, 56 P.3d 626 (Wyo. 2002); *State v. Campbell*, 241 Mont. 323, 787 P.2d 329 (1990); *Wilson v. People*, 743 P.2d 415 (Colo. 1987).

[16] *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

[17] *State v. Whipper*, 258 Conn. 229, 780 A.2d 53 (2001), *overruled on other grounds, State v. Grant*, 286 Conn. 499, 944 A.2d 947 (2008).

[18] See, *Wend v. People*, 235 P.3d 1089 (Colo. 2010); *State v. Hilton*, 79 Conn. App. 155, 829 A.2d 890 (2003); *Gomez v. State*, 751 So. 2d 630 (Fla. App. 1999); *State v. Graves, supra* note 14; *Haddock v. State*, 282 Kan. 475, 146 P.3d 187 (2006); *State v. Campbell, supra* note 15.

arguments often have a "'rough and tumble quality about them, . . . the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument.'"[19]

[8] Instead, we adopt the approach that looks at the entire context of the language used to determine whether the prosecutor was expressing a personal opinion or merely submitting to the jury a conclusion that the prosecutor is arguing can be drawn from the evidence.[20] If the prosecutor is commenting on the fact that the evidence supports the inference that the defendant lied, as opposed to a personal opinion carrying the imprimatur of the government, the comment is not misconduct.[21] This is distinguishable from calling the defendant a "liar," which is more likely to be perceived as a personal attack on the defendant's character.

In *State v. Nolan*,[22] we found that the prosecutor's argument that defense counsel was going to use "'smoke screens and mirrors'" was not misconduct. We reasoned that the prosecutor's statement was made in the context of what the State believed the evidence showed and the prosecutor's belief that defense counsel was going to try to divert the jurors' attention from that evidence.[23]

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[19] *State v. Hampton*, 66 Conn. App. 357, 373, 784 A.2d 444, 455 (2001).

[20] See, *U.S. v. Iacona, supra* note 14; *U.S. v. Delgado*, 672 F.3d 320 (5th Cir. 2012); *U.S. v. Kravchuk*, 335 F.3d 1147 (10th Cir. 2003); *People v. Boyette*, 29 Cal. 4th 381, 127 Cal. Rptr. 2d 544, 58 P.3d 391 (2002); *Lugo v. State*, 845 So. 2d 74 (Fla. 2003); *Pacifico v. State*, 642 So. 2d 1178 (Fla. App. 1994); *State v. Cordeiro*, 99 Haw. 390, 56 P.3d 692 (2002); *State v. Graves, supra* note 14; *Com. v. Coren*, 437 Mass. 723, 774 N.E.2d 623 (2002); *State v. Davis*, 311 P.3d 538 (Utah App. 2013).

[21] See, *Com. v. Coren, supra* note 20; *People v. Howard*, 226 Mich. App. 528, 575 N.W.2d 16 (1997).

[22] *State v. Nolan*, 292 Neb. 118, 135, 870 N.W.2d 806, 822 (2015).

[23] *Id.*

In *U.S. v. Hernandez-Muniz*,[24] the court found no misconduct based on the prosecutor's statements in closing arguments urging that the jury would "'have to agree that there were some lies told during the course of this case'" and characterizing the defendant's statement as "a 'lie'" after drawing the jury's attention to conflicting testimony among the defendant and other witnesses. The court stated that while a prosecutor would be well advised to avoid directly accusing a defendant of lying,[25] the comments, in context, were not improper. They were in response to arguments by opposing counsel and were only a commentary on the evidence.

In *U.S. v. Delgado*,[26] the court similarly held that the prosecutor did not commit misconduct by arguing in closing arguments that the defendant had lied. The court noted that "context is crucial"[27] and that the prosecutor's statement was made in response to defense counsel's attack of government witnesses and after a detailed summary of the evidence. The statement that the defendant lied, the court explained, was a commentary on what the evidence showed; it was not an assertion of the prosecutor's personal opinion or an attack on the defendant's character.[28] The court also distinguished asserting that the defendant had lied from describing the defendant as a liar.[29] Finally, the court placed weight on the fact that the prosecutor did not use "'expressions such as "I think," "I know," "I believe,"'" or other expressions that convey a personal opinion.[30]

Here, the prosecutor did not call Gonzales a "liar" and did not preface any statement in a way that conveyed a personal

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[24] *U.S. v. Hernandez-Muniz*, 170 F.3d 1007, 1012 (10th Cir. 1999).

[25] *Id.*

[26] *U.S. v. Delgado, supra* note 20.

[27] *Id.* at 335.

[28] *U.S. v. Delgado, supra* note 20.

[29] *Id.*

[30] *Id.* at 337.

opinion. To the contrary, the statements complained of on appeal were in the context of a detailed summation of the evidence. The prosecutor's comments were also in response to defense counsel's emphasis on the number of times that Gonzales denied committing the crime. The prosecutor's statements are properly viewed as a commentary on the evidence presented at trial, as opposed to an expression of personal opinion.

We encourage prosecutors to preface any questionable statements with the phrase, "the evidence shows." But viewed in context, it is clear that the prosecutor's statement that Gonzales lied, as well as the prosecutor's dramatic summations of defense counsel's theories as "science fiction" and the like, was nothing more than commentary on what the prosecutor believed the evidence showed. We do not conclude that the prosecutor was stating a personal belief based on personal knowledge. Thus, we find no misconduct.

(b) Were Statements Prejudicial?

[9] In any event, the statements complained of in this appeal were not unfairly prejudicial. Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.[31] In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, we consider the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.[32]

[10] Hyperbole in closing arguments is hardly rare, and juries should be given credit for the ability to filter out

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[31] *State v. McSwine, supra* note 4.

[32] *Id.*

oratorical flourishes.[33] In this case, the alleged prosecutorial misconduct was limited to statements made in closing arguments and did not inundate the trial. The objected-to statements were largely hyperbole. And the court gave a lengthy curative instruction. In that curative instruction, the court emphasized for the jury that the prosecutor's comments were not evidence and that the jurors were to disregard any of the prosecutor's comments regarding Gonzales' credibility.

[11] The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. Consequently, "the aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'"[34] The prosecutor's comments in this case, even if they could be considered misconduct, did not deprive Gonzales of his right to a fair trial.

2. Jury Instructions

We turn next to Gonzales' assignment of error concerning the jury instructions. Gonzales asserts that the court erred by failing to instruct for first degree murder that the jury must find the "negative element" that the killing was not upon a sudden quarrel.[35] He also asserts that he was prejudiced because the trial court failed to specify in the definition of sudden quarrel that provocation negates the element of malice.

[12,13] In reviewing a claim of prejudice from jury instructions given or refused, the appellant has the burden to show that the allegedly improper instruction or the refusal to give the requested instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[36] To

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[33] *State v. Barfield, supra* note 9.

[34] *Smith v. Phillips*, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).

[35] Brief for appellant at 41. See *State v. Hinrichsen*, 292 Neb. 611, 877 N.W.2d 211 (2016).

[36] *State v. Casterline, supra* note 2.

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.[37]

[14] It is the duty of the trial court, in homicide cases, to instruct only on those degrees of homicide that find support in the evidence.[38] And where the evidence shows that the defendant purposely pointed a loaded gun at another and pulled the trigger, and there is no evidence of a sudden quarrel or other condition that might permit a finding that there was an absence of malice, then the court is not required to give an instruction that would permit the jury to render a verdict of manslaughter.[39] We conclude that Gonzales' tendered instructions were not warranted by the evidence, because the facts do not permit a finding that the shooting of Bonnie was without malice and upon a sudden quarrel.

[15,16] Sudden quarrel manslaughter is distinguished from second degree murder by the fact that the killing, even if intentional, was the result of a legally recognized provocation, i.e., the sudden quarrel, as that term has been defined by our jurisprudence.[40] Such provocation is an extenuating circumstance that mitigates the killing.[41] The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.[42]

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[37] *Id.*

[38] *State v. Freeman*, 201 Neb. 382, 267 N.W.2d 544 (1978).

[39] See *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982).

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

[41] See *id.*

[42] *Id.*

[17] The test is an objective one.[43] A passion for revenge will not mitigate murder to manslaughter.[44] Qualities peculiar to the defendant which render him or her particularly excitable are not considered.[45] The concept of manslaughter was not intended to excuse a defendant's subjective personality flaws.[46] "The concept of manslaughter '"is a concession to the infirmity of human nature, not an excuse for undue or abnormal irascibility. . . ."'"[47]

A quarrel is generally defined as an altercation, an angry dispute, or an exchange of recriminations, taunts, threats, or accusations between two persons.[48] A quarrel justifying the lesser offense of manslaughter is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.[49] It is "'"severe"'" provocation.[50]

[18,19] And it is not the provocation alone that reduces the grade of the crime; it is also the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.[51] Thus, if there was enough time between the provocation and the killing for a reasonable person to reflect on the intended course of action, then the mere presence of passion does not reduce the crime below murder.[52] The inquiry is whether the suspension

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[43] *Id.*

[44] See 2 Wayne R. LaFave, Substantive Criminal Law § 15.2 (2d ed. 2003).

[45] *Id.*

[46] *State v. Dubray, supra* note 13.

[47] *State v. Lyle*, 245 Neb. 354, 364, 513 N.W.2d 293, 302 (1994), quoting *Com. v. Pirela*, 510 Pa. 43, 507 A.2d 23 (1986).

[48] See *State v. Morrow*, 237 Neb. 653, 467 N.W.2d 63 (1991).

[49] *Id.*

[50] See *State v. Cave*, 240 Neb. 783, 790, 484 N.W.2d 458, 464 (1992).

[51] See *id.*

[52] See *State v. Lyle, supra* note 47.

of reason reasonably continued from the time of provocation until the very instant of the act producing death took place.[53] "'[I]f, from any circumstances whatever shown in evidence, it appears that the [defendant] reflected and deliberated, or if in legal presumption there was time or opportunity for cooling, the provocation [cannot] be considered by the jury in arriving at [its] verdict.'"[54]

Assuming without deciding that the alleged provocation in this case was sufficient to cause a reasonable person to act rashly and from passion, the evidence failed to permit a finding that any such suspension of reason reasonably continued from the time of the provocation until the time Bonnie was killed. The shooting occurred at least 5 hours from the time of the alleged sexual assault and at least 2 hours from the time that the teasing about that encounter had ceased. The evidence was uncontroverted that when being teased at the trailer, Gonzales threatened to go get a gun and come back and shoot people. If the jury believed that Gonzales was the shooter, the evidence was that he did precisely that. Gonzales retrieved a gun, arranged a ride back to the trailer, and shot Bonnie 16 times. Both the length of time from the allegedly sufficient provocation and the calculating nature of leaving the scene to retrieve a weapon indicate that the killing did not occur under a reasonably continuing suspension of reason.

In cases where there was a much shorter cooling-off period, but the defendant left the scene of the provocation and returned later with a weapon, we have held that the evidence did not support an instruction on manslaughter. For instance, in *State v. Lyle*,[55] we held that the 20-minute time period between the provocation and the killing, in which time the defendant left, obtained a gun, and returned to the vicinity of the fight, was inconsistent with sudden quarrel manslaughter.

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[53] See *id.*

[54] *Id.* at 360, 513 N.W.2d at 300.

[55] *State v. Lyle, supra* note 47.

Similarly, in *State v. Freeman*,[56] we held that there was no evidence from which a jury could infer that the murder was upon a sudden quarrel when the victim was stabbed 14 times after the defendant had gone to the kitchen to procure the knife and returned to the victim's bedroom.

Furthermore, Gonzales did not kill Elmer, Rave, or any other person who allegedly provoked him. He killed Bonnie, who by all accounts was involved in these events only to the extent that she asked everyone to leave the trailer. There was no evidence of any kind of quarrel between Bonnie and Gonzales before she was shot.

The majority rule is that the lesser crime of manslaughter may be justified when the defendant kills a third party who was not responsible for the acts of provocation when (1) the defendant is mistaken that the person is responsible for the acts of provocation or (2) the defendant attempts to kill the provoker but accidentally kills an innocent bystander.[57] But courts have consistently held that it is not manslaughter when the defendant strikes out in rage and intentionally kills a person known by the defendant at the time to be innocent of the provocation.[58]

[20] The legal assumption is that a reasonable person would never be so greatly provoked as to intentionally strike out in anger at an innocent person.[59] Thus, in *State v. Bautista*,[60] we held that it was not error for the trial court to refuse to instruct on manslaughter when the defendant went back to a bar looking for the man he had been in a fight with and, not finding him, killed the provoker's father.

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[56] *State v. Freeman, supra* note 38.

[57] See 2 LaFave, *supra* note 44 (and cases cited therein).

[58] See *id*.

[59] See *id*.

[60] *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975). See, also, *State v. Cave, supra* note 50.

There was no evidence from which the jury could have concluded that Gonzales had mistaken Bonnie for someone else, had accidentally struck her while aiming his weapon at a provoker, or was blindly striking out in an immediate response to provocation. Instead, the killing appears to be an act of vengeance upon the only person Gonzales could find present when he returned to the trailer with a gun. And, as stated, a passion for revenge will not mitigate murder to manslaughter.[61] Even if the shooting could be viewed as an act less subjectively calculating, the evidence supports nothing more than undue irascibility, which is likewise not grounds for a manslaughter instruction.[62] A reasonable person under the provocation alleged in this case would not intentionally shoot a person indisputably innocent of the provocation, especially given the lengthy cooling-off period that had passed.

For these reasons, we conclude that the evidence did not support a finding of sudden quarrel manslaughter. Because the evidence did not support a finding of sudden quarrel manslaughter, there can be no reversible error based on the alleged deficiencies in the instructions on sudden quarrel manslaughter.

3. Sufficiency of Evidence

[21] Lastly, we address Gonzales' claim that the evidence was insufficient to support the verdict. 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.[63] The relevant question for an appellate court

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[61] See 2 LaFave, *supra* note 44.

[62] *State v. Lyle, supra* note 47.

[63] *State v. Casterline, supra* note 2.

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.

There was evidence that on the day of the killing, Gonzales had threatened to return to the trailer and shoot the place up like a "fireworks show." Eyewitness reports of the shooter generally match the description of Gonzales as he appeared that day, and one eyewitness described the getaway vehicle as being of a make, model, and color similar to the car belonging to Gonzales' cousin Anthony. Gonzales' relatives testified that Gonzales' whereabouts could not be confirmed for a period of time close to the time of the shooting. Rodriguez and Anthony testified that they picked Gonzales up at the Atokad Trailer Park, even though numerous other witnesses attested that Whitebear had driven Gonzales home from the party, and Gonzales claimed that he did not return to the trailer park after going home. When Gonzales was arrested, there was gun residue on his hands, he had showered, the clothes he wore the day of the killing were never located, and Gonzales told officers that if they did find his clothes, they might find his blood on his shirt. The evidence was sufficient to convict Gonzales of first degree murder and use of a firearm to commit a felony.

VI. CONCLUSION

For the foregoing reasons, we find no merit to Gonzales' assignments of error. We affirm the judgment of the trial court.

Affirmed.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

Dennis "DJ" Nichols, appellee and cross-appellant, v. Fairway Building Products, L.P., and its workers' compensation insurer, Pennsylvania Manufacturers' Association Insurance Co., appellants and cross-appellees.

884 N.W.2d 124

Filed September 2, 2016. No. S-15-888.

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.** When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.
4. **Workers' Compensation.** As the trier of fact, the single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
5. **Workers' Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.

6. **Workers' Compensation: Evidence: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2014), an appellate court may modify an award of the compensation court when there is not sufficient competent evidence in the record to support the award.
7. **Workers' Compensation: Appeal and Error.** For the purposes of Neb. Rev. Stat. § 48-125 (Supp. 2015), a reasonable controversy exists if (1) there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court about an aspect of an employee's claim, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.
8. **Workers' Compensation: Trial: Testimony.** When there is some conflict in the medical testimony adduced at trial, reasonable but opposite conclusions could be reached by the compensation court.

Appeal from the Workers' Compensation Court: John R. Hoffert, Judge. Affirmed as modified.

Christopher A. Sievers, of Prentiss Grant, L.L.C., for appellants.

Christa Binstock Israel, of Atwood, Holsten, Brown, Deaver & Spier Law Firm, P.C., L.L.O., for appellee.

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

Wright, J.

NATURE OF CASE

Fairway Building Products, L.P., and its workers' compensation insurer, Pennsylvania Manufacturers' Association Insurance Co. (collectively Fairway), appeal, and the claimant, Dennis "DJ" Nichols, cross-appeals from an award entered by the Nebraska Workers' Compensation Court in favor of Nichols. The court found that Nichols was permanently and totally disabled as a result of his workplace injury. It determined that Nichols was entitled to temporary total and temporary partial disability benefits for the periods and amounts

stipulated by the parties. In addition, it awarded permanent total disability benefits of $440.27 per week for as long as Nichols remains permanently and totally disabled, plus past and future medical benefits.

BACKGROUND

On June 18, 2012, Nichols was operating a forklift in the course of his employment with Fairway when the hydraulic lift dock supporting the forklift collapsed, causing the forklift and Nichols to suddenly drop approximately 8 inches. Nichols sought medical treatment later that day, complaining of "piercing" midback to low-back pain that had been persistent for several hours, which he attributed to the forklift accident. An x ray was performed, which did not reveal any abnormalities. Nichols was prescribed a pain medication and was advised to limit lifting, twisting, and bending, apply ice or heat to the area, and take ibuprofen or another over-the-counter pain reliever as needed.

Nichols testified that he experienced persistent and worsening back pain over the next few months, which gradually extended into his legs and caused urinary urgency and discomfort. He testified that he continued to work through the pain, because he was involved in a child custody dispute at that time and was concerned that if he were restricted from working, he would lose custody of his children.

On July 22, 2012, Nichols presented to a medical clinic reporting "sharp" abdominal pain and discomfort when urinating. Nichols testified that he was still experiencing back pain at that time, but did not know that urinary symptoms could be associated with a low-back injury. His doctor prescribed a pain medication and ordered a urinalysis, which did not show any abnormalities.

Nichols presented to a urology clinic on October 11, 2012. He reported midback and low-back pain with radiation to the abdomen and continued urinary urgency. Due to his history of kidney stones, the doctor ordered a CT scan, which showed a very small nonobstructing renal stone. The doctor noted

possible swelling in the paraspinous muscles on the left lower thoracic area of Nichols' back, and gave him a shot of medication for his pain. The doctor indicated in the report that she did not believe the kidney stone was the source of Nichols' pain, and recommended that he follow up with his primary care doctor regarding his back pain.

Nichols called to schedule an appointment that day, and he was seen the following week on October 15, 2012. The report indicates that he presented with "chronic lumbar back pain," which occurred "without any known injury." However, Nichols testified that his pain had been persistent since the work accident on June 18, 2012. He was prescribed various pain medications and instructed to follow up if his pain did not resolve.

Nichols returned to the clinic on October 24, 2012. Because his pain had continued despite treatment, the doctor ordered an MRI of his lumbar spine. The MRI confirmed multiple bulging and ruptured disks, at which point Nichols was referred to a specialist and advised not to return to work until further notice.

On November 1, 2012, Nichols was seen by a specialist at a neurological and spinal surgery clinic. The following history was noted in the report: "The patient was injured while driving a forklift at work in June 2012. . . . Since that time, the patient has had low back pain and bilateral leg tingling and numbness at times in bilateral feet. The patient states he cannot sit. His low back pain continues to worse[n]." The report further indicated that Nichols had "[l]umbar spondylosis and lumbago with disc protrusion at Lumbar 3 with superior migration on the right and Lumbar 5 with some extension to the left Sacral 1 nerve." It was not felt that surgery was the best option at that point, so Nichols was referred to another doctor for an evaluation to determine nonsurgical treatment options.

After attempting physical therapy and other nonsurgical treatments without much success, Nichols underwent surgery on November 28, 2012, to remove a large extruded disk at

L3-4. His pain improved slightly after the surgery, but it did not provide meaningful or long-lasting relief. He tried additional physical therapy and continued to take pain medications, but was still having low-back pain that radiated down his legs and into his feet. Eventually, Nichols underwent two additional surgeries with Dr. Daniel Ripa, including an anterior lumbar interbody fusion across L3-4, L4-5, and L5-S1 on June 26, 2013, and a decompression of the right L4-5 and right L5-S1 on March 19, 2014.

Ripa determined that Nichols reached maximum medical improvement on July 17, 2014, and recommended several permanent physical restrictions. He recommended that Nichols never lift more than 20 pounds and not more than 10 pounds repetitively, not lift anything below knee level or above shoulder level, and avoid bending, stooping, squatting, crouching, or climbing. Additionally, Ripa opined that Nichols would be unable to sit for more than 20 minutes at a time without the opportunity to either stand or recline, nor would he be expected to stand for more than 20 minutes at one time without the opportunity to either sit down or move about.

Nichols timely filed a workers' compensation claim for low-back and psychological injuries allegedly sustained as a result of the June 18, 2012, incident. Prior to trial, the parties stipulated that if Nichols' injuries were found to be compensable, Nichols was entitled to temporary total disability benefits for the specified time periods set forth in the "Plaintiff's Pretrial Statement" and exhibit 33.

There was conflicting evidence presented at trial regarding the issue of causation. Nichols presented evidence from Ripa, who diagnosed Nichols with numerous lumbar spine injuries and expressed his opinion, within a reasonable degree of medical certainty, that those injuries were more likely than not caused and/or permanently aggravated by the June 18, 2012, work accident.

Fairway attempted to show, through a number of previous accidents and injuries, none of which were disclosed to Ripa,

that Nichols had actually suffered from back injuries prior to the June 18, 2012, workplace incident. Fairway presented evidence that (1) Nichols was involved in a motor vehicle accident in 1994 which required treatment for his neck and midlumbar spine area; (2) Nichols was treated for back pain in December 2002 after he operated a forklift with a bouncy seat; and (3) Nichols was treated for another work-related back injury in September 2006, after he slipped and fell while stepping off a forklift. Nichols testified that he could not recall those incidents and that they did not cause him any ongoing back problems.

Fairway also retained Dr. Dennis Bozarth to examine Nichols and provide his medical opinions regarding the cause of Nichols' injuries. Upon his initial examination on November 16, 2012, Bozarth could not to a reasonable degree of medical certainty link Nichols' back pain to the accident at issue, but he did acknowledge that "the accident at work was the initiating cause of his subjective complaints of back pain." After reviewing additional records provided by Fairway in December 2012, Bozarth stated that the "records do confirm . . . Nichols' history as presented" and that "surgery was done in an attempt to relieve symptoms that, more likely than not, started from the industrial accident of June 18, 2012." However, 2 years later, in November 2014, Bozarth opined that it was very difficult to say which diagnoses/injuries were attributable to the accident, and he could not state to a reasonable degree of medical certainty that the accident caused any damage to Nichols. He concluded that, without any further documentation, he believed Nichols' June 18, 2012, accident "was an exacerbation of back pain and resolved within 12 weeks after the incident."

The compensation court found that Ripa's opinions were more persuasive than those offered by Bozarth. Regarding the evidence of prior back injuries, the court noted that they occurred 6 to 18 years prior to the accident at issue in this case and that there was no evidence they required extended

medical care or otherwise resulted in any ongoing difficulties for Nichols.

The court ultimately concluded that Nichols was permanently and totally disabled as a result of the low-back and psychological injuries he sustained during the June 18, 2012, work accident. It determined that Nichols was entitled to certain periods of temporary total and partial disability, as stipulated by the parties. The compensation court correctly listed those periods of temporary total disability to which the parties had stipulated, but miscalculated the sum of those periods to be 55.4286 weeks, rather than the actual 81.857 weeks as stipulated by the parties. In addition to the stipulated benefits, the court also awarded permanent total disability benefits of $440.27 per week for as long as Nichols remains permanently and totally disabled, plus past and future medical expenses.

Fairway timely filed a notice of appeal on September 21, 2015, but then filed a "Withdrawal of Appeal" 2 days before its initial brief was due to be filed. Before the motion to dismiss the appeal had been ruled upon, Nichols timely filed a notice of intent to cross-appeal. Pursuant to Neb. Ct. R. App. P. § 2-108(D), the case was ordered to proceed as though Nichols had been the initial appellant. Section 2-108(D) states:

> Time for Response of Appellees. A motion to dismiss filed by appellant will be submitted to the court 14 days after it is filed with the Supreme Court Clerk or after service upon opposing counsel, whichever is later. Appellee's response to the motion must be made within 14 days. Any party having a right of cross-appeal at the time the motion to dismiss is filed may, within the 14-day period provided in this rule, file a notice of intention to cross-appeal. Upon the filing of such notice, the court shall deny the motion to dismiss and shall fix a brief day for the cross-appellant. The cause shall then proceed as if the appeal had originally been perfected by the appellee who has cross-appealed.

However, as the case has been docketed, Fairway remains the appellant and cross-appellee and Nichols is the appellee and cross-appellant.

ASSIGNMENTS OF ERROR

Fairway assigns, combined and restated, that the award was not supported by competent evidence and that the compensation court erred in relying on a medical opinion that was based on false and incomplete information.

On cross-appeal, Nichols assigns that the compensation court erred by miscalculating the number of weeks for which Nichols was entitled to temporary total disability benefits. Though not assigned as error, Nichols also claims that Fairway is subject to a 50-percent waiting-time penalty because Fairway filed an appeal with no basis in law or fact.[1]

STANDARD OF REVIEW

[1-3] 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] When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable

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[1] See Neb. Rev. Stat. § 48-125 (Supp. 2015).

[2] *Hynes v. Good Samaritan Hosp.*, 291 Neb. 757, 869 N.W.2d 78 (2015).

[3] *Id.*

to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence.[4]

ANALYSIS

This case presents conflicting expert opinions on whether Nichols' injuries were causally related to the workplace incident on June 18, 2012. Nichols' expert, Ripa, opined within a reasonable degree of medical certainty that Nichols' injuries were more likely than not caused and/or permanently aggravated by the June 18 work accident. Fairway's expert, Bozarth, disagreed and stated that it was very difficult to say which injuries were attributable to the accident and that he could not say to a reasonable degree of medical certainty that the accident caused any damage to Nichols.

Fairway argues on appeal that Ripa's medical opinion was unreliable because Nichols did not inform Ripa of his prior back injuries. This is essentially a foundational objection to Ripa's expert medical opinion. However, the exhibits containing Ripa's opinion were received into evidence without objection. Because Fairway did not make an objection on these grounds before the compensation court, it failed to preserve its foundational argument for our review.[5]

[4,5] As the trier of fact, the single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.[6] Where the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.[7] Here, the compensation court accepted Ripa's opinion and determined that

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[4] *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

[5] See *id.*

[6] *Id.*

[7] *Id.*

Nichols suffered a compensable work-related injury. We find no clear error in its determination.

On cross-appeal, Nichols claims that the lower court miscalculated the number of weeks for which he was entitled to temporary total disability benefits to a sum of 55.4286 weeks, when the periods stipulated by the parties actually totaled 81.857 weeks. Fairway agrees with Nichols on this point, but contends that the issue is moot because Fairway has already paid Nichols for "82.2 weeks" of temporary total disability.[8] Nichols asserts that the issue is not moot, because it could result in Fairway receiving an unintended credit against the remaining benefits due. Nichols requests that this court modify the award to correct the miscalculation.

[6] Pursuant to § 48-185, this court may modify an award of the compensation court when there is not sufficient competent evidence in the record to support the award. Both parties agree that the compensation court miscalculated the total number of weeks for which Nichols was entitled to temporary total disability benefits. The periods of temporary total disability, as stipulated by the parties, amount to a sum of 81.857 weeks, rather than the sum of 55.4286 weeks stated in the award. We agree with Nichols that such error could result in an unintended credit against the remaining benefits due, given that the award states that Fairway is entitled to a credit for benefits already paid. We therefore modify the award to reflect 81.857 weeks of temporary total disability benefits awarded.

Nichols also raises a claim for penalties under § 48-125, which authorizes a 50-percent payment for waiting time involving delinquent payment of compensation and attorney fees where there is no reasonable controversy regarding an employee's claim for workers' compensation. Nichols points to our decision in *Roth v. Sarpy Cty. Highway Dept.*,[9] holding that an employer is subject to a 50-percent waiting-time penalty if

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[8] Brief for appellants at 9.

[9] *Roth v. Sarpy Cty. Highway Dept.*, 253 Neb. 703, 572 N.W.2d 786 (1998).

it appeals an award when there is no actual basis in law or fact for continuing to dispute the employee's claim. Fairway argues that a penalty is not warranted, because there is a reasonable controversy in this case.

[7,8] For the purposes of § 48-125, a reasonable controversy exists if (1) there is a question of law previously unanswered by the Supreme Court, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the compensation court about an aspect of an employee's claim, which conclusions affect allowance or rejection of an employee's claim, in whole or in part.[10] We have held that when there is some conflict in the medical testimony adduced at trial, reasonable but opposite conclusions could be reached by the compensation court.[11]

We find that Bozarth's opinion was sufficient to establish a reasonable controversy regarding the cause of Nichols' injuries. Therefore, we decline to award a waiting-time penalty under § 48-125.

CONCLUSION

For the reasons set forth above, we affirm the judgment of the compensation court, but modify the award of temporary total disability to reflect a total of 81.857 weeks of temporary total disability, in accordance with the parties' stipulation.

Affirmed as modified.

Connolly, J., not participating.

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[10] *Armstrong v. State*, 290 Neb. 205, 859 N.W.2d 541 (2015).

[11] See *id.*

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

Barney D. Meyer, appellee, v. Scott R. Frakes, director, Nebraska Department of Correctional Services, et al., appellants.

884 N.W.2d 131

Filed September 2, 2016. No. S-16-417.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Habeas Corpus.** Where a party is unlawfully restrained of his or her liberty, the writ of habeas corpus is the appropriate remedy.
3. ____. Habeas corpus is a collateral proceeding and as such cannot be used as a substitute for an appeal or proceedings in error.
4. **Habitual Criminals: Sentences.** A separate sentence for the nonexistent crime of being a habitual criminal is void.
5. **Criminal Law: Habitual Criminals.** Habitual criminality is a state, not a crime. There is no such offense as being a habitual criminal.
6. **Sentences.** A sentence outside of the period authorized by the relevant sentencing statute is merely erroneous and is not void.
7. **Habeas Corpus: Judgments: Sentences.** Habeas corpus will not lie upon the ground of mere errors and irregularities in the judgment or sentence rendering it not void, but only voidable.
8. **Double Jeopardy: Sentences.** Where a defendant has a legitimate expectation of finality, then an increase in his or her sentence in a second proceeding violates the prohibition of the Double Jeopardy Clause against multiple punishments for the same offense.
9. **Sentences: Notice.** A defendant may acquire a legitimate expectation of finality in an erroneous sentence if the sentence has been substantially or fully served, unless the defendant was on notice that the sentence might be modified.

Appeal from the District Court for Lancaster County: Jodi Nelson, Judge. Affirmed.

Douglas J. Peterson, Attorney General, George R. Love, and Kale Burdick for appellants.

Gerald L. Soucie for appellee.

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

Per Curiam.

On April 20, 2016, the district court for Lancaster County granted a writ of habeas corpus to Barney D. Meyer. This matter arises from an appeal filed by Scott R. Frakes, director of the Nebraska Department of Correctional Services; Richard Cruickshank, warden of the Nebraska State Penitentiary; and the Nebraska Department of Correctional Services (collectively the appellants). As of the date of this opinion, Meyer remains in the custody of the department because he is unable to meet the conditions of his bond imposed by the district court. For the reasons set forth, we sustain Meyer's motion for summary affirmance and direct that Meyer be released from custody forthwith.

BACKGROUND

Convictions and Sentences

Meyer was sentenced by the district court for Pierce County, Nebraska, on March 29, 2012, in case No. CR11-12, to an indeterminate prison term of 2 to 4 years for the crime of theft by receiving stolen property. He was given credit for 54 days already spent in custody. This sentence was ordered to be served consecutively to another sentence imposed in case No. CR11-29 on the same day.

In case No. CR11-29, Meyer was charged in the information with count I, burglary, a Class III felony, and with "Count II — Enforceable as a Habitual Criminal." The court sentenced Meyer on count I to an indeterminate prison term of 2 to 4 years. He was given credit for 165 days. On count II, habitual criminal, Meyer was convicted and sentenced to an indeterminate prison term of 10 years. It was ordered that the

sentences in case No. CR11-29 were to be served concurrently to one another, but consecutively to the sentence imposed in case No. CR11-12. Neither the State nor Meyer appealed the convictions or sentences imposed in either case No. CR11-12 or case No. CR11-29.

Writ of Habeas Corpus

Meyer petitioned the district court for a writ of habeas corpus, alleging that the sentence imposed in count II of the information in case No. CR11-29, habitual criminal, was a void sentence. Meyer alleged he had served the valid sentences imposed for theft in case No. CR11-12 and for burglary in case No. CR11-29. He alleged that he is now being held beyond the lawful term of his sentences and is entitled to be discharged.

The district court granted the writ of habeas corpus. The court concluded that as to count II in case No. CR11-29, the separate offense of being a habitual criminal was a void sentence.

The court relied in part upon *State v. Rolling*,[1] in which we stated that the habitual criminal statute did not establish a separate offense. We held that the habitual criminal statute provides an enhancement of the penalty for a felony conviction where one is also found to be a habitual criminal.

In *Rolling*, the defendant was charged with four substantive felonies: two felony theft offenses, attempted armed robbery, and use of a weapon to commit a felony. He was additionally charged with a fifth count of being a habitual criminal. He was found guilty of the four substantive felonies and sentenced by the trial court on the first four counts to terms of imprisonment, none of which exceeded 10 years. He was also sentenced to a term of imprisonment as a habitual criminal. He appealed, claiming that the evidence was insufficient to have found him guilty and that the sentences imposed were too harsh and an abuse of discretion.

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[1] *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981).

On direct appeal, we found plain error in the sentencing of the defendant separately as a habitual criminal and pointed out that under the provisions of Neb. Rev. Stat. § 29-2221 (Reissue 1979), one is not sentenced as a habitual criminal. The habitual criminal statute is not a separate offense, but provides an enhancement of a penalty with a minimum prison sentence of 10 years and a maximum sentence of 60 years.

In *Rolling*, we stated that *State v. Gaston*[2] set forth the proper procedure to be followed. In *Gaston*, the defendant was found guilty of forgery and, in a subsequent proceeding, of being a habitual criminal. The district court, instead of imposing one sentence on the forgery conviction for the mandatory minimum prison sentence of 10 years and a maximum sentence of 60 years required by § 29-2221, imposed separate prison sentences of 1 to 2 years on the forgery conviction and 20 to 30 years on the conviction under § 29-2221. On the day the sentence was pronounced, the court committed the defendant to the Nebraska Penal and Correctional Complex by entering a formal written journal entry of judgment and commitment for an indeterminate prison term of 20 to 30 years on the charge of forgery and being a habitual criminal. We held that the written entry of judgment stated a proper sentence, but that it did not conform to the two sentences imposed in open court.

The defendant in *Gaston* contended on direct appeal that the second and separate habitual criminal sentence was illegal and void. We stated that "[o]n direct appeal this court has the power to remand a cause for a lawful sentence where the one pronounced was void as being beyond the power of the trial court to pronounce and where the accused himself invoked appellate jurisdiction for the correction of errors."[3]

But here, the district court, in granting Meyer habeas relief, found most apposite *Kuwitzky v. O'Grady*,[4] which presented

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[2] *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974).

[3] *Id.* at 123, 214 N.W.2d at 377. See, also, *State v. Rolling, supra* note 1.

[4] *Kuwitzky v. O'Grady*, 135 Neb. 466, 282 N.W. 396 (1938).

a habeas action attacking the validity of the habitual criminal sentence, rather than through a direct appeal, as was the case in *Rolling* and *Gaston.* The court found *Kuwitzky* was nearly identical to the case at bar. The petitioner in *Kuwitzky* petitioned for a writ of habeas corpus, claiming his sentence under a second count for being a habitual criminal was null and void. The trial court denied the writ, and the petitioner appealed. We reversed the trial court's decision, concluding that the petitioner had been improperly sentenced separately as a habitual criminal and that he was unlawfully imprisoned and entitled to be released and discharged.

In the present case, the court found that Meyer was similarly wrongfully sentenced in a separate count for being a habitual criminal. It concluded the sentence for being a habitual criminal was void. It granted the petition for writ of habeas corpus, concluding that Meyer was being held on a void sentence. Pursuant to Neb. Rev. Stat. § 29-2823 (Reissue 2008), the court set the matter for hearing for the determination of bond pending the appeal. As of this date, Meyer remains in the custody of the appellants, having been unable to meet the conditions for bond imposed by the district court.

STANDARD OF REVIEW

[1] On appeal of a habeas corpus 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] The writ of habeas corpus has long been recognized in Nebraska. Where a party is unlawfully restrained of his or her liberty, the writ of habeas corpus is the appropriate remedy.[6] In an action for a writ of habeas corpus, including one which challenges extradition proceedings, the burden of proof is upon the petitioner to establish a claim that his or her

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[5] *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94 (2009).

[6] *Rose v. Vosburg*, 107 Neb. 847, 187 N.W. 46 (1922).

detention is illegal.[7] Habeas corpus is a collateral proceeding and as such cannot be used as a substitute for an appeal or proceedings in error.[8]

In his petition for writ of habeas corpus, Meyer alleges that the sentence imposed for being a habitual criminal in case No. CR11-29 is a void sentence. He further alleges that he has served the valid sentences imposed in cases Nos. CR11-12 and CR11-29 and that he is now being held beyond the lawful term of his sentences and is entitled to be discharged.

In addressing his motion for summary affirmance, two questions are presented. First, Is being a habitual criminal a separate crime for which Meyer can be sentenced separately, such that his separate 10-year prison sentence for being a habitual criminal that he is currently serving is valid? Second, Is the sentence served by Meyer on the conviction for burglary a facially valid sentence that has been fully served by Meyer and cannot now be collaterally attacked by the State in an attempt to increase that sentence?

Habitual Criminal

[4,5] As to the first question, the parties do not dispute that the habitual criminal statute is not a separate offense and that it instead provides an enhancement of the conviction committed by one found to be a habitual criminal.[9] As already described, in *Rolling*,[10] we held that the habitual criminal statute is not a separate offense, but, rather, provides an enhancement of the penalty with a minimum prison sentence of 10 years and a maximum sentence of 60 years for each count committed by one found to be a habitual criminal. And in other cases, such as *Kuwitzky*, which presented collateral attacks on the separate sentence for being a habitual criminal, we have explained that a separate sentence for the nonexistent

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[7] *Dovel v. Adams*, 207 Neb. 766, 301 N.W.2d 102 (1981).

[8] *Sileven v. Tesch*, 212 Neb. 880, 326 N.W.2d 850 (1982).

[9] See *State v. Rolling, supra* note 1.

[10] *Id.*

crime of being a habitual criminal is void.[11] Habitual criminality is a state, not a crime.[12] There is no such offense as being a habitual criminal.[13]

Having thus held that the habitual criminal statute is not a separate offense and cannot be charged and sentenced as such, we hold that Meyer's separate sentence of being a habitual criminal is void. This is not a contention disputed by either party. We proceed to determine whether the sentence served by Meyer on his conviction for burglary was a valid sentence which has now been served by Meyer.

Sentence for Burglary

The appellants assert as to the second question that Meyer's continued detention is not illegal, because his burglary sentence should have been enhanced to a minimum prison term of 10 years. They claim that by challenging the separate sentence for being a habitual criminal, Meyer has not challenged the "judgment" of the district court finding him to be a habitual criminal.[14] We are perplexed as to how Meyer's claim that his sentence to count II, habitual criminal, is void, leaves unchallenged a "judgment" of being a habitual criminal. In any event, the appellants argue that because the habeas corpus statute refers to having fully been "unlawfully" deprived of liberty or imprisoned "without any legal authority,"[15] they may collaterally attack the fully served burglary sentence in Meyer's habeas action. We disagree. Meyer has fully served two of the three sentences imposed by the court. Only the sentence he has not fully served is void.

We agree with the district court that *Kuwitzky* is factually similar to the case at bar. In *Kuwitzky*, we granted habeas

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[11] See, *Gamron v. Jones*, 148 Neb. 645, 28 N.W.2d 403 (1947); *Kuwitzky v. O'Grady, supra* note 4.

[12] See *Kuwitzky v. O'Grady, supra* note 4.

[13] See *id.*

[14] Brief for appellants at 6.

[15] See Neb. Rev. Stat. § 29-2801 (Reissue 2008).

relief for a petitioner who had fully served his unenhanced sentence and who had also been separately sentenced for being a habitual criminal. The information had charged the petitioner with one count of burglary and a second count of being a habitual criminal. The petitioner had been convicted of several prior felonies, and he pled guilty to both counts. The petitioner was sentenced to prison terms of 5 years on the burglary count and 10 years for the habitual criminal count. The sentences were ordered to run concurrently.[16]

The parties stipulated that the petitioner had served his first prison sentence of 5 years under the first count and that he had also served 2 months 16 days of the sentence given for being a habitual criminal. The question was whether his continued detention in the penitentiary was lawful.

We explained that the previous convictions on the several felonies alleged would, if proved, show that the petitioner was a habitual criminal and permit his punishment for the act of burglary in count I to be increased, but that the trial court was without authority to render a distinct separate judgment and sentence upon count II, habitual criminal. The sentence on count II for being a habitual criminal was therefore void. Because the petitioner had fully served the sentence imposed for burglary, we concluded that the petitioner was being unlawfully imprisoned without due process of law and was entitled to be released and discharged.

The appellants assert that reliance on *Kuwitzky* is misplaced, because the State did not challenge therein the validity of the unenhanced burglary sentence. But in an action that released the petitioner from the total sentence the court intended to impose for the acts committed, we could have recognized, sua sponte, that the unenhanced burglary sentence was insufficient and that therefore, the petitioner was not unlawfully restrained. We did not do so. To the contrary, our conclusion that the petitioner's continuing incarceration was unlawful implicitly rejected any theory that the petitioner could continue to be

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[16] *Kuwitzky v. O'Grady, supra* note 4.

lawfully detained by virtue of the fact that there was a finding he was a habitual criminal and the burglary sentence failed to impose the mandatory minimum required by the habitual criminal statute.

Gamron v. Jones,[17] reiterates this point. In *Gamron*, we again found on habeas that a separate habitual criminal sentence was void. And in *Gamron*, the petitioner had not even been charged under an improper information; the court simply sentenced the petitioner to a separate prison term for being a habitual criminal, to be served consecutively to the prison term imposed for the underlying crime of chicken stealing.

Although the unenhanced 2-year sentence for the underlying crime had not yet been served, the petitioner argued he was unlawfully detained, because the 2-year prison sentence was in excess of the statutory maximum sentence of 1 year for that crime. Thus, the petitioner challenged the validity of both the separate sentence for being a habitual criminal and the unenhanced sentence for the underlying crime.

The State argued that the habitual criminal sentence and the unenhanced sentence for the underlying crime were but one sentence. We, however, saw "no reasonable basis for construing the judgment of the court to be other than one imposing two sentences."[18]

In response to the petitioner's attack on the sentence for chicken stealing, we emphasized that in contrast to a sentence for a nonexistent crime, failure by the court to impose a sentence inside of the mandatory statutory limits for a valid crime is erroneous only; it is not a void sentence subject to collateral attack in a habeas action.[19] We held that only the conviction and sentence to a separate offense of being a habitual criminal was void. We concluded that because the petitioner had not yet served the merely erroneous 2-year

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[17] *Gamron v. Jones, supra* note 11.

[18] *Id.* at 646, 28 N.W.2d at 404.

[19] See *Gamron v. Jones, supra* note 11.

sentence for chicken stealing, habeas corpus would not yet lie to secure his release.

[6] In several other cases, we have similarly said that a sentence outside of the period authorized by the relevant sentencing statute is merely erroneous and is not void.[20] "'If the court has jurisdiction of the person of the accused and of the crime charged in the information and does not exceed its lawful authority in passing sentence, its judgment is not void whatever errors may have preceded the rendition thereof.'"[21]

[7] Further, we have repeatedly held that habeas corpus will not lie on the ground that the sentence is merely erroneous.[22] We have explained that only an "absolutely void"[23] judgment is subject to collateral attack.[24] A judgment, even if erroneous, cannot be collaterally assailed.[25] Habeas corpus cannot take the place of a writ of error or a direct appeal.[26] Thus, "habeas corpus will not lie upon the ground of mere errors and irregularities in the judgment or sentence rendering it not void, but only voidable."[27]

Under this principle, we held in *Hickman v. Fenton*[28] that when there was no direct appeal or writ of error and the

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[20] See, *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009); *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005); *Hickman v. Fenton*, 120 Neb. 66, 231 N.W. 510 (1930). See, also, *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Alford*, 6 Neb. App. 969, 578 N.W.2d 885 (1998).

[21] *Hickman v. Fenton, supra* note 20, 120 Neb. at 70, 231 N.W. at 512.

[22] See, *McElhaney v. Fenton*, 115 Neb. 299, 212 N.W. 612 (1927); *In re Fanton*, 55 Neb. 703, 76 N.W. 447 (1898); *State v. Clark*, 17 Neb. App. 361, 762 N.W.2d 64 (2009); *State v. Wayt*, 13 Neb. App. 759, 701 N.W.2d 841 (2005).

[23] *Von Bokelman v. Sigler*, 175 Neb. 305, 309, 121 N.W.2d 572, 575 (1963).

[24] See *State v. Wessels*, 232 Neb. 56, 439 N.W.2d 484 (1989).

[25] *Id.*; *Shade v. Kirk*, 227 Neb. 775, 420 N.W.2d 284 (1988).

[26] See *Hulbert v. Fenton*, 115 Neb. 818, 215 N.W. 104 (1927).

[27] *Id.* at 821, 215 N.W. at 105.

[28] *Hickman v. Fenton, supra* note 20.

defendant had begun to serve his sentence, the district court had no power to vacate that sentence on the ground that it imposed a minimum period less than that mandated by the sentencing statute.

The sentencing court in *Hickman* had resentenced the defendant to a minimum prison term of 25 years in order to correct its prior error imposing a prison term of 3 to 5 years for a crime punishable by a mandatory minimum of 20 years. The defendant brought a habeas action on the ground that the second sentence was void, because the first sentence was not challenged on direct appeal or by petition in error, and he had already served the first sentence that imposed a prison term of 3 to 5 years. We found merit to the defendant's contention and granted habeas relief on the ground that he was being illegally detained—despite the fact that the sentence he had served was less than the mandatory minimum required by law for his crime.

In doing so, we again implicitly rejected any argument that the defendant was not illegally detained because his prison sentence of 3 to 5 years was less than the 20 years as required by law. Rather, we explicitly rejected the notion that the 3-to-5-year prison sentence would be subject to a collateral attack as being outside the court's statutory scope of sentencing authority. We said:

> The source of power to vacate a penitentiary sentence after a portion of it has been served and to impose a new and greater penalty under the same [conviction] has not been pointed out, except in cases of void sentences and in cases where the convict himself applied for a rehearing or invoked appellate jurisdiction for the correction of errors.[29]

And we cited to *In re Fanton*[30] for the proposition that a sentence outside of the term of punishment set forth in the

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[29] *Id.* at 68, 231 N.W. at 511.

[30] *In re Fanton, supra* note 22.

relevant sentencing statute is erroneous but not void; therefore, it could not be collaterally attacked or set aside. In *In re Fanton*, we denied the petitioner's claim for habeas relief based on the fact that the sentence imposed was greater than the maximum allowed by law. We reasoned in *In re Fanton* that such a sentence was merely erroneous, and not void. We said in *Hickman* that the same was true for the converse situation where the court imposed a shorter term than that prescribed by law.

Although decided in 1930, *Hickman* remains the law in Nebraska. The sentencing court, we explained, had the constitutional power to accept the defendant's plea and impose a sentence within the terms of the sentencing statute, and "[t]hat power was exercised to the extent of a sentence of three to five years. It was valid as far as it went, but was erroneous in failing to impose the minimum penalty of 20 years."[31] We found the defendant, who had fully served the erroneously lenient sentence, was entitled to his liberty.[32]

Hickman is consistent with *Hulbert v. Fenton*,[33] wherein we denied habeas relief for a defendant who claimed that his indeterminate sentence was void, because the statute allowed an indeterminate sentence only if the defendant had no history of confinement to the penitentiary and the sentencing judge had indicated from the bench that he knew the defendant had previously been confined to the penitentiary. The defendant was still serving this sentence but hoped that if that sentence were declared void, it would be determined that he was illegally detained.

We explained:

> Habeas corpus is a collateral, and not a direct, proceeding, when regarded as a means of attack upon the judgment, and so long as the judgment is regular upon its

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[31] *Hickman v. Fenton, supra* note 20, 120 Neb. at 70, 231 N.W. at 512.

[32] See *Hickman v. Fenton, supra* note 20.

[33] *Hulbert v. Fenton, supra* note 26.

> face and was given in an action of which the court had jurisdiction, no extrinsic evidence is admissible [in a habeas corpus proceeding] to show its invalidity.[34]

It was improper to consider in the habeas action what the judge said about the defendant's prior incarceration because the "sentence was the final judgment and record of the court."[35] Furthermore, we stated that the allegation that the indeterminate nature of the sentence was not authorized by statute concerned mere errors and irregularities rather than a sentence that was void.[36]

We recognize that under the more broadly worded federal habeas statutes, a petitioner may challenge his or her confinement as being outside the maximum sentence allowed by the law and that some other courts consider sentences greater than that prescribed by law to be void ab initio.[37] But even if we were to reevaluate our concept of voidness as concerns sentences outside the limits authorized by statute or we were to expand our narrow limitation on collateral attacks under our habeas statute,[38] failing to grant habeas relief in this case would run afoul of principles of double jeopardy and the fundamental scope of Nebraska's habeas relief as a means of redress for the unlawfully detained.

The appellants cite to no authority by which the State is permitted to use the habeas statute as a sword against the petitioner imprisoned on a void sentence to gain resentencing and correct an error on a fully served sentence that the petitioner is not challenging and that the State failed to challenge in a direct appeal as excessively lenient.[39] Habeas corpus is a

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[34] *Id.* at 823, 215 N.W. at 106.

[35] *Id*. at 822, 215 N.W. at 106.

[36] See *Hulbert v. Fenton, supra* note 26.

[37] See 39 Am. Jur. 2d *Habeas Corpus* § 60 (2008). See, also, *State v. Beasley*, 14 Ohio St. 3d 74, 471 N.E.2d 774 (1984) (superseded by statute as stated in *State v. Singleton*, 124 Ohio St. 3d 173, 920 N.E.2d 958 (2009)).

[38] See § 29-2801.

[39] See, e.g., *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

special civil proceeding providing a summary remedy to persons illegally detained.[40] A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty.[41] A writ is available only when the release of the petitioner from the deprivation of liberty being attacked will follow as a result of a decision in the petitioner's favor.[42]

Contrary to these principles, the appellants wish for greater punishment to follow from the writ.

[8] The appellants indeed fail to cite to any authority supporting its ability to collaterally attack in any proceeding a facially valid sentence that has been fully served. A "primary purpose" of the Double Jeopardy Clause is "to preserve the finality of judgments."[43] Where a defendant has a legitimate expectation of finality, then an increase in his or her sentence in a second proceeding violates the prohibition of the Double Jeopardy Clause against multiple punishments for the same offense.[44]

[9] "[H]istory demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the prosecution."[45] The defendant's expectation of finality includes knowledge of the State's ability to appeal.[46] But a defendant may acquire a legitimate expectation of finality in an erroneous sentence if the sentence has been substantially or fully served,

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[40] *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

[41] *Id.*

[42] *Id.*

[43] *Crist v. Bretz*, 437 U.S. 28, 33, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978).

[44] See, *Pennsylvania v. Goldhammer*, 474 U.S. 28, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985); *United States v. DiFrancesco*, 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980).

[45] *United States v. DiFrancesco, supra* note 44, 449 U.S. at 134.

[46] *Com. v. Postell*, 693 A.2d 612 (Pa. Super. 1997).

unless the defendant was on notice that the sentence might be modified.[47]

Here, even if Meyer should be charged with knowledge that his unenhanced burglary sentence was erroneous and could have been corrected on a direct appeal by the State, the prison sentence of 2 to 4 years facially complied with the statutory confines for a conviction of burglary. And Meyer had no reason to expect, in light of Nebraska law, that the State could collaterally attack his fully served sentence after the time for direct appeal had passed—let alone on the ground that his conviction for burglary somehow included a judgment of being a habitual criminal when the sentence for that separately charged and nonexistent crime is void. There is no historical basis in Nebraska for the State to collaterally attack the legality of a fully served sentence, and certainly not through what is effectively a counterclaim in a habeas action, asserting that the otherwise facially lawful sentence should have been enhanced by virtue of a separate, void sentence.

Suffice it to say that we are unpersuaded in this case to depart from precedent clearly holding that a sentence under the mandatory minimum is not void and that, as such, it cannot be collaterally attacked in a habeas action. The sentencing court had jurisdiction over Meyer and over the crime of burglary. This is in contrast to its exercise of power in sentencing Meyer for being a habitual criminal. There was no jurisdiction over the offense of being a habitual criminal, because no such offense exists. Thus, whereas the sentence for being a habitual criminal is void, the sentence for burglary is not.

The district court's reliance on *Kuwitzky* was not misguided.[48] While the likely result—had there been a direct appeal—would have been a remand to the district court for a proper sentencing in case No. CR11-29, neither party filed a

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[47] *State v. Hardesty*, 129 Wash. 2d 303, 915 P.2d 1080 (1996). See, also, e.g., Arthur W. Campbell, Law of Sentencing § 8:15 (3d ed. 2004).

[48] See *Kuwitzky v. O'Grady, supra* note 4.

direct appeal. The State waited until Meyer had fully served his burglary sentence to raise for the first time the lack of enhancement in the burglary sentence. The appellants attempt to use the habeas statute—a tool for granting relief to those who are unlawfully detained—as a means of forcing resentencing of a fully served and facially valid sentence in order to obtain a greater period of incarceration against the habeas petitioner. We find no support for such procedure.

It is conceded by the appellants that if the sentence for being a habitual criminal in case No. CR11-29 is void and its challenges to the burglary sentence have no merit, then Meyer became eligible for parole on August 19, 2013, and reached his discharge date on August 19, 2015. Because the State cannot attack the legality of the burglary sentence in the hope that Meyer will be resentenced to a longer term, Meyer has proved that he is a person imprisoned without legal authority. We conclude that Meyer, having served the sentences lawfully imposed and which cannot now be collaterally attacked, is being unlawfully imprisoned upon a void sentence and is entitled to be released and discharged forthwith.

CONCLUSION

The granting of the writ of habeas corpus by the district court is hereby affirmed.

Affirmed.

Connolly, 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. Erica A. Jenkins, appellant.

884 N.W.2d 429

Filed September 9, 2016. No. S-14-1087.

1. **Criminal Law: Federal Acts: Records.** Under 18 U.S.C. § 2703(d) (2012), the government may obtain a court order that requires a cellular service provider to disclose a customer's records upon a showing that specific and articulable facts showing that there are reasonable grounds to believe the information sought is relevant and material to an ongoing criminal investigation.
2. **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 protections is a question of law that an appellate court reviews independently of the trial court's determination.
3. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government. These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.
4. **Constitutional Law: Search and Seizure: States.** The Fourth Amendment's protections are implicated whenever state action intrudes on a citizen's reasonable expectation of privacy.
5. **Constitutional Law: Search and Seizure.** Determining whether a reasonable expectation of privacy exists normally involves answering two inquiries: first, whether the individual has exhibited an actual (subjective) expectation of privacy, and, second, whether the individual's expectation is one that society is prepared to recognize as "reasonable."

6. ____: ____. For purposes of the Fourth Amendment, a search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.
7. **Constitutional Law.** Under the third-party doctrine, there is no reasonable expectation of privacy in personal information a defendant knowingly exposes to third parties. This is true even when the information is revealed to the third party on the assumption that it will be used only for a limited purpose and the confidence in the third party will not be betrayed.
8. **Constitutional Law: Records.** Cell phone users can claim no reasonable expectation of privacy in their service providers' business records documenting the cellular towers that route their calls.
9. **Constitutional Law: Federal Acts: Search and Seizure.** The State's acquisition of historical cell site location information pursuant to 18 U.S.C. § 2703(d) (2012) does not violate or implicate the Fourth Amendment and is not a search under either the U.S. or Nebraska Constitution.
10. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
11. **Trial: Photographs: Appeal and Error.** An appellate court reviews the court's admission of photographs of the victims' bodies for abuse of discretion.
12. **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 or if it is needlessly cumulative.
13. **Homicide: Photographs.** If the State lays proper foundation, photographs that illustrate or make clear a controverted issue in a homicide case are admissible, even if gruesome.
14. ____: ____. In a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish an element of the crime.
15. **Photographs: Rules of Evidence.** Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), does not require the State to have a separate purpose for every photograph.
16. ____: ____. Generally, when a court admits photographs for a proper purpose, additional photographs of the same type are not unfairly prejudicial.

17. **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, determine the plausibility of explanations, 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.
18. **Robbery: Words and Phrases.** A person commits robbery if, with the intent to steal, he or she forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever.
19. **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.
20. **Prosecuting Attorneys: Pretrial Procedure: Evidence.** Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the prosecution has a duty to disclose all favorable evidence to a criminal defendant prior to trial. Impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule.
21. **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.
22. **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.
23. **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.
24. **Sentences: Prior Convictions: Habitual Criminals: Proof.** In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was

represented by counsel or had knowingly and voluntarily waived representation for those proceedings.

25. **Criminal Law: Habitual Criminals.** To warrant enhancement under the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 2008), the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense.
26. **Criminal Law: Prior Convictions: Habitual Criminals.** Where the sequence of prior convictions is in issue, the rule is that each successive felony must be committed after the previous felony conviction in order to count toward habitual criminal status.
27. **Sentences: Prior Convictions: Habitual Criminals.** So long as each successive felony is committed after the previous felony conviction, it is immaterial to the habitual criminal analysis that an offender has not yet finished serving his or her sentence on the previous felony.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Beau G. Finley, of Finley & Kahler Law Firm, P.C., L.L.O., and Sean M. Conway, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

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

Stacy, J.

I. SUMMARY OF CASE

Following a jury trial, Erica A. Jenkins was convicted of two counts of robbery. She was sentenced to consecutive terms of 30 to 50 years' imprisonment. This is her direct appeal.

Several issues are assigned as error, but the primary issue presented is whether the State's acquisition of Jenkins' cell phone records from her service provider amounted to a search under the U.S. and Nebraska Constitutions. We find Jenkins had no reasonable expectation of privacy in these records, and

we conclude the State's acquisition of those records was not a search implicating the Fourth Amendment. We find no merit to Jenkins' remaining assignments of error, and we affirm her convictions and sentences.

II. FACTS

On August 11, 2013, the bodies of two men were found in a pickup truck near a park in Omaha, Nebraska. The men had each been shot in the head, the pockets in their pants had been turned inside out, and their wallets were missing. The men were later identified as Juan Uribe-Pena and Jorge Cajiga-Ruiz.

A palmprint found on the pickup truck led police to Christine Bordeaux, who was the State's main witness at trial. Bordeaux testified that on the evening of August 10, 2013, Jenkins' brother, Nikko Jenkins (Nikko), suggested a plan for Bordeaux and Jenkins to lure men to a place where Nikko would rob them. According to Bordeaux, she and Jenkins agreed to "hit a lick" or "go do a robbery" with Nikko. When asked at trial whether she had any doubt that Jenkins knew the entire night "was about getting money and robbing guys," Bordeaux responded, "There's no doubt, no."

Bordeaux testified that she and Jenkins left with Nikko that night and that he drove them to an Omaha bar. Nikko dropped the women off and parked nearby. The women were approached by some men in a pickup truck who asked whether the women "wanted to party." Bordeaux and Jenkins got into the pickup, and the men drove them to an Omaha apartment. Once inside the apartment, Bordeaux asked the men whether they had any money. One of the men told her not to worry, "he was gonna have another friend come and bring his money, possibly up to $1,000." Jenkins then went into the bathroom to call Nikko on her cell phone. About 30 minutes later, Bordeaux and Jenkins left the apartment with two of the men to buy more alcohol and pick up another woman. Bordeaux testified she wanted to "get them out of the apartment" and

"go to the store . . . so Nikko could rob 'em." They left the apartment in a white pickup truck driven by one of the men. Bordeaux rode in the front passenger seat of the pickup, and Jenkins sat immediately behind her. Nikko followed the pickup in another vehicle.

When the pickup stopped at the end of a road near a park, Nikko approached with a gun and knocked on a window of the pickup. Bordeaux and Jenkins got out of the pickup. Nikko then demanded money from the men, shot them, and took their wallets. According to Bordeaux, Nikko first shot the man in the back seat and then shot the driver, who had moved over to the passenger side of the pickup when he saw Nikko. After the second shot, Jenkins screamed and ran. Bordeaux and Jenkins waited in Nikko's car while he gathered the shell casings. Nikko eventually returned to the car carrying two wallets and two shell casings.

After the shootings, Nikko drove Bordeaux and Jenkins to a motel in Council Bluffs, Iowa, so they could switch vehicles and change clothes. According to Bordeaux, after they changed clothes, she and Nikko waited in the motel parking lot in another vehicle while Jenkins tried to fix the taillights on her vehicle. When a police cruiser pulled into the motel parking lot, Nikko and Bordeaux drove away.

A Council Bluffs police officer testified he was patrolling the motel parking lot at about 3:40 a.m. and contacted a black female in a vehicle registered to Jenkins. She told the officer she was having car trouble and explained her cousin had just pulled out of the parking lot in another vehicle.

A cell phone found under the body of one of the victims led police to Jose Oscar Ramirez-Martinez. Ramirez-Martinez testified he was with the two victims, Uribe-Pena and Cajiga-Ruiz, at an Omaha bar a few hours before the shooting. According to Ramirez-Martinez, he and the two victims met two women at the bar and eventually left with the women to go to Uribe-Pena's apartment. Ramirez-Martinez described one woman as "white" and "blonde" and the other as "dark" and

"thin." He testified the thin woman went into the bathroom upon arriving at the apartment. Ramirez-Martinez testified he was in the apartment about 10 minutes before leaving to get more money. After leaving the apartment, Ramirez-Martinez received a call from Uribe-Pena telling him they were driving with the women to find another female friend. Ramirez-Martinez tried calling Uribe-Pena several times after that, but received no answer. He later learned Uribe-Pena and Cajiga-Ruiz had been killed.

Eventually, Jenkins was arrested and charged with two counts of robbery and one count of criminal conspiracy. The information also alleged Jenkins was a habitual criminal. In a separate case, Nikko was charged with, and convicted of, two counts of first degree murder in connection with the deaths of Uribe-Pena and Cajiga-Ruiz.

After her arrest, Jenkins disclosed her cell phone number to police. Police then obtained, from Jenkins' cellular service provider, certain cell phone records associated with that number. The records included subscriber information and user activity for connections to and from the account around the time of the crime, including records regarding cellular site and sector information. Police did not request or obtain production of the content of any communications or files stored for the account.

The cell phone records showed that calls involving Jenkins' cell phone occurred at 1:33, 1:54, and 2:09 a.m. and were routed through a cell tower one block from Uribe-Pena's apartment. A call from Jenkins' cell phone at 2:17 a.m. was routed through a cell tower near the crime scene. And multiple calls from Jenkins' cell phone made between 3:46 and 3:53 a.m. were routed through a cell tower located in Council Bluffs. As such, the records provided evidence that Jenkins' cell phone was near the crime scene during the relevant timeframe and provided evidence that corroborated witness testimony of Jenkins' whereabouts before and after the crime occurred.

Prior to trial, Jenkins moved to suppress the cell phone records. She argued the State obtained the records pursuant to a search warrant that was not supported by probable cause and thereby violated her rights under the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution. The district court held a hearing on the motion and took the matter under advisement.

The next day, while the suppression motion was still under advisement, the State obtained another search warrant for the same cell phone records, this time supported by an affidavit which more precisely described Jenkins' involvement and her use of the cell phone at the time of the crimes. The cellular service provider again produced the requested cell phone records, and Jenkins filed a supplemental motion to suppress. At the hearing on the supplemental motion, Jenkins did not argue the affidavit supporting the second search warrant lacked probable cause, but instead argued the State had impermissibly supplemented its affidavit.

The district court denied both the original and supplemental motions to suppress. The court relied on our opinion in *State v. Knutson*[1] to find that Jenkins had no reasonable expectation of privacy in the cell phone records and thus concluded police did not conduct a search implicating the Fourth Amendment when officers obtained the records. Alternatively, the district court found that even if a search under the U.S. and Nebraska Constitutions occurred, the second search warrant was supported by probable cause.

Following a jury trial, Jenkins was found guilty of two counts of robbery. The jury could not reach a unanimous verdict on the separate count of criminal conspiracy. After an enhancement hearing at which the court found Jenkins to be a habitual criminal, she was sentenced to consecutive prison terms of 30 to 50 years on each robbery count. Jenkins timely

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[1] *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014).

appealed, and we granted her petition to bypass the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

Jenkins assigns, rephrased, that (1) the district court erred in overruling her motion to suppress the cell phone records, (2) the district court erred in admitting gruesome photographs, (3) the district court erred in overruling her motion for new trial, (4) the evidence at trial was insufficient to support her convictions, and (5) the district court erred in finding her to be a habitual criminal.

IV. ANALYSIS

1. Motion to Suppress Cell Phone Records

(a) Background

[1] In this case, police relied on the federal Stored Communications Act[2] to request and obtain Jenkins' cell phone records. Under the federal act, the government may obtain a court order that requires a cellular service provider to disclose a customer's records upon a showing that "specific and articulable facts showing that there are reasonable grounds to believe [the information sought is] relevant and material to an ongoing criminal investigation."[3] Section 2703(d) does not require the government to show probable cause in connection with obtaining a court order.[4]

Here, the parties and the district court consistently refer to the § 2703(d) order used to obtain the cell phone records as a "search warrant," but it is more properly characterized as a court order. Using the language of § 2703(d), the district court made a finding that "the applicant has offered specific and articulable facts showing that there are

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[2] 18 U.S.C. §§ 2701 to 2711 (2012).

[3] § 2703(d).

[4] See *U.S. v. Davis*, 785 F.3d 498 (11th Cir. 2015) (en banc), *cert. denied* 577 U.S. 975, 136 S. Ct. 479, 193 L. Ed. 2d 349.

reasonable grounds to believe that the records . . . sought are relevant and material to an ongoing criminal investigation." The court then compelled the cellular service provider to produce the cell phone records using the following language: "**YOU ARE, THEREFORE, ORDERED,** pursuant to Title 18, United States Code, Section 2703(d)[, to] turn over to the Omaha, Nebraska Police Department the records and other information [requested]." As such, although the Stored Communications Act authorizes governmental entities to obtain cell phone records using either warrants[5] or court orders,[6] the records in this case were obtained using a court order issued pursuant to § 2703(d).

On appeal, Jenkins does not argue that the court orders obtained by police failed to satisfy the statutory requirements of the Stored Communications Act. Rather, she argues that her rights under the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution were violated when her cell phone records were obtained by police. Jenkins argues she has an expectation of privacy in the cell phone records and contends the affidavit supporting the first "warrant" lacked probable cause. Jenkins concedes the second "warrant" was supported by an affidavit which recited probable cause, but argues the affidavit was impermissibly rehabilitated.

In response, the State argues Jenkins did not have a reasonable expectation of privacy in the cell phone records, so officers did not conduct a search subject to Fourth Amendment protection when they obtained the records. Alternatively, the State argues that even assuming officers conducted a search when they obtained the cell phone records, the second search warrant was supported by probable cause and the motion to suppress was properly overruled. The State further argues that the exclusionary rule does not apply in this case, because

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[5] See § 2703(c)(1)(A).

[6] See § 2703(d).

either the good faith exception[7] applies, the independent source doctrine[8] applies, or the inevitable discovery doctrine[9] applies.

(b) Standard of Review

[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.[10] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[11]

(c) Analysis

[3] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.[12] These constitutional provisions do not protect citizens from all governmental intrusion, but only from unreasonable intrusions.[13] Here, the threshold question is whether the State's acquisition of Jenkins' cell phone records amounted to a search or seizure under the U.S. and Nebraska Constitutions. Jenkins does not argue that Nebraska's constitutional provisions impose any higher standard than the

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[7] See, *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012); *State v. Nuss*, 279 Neb. 648, 781 N.W.2d 60 (2010).

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

[9] See *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006).

[10] *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015); *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[11] *Id.*

[12] *State v. Knutson, supra* note 1.

[13] *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

Fourth Amendment, and we analyze her claims under familiar Fourth Amendment principles.

[4-6] The Fourth Amendment's protections are implicated whenever state action intrudes on a citizen's reasonable expectation of privacy.[14] Determining whether a reasonable expectation of privacy exists normally involves answering two inquiries: first, whether the individual has exhibited an actual (subjective) expectation of privacy, and, second, whether the individual's expectation is one that society is prepared to recognize as "reasonable."[15] As such, for purposes of the Fourth Amendment, a "search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable."[16]

Before addressing whether Jenkins has a reasonable expectation of privacy in her cell phone records, we pause to clarify the nature of the records sought and produced in this case.[17] The court orders compelled the cellular service provider to turn over subscriber information and records of user activity for connections made to and from the account, including "caller identification records" and the "cellular site and sector guide" for the prior 30-day period. As such, the court orders compelled production of what is commonly referred to as "historical cell site location information" (CSLI). The court orders did not compel production of the content of any communications involving the cell phone, and nothing in our record suggests any content-based information was provided. Nor did the historical CSLI allow law enforcement to track Jenkins' use of her cell phone prospectively or in real time.

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[14] *State v. Knutson, supra* note 1.

[15] *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

[16] *Kyllo v. United States*, 533 U.S. 27, 33, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001).

[17] See *Smith v. Maryland, supra* note 15, 442 U.S. at 741 (in deciding whether the Fourth Amendment applies, "it is important to begin by specifying precisely the nature of the state activity that is challenged").

At the hearing on the motion to suppress, the records custodian for the cellular service provider testified that when a cell phone is used to make or accept calls or text messages, the service provider records the date and time of the transaction, the cell phone numbers involved, and the beginning and ending sector and cell tower site associated with the transaction. This information is recorded at or near the time of each transaction and is kept by the cellular service provider for all accounts in the regular course of its business. The service provider stores the CSLI in a database for 18 months.

Jenkins asks us to find she had a reasonable expectation of privacy in the cell phone records maintained by her service provider. We rejected a similar claim in *State v. Knutson*.[18]

In *Knutson*, the State used a subpoena to obtain the defendant's cell phone records from his service provider. The records showed the date and time of calls and text messages between the defendant and a minor he was accused of assaulting, but did not include the content of any communications. The defendant argued his rights under the Fourth Amendment were violated because the State obtained the records from his cellular service provider through a subpoena rather than a search warrant supported by probable cause.

To determine whether the Fourth Amendment was implicated, we considered whether the defendant in *Knutson* had a reasonable expectation of privacy in business records maintained by his service provider detailing the destination number and times for calls and text messages he sent and received. We applied the reasoning articulated by the U.S. Supreme Court in *Smith v. Maryland*.[19] There, the Court applied the third-party doctrine and held that law enforcement officers do not need a warrant to have a telephone company install a pen register to record the numbers dialed from a

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[18] *State v. Knutson, supra* note 1.

[19] *Smith v. Maryland, supra* note 15.

person's telephone, because the activity does not amount to a search under the Fourth Amendment. The Court reasoned that each time a customer uses a telephone, he or she voluntarily conveys numerical information to the telephone company. By doing so, the customer assumes the risk that the company will reveal to police "the numbers dialed [and the] switching equipment that processed those numbers," which the Court described as "merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber."[20]

In *Knutson*, we applied the third-party doctrine and found the defendant did not have a reasonable expectation of privacy in the cell phone records maintained by his service provider. And we concluded he had no Fourth Amendment claim when the government obtained those records using a subpoena, because there was no constitutional interest at stake.[21]

[7] Here, like in *Knutson*, we conclude the third-party doctrine governs our analysis. The U.S. Supreme Court has repeatedly said there is no reasonable expectation of privacy in personal information a defendant knowingly exposes to third parties.[22] And this is true even when the information is revealed to the third party on the assumption that it will be used only for a limited purpose and the confidence in the third party will not be betrayed.[23]

Applying the third-party doctrine to the facts of this case, we conclude Jenkins did not have a reasonable expectation

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[20] *Id.*, 442 U.S. at 744.

[21] *State v. Knutson, supra* note 1.

[22] *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013), citing *Smith v. Maryland, supra* note 15; *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976); *Couch v. United States*, 409 U.S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973); *Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); and *Lopez v. United States*, 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963).

[23] *Id.*, citing *United States v. Miller, supra* note 22.

of privacy in the historical CSLI maintained by her cellular service provider. Each time she sent or received a call or text message, her cellular service provider generated a record which included the date and time of the communication and the sector and cell tower sites used to route the communication. This historical CSLI was recorded and kept by the cellular service provider in the ordinary course of business. The government did not require Jenkins' service provider to record or store this information, and "[t]he fortuity of whether or not the [third party] in fact elects to make a quasi-permanent record" of information conveyed to it "does not . . . make any constitutional difference."[24]

In arguing that we should recognize a reasonable expectation of privacy on these facts, Jenkins claims the cell phone records stored by her service provider contain "far more than simply a call log," because "such information can be used to track [her] movements and location."[25] She points out the records were used at trial to provide evidence of her general location during the robbery and homicide. As such, she argues our analysis of the records should be governed by global position system (GPS) tracking cases such as *United States v. Jones*,[26] rather than by *Smith*.

In *Jones*, the FBI and local law enforcement secretly installed a GPS tracking device on a private vehicle and monitored the vehicle's movements for 28 days. The GPS device established the vehicle's location within 50 to 100 feet and communicated that location to a government computer. The *Jones* Court concluded that the government physically intruded on the defendant's private property to install the GPS device and that the government's use of that device to monitor the vehicle's movements constituted a search and violated the

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[24] *Smith v. Maryland, supra* note 15, 442 U.S. at 745.

[25] Brief for appellant at 31.

[26] *United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012).

Fourth Amendment.[27] The Court highlighted the significance of the governmental activity involved, stating:

> It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.[28]

But the present case does not involve the issue of government tracking, and the Court's analysis in *Jones* tells us little about whether the State's acquisition of business records containing historical CSLI from a cellular service provider is a search within the meaning of the Fourth Amendment. Unlike the GPS surveillance information collected by the government in *Jones*, the historical CSLI obtained in the present case is routinely collected by the service provider for all subscribers and enables only general conclusions to be drawn regarding the caller's location when calls and texts are sent and received. The historical CSLI in this case was not collected by the government, did not involve a physical intrusion on private property, and did not enable real-time tracking or permit prosecutors to place Jenkins at a precise location at any point in time.

It is worth mentioning that, given the landline technology of telephones at the time of *Smith*, the records obtained by the government in that case arguably contained more precise location data than the CSLI at issue here, because landlines are associated with a physical street address.[29] The fact that the business records in *Smith* showed exactly where the caller was (in his home) at the time the calls were placed did not preclude the Court from applying the third-party doctrine and

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[27] *Id.*

[28] *Id.*, 565 U.S. at 404-05.

[29] See *U.S. v. Davis, supra* note 4.

concluding he had no reasonable expectation of privacy in the telephone records. Despite advances in technology, we see no compelling reason to depart from the third-party doctrine just because the business records at issue pertain to a customer's use of a cell phone rather than a landline telephone.

It is true that the technology used to route cell phone communications may act in some respects like a tracking device, but it is one which cellular customers knowingly and voluntarily carry and use, not one placed secretly on their person or property by the government. And the routing information from which general location information can later be gleaned is information recorded and kept by the service provider in the ordinary course of business, not at the behest of the government. These distinctions are significant.[30] Cases such as *Jones*, which analyze direct government surveillance using GPS technology, do not answer the question whether the government invades an individual's reasonable expectation of privacy when it obtains, from a third-party service provider, cell phone records which include historical CSLI from which the government can deduce general location information.[31]

Jenkins also argues that the U.S. Supreme Court's recent holding in *Riley v. California*[32] compels the conclusion that she has a reasonable expectation of privacy in her cell phone records. We disagree.

In *Knutson*, when determining whether a Fourth Amendment search occurs when the government obtains cell phone records from a third-party service provider, we expressly rejected the suggestion that this issue was controlled by cases involving

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[30] See, *U.S. v. Graham*, 824 F.3d 421 (4th Cir. 2016); *U.S. v. Davis, supra* note 4; *In re U.S. for Historical Cell Site Data*, 724 F.3d 600 (5th Cir. 2013); *In re Electronic Communication Service to Disclose*, 620 F.3d 304 (3d Cir. 2010).

[31] *Id.*

[32] *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).

searches of cell phones to obtain "*content* information."[33] We adhere to this reasoning in the present case and see nothing in *Riley* which compels a different conclusion.

The Court in *Riley* phrased the question presented as whether the police may, without a warrant, search digital information stored on a cell phone seized from an individual who has been arrested. In *Riley*, the digital *contents* of cell phones had been searched by police incident to arrest, and the Court was required "to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."[34] The Court in *Riley* held that police generally may not, without a warrant, search the digital information stored on a cell phone seized from an individual who has been arrested.[35]

The U.S. Supreme Court's analysis in *Riley* is not particularly instructive here, because it pertains to governmental searches of a cell phone's *contents*. The present case does not involve such a search. The Court made a clear distinction in *Smith* between obtaining the *content* of communications and obtaining *noncontent* information that enables service providers to transmit a communication.[36] Here, the State did not acquire the CSLI records by searching the contents of Jenkins' cell phone, and the business records produced by the service provider did not include the content of any communications. So while *Riley* properly governs our analysis when police

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[33] *State v. Knutson, supra* note 1, 288 Neb. at 836, 852 N.W.2d at 319 (emphasis supplied).

[34] *Riley v. California, supra* note 32, 573 U.S. at 385.

[35] *Id.*

[36] *Smith v. Maryland, supra* note 15, 442 U.S. at 741 ("a pen register differs significantly from the listening device employed in *Katz* [*v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)], for pen registers do not acquire the *contents* of communications") (emphasis supplied).

acquire the digital contents of an individual's cell phone,[37] it does not address whether the government conducts a search when it acquires noncontent business records containing historical CSLI from a person's cellular service provider.

[8,9] Instead, as stated previously, the third-party doctrine of *Smith* governs our analysis of the historical CSLI at issue in this case. Like the pen register information in *Smith*, the CSLI at issue here documents call routing information that was gathered and kept by the service provider in the ordinary course of business. These business records disclose only the "'"means of establishing communication"'" and not the contents of any communication.[38] And like the telephone customer in *Smith*, we conclude Jenkins can claim no reasonable expectation of privacy in her service provider's business records documenting the cell towers that routed her calls, because "[t]he switching equipment that processed [her calls] is merely the modern counterpart of the operator who, in an earlier day, personally completed calls for the subscriber."[39] We hold the State's acquisition of historical CSLI pursuant to § 2703(d) did not violate or implicate the Fourth Amendment. Our holding in this regard is in accord with every federal circuit court to have considered the Fourth Amendment question before us.[40] Because we conclude the acquisition of historical CSLI is not a search under either the U.S. or Nebraska Constitution, we find no error in the district court's denial of Jenkins' motion to suppress. Given our resolution of this assignment or error, it is not necessary to address the other Fourth Amendment arguments raised by the parties.

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

[38] *Smith v. Maryland, supra* note 15, 442 U.S. at 741.

[39] *Id.*, 442 U.S. at 744.

[40] *U.S. v. Graham, supra* note 30; *U.S. v. Davis, supra* note 4; *In re U.S. for Historical Cell Site Data, supra* note 30; *U.S. v. Skinner*, 690 F.3d 772 (6th Cir. 2012); *In re Electronic Communication Service to Disclose, supra* note 30.

2. Photographic Evidence

(a) Background

Over Jenkins' objections, the trial court admitted three photographs of the crime scene into evidence. Each photograph depicts a pickup truck with the front and back doors open. The legs and feet of one victim are visible in the back seat. Another victim is seen slumped over in the front passenger seat; a single exit wound on his head is discernible. All three photographs were taken from a vantage point some distance back from the truck and generally depict, from different angles, the location and position of the pickup on the street and the position of the victims' bodies inside the pickup.

Jenkins objected to the three photographs on rule 403[41] grounds, arguing the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. The record indicates the State offered the photographs to corroborate Bordeaux's testimony regarding the crime scene. After confirming the State did not intend to offer additional photographs of the victims' bodies, the district court overruled the rule 403 objection and admitted the photographs into evidence. Jenkins assigns this as error.

(b) Standard of Review

[10,11] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[42] We review the court's admission of photographs of the victims' bodies for abuse of discretion.[43]

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[41] See Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

[42] *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). See, also, *State v. Robinson*, 185 Neb. 64, 173 N.W.2d 443 (1970).

[43] *Id.*

(c) Analysis

On appeal, Jenkins argues the photographs were gruesome and therefore more prejudicial than probative. And she argues that even if the photographs were otherwise admissible, the use of three photographs was more than was "'absolutely necessary.'"[44]

[12-14] 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.[45] We have often observed that gruesome crimes produce gruesome photographs.[46] And we have held that if the State lays proper foundation, photographs that illustrate or make clear a controverted issue in a homicide case are admissible, even if gruesome.[47] In a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish an element of the crime.[48]

Jenkins was charged with robbery rather than with homicide, but the photographs were relevant to show the location and position of the robbery victims after the crimes and to corroborate the testimony of the State's key witness, Bordeaux. The photographs also provided evidence that the victims' property was taken from them "forcibly and by violence"[49] and, as such, tended to establish one of the elements of the charged crimes. The photographs of the pickup were all taken

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[44] Brief for appellant at 56.

[45] *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016); *State v. Dubray, supra* note 42.

[46] *State v. Dubray, supra* note 42, citing *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[47] *State v. Dubray, supra* note 42.

[48] *Id.*

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

from a considerable distance; there were no closeup photographs of the victims or their injuries.

[15,16] Regarding Jenkins' argument that the three photographs were unnecessarily cumulative, we note that rule 403 does not require the State to have a separate purpose for every photograph.[50] Generally, when a court admits photographs for a proper purpose, additional photographs of the same type are not unfairly prejudicial.[51] Here, the photographs were not needlessly cumulative, because they each depicted the pickup and the nearby roads from a slightly different angle and distance, putting the scene into context.[52]

On this record, the prejudicial effect of the crime scene photographs did not substantially outweigh their probative value and the number of photographs was not needlessly cumulative. We find no abuse of discretion in admitting the photographs into evidence.

3. Insufficient Evidence

(a) Background

Jenkins claims the evidence at trial was insufficient to support her robbery convictions. She argues that for a variety of reasons, the testimony of Bordeaux and Ramirez-Martinez was not credible and should not have been believed by the jury. She also argues there was a lack of physical evidence linking her to the crime because none of the fingerprints found at the scene matched hers, none of the DNA obtained in the investigation matched her profile, and police did not test any of her clothing for gunshot residue.

(b) Standard of Review

[17] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination

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[50] *State v. Oliveira-Coutinho, supra* note 8; *State v. Dubray, supra* note 42.

[51] See *id.*

[52] See *State v. Grant, supra* note 45.

thereof, the standard is the same: An appellate court does not 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.[53] 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.[54]

(c) Analysis

To the extent Jenkins' arguments on appeal ask us to reweigh the evidence or pass on the credibility of the witnesses, we decline to do so, because those were matters for the jury.[55] Viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to support the jury's verdict.

[18] A person commits robbery if, with the intent to steal, he or she forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever.[56] In this case, an aiding and abetting instruction was given to the jury that provided:

> [Jenkins] can be guilty of robbery even though she personally did not commit any act involved in the crime so long as she aided someone else to commit it. [Jenkins] aided someone else if:
>
> 1. [Jenkins] intentionally encouraged or intentionally helped another person to commit the robbery; and
>
> 2. [Jenkins] intended that the robbery be committed; or [Jenkins] expected the other person to commit the robbery; and

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[53] *State v. Weideman, supra* note 22. See, *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015); *Clark v. State*, 151 Neb. 348, 37 N.W.2d 601 (1949).

[54] *State v. Weideman, supra* note 22. See *State v. Erpelding, supra* note 53.

[55] See *id*.

[56] § 28-324.

3. The robbery in fact was committed by that other person.

Bordeaux testified that she and Jenkins agreed to lure men to a place where Nikko could rob them, and she testified that Nikko robbed, and then murdered, Uribe-Pena and Cajiga-Ruiz.

The CSLI evidence generally followed the timeline of events as testified to by Bordeaux, Ramirez-Martinez, and a Council Bluffs police officer. Bordeaux testified that Jenkins called Nikko from the victims' apartment once the plan was underway, and the evidence showed that calls involving Jenkins' cell phone were routed through a cell tower one block from Uribe-Pena's apartment between about 1:30 and 2:09 a.m. Shortly thereafter, at 2:17 a.m., a call from Jenkins' cell phone was routed through a cell tower near the location where Uribe-Pena and Cajiga-Ruiz were robbed and murdered. Bordeaux testified that after the robbery, she, Jenkins, and Nikko drove to a motel in Council Bluffs. A Council Bluffs police officer testified he was patrolling the motel parking lot at approximately 3:40 a.m. and contacted a black female in a vehicle registered to Jenkins. Several calls from Jenkins' cell phone between about 3:45 and 3:50 a.m. were routed through a cell tower located in Council Bluffs.

This evidence, if believed by the finder of fact, was more than sufficient to convict Jenkins of robbery. Her assignment to the contrary is without merit.

4. Motion for New Trial

(a) Background

Jenkins filed a motion for new trial based on an alleged violation of *Brady v. Maryland*,[57] claiming the State had an undisclosed tacit agreement with Lori Sayles for her testimony. Sayles was the only witness called by the defense at

[57] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

trial. The State had endorsed Sayles as a witness, but did not call her.

Sayles is the sister of Jenkins and Nikko and a cousin of Bordeaux. Sayles testified that on August 10, 2013, she was staying with her mother and other family members in a motel room in Council Bluffs. Sayles testified that when she fell asleep around 11 p.m., Jenkins, Nikko, and Bordeaux were all in the motel room. When Sayles awakened at 4 a.m., she saw Jenkins asleep in the motel room but did not see Nikko or Bordeaux. Sayles was asked, "Do you have any information that . . . Jenkins left at all that evening?" and she responded, "No."

On cross-examination, Sayles admitted that a couple of days after the double murder, she talked with Jenkins about it and that Jenkins compared it to a horror movie entitled "The Hills Have Eyes." She testified that Jenkins "never verbally said [she] was there, but what she was saying will make her probably present." Sayles also recalled Jenkins saying "she heard gunshots and ran away."

On redirect, Sayles admitted she was being held in jail pending trial on felony charges in a separate criminal matter. She was asked whether, by testifying as she did on cross-examination, she was hoping for dismissal of the charges in her own case or favorable consideration at sentencing. She denied that was her motivation.

Approximately 1 week after Sayles testified in Jenkins' trial, Sayles' attorney filed a motion for bond review asking that Sayles be released on a recognizance bond. The State did not object to the request, and the district court granted the bond reduction.

Jenkins then moved for a new trial, claiming the State failed to disclose a tacit agreement with Sayles "to release . . . Sayles from custody as a result of her anticipated trial testimony" and that doing so violated *Brady*. At the hearing on the motion for new trial, Sayles' defense attorney testified he

had been representing Sayles since the inception of her felony charges and that there had never been a plea agreement or an agreement "of any kind" with the State that if Sayles testified a certain way, she would receive any benefit.

The district court overruled Jenkins' motion for new trial. Regarding its earlier decision to release Sayles on a recognizance bond, the court explained:

> At the bond review, this Court was advised that the minimum sentence for each of the charges against Ms. Sayles was one year and that Ms. Sayles had been in jail [for] over a year at the time of the . . . bond review. The Court was further advised of her truthfulness at the trial, that she had never actively participated in any crime, that she had no criminal record, she was 18 years old at the time of these crimes, and [her defense attorney] requested that Ms. Sayles should be released on her own recognizance. There was no objection by the Stat[e] of Nebraska, and this Court released Ms. Sayles on her own recognizance.

The district court acknowledged that the State's decision not to object at Sayles' bond review hearing was circumstantial evidence of a possible agreement, but found it was insufficient to prove an agreement, particularly when both Sayles and her counsel testified that Sayles had no agreement with the State. Finding that no agreement had been proved to support a *Brady* violation, the district court denied the motion for new trial. Jenkins assigns this as error.

(b) Standard of Review

[19] 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.[58]

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[58] *State v. Ballew*, 291 Neb. 577, 867 N.W.2d 571 (2015).

(c) Analysis

[20] In *Brady*, the U.S. Supreme Court held that the prosecution has a duty to disclose all favorable evidence to a criminal defendant prior to trial.[59] In *United States v. Bagley*,[60] the Court clarified that impeachment evidence, as well as exculpatory evidence, falls within the *Brady* rule.[61] Here, Jenkins claims the State failed to disclose a tacit agreement with Sayles which Jenkins could have used to impeach Sayles' credibility.

In *State v. Rice*,[62] a prosecution witness charged with the same murder as the defendant explained that he chose to testify because he felt things would go easier for him if he did, but he repeatedly denied there was any agreement with the prosecution for his testimony. We held that while the evidence established the witness had an expectation of leniency in exchange for his testimony, it fell short of establishing an express or implied promise by the State. We reach the same conclusion here.

[21] Both Sayles and her defense attorney testified there was no agreement with the State for Sayles' testimony, and Sayles denied she was hoping for leniency at sentencing or dismissal of the charges in exchange for her testimony. 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.[63] On this record, we find no abuse of discretion in the district court's denial of the motion for new trial.

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[59] See *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014).

[60] *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

[61] *State v. Patton, supra* note 59.

[62] *State v. Rice*, 214 Neb. 518, 335 N.W.2d 269 (1983).

[63] *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

5. Habitual Criminal Enhancement

(a) Background

Prior to sentencing, the court held a hearing on the habitual criminal enhancement. The State offered, and the court received, certified copies of two prior felony convictions: a 2006 conviction for attempted robbery for which Jenkins received a prison sentence of 4 to 8 years and a 2009 conviction for unlawful possession with intent to deliver a controlled substance for which she received a consecutive prison sentence of 1 year. The district court found Jenkins was a habitual criminal. She assigns this as error.

(b) Standard of Review

[22,23] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[64] 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.[65]

(c) Analysis

Subject to exceptions not applicable to this case, Nebraska's habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 2008), provides in relevant part:

> (1) Whoever has been twice convicted of a crime, sentenced, and committed to prison . . . 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 and shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .

[24] In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based

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[64] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

[65] *State v. Wang*, 291 Neb. 632, 867 N.W.2d 564 (2015).

upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.[66]

Here, the district court found the State had proved Jenkins had two valid prior convictions for purposes of habitual criminal enhancement. On appeal, Jenkins does not suggest the evidence regarding either prior conviction was lacking. Instead, she argues that because she committed the 2009 felony while still on parole for the 2006 felony, her second conviction should not be considered valid for purposes of habitual criminal enhancement. In other words, she suggests that because she had not finished serving the sentence imposed for her 2006 conviction when she committed the crime resulting in her 2009 conviction, she cannot be found to be a habitual criminal. She relies on language in *State v. Ellis*[67] to support her novel argument.

[25] In *Ellis*, we held that in order to warrant enhancement under the habitual criminal statute, "the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense."[68] Because both of Ellis' prior convictions had been imposed at the same time, we reversed the finding that he was a habitual criminal and we remanded the cause for resentencing. In discussing the purpose of Nebraska's habitual criminal statutes, we observed:

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[66] *State v. Kinser*, 283 Neb. 560, 811 N.W.2d 227 (2012); *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[67] *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983).

[68] *Id.* at 176, 333 N.W.2d at 394.

> We believe that the purpose of enacting the habitual criminal statute is to serve as a warning to previous offenders that if they do not reform their ways they may be imprisoned for a considerable period of time, regardless of the penalty for the specific crime charged. . . . "'Recidivist statutes are enacted in an effort to deter and punish incorrigible offenders. . . . They are intended to apply to persistent violators who have not responded to the restraining influence of conviction and punishment.' . . . 'It is the *commission* of the second felony *after conviction* for the first, and the *commission* of the *third* felony *after conviction* of the second that is deemed to make the defendant incorrigible.' . . ."[69]

Jenkins focuses on this language to argue that, before a third felony conviction can be considered valid under the habitual criminal statute, a defendant must have "committed the first offense, received the full social benefit or effect of that punishment, then committed a second offense, and received the full social benefit or effect of that second punishment prior to the commission of the third offense."[70]

We reject this argument in its entirety. It misapplies our comment in *Ellis* and is fundamentally inconsistent with the language and the purpose of the habitual criminal statute. The habitual criminal statute is designed to deter and punish recidivism,[71] but Jenkins' interpretation would actually incentivize recidivism by encouraging offenders to commit subsequent crimes while still on probation or parole, in order to immunize the subsequent crime from the possibility of habitual criminal enhancement.

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[69] *Id*. at 175-76, 333 N.W.2d at 394 (emphasis in original), quoting *State v. Pierce*, 204 Neb. 433, 283 N.W.2d 6 (1979) (Hastings, J., dissenting; Krivosha, C.J., and McCown, J., join), and *Coleman v. Commonwealth*, 276 Ky. 802, 125 S.W.2d 728 (1939).

[70] Brief for appellant at 58.

[71] *State v. Ellis, supra* note 67.

[26,27] As we stated in *Ellis*: "'"[W]here the sequence of prior convictions is in issue, the rule . . . is that each successive felony must be committed after the previous felony conviction in order to count towards habitual criminal status."' . . ."[72] So long as each successive felony is committed after the previous felony conviction, it is immaterial to the habitual criminal analysis that an offender has not yet finished serving his or her sentence on the previous felony. Jenkins' argument is meritless, and the district court did not abuse its discretion in finding she was a habitual criminal.

V. CONCLUSION

For the foregoing reasons, we affirm the convictions and sentences in all respects.

Affirmed.

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[72] *Id.* at 176, 333 N.W.2d at 394.

Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

Shayla Funk, appellee, v. Lincoln-Lancaster County Crime Stoppers, Inc., appellee, and City of Lincoln, appellant.

885 N.W.2d 1

Filed September 9, 2016. No. S-15-743.

1. **Political Subdivisions Tort Claims Act: Judgments: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless clearly wrong; however, questions of law are reviewed independently of the decision reached by the court below.
2. **Libel and Slander: Appeal and Error.** Whether a communication is privileged by reason of its character or the occasion on which it was made is a question of law, which an appellate court resolves independently of the determination reached by the court below.
3. **Damages: Appeal and Error.** A fact finder's decision as to the amount of damages will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
4. **Libel and Slander: Words and Phrases.** Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he or she has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty.
5. **Libel and Slander.** When a party making a defamatory statement takes no steps to investigate but relies entirely on information received from another without verification, he or she has not acted as a reasonably prudent person and lacks probable or reasonable grounds for making the defamatory statement, in which event the statement may not be protected by a qualified privilege.

6. **Pleadings.** An affirmative defense raises new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition.
7. **Libel and Slander: Trial.** The failure to request a retraction under Neb. Rev. Stat. § 25-840.01 (Reissue 2008) constitutes an affirmative defense which must be raised prior to trial.
8. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.
9. **Damages: Judgments: Appeal and Error.** With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.
10. **Libel and Slander: Damages.** In an action for defamation, the damages which may be recovered are (1) general damages for harm to reputation; (2) special damages; (3) damages for mental suffering, and (4) if none of these are proved, nominal damages.
11. **Rules of the Supreme Court: Pleadings: Notice.** The Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, but the touchstone is whether fair notice was provided.
12. **Actions: Pleadings.** Prayers for equitable relief have no place or role in a law action.
13. **Actions: Pleadings: Equity.** In Nebraska, the essential character of a cause of action and the remedy or relief it seeks as shown by the allegations of the complaint determine whether a particular action is one at law or in equity.
14. **Libel and Slander.** In order to survive as a separate cause of action, a false light claim must allege a nondefamatory statement. If the statements alleged are defamatory, the claims would be for defamation only, not false light privacy.
15. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, a trial court's admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about the ruling.

Appeal from the District Court for Lancaster County: Steven D. Burns, Judge. Affirmed in part, and in part vacated.

Jeffery R. Kirkpatrick, Lincoln City Attorney, and Elizabeth D. Elliott for appellant.

Vincent M. Powers, of Powers Law, for appellee Shayla Funk.

Wright, Miller-Lerman, Cassel, and Kelch, JJ., and Moore, Chief Judge.

Kelch, J.

I. NATURE OF CASE

Shayla Funk sued Lincoln-Lancaster County Crime Stoppers, Inc. (Crime Stoppers), and the City of Lincoln (City) after still images from a video of Funk conducting a legitimate transaction at an automated teller machine (ATM) were placed on the Crime Stoppers Web site with the text "This young lady doesn't look like your typical crook, but she is! She used someone's stolen credit card . . . . If you know who she is, leave us a tip HERE!" The Lancaster County District Court found in Funk's favor and awarded her injunctive relief and damages in the amount of $259,217.60. The City appeals.

II. BACKGROUND

On May 3, 2013, a West Gate Bank customer reported that his debit card had been stolen and used to conduct an unauthorized transaction. Money had been withdrawn from the customer's account using one of the bank's ATM's.

1. Investigation

An officer from the Lincoln Police Department (LPD) began an investigation. The officer met with the bank customer, who provided the officer with a bank statement showing details of the unauthorized transaction. The officer then talked to a teller from the bank and showed him or her the bank statement. From the bank statement, the teller was able to determine which ATM had been used to withdraw the funds. The teller advised the officer that the teller would talk to someone about getting a video of the security camera footage of that ATM.

Sometime later, the officer returned to the bank to retrieve the video. The officer testified that the bank knew what footage

to provide based on the bank's records of the customer's transactions. The video depicted a female walking up to an ATM and using a debit card to withdraw cash.

At trial, the officer testified that he had no reason to believe that the female depicted in the video was not the person who had used the stolen debit card. He testified that he had asked the employees of the bank to give him the surveillance footage of the unauthorized transaction and that is what the employees said they did. He also testified that the customer's detailed bank statement corroborated that the video depicted the unauthorized transaction; the statement showed that the withdrawal was made from an ATM on Cornhusker Highway in Lincoln, Nebraska, on April 29, 2013, and the video depicted the ATM at the same address and on the same date. However, the video did not have a time stamp, and there was no evidence that the officer would have been able to obtain the time of the surveillance from the video's metadata.

The officer was unable to identify the person in the video, so he sent an e-mail to Jared Minary, LPD's audio and video technician, requesting that Minary capture still images from the video and have them posted to the Crime Stoppers Web site. Crime Stoppers is a nonprofit organization that allows people to anonymously provide information about criminal activity. This is achieved either through a Web-based program called TipSoft or through the Crime Stoppers hotline. A "Crime Stoppers" Web site is owned by the City and operated by LPD. The Web site hosts photographs of suspected criminals, links tipsters to TipSoft, and provides the telephone number for Crime Stoppers. Crime Stoppers then provides the information to law enforcement in an effort to solve crimes.

Minary captured still images from the ATM video and forwarded them to Shane Winterbauer, another LPD officer, so that Winterbauer could post them on the Web site. At trial, Minary was asked what he did to make sure he had captured the correct still image to forward to Winterbauer. Minary replied that he verified the characteristics of the person in the

video with the physical characteristics of the suspect as listed in the investigating officer's report. Minary also testified that he e-mailed the images to the officer and that the officer did not indicate anything was wrong with the images. Minary testified that the video did not have a date or time stamp on it, so he could not verify it in that manner.

2. Posting on Crime Stoppers Web Site

After receiving the images from Minary, Winterbauer posted them on the Crime Stoppers Web site and added a headline and text. The headline stated, "Takes All Kinds." The text stated, "This young lady doesn't look like your typical crook, but she is! She used someone's stolen credit card and made a fake deposit at the ATM, then withdrew some cash. If you know who she is, leave us a tip HERE!" Winterbauer testified that the language in the text was used to draw attention to the site. The images and text were uploaded onto the Web site on May 17, 2013.

This posting formed the basis for Funk's defamation action against Crime Stoppers and the City. However, evidence of other instances of alleged defamation were received at trial.

On May 22, 2013, the same images posted on the Crime Stoppers Web site were used in a Crime Stoppers segment airing on local television station KOLN/KGIN 10/11 News (10/11). A video of the segment was not preserved for trial, but Winterbauer testified that he had e-mailed 10/11 staff on May 21, advising them of the cases to be highlighted that week, including the case involving Funk.

On May 23, 2013, a link to the Crime Stoppers Web site was posted to the Crime Stoppers Facebook page. The post contained the same text as the Web site, but the photograph in the post showed only Funk's torso and not her face.

As a result of these publications, LPD received multiple tips that the female in the video was Funk. On or about June 15, 2013, the investigating officer interviewed Funk. Funk

admitted that she was the person in the video, but denied using a stolen credit card. After the interview, Funk was cited for unauthorized use of a financial transaction device. Although Funk had identified herself as the person in the video, the post was not removed from the Crime Stoppers Web site or the Facebook page.

Sometime between June 15 and July 18, 2013, 10/11 aired a news broadcast about the Crime Stoppers program. A video of the broadcast was published to the jury. The broadcast explained how Crime Stoppers works and how anonymous tips help officers solve numerous crimes in the area. As part of the story, four examples were provided. One of the examples was the case involving Funk. As still images of Funk and the ATM appeared on screen, a female voice could be heard saying, "ATM video led officers to Sheila [sic] Funk and a stolen credit card." Then, Winterbauer appeared, saying, "We confronted her with the fact that the card was somebody else's and she couldn't come up with an explanation for that." The female voice later states, "Each of these cases were [sic] solved because of information from the public."

On July 5, 2013, Crime Stoppers received a tip, which provided, in relevant part, "'"She doesn't look like the typical crook because she isn't a crook. You guys are ruining an innocent person's life by putting her picture on 10/11 . . . even after you had her name and she had met with the police."'" Minary immediately removed the post from the Crime Stoppers Web site. However, as of the time of trial, the post was still on Facebook. Prior to trial, Funk never asked that either of the posts be removed.

On July 10, 2013, a subpoena was faxed to Funk's bank, requesting her banking transactions on the days surrounding the crime. The bank responded the same day with records showing that Funk had engaged in a legitimate transaction with her own account the same day. On July 18, the deputy county attorney wrote Funk a letter notifying her that charges were not filed and that she did not have to appear in court.

3. Facts Relevant to Damages

At the time of the publication, Funk was working for Grand Island Physical Therapy (GIPT), which required her to do occupational therapy at different schools around Nebraska. She was contracted to work 1,600 hours a year, August to August, for $31 per hour. If Funk worked more than 1,600 hours, she was to earn $32.86 per hour. Funk also received benefits through her employment, including a retirement plan to which her employer matched 5 percent.

At trial, Funk testified that in early July 2013, after representatives of the schools contacted GIPT about the Crime Stoppers incident, Funk was placed on an unpaid leave. Funk testified that after talking to her supervisors about it, she began to look for another job, because she did not feel that they believed her when she told them she was innocent.

On July 18, 2013, Funk e-mailed her supervisor to let him know that she had another job offer in Lincoln and that she was seriously considering that option. Funk testified that she had signed a contract with GIPT for the 2013-14 school year and wanted to see if she could get out of it. Funk's supervisor responded, encouraging Funk to take the job in Lincoln.

On July 22, 2013, Funk submitted her resignation to GIPT. Her contract with GIPT that year was to end August 11. Funk testified that because she had already worked 1,600 hours that year, she would have earned $32.86 per hour for the remainder of her 2012-13 contract. Funk testified that most of her work took place during the school year and that during the months of June and July, she was working only 16 to 24 hours per week. But Funk testified that from August 1 to 11, 2013, she would have been working 40 hours per week.

On the same day that Funk resigned from GIPT, she accepted the job in Lincoln with Select Rehabilitation, which job began on August 19, 2013. Funk testified that no one from Select Rehabilitation questioned her about the Crime Stoppers incident. She testified that when she applied to work at Select

Rehabilitation, she represented that she wanted to quit GIPT because she was "sick of traveling and wanted to change from school-based." The starting pay at Select Rehabilitation was $30 per hour, which was $1 per hour less than her pay with GIPT. At the time of trial, Funk had received a raise and was earning $30.90 per hour. Select Rehabilitation does not match Funk's 401K contributions.

During the time that Funk worked for GIPT, she also worked part time for Quantum Health Professionals to make up the hours that she did not get with GIPT in the summer. The Crime Stoppers incident did not have an effect on her employment with Quantum Health Professionals, but she left that job in 2014 and began working for another company part time. Funk testified that the Crime Stoppers incident did not have any adverse employment impact since she began working for Select Rehabilitation.

At trial, Funk called five witnesses to testify about the effect of the Crime Stoppers incident on Funk and Funk's reputation within the community of Ewing, Nebraska, Funk's hometown. The first two witnesses were Funk's cousins, the third witness was a friend of Funk, the fourth witness was Funk's friend's husband, and the fifth witness was Funk's fiance. All of the witnesses heard about the Crimes Stoppers incident from either Funk, Funk's fiance, or people in Ewing. Although they testified that Funk did not lose any friends over the incident, they believed that it had embarrassed and humiliated Funk. A few of the witnesses testified that some people in Ewing directed comments to Funk that were "poking fun," making jokes like "'everybody hide your debit cards'" when Funk walked into the room.

4. Procedural Posture and Trial

In March 2014, Funk filed a complaint against Crime Stoppers, alleging that the postings on the Crime Stoppers Web site constituted libel, slander, and defamation, and that it

violated Funk's privacy by placing her in a false light. Funk also alleged that these torts were done in a joint venture with the City. In December 2014, the City was added as a defendant and an amended complaint was filed to reflect the addition. In the City's answer, it raised as affirmative defenses, first, that it was protected by sovereign immunity and, second, that any statements made by the City were made in good faith and without malice and were therefore protected by qualified privilege. The City did not allege that Funk had failed to request a retraction and was therefore limited to special damages pursuant to Neb. Rev. Stat. § 25-840.01 (Reissue 2008). After it was determined that the City had waived immunity under the Political Subdivisions Tort Claims Act by purchasing excess insurance, the case was set for trial.

The claim against Crime Stoppers was submitted to a jury trial, and the claim against the City was submitted to the district court as required by the Political Subdivisions Tort Claims Act. Ultimately, the trials were done at the same time. The City's opening statement was conducted outside the presence of the jury, and the jury was brought in for the opening statements of Funk and Crime Stoppers. At the close of Funk's case, the City moved for directed verdict and, at the close of its own case, renewed the motion; both motions were overruled. In lieu of a closing statement, the City submitted a brief. The City's counsel was excused just before the jury instruction conference and was not present at the conference.

The jury found that Funk had met her burden of proof and was entitled to $75,000 against Crime Stoppers. It was not specified whether these damages were economic, noneconomic, or both. Entry of judgment was deferred pending the court's decision in the case against the City.

After briefs were submitted, the district court found the City liable for defamation. The court's order stated in part:

> [J]udgment is entered in favor of [Funk] and against the [City] in the amount of $259,217.60. Judgment is entered in favor of [Funk] and against [Crime Stoppers] in the

> amount of $75,000. The judgment against Crime Stoppers and $75,000 of the judgment against [the City] is a joint and several judgment. The remainder of the judgment against the [City] is its sole obligation. The defendants are ordered to pay the court costs.

In addition to the monetary damages, the court ordered that the City was to publish a retraction, which, among other things, would affirmatively state that LPD had failed to conduct a simple investigation that would have resulted in finding that Funk was innocent.

III. ASSIGNMENTS OF ERROR

The City assigns, combined and restated, that the district court erred (1) in finding that qualified privilege did not apply, (2) in finding that Funk was entitled to general damages, (3) in finding that the Facebook post was defamatory, (4) in awarding damages not supported by the evidence, and (5) in overruling its motion for directed verdict for the violation of privacy by false light claim.

IV. STANDARD OF REVIEW

[1] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless clearly wrong[1]; however, questions of law are reviewed independently of the decision reached by the court below.[2]

[2] Whether a communication is privileged by reason of its character or the occasion on which it was made is a question of law, which an appellate court resolves independently of the determination reached by the court below.[3]

[3] A fact finder's decision as to the amount of damages will not be disturbed on appeal if it is supported by the evidence

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[1] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

[2] See, *id.*; *Scholl v. County of Boone*, 250 Neb. 283, 549 N.W.2d 144 (1996).

[3] See *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010).

and bears a reasonable relationship to the elements of the damages proved.[4]

V. ANALYSIS

1. Qualified Privilege

The City first assigns that the district court erred by finding that qualified privilege did not apply. The district court determined that the privilege did not apply, because some of the recipients of the communication were located outside of Lincoln and did not have an interest in solving crime in Lincoln. Although our reasoning differs from that of the district court, we agree that qualified privilege did not apply and affirm the district court's finding of the same.

[4] As the district court noted, conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he or she has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty.[5]

"Good faith" has been defined in part as "[a] state of mind consisting in (1) honesty in belief or purpose [and] (2) faithfulness to one's duty or obligation."[6] The City argues that the officer *honestly believed*, based upon information provided by the bank, Funk was the person who committed a criminal act and that therefore, the statement is subject to a qualified privilege. Indeed, the officer did testify, "At that point I had no reason to believe that there would be any other person (indiscernible), so I provided the [bank] statements, asked the bank to give me the surveillance footage of that actual transaction and that's what they told me they did."

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[4] See *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002).

[5] *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987).

[6] Black's Law Dictionary 808 (10th ed. 2014).

On the other hand, Funk argues that the statement was not made in good faith, because the officer failed to take any steps to verify that the video he received from the bank depicted the unauthorized transaction. We find that the officer's failure to investigate relates more to whether he had reasonable or probable grounds for believing the statement to be true. In this case, we determine that the officer did not have such grounds, and therefore the qualified privilege does not apply.

[5] When a party making a defamatory statement takes no steps to investigate but relies entirely on information received from another without verification, he or she has not acted as a reasonably prudent person and lacks probable or reasonable grounds for making the defamatory statement, in which event the statement may not be protected by a qualified privilege.[7]

The critical evidence before the officer was the video of Funk at the ATM. The video had no transactional stamp or time stamp to provide any verification that Funk was the person who committed the unauthorized transaction. The officer testified that when he initially contacted the bank, he was informed that someone from the security department would be able to provide surveillance footage of the unauthorized transaction. The officer later testified that although the video was given to him by a bank teller, he did not know who created it.

The officer relied entirely upon the assertion of a bank employee who, in turn, must have relied upon an assertion of another unknown employee from the bank's security department. Without a transactional stamp or time stamp, the video could be depicting any person who happened to unfortunately use the same ATM on the same day as the unauthorized transaction, which is what happened in this case.

Additionally, the context of the situation needs to be considered. The video was the key evidence used to identify Funk and cite her with a criminal law violation which was intended to lead to a criminal prosecution. Considering the

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[7] See *Scott Fetzer Co. v. Williamson*, 101 F.3d 549 (8th Cir. 1996).

serious ramifications of the statement, it would not be unreasonable as part of the duties of an investigating officer to have made further inquiry at the bank. The officer might have asked, for example, whether the person in the video matched the person who was conducting the unauthorized transaction and, if so, how the bank determined that to be correct without a time stamp or transactional stamp. This would not be an onerous requirement. Because there was no evidence that the officer made any inquiries about the video, and, instead, the officer relied entirely on unverified representations made by the bank, we find that the defamatory statement was made without reasonable or probable grounds for believing it to be true. Accordingly, the district court did not err in finding that the publication did not have the protection of a qualified privilege.

2. § 25-840.01

The City next assigns that the district court erred in finding that the publication was prompted by actual malice and in awarding Funk general damages. The district court found that Funk was entitled to general damages, despite the City's argument that Funk was limited to special damages pursuant to § 25-840.01. That statute provides, in relevant part:

> (1) In an action for damages for [defamation], the plaintiff shall recover no more than special damages unless correction was requested as herein provided and was not published. Within twenty days after knowledge of the publication, plaintiff shall have given each defendant a notice by certified or registered mail specifying the statements claimed to be libelous or to have invaded privacy as provided by section 20-204 and specifically requesting correction. . . . The term special damages, as used in this section, shall include only such damages as plaintiff alleges and proves were suffered in respect to his or her property, business, trade, profession, or occupation as the direct and proximate result of the defendant's publication.

> (2) This section shall not apply if it is alleged and proved that the publication was prompted by actual malice, and actual malice shall not be inferred or presumed from the publication.

It is undisputed that Funk failed to request a retraction within 20 days of her knowledge of the publication. However, the district court found that § 25-840.01 did not apply, because it concluded that the publication was prompted by actual malice.

In Funk's brief on appeal, Funk tells us that we need not review the district court's finding of malice, because the City waived the limitation of damages when it failed to raise § 25-840.01 as an affirmative defense prior to trial. Indeed, an affirmative defense must be pleaded to be considered in the trial court and on appeal.[8] The burden of both pleading and proving affirmative defenses is upon the defendants, and when they fail to do so, they cannot recover upon mere argument alone.[9]

[6] Thus, the question becomes whether a "failure to request a retraction" under § 25-840.01 is an affirmative defense. We have said that an affirmative defense raises new matter which, assuming the allegations in the petition to be true, constitutes a defense to the merits of a claim asserted in the petition.[10] The rationale for requiring the defendant to plead a specific defense is to set forth the defense so that the plaintiff may be advised of the exact defense he or she will be required to meet and the trial court may be informed as to the exact issues to be determined.[11]

The City's argument pursuant to § 25-840.01 was a new matter that raised two new issues: (1) whether Funk failed

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[8] *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993), *disapproved on other grounds, Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

[9] *Id.*

[10] *Id.*

[11] *Id.*

to timely request a retraction and (2) whether the publication was prompted by actual malice. If the City proved that Funk failed to timely request a retraction, the City would not be liable for general damages, unless Funk proved that the publication was prompted by actual malice. Because the City did not plead "failure to request a retraction" as an affirmative defense, Funk was not on notice that she would be required to prove actual malice to rebut the statutory defense set forth by § 25-840.01.

Further, although defamation is an intentional tort, an analogy can be drawn from affirmative defenses in negligence actions. For example, a defendant seeking to mitigate damages in a negligence action by reason of contributory negligence must raise the issue of contributory negligence prior to trial in order to successfully reduce damages.[12] Here, the City was also seeking to mitigate damages, albeit by reason of Funk's failure to request a retraction. Just like in a negligence action, the City was required to raise the mitigation of damages issue prior to trial.

[7] We therefore conclude that the failure to request a retraction under § 25-840.01 constitutes an affirmative defense which must be raised prior to trial. Because the City failed to raise such defense, we find that it does not apply and that Funk is entitled to general damages.

3. Facebook

The City next assigns that the district court erred in finding that the Facebook post was defamatory, because the person depicted in the photograph on the post is unidentifiable. The district court found that the Facebook post was defamatory and "embarked upon by the City alone," and the court used the Facebook post as a justification for awarding Funk additional damages beyond those awarded by the jury in the trial against Crime Stoppers.

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[12] See, Neb. Rev. Stat. § 25-21,185.09 (Reissue 2008); *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996).

Although the Facebook photograph depicts only Funk's torso, the page links viewers to the post on the Crime Stoppers Web site, where the full image can be seen. The City admits that the post on the Crime Stoppers Web site is defamatory. It is self-evident that regardless of whether the Facebook post is defamatory, the posting of the link on Facebook increased the readership of the post on the Crime Stoppers Web site and likewise the harm to Funk's reputation. Therefore, we conclude that the district court properly considered the Facebook post in awarding damages, and we need not determine whether the post by itself was defamatory.

4. Damages

As noted, the district court awarded Funk damages in the amount of $259,217.60, with $75,000 of that amount being owed jointly and severally with Crime Stoppers. It also ordered the City to publish several retractions. On appeal, the City argues that the damages awarded by the district court were improper, because they were based on speculation and conjecture. The City also argues that the award of injunctive relief was improper, since such relief was not requested. After considering each issue in turn, we affirm the district court's award of monetary damages, but reverse the award of injunctive relief.

(a) Monetary Damages

The City argues that the damages awarded by the district court were speculative and conjectural. To support its argument, the City points to statements in the damages section of the August 5, 2015, order, such as: "At any time [the Crime Stoppers incident] could impact [Funk's] credit rating, her ability to obtain a loan or mortgage, . . . even her potential for custody in a custody of children dispute." The City argues that the district court's award of general damages was improper, because there was no evidence on the effect of Funk's credit rating, her ability to obtain a loan or mortgage, or her potential for custody. The City made similar arguments with respect to

other comments made by the district court. However, the City glossed over the district court's discussion on harm caused to Funk's reputation and mental well-being.

[8,9] The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.[13] With respect to damages, an appellate court reviews the trial court's factual findings under a clearly erroneous standard of review.[14]

[10] Under this standard of review, we must affirm the district court's award of damages, because the award is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. In an action for defamation, the damages which may be recovered are (1) general damages for harm to reputation; (2) special damages; (3) damages for mental suffering, and (4) if none of these are proved, nominal damages.[15]

Sufficient evidence supports that Funk's reputation was harmed as a result of the City's defamatory statements. Not only does the evidence show that the statements affected Funk's personal reputation in her hometown of Ewing, but it is also clear that Funk's reputation was harmed in the context of her employment with GIPT. Further, sufficient evidence also supports that Funk endured some emotional suffering. Numerous witnesses testified that the statements embarrassed and humiliated Funk. Additionally, Funk's fiance confirmed that Funk was embarrassed and humiliated, and he revealed that Funk lost sleep over the incident.

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[13] *BSB Constr. v. Pinnacle Bank*, 278 Neb. 1027, 776 N.W.2d 188 (2009); *Lacey v. State*, 278 Neb. 87, 768 N.W.2d 132 (2009); *State ex rel. Stenberg v. Consumer's Choice Foods*, 276 Neb. 481, 755 N.W.2d 583 (2008); *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008); *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[14] *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

[15] *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990).

With regard to the amount of damages sustained, Funk was simply required to offer sufficient proof of damages so that the fact finder could reach its award without awarding an uncertain, speculative recovery.[16] As we have said before, "The amount of damages for pain, suffering, and emotional distress inherently eludes exact valuation."[17] Accordingly, we find that there was sufficient evidence to support the district court's award of monetary damages, and therefore find that the City's assignment of error with respect to damages is without merit.

(b) Equitable Relief

[11] The City also argues that the district court erred in awarding injunctive relief, because such relief was not requested in Funk's complaint. The Nebraska Rules of Pleading in Civil Actions, like the federal rules, have a liberal pleading requirement for both causes of action and affirmative defenses, but the touchstone is whether fair notice was provided.[18] This is the same standard adopted by the federal courts.[19]

We agree with the City that the averments in Funk's complaint do not raise the issue of retraction or any other equitable relief. Nowhere in Funk's second amended complaint does she request a retraction. Funk claimed only to have "suffered damages including the loss of her employment, loss of wages, humiliation, inconvenience, mental anguish, loss of earning capacity and damage to her reputation."

[12] In countering, Funk claims that she did request equitable relief and points to the prayer in her complaint which states, "WHEREFORE [Funk] seeks damages in an amount, which will fairly and justly compensate her together with the

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[16] See *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993).

[17] *Id.* at 823, 503 N.W.2d at 183.

[18] *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

[19] See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

costs of this action and *such other and further relief as the Court deems just*." (Emphasis supplied.) However, in actions at law, we have stated that such general prayers for equitable relief are mere surplusages and "gratuitous phrase[s]," reasoning that prayers for equitable relief have no place or role in a law action.[20] Although these statements were made while Nebraska was a code-pleading state, we find no reason why this principle does not apply to notice pleading as well.

[13] The action initiated by Funk was clearly an action at law. In Nebraska, the essential character of a cause of action and the remedy or relief it seeks as shown by the allegations of the complaint determine whether a particular action is one at law or in equity.[21] Despite the gratuitous phrase in Funk's prayer, the essential character of Funk's cause of action for defamation was in law for damages and not for equity. Accordingly, with this being an action at law for damages, Funk was not entitled to equitable relief.

Because Funk filed her complaint as an action at law for damages and not for equitable relief, we need not and do not consider whether equitable relief in the form of a retraction is an available remedy in a libel action. Although the attractiveness of the district court's equitable relief is not lost upon this court, we find the district court had the authority to award only damages, and the portion of the district court's order granting equitable relief is hereby vacated.

5. False Light

[14] Finally, the City claims that the district court erred in overruling its motion for a directed verdict for the violation of privacy by false light claim. The City argues that a statement

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[20] See *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 262, 369 N.W.2d 96, 99 (1985). See, also, *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984); *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984).

[21] *Genetti v. Caterpillar, Inc*, 261 Neb. 98, 621 N.W.2d 529 (2001); *Dillon Tire, Inc. v. Fife*, 256 Neb. 147, 589 N.W.2d 137 (1999).

alleged to be both defamatory and a false light invasion of privacy is subsumed within the defamation claim and is not separately actionable. Indeed, we have stated that "'[i]n order to survive as a separate cause of action, a false light claim must allege a nondefamatory statement. If the statements alleged are defamatory, the claims would be for defamation only, not false light privacy.'"[22]

[15] However, to constitute reversible error in a civil case, a trial court's admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about the ruling.[23] The City fails to alert the court as to how this ruling unfairly prejudiced the City, and it appears that the district court attempted to award damages only for one cause of action—defamation. We therefore conclude that this assignment of error is without merit.

VI. CONCLUSION

For the foregoing reasons, we affirm the district court's finding that the communication was not made pursuant to a qualified privilege and its finding that Funk was entitled to both general and special damages. We also affirm the district court's monetary award. However, we vacate the district court's award of equitable relief.

Affirmed in part, and in part vacated.

Heavican, C.J., and Connolly and Stacy, JJ., not participating.

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[22] *Moats v. Republican Party of Neb.*, 281 Neb. 411, 428, 796 N.W.2d 584, 598 (2011) (quoting *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188 (9th Cir. 1989), and citing *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967)).

[23] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009).

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

Steven M. Jacob, appellant, v. Nebraska Department of Correctional Services and Scott Frakes, director of the Nebraska Department of Correctional Services, appellees.

884 N.W.2d 687

Filed September 9, 2016. No. S-15-826.

1. **Declaratory Judgments: Pleadings: Time: Appeal and Error.** In an action for declaratory judgment under Neb. Rev. Stat. § 25-21,149 (Reissue 2008), a motion to alter or amend tolls the time for filing an appeal and any notice of appeal prior to the disposition of the motion to alter or amend has no effect.
2. **Pleadings: Courts: Appeal and Error.** A motion to alter or amend a decision by the district court sitting as an appellate court is merely a motion for the court to exercise its inherent power to reconsider the judgment.
3. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
4. **Prisoners: Courts: Claims: Damages: Proof.** To establish a violation of the right of meaningful access to the courts, a prisoner must establish the State has not provided an opportunity to litigate a claim challenging the prisoner's sentence or conditions of confinement in a court of law, which resulted in actual injury.
5. **Constitutional Law: Courts: Prisoners.** The U.S. Constitution guarantees a prisoner a right to access the courts.
6. **Courts: Actions: Words and Phrases.** Meaningful access to the courts is the capability to bring actions seeking new trials, release from confinement, or vindication of fundamental civil rights.
7. **Constitutional Law: Courts: Prisoners.** An inmate's right of access to the courts in Nebraska is no greater than those rights of access to the federal courts under the U.S. Constitution.

8. **Statutes: Prisoners: Words and Phrases.** A statute or regulation can forge a heightened, state-created right for inmates only if the right is limited to freedom from restraint which imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Steven M. Jacob, pro se.

Douglas J. Peterson, Attorney General, and Kyle Citta for appellees.

Wright, Miller-Lerman, Cassel, and Kelch, JJ., and Moore, Chief Judge.

Wright, J.

NATURE OF CASE

The Nebraska Department of Correctional Services (Department) refused to return a typewriter to an inmate, Steven M. Jacob, after Jacob sent the typewriter out of the prison for repairs. Jacob filed a grievance, which the Department denied without a hearing. Jacob then petitioned the district court for Lancaster County for a declaratory judgment and also for review under the Administrative Procedure Act (APA), Neb. Rev. Stat. § 84-901 et seq. (Reissue 2008 & Cum. Supp. 2012).

Initially the district court dismissed the petition as moot. Jacob then moved to alter or amend, but before a hearing on the motion was held, he appealed. This court dismissed the appeal in a November 19, 2014, memorandum opinion in case No. S-14-035 for lack of jurisdiction. Upon remand, the district court sustained Jacob's motion to alter or amend, and the Department moved to dismiss for failure to state a claim pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). The district court sustained the motion and dismissed the action. Jacob now appeals from that dismissal.

BACKGROUND

Jacob is incarcerated with the Department. He has utilized his personal typewriter, a Brother ML500 with "text memory" capabilities, for a number of years in his cell. In March 2013, Jacob requested to have the typewriter sent to a repair service outside the prison to correct various typing errors. He was informed by the Department that if he sent the typewriter out for servicing, it would not be returned to his possession. The Department explained that the model Jacob possessed was no longer an approved item due to its text memory capabilities and that if he sent the typewriter out for repairs, he would have to make other arrangements for its disposition once it was repaired.

Grievance With Department

Jacob, pro se, filed a grievance with the Department. He alleged that without his typewriter, his right to access to the courts would be impaired. He claimed the Department's refusal to return his typewriter violated Neb. Rev. Stat. § 83-4,123 (Reissue 2014). Jacob also asked for a declaratory order by the Department under § 84-912.01, stating that he had a right to the return of his typewriter if he sent it for repairs.

The Department denied Jacob's grievance. It stated: "You are grieving the policy that provides if an item that is no longer approved is sent out of the institution for repairs, the item cannot be returned to the inmate. This policy will not be changed at this time."

Petition Before District Court

Jacob then filed a "Petition for Review of Administrative Order and Declaratory Judgment" in the district court. He admitted that he was advised by the Department that he could send his typewriter out for service, but that he would not be allowed to have it back if he did. Jacob acknowledged that the Department regulations did not allow inmates to have personal typewriters with text memory capabilities.

Jacob claimed that his typewriter facilitated his access to the courts. He stated that he had access to his typewriter for 10 hours every day, as opposed to the prison law library typewriters for only 1 hour every odd day. Jacob alleged that unlike the law library typewriters, his typewriter had spell checking and allowed him "to review and edit his writing without wasting ribbons, paper, or time." He concluded that without his typewriter, his access to the courts was "impair[ed]." He asserted that the Department's refusal to return his typewriter was not pursuant to any disciplinary action against him.

Under the "Declaratory Judgment" section of his petition, Jacob stated that he was seeking a declaratory judgment and that he had a right "under Neb.Rev.Stat. §84-912.01(2) to rules and regulations providing for the written procedures to follow when seeking a Declaratory Order from the [Department]." Jacob also sought "a declaratory judgment seeking a statement of [his] rights under Neb.Rev.Stat. §83-4,123 to not have his right to access the courts impaired by rules, regulations or policies of the Department." Jacob generally asked the district court for an order stating that the Department must allow him possession of his typewriter after it had been repaired.

Jacob did not set forth a separate petition for APA review in his petition. Under his general allegations, he stated he was seeking review under § 84-917, which provided for judicial review under the APA for the benefit of any person aggrieved by a final decision in a contested case. He did not allege how the Department's denial of his grievance was a final decision in a contested case. Generally, he alleged that the Department's decision denying his grievance violated the same statutes that he referred to in his petition's "Declaratory Judgment" section.

Motion to Dismiss for Failure to State Claim

The Department and its director moved to dismiss Jacob's petition for failure to state a cause of action. Jacob argued that even though there was no hearing below, there was a

declaratory order by the Department. Section 84-912.01(6) provides that a declaratory order shall have the same status and binding effect as any other order issued in a contested case. He claimed that without a contested case, it was proper to appeal the Department's declaratory order by filing a petition for review under the APA.

In his "Brief in Opposition to Motion to Dismiss," Jacob stated that his typewriter had eventually been sent out for repairs, but that it "was physically destroyed beyond repair" upon its arrival at the repair center. At the hearing on the State's motion to dismiss, the State argued that Jacob's claims were moot due to Jacob's statements about the destruction of his typewriter. The district court agreed and dismissed Jacob's petition as moot. It reasoned that according to Jacob's brief, the typewriter no longer existed.

Jacob timely moved to alter or amend the judgment. The matter was set for hearing, but before the hearing was held, Jacob filed a notice of appeal from the district court's order of dismissal. The notice of appeal stated that it was being filed in an "abundance of procedural caution." The district court granted Jacob's motion to proceed with this appeal in forma pauperis. It canceled its hearing on the motion to alter or amend, reasoning that due to Jacob's notice of appeal, it no longer had jurisdiction.

First Appeal

The question presented on Jacob's first appeal was whether this court had jurisdiction when Jacob's motion to alter or amend was still pending in the lower court.

[1] We concluded that in an action for declaratory judgment under Neb. Rev. Stat. § 25-21,149 (Reissue 2008), a motion to alter or amend tolled the time for filing an appeal and any notice of appeal prior to the disposition of the motion to alter or amend had no effect. We concluded that we lacked jurisdiction over the appeal from the dismissal of Jacob's declaratory judgment action, because the motion to alter or amend was still pending.

[2] As to Jacob's appeal under the APA, we stated that a motion to alter or amend was not a tolling motion under Neb. Rev. Stat. § 25-1329 (Reissue 2008). We explained that a motion to alter or amend a decision by the district court sitting as an appellate court is merely a motion for the court to exercise its inherent power to reconsider the judgment. Therefore, a timely notice of appeal from the decision of the district court sitting as an appellate court under the APA remained effective even when a motion to alter or amend the judgment was still pending below.

However, we concluded that the appeal should be dismissed in its entirety for lack of jurisdiction because there was not a final decision in a contested case and because Jacob never had an appeal under the APA. We stated that under § 84-917, for an agency decision to be reviewed by the district court, there must be a final decision in a contested case.[1] Because there was no agency hearing upon Jacob's grievance, the decision Jacob attempted to appeal from was the one-page response signed on behalf of the Department's director denying Jacob's grievance on the grounds that the policy clearly prohibited the return of Jacob's typewriter and that the policy would not be changed. There are no statutes requiring a hearing on inmate grievances, and the Department's rules and regulations do not require a hearing. Although Jacob stated in his grievance that he sought a declaratory judgment by an agency as provided for in § 84-912.01, the Department did not consider the grievance form to be the proper means of requesting such declaratory order. We concluded that because no law or constitutional provision required a hearing before the Department on Jacob's grievance, there was no contested case. Therefore, despite the label Jacob attached to his petition, there was no appeal under the APA. Rather, the district court was acting solely as a trial court to determine Jacob's various requests for declaratory relief.

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[1] See § 84-901(3).

Because the notice of appeal had no effect as to the declaratory judgment actions, we dismissed the appeal for lack of jurisdiction and remanded the matter to the district court for consideration of Jacob's pending motion to alter or amend.

Remand

Upon remand, a hearing was held on Jacob's motion to alter or amend. The district court sustained the motion and gave the Department 21 days to respond. The Department then filed a second motion to dismiss for failure to state a claim. The district court sustained the Department's motion and dismissed the action. It concluded, based on legal precedent from several jurisdictions, that an inmate's right to access the courts did not include a right to a personal typewriter. It also found that Jacob did not allege any specific facts establishing that he was actually prejudiced in connection with any pending or contemplated legal proceeding because of his lack of a personal typewriter. Jacob appeals from that judgment.

ASSIGNMENT OF ERROR

Jacob assigns that the district court erred in dismissing the action for failure to state a claim.

STANDARD OF REVIEW

[3] An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[2]

ANALYSIS

Jacob first argues that because we found in the previous appeal that he had "properly stated an action for declaratory judgment," the district court was precluded from dismissing this action for failure to state a claim. Jacob's argument misunderstands the nature and context of our November 19,

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[2] *Rafert v. Meyer*, 290 Neb. 219, 859 N.W.2d 332 (2015).

2014, memorandum opinion in case No. S-14-035, in which we held:

> There is no dispute that in an action for declaratory judgment under § 25-21,149, a motion to alter or amend tolls the time for filing an appeal, and any notice of appeal prior to the disposition of the motion to alter or amend has no effect. We find that Jacob properly stated an action for declaratory judgment, *whatever its underlying merit.* Thus, this court lacks jurisdiction over the appeal from the dismissal of Jacob's declaratory judgment action.

When considered in the proper context, it becomes apparent that although we determined that Jacob's petition included an action for declaratory judgment, we did not address the merits of that claim or hold that it was sufficient to survive an attack under § 6-1112(b)(6). Jacob's argument to the contrary is without merit.

Now, the case is before us on appeal from the dismissal of Jacob's claim for declaratory judgment by the district court for failure to state a claim upon which relief may be granted. The question presented is whether Jacob's pleading protesting the Department's denial of his grievance regarding the denial of access to his typewriter states a claim upon which relief may be granted.

Jacob alleged that the Department's refusal to return his typewriter violated § 83-4,123. That section provides that the statutes empowering the Department to adopt and promulgate rules and regulations relating to discipline shall not be construed to restrict or impair an inmate's free access to the courts and necessary legal assistance where the action pertains to disciplinary measures. But the Department's policy underlying Jacob's grievance is not related to discipline. Therefore, Jacob's argument based upon § 83-4,123 must fail.

Furthermore, in *American Inmate Paralegal Assoc. v. Cline*, the Eighth Circuit Court of Appeals held that prison inmates

have no constitutional right of access to a typewriter.[3] And prison officials are not required to provide one as long as the prisoner is not denied access to the courts.[4]

Jacob has conceded that he does not have a federal right of access to his typewriter.[5] The U.S. Supreme Court in *Lewis v. Casey*[6] held that an inmate could show a violation of his right to access the courts only by showing "'actual injury'—that is, 'actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.'"

But Jacob claims that the State of Nebraska, through various statutes, has created a greater right of access to the courts which is more protective than the federal standard. He concludes this heightened State-created privilege gives him the right to have his typewriter with text memory capabilities inside his prison cell. We disagree.

[4] Our right of access to the courts in Nebraska is the same as the federal standard. In *Payne v. Nebraska Dept. of Corr. Servs.*,[7] we adopted the federal "actual injury" standard from *Lewis*.[8] We stated that to establish a violation of the right of meaningful access to the courts, a prisoner must establish the State has not provided an opportunity to litigate a claim challenging the prisoner's sentence or conditions of confinement in a court of law, which resulted in actual injury. We stated that the only relevant question was whether an inmate has the

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[3] *American Inmate Paralegal Assoc. v. Cline*, 859 F.2d 59 (8th Cir. 1988). See, also, *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851 (9th Cir. 1985).

[4] *United States v. West*, 557 F.2d 151 (8th Cir. 1977).

[5] See *American Inmate Paralegal Assoc. v. Cline, supra* note 3.

[6] *Lewis v. Casey*, 518 U.S. 343, 348, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

[7] *Payne v. Nebraska Dept. of Corr. Servs.*, 288 Neb. 330, 848 N.W.2d 597 (2014).

[8] *Lewis v. Casey, supra* note 6, 518 U.S. at 349.

capability of bringing a legal issue to court, specifically the capability of bringing before the courts contemplated challenges to sentences or conditions of confinement.[9]

In *Payne*, the prisoner filed a petition for declaratory judgment alleging that certain operational memorandums of the Department were invalid because they restricted his library time, in violation of his rights to access to the courts. He alleged he had filed or had planned on filing civil actions and two criminal postconviction actions. In one postconviction action, he was represented by counsel, and the rest were being undertaken pro se.

The primary issue was whether the 1-hour-per-day regulation on the prisoner's law library time created an actual injury sufficient to meaningfully deny him access to the courts. Ultimately, the district court granted summary judgment in favor of the Department and found there was no genuine issue of material fact that the prisoner did not show an actual injury to a nonfrivolous and arguably meritorious claim as a result of the challenged regulations and the limits on his access to the law library.

[5,6] We recognized that the U.S. Constitution guarantees a prisoner a right to access the courts.[10] Meaningful access to the courts is the capability to bring "'"actions seeking new trials, release from confinement, or vindication of fundamental civil rights."'"[11] 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.[12]

To establish a violation of the right of meaningful access to the courts, a prisoner must establish the State has not

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[9] *Payne v. Nebraska Dept. of Corr. Servs., supra* note 7.

[10] *Id.* See *White v. Kautzky*, 494 F.3d 677 (8th Cir. 2007).

[11] *Payne v. Nebraska Dept. of Corr. Servs., supra* note 7, 288 Neb. at 334, 848 N.W.2d at 601.

[12] *Payne v. Nebraska Dept. of Corr. Servs., supra* note 7.

provided an opportunity to litigate a claim challenging the prisoner's sentence or conditions of confinement in a court of law, which resulted in actual injury, that is, the hindrance of a nonfrivolous and arguably meritorious underlying legal claim.[13] The constitutional right to access the courts does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims.[14] The tools it requires to be provided are those that the inmates need in order to attack their sentences directly or collaterally and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental and perfectly constitutional consequences of conviction and incarceration.[15]

[7] Contrary to Jacob's assertion, we hold that an inmate's right of access to the courts in Nebraska is no greater than those rights of access to the federal courts under the U.S. Constitution.

In his interpretation of § 83-4,123 and Neb. Rev. Stat. § 83-4,111 (Reissue 2008), Jacob claims these statutes create a higher right of access to the courts in Nebraska than those espoused by the federal courts. We disagree. The U.S. Supreme Court in *Sandin v. Conner*[16] determined that whether a state chooses to heighten an inmate's rights is analyzed under the "atypical . . . deprivation" test. Prior to *Sandin*, prisoners could discover "state-created" heightened privileges and protections based upon express language of state laws and regulations.[17] But in *Sandin*, the U.S. Supreme Court rejected

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[13] *Id.*

[14] *Id.*

[15] *Lewis v. Casey, supra* note 6.

[16] *Sandin v. Conner*, 515 U.S. 472, 486, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).

[17] See *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

this approach because it "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges."[18]

[8] Instead of heightened rights that were based on language from state laws and regulations, the court in *Sandin* created a new standard: A statute or regulation can forge a heightened, state-created right for inmates only if the right is "limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[19] Thus, states raise the federal bar if they allow an inmate to experience something that is "significantly atypical" of the usual prisoner experience and is protected by mandatory language in the statutes and regulations. This is usually found in cases where the government tries to lengthen the inmate's time of imprisonment.

Nothing in Jacob's petition regarding his typewriter with text memory capabilities meets the *Sandin* atypical deprivation test. Nothing in Jacob's petition establishes that he has a heightened State-created right of access to the courts, i.e., to a typewriter with such capabilities. Because the prohibition of Jacob's typewriter is not an "atypical, significant deprivation" in relation to the ordinary incidents of prison life, Jacob's petition fails to state a claim for relief.[20]

For the reasons stated herein, we conclude that Jacob has failed to state a claim upon which relief can be granted, and the court did not err in sustaining the Department's motion to dismiss Jacob's claim.

Affirmed.

Heavican, C.J., and Connolly and Stacy, JJ., not participating.

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[18] *Sandin v. Conner, supra* note 16, 515 U.S. at 481.

[19] *Id.*, 515 U.S. at 484.

[20] *Id.*, 515 U.S. at 486.



Nebraska Supreme Court

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

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Edward Hood, appellant.

884 N.W.2d 696

Filed September 9, 2016. No. S-15-1124.

1. **Judgments: Speedy Trial: Appeal and Error.** Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **Speedy Trial.** Nebraska's speedy trial statutes provide in part that every person indicted or informed against for any offense shall be brought to trial within 6 months.
4. ____. In computing whether a trial is timely, certain periods of delay are excluded from the calculation, including the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence.
5. **Speedy Trial: Motions to Suppress.** Determination of whether the speedy trial clock is tolled during the State's interlocutory appeal from a suppression order does not turn on whether the appeal was successful or why it was dismissed, but, rather, on whether it was authorized.
6. **Speedy Trial.** When the State is statutorily authorized to take an interlocutory appeal from a district court's order granting a defendant's pretrial motion in a criminal case, then such an appeal is an expected and reasonable consequence of the defendant's motion and the time attributable to the appeal, regardless of the course the appeal takes, is properly excluded from the speedy trial computation under Neb. Rev. Stat. § 29-1207(4)(a) (Cum. Supp. 2014).
7. **Motions to Suppress: Speedy Trial: Appeal and Error.** Neb. Rev. Stat. § 29-824 (Reissue 2008) expressly authorizes the State to appeal from a district court's order granting a defendant's motion to suppress,

so such an appeal is an expected and reasonable consequence of the defendant's motion to suppress and final disposition of the motion to suppress under Neb. Rev. Stat. § 29-1207(4)(a) (Cum. Supp. 2014) does not occur until the State's appeal is decided.

Appeal from the District Court for Garden County: Derek C. Weimer, Judge. Affirmed.

Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

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

Stacy, J.

Edward Hood appeals from a district court order denying his motion for absolute discharge. The issue presented is whether to exclude from the speedy trial calculation time attributable to the State's unsuccessful appeal from an order sustaining Hood's motion to suppress evidence. We conclude the speedy trial clock was tolled while the State pursued the appeal, and we affirm the denial of the motion for discharge.

FACTS

On January 29, 2014, an information was filed in the district court charging Hood with six counts: motor vehicle homicide, manslaughter, driving under the influence of alcohol or drugs causing serious bodily injury, driving under the influence of alcohol or drugs with two prior convictions, refusal to submit to a chemical test with two prior convictions, and refusal to submit to a preliminary breath test. The charges arose out of a December 7, 2013, accident in which the driver of another vehicle was killed by a vehicle driven by Hood.

Prior to trial, Hood filed a motion to suppress blood and urine samples taken from him. After conducting an

evidentiary hearing, the district court granted the motion. The order granting the motion to suppress was entered on February 27, 2015.

On March 4, 2015, the State filed a notice in the district court that it intended to appeal from the order granting the motion to suppress and asked the district court to fix a time for it to file its application for appellate review.[1] On the same date, the State filed a praecipe in district court, asking that a transcript of the proceedings be prepared and filed with the Clerk of the Supreme Court of Nebraska.

On April 1, 2015, the State filed its application for review with the Clerk of the Supreme Court.[2] The bill of exceptions was filed on April 7. The record indicates the bill of exceptions was not filed sooner, because the court reporter believed she had 7 weeks in which to file it.

The Nebraska Court of Appeals dismissed the State's appeal, finding that § 29-825 required the State to file the bill of exceptions within 30 days of filing the notice of intent to appeal and that the State's failure to do so deprived the court of appellate jurisdiction.[3] After the cause was remanded to the district court, Hood filed a motion for absolute discharge, claiming his statutory right to a speedy trial had been violated. He contended the appeal did not toll the 6-month time period the State had to bring him to trial,[4] and he asked the district court to dismiss all charges against him.

The district court found the time during which the appeal was pending was excludable from the statutory speedy trial calculation and denied the motion for absolute discharge. Hood filed this timely appeal, and we granted his petition to bypass the Court of Appeals.

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[1] See Neb. Rev. Stat. §§ 29-824 to 29-826 (Reissue 2008).

[2] See § 29-824.

[3] See *State v. Hood*, 23 Neb. App. 208, 869 N.W.2d 383 (2015).

[4] See Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2014).

ASSIGNMENT OF ERROR

Hood assigns that the district court erred in finding the time attributable to the State's interlocutory appeal of the suppression order was excludable from the speedy trial calculation.

STANDARD OF REVIEW

[1] Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.[5]

[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[6]

ANALYSIS

[3,4] Nebraska's speedy trial statutes provide in part that "[e]very person indicted or informed against for any offense shall be brought to trial within six months . . . ."[7] In computing whether a trial is timely, certain periods of delay are excluded from the calculation, including "the time from filing until final disposition of pretrial motions of the defendant, including motions to suppress evidence."[8] The question before us is whether the time attributable to the State's interlocutory appeal from the suppression order is properly excluded from the speedy trial calculation.

In *State v. Hayes*,[9] the Court of Appeals considered the effect on a defendant's speedy trial rights when the State files an interlocutory appeal of an order suppressing evidence.

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[5] *State v. Vela-Montes*, 287 Neb. 679, 844 N.W.2d 286 (2014); *State v. Brooks*, 285 Neb. 640, 828 N.W.2d 496 (2013).

[6] *State v. Carman*, 292 Neb. 207, 872 N.W.2d 559 (2015); *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015).

[7] § 29-1207(1).

[8] § 29-1207(4)(a).

[9] *State v. Hayes*, 10 Neb. App. 833, 639 N.W.2d 418 (2002).

Then, as now, § 29-1207(4)(a) requires exclusion of "the time from filing until final disposition" of a defendant's motion to suppress, and the court held that "final disposition" does not occur until any interlocutory appeal from an order granting suppression is decided. The court reasoned that absent such tolling, the State's statutory right to appeal an order granting a motion to suppress would be rendered meaningless:

> [T]he State's right to appeal would be largely a nullity if the speedy trial clock were running during an appeal's pendency. This concern has been noted in other jurisdictions where the State has a statutory right to appeal. . . . Indeed, it would be a perverse result if the appellate judge were to reverse the suppression, but no time was left on the speedy trial clock because it had been running while the State sought reversal of a suppression order. In short, to avoid rendering the State's statutory right to appeal suppression orders meaningless, we hold that the speedy trial clock does not run while the State pursues such an appeal.[10]

We implicitly agreed with *Hayes* in *State v. Recek*.[11] There, the district court granted a defendant's pretrial motion to quash one of two counts in an information. The State attempted to appeal the ruling pursuant to a statute which authorizes certain appeals by the State from final orders.[12] The State's appeal was summarily dismissed, because the order appealed from was not a final order, and its subsequent motion for rehearing was overruled. After the mandate issued, the defendant moved the district court for absolute discharge, claiming his speedy trial rights had been violated. There was no dispute that the time between the filing of the motion to

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[10] *Id*. at 840-41, 639 N.W.2d at 426-27.

[11] *State v. Recek*, 263 Neb. 644, 641 N.W.2d 391 (2002), *disapproved on other grounds, State v. Feldhacker*, 267 Neb. 145, 672 N.W.2d 627 (2004).

[12] See Neb. Rev. Stat. § 29-2315.01 (Reissue 2008).

quash and the district court's order granting the motion was properly excludable under § 29-1207, but the parties disagreed whether the time attributable to the State's interlocutory appeal was excludable.

Recek acknowledged the holding in *Hayes* that the speedy trial clock does not run while the State pursues an appeal from an order granting a motion to suppress. But *Recek* concluded *Hayes* was inapplicable, because "in [*Hayes*,] the State's appeal was clearly permissible"[13] pursuant to the relevant statute, while in *Recek*, there was no statute granting the State authority to appeal from the order quashing one of two counts in an information, a nonfinal order. Because the State lacked authority to pursue the interlocutory appeal, we concluded in *Recek* that the time during which the appeal was pending was not properly excluded from the speedy trial calculation. We specifically reasoned that because the appeal was not authorized, the "delay was not an expected and reasonable consequence of the motion to quash and [thus] was not chargeable to" the defendant.[14]

Here, both parties agree the appeal by the State was statutorily authorized by § 29-824, which provides in relevant part: "In addition to any other right to appeal, the state shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence . . . ." They disagree, however, on the significance, for purposes of the speedy trial calculation, of the State's failure to file the bill of exceptions within 30 days of filing the notice of intent to appeal.[15]

Hood argues that because the timing of the State's filing of the bill of exceptions prompted the Court of Appeals to dismiss the appeal for lack of jurisdiction, our holding in *Recek*

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[13] *State v. Recek, supra* note 11, 263 Neb. at 649, 641 N.W.2d at 396.

[14] *Id.* at 651, 641 N.W.2d at 397.

[15] See §§ 29-824 to 29-826.

compels the conclusion that the time attributable to the State's appeal should not count against Hood. The State argues that the timely filing of a bill of exceptions under § 29-825 is not a jurisdictional requirement, and also argues that this case is distinguishable from *Recek*, because there, the State attempted to appeal from a nonfinal order, while here, the State had express statutory authority to appeal.

It is true the Court of Appeals dismissed the State's interlocutory appeal of the suppression order by reasoning the failure to file the bill of exceptions within 30 days of filing the notice of intent to appeal deprived the court of jurisdiction to consider the appeal.[16] While the plain language of § 29-825 mandates the filing of a bill of exceptions, we have not yet considered whether such filing is a jurisdictional requirement. But even if it is—a question we do not decide here because it is not squarely before us—the reason underlying the dismissal of the State's interlocutory appeal of the suppression order does not answer the question presented in the appeal before us now.

[5,6] Here, we must decide whether the speedy trial clock was tolled during the State's interlocutory appeal from the suppression order. Under our analysis in *Recek*, the answer to that question does not turn on whether the State's appeal was successful or why it was dismissed, but, rather, on whether it was authorized. Under *Recek*, when the State is statutorily authorized to take an interlocutory appeal from a district court's order granting a defendant's pretrial motion in a criminal case, then such an appeal is an "expected and reasonable consequence" of the defendant's motion and the time attributable to the appeal, regardless of the course the appeal takes, is properly excluded from the speedy trial computation under § 29-1207(4)(a).[17]

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[16] See *State v. Hood, supra* note 3.

[17] *State v. Recek, supra* note 11.

[7] Section 29-824 expressly authorized the State to appeal from the district court's order granting Hood's motion to suppress. As such, the State's appeal was "an expected and reasonable consequence"[18] of Hood's motion to suppress, and "final disposition" of the motion to suppress under § 29-1207(4)(a) did not occur until the State's appeal was decided.[19] The district court correctly held that the time attributable to the State's appeal was excluded from the speedy trial calculation under § 29-1207(4)(a).

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision overruling the motion for absolute discharge and remand the cause for further proceedings.

Affirmed.

Connolly, J., not participating.

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[18] *Id.* at 651, 641 N.W.2d at 397.

[19] See *State* v. *Hayes, supra* note 9.

Nebraska Supreme Court
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Marcia R. Schlake et al., appellees, v. Gene W. Schlake, appellant, and CWHEQ, Inc., et al., appellees.

885 N.W.2d 15

Filed September 16, 2016. No. S-15-263.

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. This is so even where neither party has raised the issue.
3. **Partition: Final Orders.** When the dispute in a partition action is over the partition itself rather than ownership or title, there is no final, appealable order until the partition is made.
4. ____: ____. When a partition action involves a dispute over ownership or title as well as a dispute over the method of partition, the parties have a right to have title determined first, and, if they elect to do so, an order resolving only the title dispute is a final, appealable order.
5. ____: ____. When the only issue in a partition action depends on ownership and the nature of the title, an order determining that issue is a final, appealable order.
6. **Partition.** A proceeding within a partition action to determine only title is a special proceeding.
7. **Partition: Final Orders.** In a partition action, the order adopting the referee's initial report and ordering a sale is not a final order. Rather, it is simply one step in the partition process.
8. **Partition: Judgments: Final Orders.** In a partition action where the parties unite the issues and litigate the question of title and the right to partition at the same time, and the court determines both issues in the same order, such a judgment or order is only one step in the partition proceedings, is interlocutory in its nature, and cannot be reviewed until the final decree of partition, or until sale and confirmation.

Appeal from the District Court for Gage County: Paul W. Korslund, Judge. Appeal dismissed.

Lyle J. Koenig, of Koenig Law Firm, for appellant.

Jeffery W. Davis, of Carlson, Schafer & Davis, P.C., L.L.O., for appellees Marcia R. Schlake, Tracy J. Schlake, and Tonia R. Katschke.

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

Stacy, J.

SUMMARY

This appeal seeks review of several orders entered by the district court in a partition action. Because we conclude none of the orders are properly before us for review, we dismiss the appeal.

BACKGROUND

Marcia R. Schlake and Gene W. Schlake purchased residential property in 1996 as joint tenants. They divorced in 1998. Their property settlement agreement, which was incorporated into the consent decree, provided that title to the residential property "shall remain in the joint ownership of the parties as joint tenants with the right of survivorship; provided that [Gene] shall assume and be solely responsible for the payment of the mortgage . . . taxes, insurance, maintenance and other expenses in connection with such property." The decree further provided that "[t]he parties shall not sell such real estate unless both parties agree in writing." Under the decree, if a sale took place, the parties were required to "agree upon the sale price" and "[u]pon the closing of the sale . . . the parties shall equally divide the net proceeds from such sale."

In 2002, Marcia conveyed a remainder interest in her undivided one-half interest to her two adult children, but retained a life estate interest in her one-half interest.

In 2014, Marcia and her children (hereinafter collectively Marcia) filed a complaint in partition regarding the property. Gene opposed the partition in a pro se answer. The answer stated Gene lived in the residence and did not wish to sell it, and noted the parties' divorce decree provided they were not to sell the property unless they both agreed "in writing."

Marcia moved for summary judgment in the partition action. Gene appeared pro se at the hearing but offered no evidence and did not oppose the entry of summary judgment. On May 20, 2014, the court granted summary judgment in Marcia's favor, finding as a matter of law that the parties' shares and interests in the real estate were as alleged in Marcia's complaint, that a partition should be made, and that a referee should be appointed. No appeal was taken from this order.

In June 2014, the referee recommended the court order a referee sale because the residential property could not be partitioned in kind. The referee recommended the net sale proceeds be divided between the parties based on their respective ownership interests.

After the referee filed his report but before the district court ruled on it, Gene retained counsel and filed a motion to vacate the May 20, 2014, summary judgment order. In support of the motion to vacate, Gene argued that when a divorce decree gives parties a tenancy in common in marital property and one of the parties continues to reside on the property, the nonresiding party waives his or her right to partition under equity principles. In opposing the motion to vacate, Marcia argued Gene was precluded from raising such an affirmative defense at that stage of the proceedings, since a judgment in partition already had been entered on summary judgment. On November 13, the district court overruled Gene's motion to vacate, reasoning in part that although Gene "could have raised an affirmative defense that [the] conveyance was a sale in violation of the decree and that as a matter of equity [Marcia] should be precluded from seeking partition," his failure to present such a defense in response

to Marcia's summary judgment motion was "not grounds to vacate the judgment."

Gene timely appealed from the order denying the motion to vacate. The Nebraska Court of Appeals dismissed his appeal in case No. A-14-1078 in a February 13, 2015, minute entry. The court cited *Vrana v. Vrana*[1] for the proposition that where an appeal in partition is prosecuted before the trial court has acted on the report of the referee, such appeal must be dismissed, because it is not from a final order.

Thereafter, on March 16, 2015, the district court entered an order approving the referee's report and ordering that "the Referee proceed to sale of the premises at public auction as upon execution, upon such terms . . . and conditions as the Referee shall deem to be reasonable, and shall make due return of his biddings to this court." Gene timely appealed from the March 16 order, and we moved this case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

ASSIGNMENTS OF ERROR

Gene assigns, restated, that the district court erred (1) in overruling his motion to vacate the summary judgment order; (2) in ordering partition of the property, in violation of the decree of dissolution; and (3) in accepting the referee's recommendation and ordering the property to be sold.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law.[3]

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has

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[1] *Vrana v. Vrana*, 85 Neb. 128, 122 N.W. 678 (1909).

[2] Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

[3] *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

jurisdiction over the matter before it.[4] This is so even where, as here, neither party has raised the issue.[5]

Gene seeks appellate review of several orders entered by the district court during the pendency of this partition action. We consider, with respect to each, whether it is properly before us.

The seminal case on the issue of the appealability of orders in a partition action is *Peterson v. Damoude*.[6] In that case, we recognized the varying procedural and factual paths a partition action can take, and we explained that the appealability of orders arising in such actions depends on the nature of the controversy resolved by the order. We noted that

> [c]ases involving partition, and the right of appeal before partition is complete, range themselves in three classes:
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> (1) Where there is no controversy as to the ownership of the property in common and the right of partition, but the controversy is as to something relating to the partition, as whether the property can be equitably divided or must be sold, one party contending that it can be equitably divided and asking for a distinct portion of the property, and the other party contending that it cannot be equitably divided and asking that the whole property be sold, or some similar controversy in regard to the partition itself. When that is the case, the partition alone is the subject of litigation, and of course is not final until the partition is made.
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> (2) The second class is where there is the same issue as above indicated as to the method of partition, and at the same time a distinct issue as to the title and ownership of the property. In such cases the parties would have a right to have their title first tried and determined, and, if that was done, the order thereon would be a final order,

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[4] *Id.*

[5] *Deines v. Essex Corp.*, 293 Neb. 577, 879 N.W.2d 30 (2016).

[6] *Peterson v. Damoude*, 95 Neb. 469, 145 N.W. 847 (1914).

> within the *per curiam* in [*Sewall v. Whiton*[7]], but if the matter is tried to the court, and the parties do not ask that their title be first determined, and there is no indication that the court proceeded first to determine the title, the parties should be held to have waived their right to appeal before the partition is completed.
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> (3) The third class is where everything depends upon the title and the nature of the title, and where, when that question is determined, the whole thing is determined. In such case there can be no doubt under the *per curiam* in the *Sewall* case that, when that question is determined, such determination is a final order, within the meaning of the statute, and is appealable.[8]

[3-5] Stated simply, when the dispute in a partition action is over the partition itself rather than ownership or title, there is no final, appealable order until the partition is made. When a partition action involves a dispute over ownership or title as well as a dispute over the method of partition, the parties have a right to have title determined first, and, if they elect to do so, an order resolving only the title dispute is a final, appealable order. Finally, when the only issue in a partition action depends on ownership and the nature of the title, an order determining that issue is a final, appealable order.[9]

[6] We implied in *Peterson* that a proceeding within a partition action to determine only title is a special proceeding, and we take this opportunity to better explain our reasoning. We have defined special proceedings in a number of different ways over the years, and we do not undertake here the Sisyphean task of reconciling those definitions.[10] As relevant

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[7] *Sewall v. Whiton*, 85 Neb. 478, 123 N.W. 1042 (1909).

[8] *Peterson v. Damoude, supra* note 6, 95 Neb. at 471, 145 N.W. at 848.

[9] *Id.*

[10] See John P. Lenich, *What's So Special About Special Proceedings? Making Sense of Nebraska's Final Order Statute*, 80 Neb. L. Rev. 239 (2001).

here, we have noted that "[w]here the law confers a right and authorizes a special application to a court to enforce the right, the proceeding is special, within the ordinary meaning of the term 'special proceeding.'"[11] Our recognition in *Peterson* that parties in partition actions have a right to have their title "first tried and determined" is recognition of just such a right, as well as recognition that an order determining title ordinarily affects a substantial right.[12]

We have consistently applied *Peterson* to determine when and under what circumstances orders in partition actions are final and appealable,[13] and we conclude it is applicable here as well.

Finality of March 16 Order

The district court's March 16, 2015, order approved the referee's initial report and ordered that "the Referee proceed to sale of the premises at public auction as upon execution, upon such terms . . . and conditions as the Referee shall deem to be reasonable, and shall make due return of his biddings to this court." We conclude this is not a final, appealable order because it is merely one step in the partition action.

The partition statutes set up a series of statutorily mandated phases in order to achieve the partition of property.[14] Partition begins with the filing of a complaint in partition.[15] The parties then produce documentary proof showing their share,[16] after which the district court shall render judgment

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[11] *State v. Jacques*, 253 Neb. 247, 253, 570 N.W.2d 331, 335 (1997).

[12] *Peterson v. Damoude, supra* note 6, 95 Neb. at 471, 145 N.W. at 848. Accord *Sewall v. Whiton, supra* note 7.

[13] See, *Trowbridge v. Donner*, 152 Neb. 206, 40 N.W.2d 655 (1950); *Beck v. Trapp*, 103 Neb. 832, 174 N.W. 610 (1919).

[14] See Neb. Rev. Stat. § 25-2170 et seq. (Reissue 2008).

[15] § 25-2170.

[16] See §§ 25-2177 and 25-2178.

"confirming those shares and interests, and directing partition to be made accordingly."[17] At this point, the district court appoints up to three referees[18] who compile a report on the property to be partitioned.[19] If, as was the case here, the report recommends partition in sale rather than partition in kind, and if the court is satisfied with the report, it "shall cause an order to be entered directing the referee or referees to sell the premises."[20] After the sale, the referee must report the results of the sale to the court.[21] At that time, the court may appoint a referee to "inquire into the nature and amount of encumbrances, and report accordingly."[22] Once the referee's final report is confirmed, "judgment thereon shall be rendered that the partition be firm and effectual forever."[23]

[7] We recite this statutory scheme to illustrate what we observed long ago in *Vrana v. Vrana*[24]: The order adopting the referee's initial report and ordering a sale is not a final order. Rather, it is simply one step in the partition process. *Vrana* was a partition action which only involved a controversy over the method of partition. There, the district court appointed a referee to make partition and report back to the court and appeal was taken from that order. We held the order appealed from was not final, and we dismissed the appeal. This is because, as we explained shortly thereafter in *Sewall v. Whiton*,[25] such an order is merely "one step in the partition proceedings, is interlocutory in its nature, and cannot

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[17] § 25-2179.

[18] § 25-2180.

[19] See §§ 25-2181 and 25-2182.

[20] § 25-2183.

[21] § 25-2186.

[22] § 25-2187.

[23] § 25-21,105.

[24] *Vrana v. Vrana, supra* note 1.

[25] *Sewall v. Whiton, supra* note 7, 85 Neb. at 479, 123 N.W. at 1043.

be reviewed until the final decree of partition, or until sale and confirmation."

In *Trowbridge v. Donner*,[26] we reviewed a partition action after the subject property had been sold and an order confirming the sale had been entered. In discussing the history of the case, we noted the district court had properly denied a supersedeas bond when one of the parties wanted to appeal from an earlier order adopting a referee's report and ordering the property sold. We noted that "the decree ordering partition and sale was not appealable as a final order until partition was effected and confirmed."[27]

We recognize that in *In re Estate of McKillip*,[28] we held that an order adopting a referee report and ordering a referee sale was a final, appealable order under Neb. Rev. Stat. § 25-1902 (Reissue 2008). But in that case, we were considering a partition for purposes of distribution within a probate proceeding.[29] Because proceedings under the probate code are special proceedings,[30] we concluded the county court's order directing a referee's sale arose in a special proceeding and affected a substantial right under § 25-1902. In concluding the order in *In re Estate of McKillip* was final and appealable, we distinguished our holdings in *Peterson* and *Trowbridge*, because those cases did not involve partitions within probate proceedings, but, rather, involved orders in civil partition actions filed in district court pursuant to chapter 25, article 21, of the Nebraska Revised Statutes.[31]

Here, the partition action was filed in district court and is not part of a probate proceeding. Analysis of whether

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[26] *Trowbridge v. Donner, supra* note 13.

[27] *Id.* at 209-10, 40 N.W.2d at 658.

[28] *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[29] See Neb. Rev. Stat. § 30-24,109 (Reissue 2008).

[30] *Id.*

[31] See § 25-2170 et seq.

the March 16, 2015, order is final is governed by *Peterson*, *Trowbridge*, and *Vrana*, rather than by *In re Estate of McKillip.* Under our established precedent, the district court's March 16 order adopting the referee's initial report and ordering a sale was not a final, appealable order.

Order on Summary Judgment and Order Overruling Motion to Vacate

Gene also seeks appellate review of the order granting summary judgment on the issue of partition and the subsequent order overruling his motion to vacate the summary judgment. We conclude neither the summary judgment order nor the order overruling the motion to vacate is properly before us in this appeal.

On May 20, 2014, the district court entered its order granting summary judgment as to the questions of title and partition. There is no dispute that Gene did not appeal from that order within 30 days. Under *Peterson*, whether the May 20 order was final depends on whether ownership or title was disputed as the record stood at that time. Our review of the record convinces us it was not.

[8] At the summary judgment hearing, Gene did not contest ownership or title in any respect, but, rather, agreed ownership was as alleged by Marcia. Moreover, even if Gene's pro se answer could liberally be construed as disputing title, we recognized in *Sewall* that if the parties

> unite the issues and litigate the question of title and the right to partition at the same time, and the court determines both issues in the same judgment, such a judgment or order is only one step in the partition proceedings, is interlocutory in its nature, and cannot be reviewed until the final decree of partition, or until sale and confirmation.[32]

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[32] *Sewall v. Whiton, supra* note 7, 85 Neb. at 479, 123 N.W. at 1043.

Here, the issues of title and partition were presented simultaneously to the district court on summary judgment without objection and the issues were determined by the court in a single order, so "the parties should be held to have waived their right to appeal [the title determination] before the partition is completed."[33]

This is not a case which falls, either procedurally or factually, into the third *Peterson* category. And whether it falls into the first or second categories is not dispositive because, either way, under the rules announced in *Peterson* and *Sewall*, there can be no final order or judgment until the partition action is complete. To the extent Gene desires appellate review of the district court's summary judgment rulings on the issues of title and partition, such review, if it is to occur, must wait until the partition action is completed.[34]

Finally, we note Gene assigns error to the district court's overruling of his motion to vacate the May 20, 2014, summary judgment order. This assigned error was the subject of Gene's first appeal, which was dismissed by the Court of Appeals for lack of a final order. Gene did not seek further review of that dismissal, and we will not, in his current appeal, revisit the issue.

CONCLUSION

For the foregoing reasons, we conclude Gene has appealed from a nonfinal order and we must dismiss the appeal.

Appeal dismissed.

Connolly, J., not participating in the decision.

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[33] See *Peterson v. Damoude, supra* note 6, 95 Neb. at 471, 145 N.W. at 848. See, also, *Sewall v. Whiton, supra* note 7.

[34] See *id.*



Nebraska Supreme Court

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State of Nebraska, appellee, v. Michael E. Harris, appellant.

884 N.W.2d 710

Filed September 16, 2016. No. S-15-332.

1. **Postconviction: Evidence: Appeal and Error.** In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. An appellate court upholds the trial court's findings unless they are clearly erroneous. In contrast, an appellate court independently resolves questions of law.
2. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
4. **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. 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 in the area. To show prejudice, the defendant must demonstrate reasonable probability

that but for counsel's deficient performance, the result of the proceeding would have been different.

5. **Postconviction: Evidence.** When a court grants an evidentiary hearing in postconviction proceedings, it is obligated to determine the issues and make findings of fact and conclusions of law with respect thereto.
6. **Judgments: Appeal and Error.** The purpose of requiring factual findings and conclusions of law is to facilitate appellate review.
7. **Courts: Judgments: Appeal and Error.** The sufficiency of a trial court's factual findings and legal conclusions will depend to a large extent on the nature of the case and the assignments of error urged on appeal. The court's findings must be sufficient to address and resolve all issues presented by the pleadings and to permit an appellate court to reach all errors assigned on appeal.
8. **Self-Defense: Statutes.** The duty to retreat is spelled out in Neb. Rev. Stat. § 28-1409(4)(b) (Reissue 2008), and the corollary privilege of nonretreat is addressed in § 28-1409(4)(b)(i).
9. **Self-Defense.** Under Neb. Rev. Stat. § 28-1409(4)(b)(i) (Reissue 2008), the privilege of nonretreat exists only in one's dwelling or place of work.
10. **Self-Defense: Words and Phrases.** For purposes of Neb. Rev. Stat. § 28-1409 (Reissue 2008), the Legislature has defined "dwelling" as "any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging."
11. **Appeal and Error.** An appellate court will not consider error which is neither assigned nor discussed in an appellant's initial brief.
12. **Effectiveness of Counsel.** Defense counsel does not perform in a deficient manner simply by failing to make the State's job more difficult.
13. **Pleas.** During a plea hearing, the court's advisement regarding possible penalties need not extend beyond reciting the range of possible penalties for the charge to which a plea is entered.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

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

Stacy, J.

I. NATURE OF CASE

Michael E. Harris appeals from the denial of postconviction relief following an evidentiary hearing. Finding no error in the district court's ruling, we affirm.

II. BACKGROUND

1. Trial and Direct Appeal

After a shooting death in 2004, Harris was charged in a three-count information with first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Harris pled guilty to possession of a deadly weapon by a prohibited person and proceeded to trial on the remaining two counts.

At trial, Harris admitted shooting Isice Jones on July 5, 2004, but claimed he did so in self-defense. On direct appeal, we summarized the competing theories of the case in a memorandum opinion[1] as follows:

> The State's theory of the case, as summarized, was that Harris was dating a woman named Valerie Johnson. Johnson had a daughter from a previous relationship with a man named Nate Jackson, who was deceased. According to the State, [Jones] was a friend of Jackson and promised Jackson, before Jackson's death, that [he] would look after Jackson's daughter. According to the State's theory, Harris resented the attention [Jones] paid to Johnson and Jackson's daughter. The State contended that when [Jones] tried to visit Jackson's daughter at Harris' residence on July 5, Harris assaulted [Jones], and then shot and killed him.
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> The defense offered a theory of self-defense. The defense contended that Harris was afraid of [Jones], that [Jones] had made an angry telephone call to Johnson at Harris' home, and that Johnson had told Harris that Jones

[1] *State v. Harris*, 269 Neb. xix (No. S-04-665, May 18, 2005).

> was coming to Harris' house with a gun and a dog. The defense contended that Harris was going to leave, to avoid a confrontation, but he put a .22-caliber pistol in his pocket to protect himself. Before Harris left, however, [Jones] arrived with a pit bull, and [Jones] behaved aggressively. According to the defense's theory, Harris thought he saw something in [Jones'] hand, and Harris shot [Jones] in self-defense.

In the instant appeal, Harris raises various claims of ineffective assistance of trial counsel. Some additional background is helpful to understanding these claims.

Harris testified at trial. He said that as he was placing a bag of trash on the curb in front of his house, Jones came speeding out of the alley in a van. Jones stopped the van at the end of Harris' driveway and jumped out screaming and cursing. Jones approached Harris aggressively and pushed his way through the open gate across Harris' driveway. Jones shoved Harris into the gate, cutting his hand. Harris testified he feared for his life, so he pulled his gun and told Jones to leave. Jones told Harris "'you just going to have to shoot me,'" and Jones raised his hand. Harris thought Jones was holding a gun, so he backed up and shot at Jones several times. Harris testified that Jones tried to duck, then ran back through the gate and fell down on the driveway. Harris ran into the house and shut the door, then came back outside to see if he could find Jones' gun to retrieve it for police. Harris saw Jones on the ground in the driveway, and on the ground next to him was a cell phone. Harris testified he panicked and ran back into the house, then out the back door, where he ditched the gun in an alley.

Johnson, Harris' girlfriend, also testified at trial. She did not witness the shooting but testified about events leading up to it. She testified Jones had telephoned her the day of the shooting to say he was angry that she and Harris had not answered their telephone the previous day when Jones tried to visit. Jones told Johnson he would be coming over to Harris'

residence with a gun and his pit bull dog. Johnson told Harris what Jones had said, and she suggested Harris should leave. Harris agreed and then went to the garage to get a gun. Jones arrived shortly thereafter.

The shooting was witnessed by several individuals, including three women who followed Jones to Harris' house in a different vehicle. One of the three women was Jones' girlfriend, and the other two were sisters of Johnson. Jones' girlfriend testified that when she and the other women arrived at Harris' house, Jones was stepping out of his van. All three women testified that Jones was calm as he approached Harris and that they saw Harris motion for Jones to enter the yard. The women did not see a gun in Jones' hand and did not observe any sort of physical altercation between Harris and Jones before Harris pulled out a gun and shot Jones. Jones fell to the ground in the driveway. The women did not go to check on Jones immediately but instead drove away to find police officers they had seen nearby. When they arrived back with police, they observed Jones lying in the driveway. Jones' girlfriend noticed he had a cell phone in his hand.

Two 7-year-old boys were riding bicycles in the area at the time of the shooting. One of the boys testified he saw Harris shoot a man three or four times in the driveway. The boy testified that the man did not have a gun but, after falling to the ground, pulled out a cell phone and tried to make a call. The other boy did not see the initial shots fired, but testified that he saw a man on the ground in the driveway and saw the man take a cell phone out of his pocket. Both boys testified that they saw Harris go inside the house while the other man lay in the driveway and then saw Harris come back outside wiping a gun with a blue towel. Both boys testified Harris then walked over to the man and shot him again.

A woman who lived across the street from Harris testified she was on her front porch when she heard what she thought were several firecrackers, followed by women screaming. From across the street, she saw a man on the ground in Harris'

driveway. While on the telephone with the 911 emergency dispatch service, the woman saw another man come out of Harris' house and point a gun at the man on the ground. She testified she saw the man with the gun say something she could not hear and then walk back into the house.

The autopsy showed Jones was shot three times. Two bullets entered his body from the front, and one entered from the back. Police located three fired .22-caliber shell casings in Harris' driveway. A small blue towel was recovered by police from Harris' dining room. The towel tested positive for gunshot residue.

The jury found Harris guilty of the lesser-included offense of second degree murder and of using a deadly weapon to commit a felony. He was sentenced to consecutive prison terms of 25 years to life for second degree murder, 25 to 30 years for use of a deadly weapon to commit a felony, and 10 to 15 years for possession of a deadly weapon by a prohibited person.

This court affirmed Harris' convictions and sentences on direct appeal.[2] Harris was represented by lawyers from the same law firm at trial and on direct appeal, so his first opportunity to raise claims of ineffective assistance was in his postconviction motion.[3]

2. Postconviction Proceedings

On August 20, 2012, Harris filed a verified motion for postconviction relief. Shortly thereafter, he was granted leave to file a supplemental verified motion in which he presented more than 20 claims of ineffective assistance of trial counsel. We address only those which are necessary to our analysis of the errors assigned by Harris on appeal.

The district court determined Harris was entitled to an evidentiary hearing on "a few of [the] claims he raises" but did

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[2] *State v. Harris, supra* note 1.

[3] See *State v. Fox*, 286 Neb. 956, 840 N.W.2d 479 (2013).

not specify which. The district court appointed Harris postconviction counsel, and eventually an evidentiary hearing was held. It does not appear from the record that the district court restricted the evidentiary hearing to any specific claims, but instead left the presentation of evidence to the attorneys.

At the evidentiary hearing, witnesses were called and depositions were offered and received. The district court took judicial notice of the prior court proceedings, the entire bill of exceptions on direct appeal, and all the postconviction pleadings.

After posthearing briefing was completed, the district court entered a written order overruling the motion for postconviction relief. The court noted that Harris' postconviction arguments "[p]rimarily" centered on his claim that his trial counsel was ineffective for failing to interview and subpoena two witnesses who Harris claims would have supported his claim of self-defense. The evidence showed that before trial, Harris gave his attorney a letter listing several witnesses he wanted to be considered for his defense. Neighbors Betty Woods and Lee Perry were included on that list. Both Woods and Perry were deposed, and their depositions were received into evidence at the postconviction hearing.

Woods testified she was looking out her window and saw a man drive up to Harris' house. She saw Harris and the man "wrestling" or "horse playing" just inside the gate near the street, but thought it looked like a "play fight," so she stopped watching. She did not see anything in either man's hand and never saw a gun. When she returned to the window, she saw the man on the ground. According to Woods, she was never contacted or interviewed by Harris' trial counsel or anyone from the defense team.

Perry testified he saw Jones knock on Harris' front door the day before the shooting. No one answered the door, and Perry saw Jones leave a note on the windshield of Harris' car. Perry told Harris later that day about the visit and the note, but Perry never read the note and did not know its contents.

According to Perry, he was never contacted or interviewed by Harris' trial counsel.

The deposition of Harris' trial counsel was also received into evidence at the postconviction hearing. Trial counsel acknowledged that Harris had given him a letter with the names of several potential witnesses, and counsel testified that he assigned a law clerk to interview both Woods and Perry. Harris' trial counsel testified that he decided not to call Woods as a witness because, based on what his law clerk told him, Woods did not see the incident and did not see the gun. He added that Woods did not relay to his law clerk the same information Woods provided later. Harris' trial attorney had no memory of Perry but, when he was told the substance of Perry's deposition testimony, he was uncertain whether he would have called Perry to testify at trial.

The law clerk, who testified at the evidentiary hearing, did not corroborate trial counsel's testimony. The law clerk had no recollection of interviewing either Woods or Perry and testified that because this was his first murder case as a law clerk, it "[p]robably" would stand out in his mind if he had talked with either witness.

In its order denying postconviction relief, the district court made a specific factual finding that no one from Harris' defense team interviewed either Woods or Perry. The court concluded that trial counsel performed deficiently by failing to conduct a reasonable investigation, but found that Harris was not prejudiced by counsel's deficient performance. The court reasoned that even though the testimony of Woods and Perry would have "aided [Harris'] claim of self-defense," it would not have done so "to the extent that it was reasonably probable that the jury would have acquitted him if it had heard the testimony."

As it regarded the myriad of other postconviction claims asserted by Harris, the district court made the following consolidated findings and conclusions:

> The evidence and record establishes [sic] that [Harris] has not met his burden as to the numerous other claims of ineffective assistance of counsel made in his amended motion for postconviction relief. The Court finds trial counsel's testimony adduced at the evidentiary hearing by deposition refutes, or satisfactorily explains, [Harris'] other claims raised in [Harris'] deposition that was also received at the evidentiary hearing. These other issues do not require any further discussion except as to the issue of the trial court not properly instructing on the issue of self-defense. As to this issue, this Court notes that the trial court did not instruct the jury that [Harris] had a duty to retreat before using deadly force. Nor can it be argued that deadly force can be used for the protection of property. [Citations omitted.] Therefore, there was no error in regards to this claim.

The district court denied the motion for postconviction relief. Harris timely appealed, and we moved the appeal to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[4]

III. ASSIGNMENTS OF ERROR

Harris assigns, rephrased and consolidated, that the district court erred in denying postconviction relief (1) on the ground trial counsel was ineffective in failing to interview Woods and Perry and offer their testimony at trial, (2) without making specific factual findings and conclusions of law as required by Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2014), (3) on the ground trial counsel was ineffective for failing to request a jury instruction on the privilege of nonretreat, and (4) on the ground trial counsel was ineffective for failing to adequately advise Harris of the consequences of his guilty plea to possession of a deadly weapon by a prohibited person. Harris also assigns

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[4] Neb. Rev. Stat. § 24-1106(3) (Supp. 2015).

that it was plain error for the trial court to accept his guilty plea, because the State did not establish he was represented by or waived counsel on the prior felony and because the trial court failed to advise Harris of the sentencing consequences of entering his plea.

IV. STANDARD OF REVIEW

[1] In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact.[5] An appellate court upholds the trial court's findings unless they are clearly erroneous.[6] In contrast, an appellate court independently resolves questions of law.[7]

[2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[8] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[9] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[10] an appellate court reviews such legal determinations independently of the lower court's decision.[11]

[3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[12] When reviewing

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[5] *State v. Poe*, 292 Neb. 60, 870 N.W.2d 779 (2015).

[6] See *id.*

[7] *Id.*

[8] *State v. DeJong*, 292 Neb. 305, 872 N.W.2d 275 (2015); *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

[9] *Id.*

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

[11] *DeJong, supra* note 8; *Thorpe, supra* note 8.

[12] *Id.*

questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[13]

V. ANALYSIS

1. Ineffective Assistance of Counsel

[4] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[14] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[15] 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 in the area.[16] To show prejudice, the defendant must demonstrate reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[17]

Harris' primary argument, both before the district court and on appeal, is that his trial counsel was ineffective for failing to interview Woods and Perry and call them to testify at trial. The district court made a factual finding that no one from Harris' defense team interviewed Woods and Perry as potential witnesses. We review this factual finding for clear error, and we find none.

The district court also concluded that counsel's failure to contact these witnesses constituted deficient performance, but that Harris had not proved he was prejudiced, because even if Woods and Perry had testified, there was no reasonable probability that the result of the proceeding would have been different. Having reviewed the record, we agree.

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[13] *Id.*

[14] *Strickland, supra* note 10.

[15] *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013).

[16] *Id.*

[17] *Id.*

Perry's testimony that he saw Jones leave a note on Harris' car the day before the shooting is consistent with the testimony of others at trial who testified that Jones went to Harris' house the day before the shooting and left when Harris did not answer the door. Harris argues that in addition to placing Jones at Harris' house the day before the shooting, Perry's testimony would have provided evidence that Jones left a threatening note. But Perry could not have testified to the contents of the note, because he admits he never read it. And the fact that Harris was aware of the note (and presumably its contents) at the time of trial, but neither offered it nor testified to its contents, belies his argument now that the note contained a threat.

Woods' testimony that she saw Harris and another man "wrestling" or "play fight[ing]" would have supported Harris' claim that an altercation of some sort occurred between Harris and Jones, but her testimony would not have changed the outcome of the trial. Woods did not see anything suggesting that Jones was the initial aggressor or that Jones had a gun. And importantly, Woods' testimony would not have refuted the strongest evidence that Harris was not acting in self-defense: The two boys who testified that after Jones had been shot and while he lay on the ground in the driveway, Harris walked down the driveway, stood over Jones, and shot him again.

Even if Harris' trial counsel had interviewed Woods and Perry and called them to testify at trial, there is no reasonable probability that the result of the proceeding would have been different. These assignments of error are without merit.

2. District Court's Order Denying Postconviction Relief

Harris argues that the district court's order denying postconviction relief did not contain adequate factual findings, and he asks that the cause be remanded with directions to make specific findings on each of the more than 20 claims of

ineffective assistance which he presented in his supplemental verified motion. We conclude remand is unnecessary because the court's factual findings were sufficient.

[5,6] When a court grants an evidentiary hearing in postconviction proceedings, it is obligated to "determine the issues and make findings of fact and conclusions of law with respect thereto."[18] We have explained that without factual findings and conclusions of law, we are unable to reach the merits of claims that a district court erred in ruling on a postconviction motion after an evidentiary hearing.[19] As such, the purpose of requiring factual findings and conclusions of law is to facilitate appellate review. With that purpose in mind, we find the district court's order in this case contained sufficient factual findings and conclusions of law to permit us to reach all assigned errors.

The court's 11-page order summarized the trial record and recited the evidence adduced during the evidentiary hearing. The court noted that Harris "[p]rimarily" focused his evidence and argument at the hearing on claims that his trial counsel was ineffective for failing to interview and subpoena Woods and Perry to testify at trial. It is not surprising, then, that the court likewise focused much of its analysis on those same claims, detailing the evidence adduced and making specific factual findings and conclusions of law with respect to those claims.

Harris does not suggest the trial court's factual findings and legal conclusions were insufficient regarding the ineffective assistance claims involving Woods and Perry, but he argues the court made insufficient findings regarding Harris' many other claims of ineffective assistance. Specifically, Harris takes issue with the court's consolidated findings and conclusions that he had "not met his burden as to the numerous other claims of

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[18] § 29-3001(2). See, also, *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990).

[19] *State v. Costanzo, supra* note 18.

ineffective assistance of counsel made in his amended motion for postconviction relief" and with the court's general finding that "trial counsel's testimony adduced at the evidentiary hearing by deposition refutes, or satisfactorily explains, [Harris'] other claims."

Importantly, Harris does not assign error to the court's finding that he failed to meet his burden of proof regarding these other claims. Rather, he argues on appeal that the court's order did not make separate findings and conclusions regarding each of his claims and asks that the cause be remanded with instructions to do so.

[7] We see nothing to be gained by remanding this cause for more detailed factual findings concerning claims which Harris does not contend were incorrectly decided and on which he submitted little or no evidence. While the sufficiency of a trial court's factual findings and legal conclusions will depend to a large extent on the nature of the case and the assignments of error urged on appeal, here we find the district court's order contained sufficient factual findings and conclusions of law to address and resolve all issues presented by the pleadings and to permit us to reach all errors assigned on appeal. There is no merit to this assignment of error.

3. Jury Instruction on Privilege of Nonretreat

Harris argues his trial counsel was ineffective for failing to request a jury instruction on the privilege of nonretreat. He argues that because the jury was instructed on self-defense, his attorney should also have requested an instruction on the privilege of nonretreat, to avoid the possibility that the jury might make "the erroneous finding that Harris, by refusing to retreat from the front yard of his home, provoked Jones' use of force against him with the intent of shooting Jones in response."[20]

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[20] Brief for appellant at 34.

Under Neb. Rev. Stat. § 28-1409(4) (Reissue 2008), the use of deadly force is not justified unless

> the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
>
> (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . except that:
>
> (i) The actor shall not be obligated to retreat from his dwelling or place of work, unless he was the initial aggressor[.]

[8-10] As such, the duty to retreat is spelled out in § 28-1409(4)(b) and the corollary privilege of nonretreat is addressed in § 28-1409(4)(b)(i). The privilege of nonretreat exists only in one's "dwelling or place of work."[21] For purposes of § 28-1409, the Legislature has defined "dwelling" as "any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging."[22]

Here, the evidence did not support the giving of an instruction regarding the privilege of nonretreat, because there was no evidence suggesting Harris and Jones were inside Harris' dwelling at any point during their encounter. Absent such evidence, an instruction informing the jury that Harris had a privilege of nonretreat was not warranted, and Harris' trial counsel was not ineffective for failing to request such an instruction. This assignment of error is without merit.

[11] For the sake of completeness, we note that Harris' reply brief also discusses his trial counsel's failure to request a jury

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[21] § 28-1409(4)(b)(i).

[22] Neb. Rev. Stat. § 28-1406(5) (Reissue 2008).

instruction on sudden quarrel manslaughter. Because this was neither assigned as error nor discussed in Harris' initial brief, we do not consider it further.[23]

4. Harris' Guilty plea

Prior to trial, Harris entered a guilty plea to count III of the information, which charged him with possession of a deadly weapon by a prohibited person. During the plea colloquy, Harris admitted that on or about July 5, 2003, in Douglas County, he was in possession of an operable firearm, and further admitted that prior to July 5th, he had been convicted of a felony and the time for appeal had passed. After Harris admitted the prior conviction, his attorney stipulated on the record that Harris had previously been convicted of first degree assault and been sentenced to 24 months in prison. The district court accepted Harris' plea and found him guilty of possession of a deadly weapon by a prohibited person.

Harris now argues his counsel was ineffective in two respects. First, he argues counsel was ineffective for stipulating to the prior felony during the hearing. Next, Harris argues counsel was ineffective for failing to advise him that if the jury ultimately found him guilty on the separate charge of using a deadly weapon to commit a felony, then any sentences imposed for the two firearm-related counts could not run concurrently. We address each argument below.

(a) Stipulating to Prior Felony

[12] Harris does not explain how his counsel rendered ineffective assistance by stipulating to the prior felony during the plea hearing. We have explained that defense counsel does not perform in a deficient manner simply by failing to make the State's job more difficult,[24] and Harris offers no other

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[23] See *Keithley v. Black*, 239 Neb. 685, 477 N.W.2d 806 (1991). See, also, *De Lair v. De Lair*, 146 Neb. 771, 21 N.W.2d 498 (1946).

[24] *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

argument as to why his counsel's performance regarding the stipulation was deficient. Most notably, there was no evidence offered suggesting the State would have been unable to prove the prior felony in the absence of counsel's stipulation. The assignment that counsel was ineffective for stipulating to a prior felony conviction during the plea hearing is meritless.

Harris also asks us to find it was plain error for the trial court to accept the stipulation, and ultimately Harris' plea, because the stipulation did not establish that Harris was represented by counsel or that he waived counsel in connection with the prior felony conviction.[25] This claim was not raised in Harris' supplemental verified motion for postconviction relief or presented to the district court, and we will not consider it for the first time on appeal.[26]

(b) Advising on Sentencing Consequences of Plea

Harris entered a guilty plea to the charge of possession of a deadly weapon by a prohibited person and proceeded to trial on the remaining charges. He now argues his trial counsel was ineffective for failing to advise him, at the time he entered his plea, that if the jury found him guilty of using a firearm to commit a felony, then the sentence imposed on that conviction would be ordered to be served consecutively to any other sentence imposed.[27] Harris also asks that we find it was plain error for the trial court not to advise him, when accepting his plea to possession of a deadly weapon by a prohibited person, of the possible penalties for using a firearm to commit a felony.

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[25] See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013) (before prior felony conviction can be used to prove defendant is prohibited person, State must prove that prior felony conviction was counseled or that counsel was waived).

[26] See *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

[27] See Neb. Rev. Stat. § 28-1205(3) (Cum. Supp. 2014).

In *State v. Golden*,[28] the defendant entered a guilty plea to two counts: (1) assaulting an officer, third degree, and (2) using a firearm to commit a felony. On direct appeal, we found his pleas had not been entered voluntarily, because he had not been advised that using a firearm to commit a felony carried a mandatory consecutive sentence. We reasoned that although the court had correctly described the sentencing ranges for both felonies, it had failed to inform the defendant that the statutory penalty for using a firearm to commit a felony mandated that such sentence be served consecutively to any other sentence imposed.

[13] Here, the evidence in the record shows trial counsel advised Harris that using a firearm to commit a felony carried a mandatory consecutive sentence. Moreover, the rule announced in *Golden* has no meaningful application to a case such as this. The record confirms Harris was correctly advised regarding the range of possible penalties for the charge to which he was pleading. The advisement regarding possible penalties need not extend beyond reciting the range of possible penalties for the charge to which a plea is entered.[29] This assignment of error is meritless.

VI. CONCLUSION

Based on the foregoing, we affirm the judgment of the district court.

Affirmed.

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[28] *State v. Golden*, 226 Neb. 863, 415 N.W.2d 469 (1987).

[29] See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

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

In re Interest of Alec S., a child under 18 years of age. State of Nebraska, appellee, v. Brenda G., appellant.

884 N.W.2d 701

Filed September 16, 2016. No. S-15-658.

1. **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.
2. **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.
3. **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.
4. **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.
5. **Parental Rights.** The best interests analysis and the parental fitness analysis are separate inquiries, but each examines essentially the same underlying facts as the other.
6. ____. Last-minute attempts by parents to comply with the rehabilitation plan do not prevent termination of parental rights.
7. ____. Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Petition for further review from the Court of Appeals, Irwin, Pirtle, and Riedmann, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, Christopher Kelly, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Matthew R. Kahler, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Anthony Hernandez, and Jocelyn Brasher, Senior Certified Law Student, for appellee.

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

Cassel, J.

INTRODUCTION

The juvenile court terminated a mother's parental rights to her child. Relying upon our decision in *In re Interest of Aaron D.*,[1] the Nebraska Court of Appeals reversed, concluding that the State failed to prove termination was in the child's best interests.[2] We granted the State's petition for further review. In comparison to the meager record in *In re Interest of Aaron D.*, the record here abounds with clear and convincing evidence supporting the termination. We reverse the Court of Appeals' decision and remand the cause with direction.

BACKGROUND

Procedural Background

On September 13, 2013, the State moved for temporary custody of Alec S. According to an affidavit for Alec's removal from the home of his mother, Brenda G., a hotline

[1] *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

[2] *In re Interest of Alec S.*, 23 Neb. App. 792, 876 N.W.2d 395 (2016).

of the Department of Health and Human Services (DHHS) received an intake on September 11, alleging that Brenda was diagnosed with mental health issues to the point that she needed to be admitted to a hospital for care. Brenda agreed to a September 12 enrollment in an inpatient program recommended by a Dr. Patera. A DHHS employee learned from Patera's nurse that Patera believed that Brenda needed to be in an inpatient program due to her mental health needs, that Brenda was currently unable to provide care for Alec, and that Brenda did not follow up on her health appointments with health care professionals. The DHHS employee confirmed on September 13 that Brenda had not checked herself into the inpatient program.

The State filed a petition seeking to adjudicate Alec simultaneously with the filing of the motion for temporary custody. The State alleged that Alec, who was "under eight years of age," was a child within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) due to the faults or habits of Brenda. The petition alleged that Brenda had been diagnosed with posttraumatic stress disorder, depression, and anxiety; that she was unable to provide proper care for Alec; that medical professionals had recommended inpatient care; and that Brenda had failed to check herself into the inpatient program as recommended by Patera. An amended petition added that Brenda's use of alcohol and/or controlled substances placed Alec at risk for harm. The juvenile court adjudicated Alec in January 2014.

On March 18, 2014, the juvenile court entered a disposition and permanency planning order. The permanency objective was reunification with a concurrent objective of adoption. The court ordered Brenda to participate in an outpatient chemical dependency therapy program, to continue submitting to random drug and alcohol testing, and to continue participation in programs at "Community Alliance." (According to testimony in the bill of exceptions, Community Alliance provides outpatient chemical dependency treatment.)

The court further ordered her to attend family and individual therapy and to continue participating in psychiatric care. Brenda was allowed supervised visitation with Alec. On September 16, the court entered a review and permanency planning order. It did not order Brenda to participate in a chemical dependency therapy program, but otherwise ordered her to participate in the same tasks as those in the March 18 order. Substantially the same requirements were contained in a January 20, 2015, order.

On February 6, 2015, the State filed a motion to terminate Brenda's parental rights under Neb. Rev. Stat. § 43-292(2), (6), and (7) (Cum. Supp. 2014).

Termination Hearing

In June 2015, the juvenile court conducted a termination hearing. Four witnesses—all called on behalf of the State—testified.

Dr. Randy LaGrone, a clinical psychologist, testified about Brenda's participation in outpatient psychological care beginning in January 2013. Her primary diagnosis was posttraumatic stress disorder, and LaGrone began working with her to obtain consistency in treatment and to increase her sense of safety. He met with Brenda only six times—Brenda missed or canceled 19 sessions. Because Brenda's difficulties were very treatable at that time and LaGrone wanted her to see someone, he made referrals to other community agencies. But Brenda did not act on those referrals. According to LaGrone, Brenda did not make any progress toward her goals. He discharged her in August 2014.

Mary Atwood, Alec's mental health therapist, provided testimony about therapy. Alec was diagnosed with "[a]djustment disorder with mixed emotions," and a treatment plan was created to work with his emotions. Atwood had two sessions of individual therapy with Alec. In March 2014, a case manager requested that Atwood conduct family therapy with Alec and Brenda. Despite scheduling weekly appointments, Atwood

had conducted only three sessions of family therapy over 2 months. According to Atwood, Brenda did not demonstrate any insight regarding the need for family therapy. The goal was to start communication between Alec and Brenda, because Alec did not feel like he could speak honestly with his mother. Atwood testified that because Brenda spent the time "fussing" over Alec and asking him questions, no progress was made toward the goal. Atwood added that as a result of Brenda's questioning, Alec tended to "shut down."

Jennifer Ratliff, a mental health therapist, testified about her individual therapy with Alec. She diagnosed Alec with adjustment disorder, unspecified, and also identified features of attention deficit hyperactivity disorder. Due to those features, Alec needed a moderately structured and stable environment to help manage the symptoms that accompanied the diagnosis. Ratliff elaborated:

> [H]e needs an environment where his physical needs are met consistently, as well as emotional needs, and any ongoing mental health services or needs need to be provided to him, including psychiatric care for medication management. Also he needs to be in an environment where . . . there are consistent rules and nonphysical discipline.

Alec made progress in two areas: identifying activities to engage in to serve as coping skills and expressing emotions. But due to becoming withdrawn, he did not make progress in addressing past trauma.

Ratliff began conducting family therapy with Alec and Brenda in March 2015. Its goals were to establish and improve communication, especially identifying and expressing emotions. Brenda attended four of the eight scheduled appointments: two in March and two in May. According to Ratliff, no progress was made during the first couple of sessions, because Brenda appeared to be preoccupied with Alec's hygiene. And Ratliff testified that Alec became withdrawn when Brenda discussed her involvement with DHHS in Alec's presence.

But the two sessions in May went well, with Brenda engaging in therapeutic dialog with Alec. Ratliff testified that Alec and Brenda were bonded and that it would be best for Alec to maintain contact with Brenda, even if her parental rights were terminated.

Finally, Alyssa Gill, a family permanency specialist with DHHS, testified. Gill was officially assigned the family's case in February 2015. She then reviewed the prior caseworkers' documented interactions with Brenda. Gill testified about Brenda's lack of compliance with various aspects of court-ordered services. There was no documentation that Brenda had completed individual therapy. To Gill's knowledge, Brenda had not completed any chemical dependency treatment. Brenda had not fully complied with urinalysis testing, and Gill testified that some of the tests in April and May 2015 were positive for alcohol.

Visitation never progressed beyond being fully supervised. Gill testified that generally, if visitation was still being supervised after a child had been in an out-of-home placement for 12 months, it meant that a safety threat was still present and that "not a lot" of progress was being made to address it. Brenda was given one visit per week, but she had missed a few visits since March 2015.

Gill testified that Brenda's mental health remained a primary concern. Gill communicated with Brenda's psychiatrist and obtained medical records from the time that Brenda was admitted to a psychiatric ward in February 2015 to the time of the termination hearing. Upon Gill's inquiry, Brenda told her that Alec's foster parents "tricked her and made her go" to inpatient treatment. But the documentation Gill received revealed that Brenda had admitted to drinking a pint of vodka and going to a police station. Alec's foster parents were then alerted because they had been "a support" to Brenda. Due to concerns about Brenda's safety after speaking with her, the foster parents took her to the hospital. Brenda's psychiatrist recommended that Brenda remain in treatment, but she left

after 4 days. Gill testified that against medical orders, Brenda left because "[s]he just felt that she did not belong there because she had been tricked to go there."

Obtaining stable housing has been a struggle for Brenda. As of November 2014, Brenda was homeless and staying at various shelters. Gill learned that Brenda had also been staying with a sister after being banned from some of the shelters as a result of her alcohol use, her escalating anger, and her inability to show stability and maintenance of her mental health. At the time of the termination hearing, Brenda was living at the "Salvation Army Mental Health and Community Support Transitional Living." Although this was appropriate housing for Brenda, children were not allowed to reside there.

Gill recognized that in the few months prior to the hearing, Brenda had made progress in certain areas. These included improvements in housing, in supervised visits, and in family therapy sessions. Gill confirmed that visitation workers reported a bond between Alec and Brenda. But Gill feared that Brenda would not maintain services if Alec were returned to Brenda's care. Gill testified that she took into consideration her conversations with Alec in forming her opinion as to what was in Alec's best interests, and she recommended termination of Brenda's parental rights.

The court received a number of exhibits during the hearing. Visitation notes for October 2013 stated that Brenda freely provided Alec with affection throughout all of the visits and that she was swift to appropriately redirect Alec's behavior using verbal warnings. However, Brenda was quick to get angry and would yell during visits. She was also late to every visit. Notes for April 2014 stated that Brenda was loving toward Alec and that he was affectionate in return. In May, a visitation specialist stated that Brenda seemed edgy and distracted. According to the document, the specialist had been told that Brenda had tested positive for methamphetamine a few weeks prior and that since the positive test, she had not

been submitting to testing. Notes for visitations in June stated that Brenda had "made a clear effort this month to not only show up to her visit but showing up on time too" and seemed "to be in a better head space." In July, the visitation specialist recommended more visitation days.

Juvenile Court's Decision

The juvenile court terminated Brenda's parental rights. The court found that Brenda's participation in visitation with Alec was sporadic and that she had not participated with therapeutic services to the degree needed to move the case toward reunification. The court recognized that there was a bond between Alec and Brenda and that Brenda's "performance in certain areas has improved somewhat over the past four months, following the filing of the Motion for Termination of Parental Rights." But the court noted that Alec had been in an out-of-home placement for 21 months and stated that there was "no realistic possibility of reunification . . . in the near, or even relatively distant future, given [Brenda's] ongoing issues with respect to substance abuse, mental health considerations and her failure to meaningfully and consistently participate with services so as to achieve reunification." The court found by clear and convincing evidence that the State proved grounds for termination under § 43-292(2), (6), and (7) and that termination was in Alec's best interests.

Court of Appeals' Decision

Upon Brenda's appeal, the Court of Appeals determined that the record clearly and convincingly showed that a ground for termination under § 43-292(7) existed. Thus, the court did not review whether termination was proper under § 43-292(2) or (6). The court found the evidence to be similar to that presented in *In re Interest of Aaron D.*[3] Ultimately, the Court of

[3] *In re Interest of Aaron D., supra* note 1.

Appeals determined that the State failed to adduce clear and convincing evidence that terminating Brenda's parental rights was in Alec's best interests.[4]

We granted the State's petition for further review.

ASSIGNMENT OF ERROR

The State assigns that the Court of Appeals erred in determining that the State failed to adduce clear and convincing evidence that termination of Brenda's parental rights was in Alec's best interests.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.[5]

ANALYSIS

[2] 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.[6] The juvenile court found the State established by clear and convincing evidence that termination was in Alec's best interests, but the Court of Appeals disagreed.

The Court of Appeals found the evidence to be similar to that in *In re Interest of Aaron D.* But we find that case to be distinguishable in several respects.

First, in *In re Interest of Aaron D.*, the State sought to terminate the mother's parental rights on the sole ground that the child had been in out-of-home placement for 15 or more of the most recent 22 months.[7] With regard to termination in cases based solely on § 43-292(7), we stated that termination

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[4] See *In re Interest of Alec S., supra* note 2.

[5] *In re Interest of Alan L., ante* p. 261, 882 N.W.2d 682 (2016).

[6] *In re Interest of Isabel P. et al.*, 293 Neb. 62, 875 N.W.2d 848 (2016).

[7] See § 43-292(7).

> may prove difficult . . . where the record is insufficient to prove any of the other statutory grounds—i.e., where the parent did not abandon the child, did not neglect to protect or provide for a child, was not unfit or unable to parent, did not fail to participate in necessary rehabilitation, and was not abusive.[8]

That is not true here. In addition to the subsection (7) finding, the juvenile court found sufficient evidence for termination on the bases that Brenda substantially and continuously or repeatedly neglected and refused to give Alec necessary parental care and protection and that reasonable efforts to preserve and reunify the family had failed to correct the conditions leading to the adjudication.[9]

Second, the record in *In re Interest of Aaron D.* did not contain any dispositional orders setting forth the court-ordered rehabilitation plans. We observed that "the State failed to introduce that evidence in support of its contention that [the mother] failed to meet the requirements of her rehabilitative plan, and is relying on [the mother's] alleged failure to comply with requirements that are not fully evidenced by the record."[10] And we elaborated on the consequence of this failure:

> [B]ecause no court-ordered plan is part of our record, the reasonability of the requirements imposed on [the mother] is uncertain. Under those circumstances, we cannot find [the mother's] alleged noncompliance with the requirements of her rehabilitation plan to be clear and convincing evidence that termination of her parental rights is in [the child's] best interests.[11]

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[8] *In re Interest of Aaron D., supra* note 1, 269 Neb. at 261, 691 N.W.2d at 173.

[9] See § 43-292(2) and (6).

[10] *In re Interest of Aaron D., supra* note 1, 269 Neb. at 264, 691 N.W.2d at 175.

[11] *Id.* at 264, 691 N.W.2d at 176.

Here, in contrast, the record contains numerous orders. These include a disposition and permanency planning order from March 18, 2014; a review and permanency planning order from September 16; and a review, permanency planning, and "LB-1041 Finding" order from January 20, 2015. These orders directed Brenda to participate in such things as urinalysis testing, programs at Community Alliance, individual and family therapy, psychiatric care, and supervised visitation. The requirements imposed on Brenda mesh with her faults as identified in the adjudication petition.

Third, the number of witnesses testifying on each party's behalf differs. In *In re Interest of Aaron D.*, only one witness testified for the State, while at least three witnesses—the mother, the child, and a family therapist—testified for the mother. Here, the State presented the testimony of four witnesses; no one testified on Brenda's behalf.

In *In re Interest of Aaron D.*, the lack of other witnesses for the State was particularly problematic. It used a DHHS caseworker "as a proxy for all of the other witnesses whose expertise and testimony would have been helpful . . . in determining what was in [the child's] best interests."[12] The caseworker's testimony was largely based on her review of records generated by those who directly observed the mother and child. Thus, much of the caseworker's testimony was based on hearsay. And in some instances, that hearsay evidence was contradicted by the testimony of the mother's witnesses.

The situation here differs in two respects. Although Gill provided testimony based on her review of records and reports generated by others, the record shows that she did more than merely review documentation in the case file. She spoke with Brenda in person and over the telephone, and she also communicated with various individuals providing services to Brenda.

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[12] *Id.* at 261, 691 N.W.2d at 174.

And Gill's testimony was generally uncontradicted. But more importantly, the State adduced testimony from others who directly worked with Alec and Brenda. This is in sharp contrast to *In re Interest of Aaron D.*, where much of the State's evidence was based on hearsay. The court in that case observed that the child's therapists did not testify. Here, two of Alec's therapists testified.

Certainly, the State could have called more witnesses and produced more evidence. In *In re Interest of Aaron D.*, like in this case, no testimony was adduced from the child's foster parents, teachers, or visitation supervisors. The Court of Appeals noted several deficiencies in the record: It contained no evidence from Patera as to Brenda's need for inpatient treatment, no evidence "as to how Brenda's mental health diagnoses and treatment needs affected her ability to safely parent Alec,"[13] little evidence "regarding what is continually and vaguely referred to as Brenda's 'mental health needs' upon which the removal and adjudication were primarily based,"[14] and no evidence as to why Brenda was required to undergo random testing for alcohol or drugs. However, the record contains Brenda's mental health diagnoses and refers to issues she had with alcohol and controlled substances. While filling in these gaps could have aided appellate review, the lack of all the "gory details" does not mean the State failed to meet its burden of proof.

[3-5] The overriding legal framework is well settled. 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.[15] In the context of the constitutionally protected relationship

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[13] *In re Interest of Alec S., supra* note 2, 23 Neb. App. at 801, 876 N.W.2d at 402.

[14] *Id.*

[15] *In re Interest of Isabel P. et al., supra* note 6.

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.[16] The best interests analysis and the parental fitness analysis are separate inquiries, but each examines essentially the same underlying facts as the other.[17]

[6] The evidence demonstrates that Brenda is unfit and that termination of her parental rights is in Alec's best interests. There is no dispute that Brenda has mental health issues, but she has failed to consistently attend treatment for the problem. Ratliff testified that structure was vital and necessary to improve the symptoms of Alec's attention deficit hyperactivity disorder, but there was no evidence that Brenda was capable of providing stability for Alec. Even more problematic is that 17 months after the case began, Brenda still lacked an understanding of why Alec was unsafe or why she needed to engage in the services offered to show that she could provide for Alec. She had sufficient opportunity to comply with the reunification plan within the 15-month condition contained in § 43-292(7), which "'serves the purpose of providing a reasonable timetable for parents to rehabilitate themselves.'"[18] But she failed to do so. We recognize that Brenda had made some progress toward her goals, but her actions appear to have been prompted by the filing of the motion to terminate her rights. Last-minute attempts by parents to comply with the rehabilitation plan do not prevent termination of parental rights.[19]

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[16] *Id.*

[17] See *id.*

[18] *In re Interest of Aaron D., supra* note 1, 269 Neb. at 261, 691 N.W.2d at 173.

[19] *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999).

Two witnesses specifically testified as to Alec's best interests. Gill opined that termination of Brenda's parental rights was in Alec's best interests. She based her opinion on the duration of the case, Alec's remaining in an out-of-home placement, the lack of liberalized visitation, Brenda's erratic behavior, and the lack of compliance with court orders. As Gill summarized, "[W]e're still very much where we were at when this case first opened." Ratliff, on the other hand, testified:

> Because there is an established bond and attachment between Alec and [Brenda], my recommendation is that the relationship continue. How that is to be done, I don't have a firm recommendation.
>
> I have offered to the [foster parents] and to [Brenda] that I would facilitate a family therapy session with the adults only, and we could come up with a plan to maintain that relationship. I believe that it would be detrimental to Alec's well-being if that relationship was severed.

But Brenda's having a bond with Alec does not make her a fit person to provide parental care for him. And although Ratliff testified that it was in Alec's best interests to "maintain a relationship with" Brenda, there was no indication from her testimony that the relationship needed to be a mother-son relationship.

[7] Alec deserves permanency. Brenda's failure to comply with the court-ordered rehabilitation plan defeated his chance to be reunified with her. At the time of the hearing, Alec had been in the State's care for 21 months. During that time, Brenda had not even progressed to being allowed unsupervised visitation with Alec. Because much progress must still be made before Brenda would be trusted with Alec's care and custody, Alec would be left to languish in foster care for an unknown amount of time with no guarantee of reunification. Children cannot, and should not, be suspended in foster care

or be made to await uncertain parental maturity.[20] We conclude that the State showed by clear and convincing evidence that termination of Brenda's parental rights was in Alec's best interests.

CONCLUSION

Upon our de novo review of the record, we conclude that the State adduced clear and convincing evidence that termination was in Alec's best interests. We reverse the decision of the Court of Appeals and remand the cause with direction to affirm the judgment of the juvenile court.

Reversed and remanded with direction.

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[20] *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014).

Nebraska Supreme Court
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State of Nebraska, appellee, v. Chancey A. Cornwell, appellant.

884 N.W.2d 722

Filed September 16, 2016. No. S-15-1040.

1. **Statutes: Appeal and Error.** Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Constitutional Law: Statutes.** A challenge to a statute asserting that no valid application of the statute exists because it is unconstitutional on its face is a facial challenge.
3. ____: ____. A plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.
4. **Constitutional Law: Statutes: Pleas: Waiver.** In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.
5. **Constitutional Law: Statutes.** A motion to quash is the proper method to challenge the constitutionality of a statute, but it is not used to question the constitutionality of a statute as applied.
6. **Constitutional Law: Statutes: Pleas.** Challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty.

Appeal from the District Court for Lancaster County: Stephanie F. Stacy, Judge. Affirmed.

David J. Tarrell for appellant.

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

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Heavican, C.J.

INTRODUCTION

Chancey A. Cornwell was charged by information with driving under the influence and refusing to submit to a chemical test. His motion to quash was denied, and he was convicted following a jury trial. Cornwell appeals, and we affirm.

FACTUAL BACKGROUND

On February 20, 2014, Cornwell was charged by information with driving under the influence and refusing to submit to a chemical test—in this case, a breath test. The record includes a postarrest chemical test advisement form, which noted in relevant part that the arresting officer had "the authority to direct whether the test or tests shall be of your breath, blood or urine, and may direct that more than one test be given." The arresting officer then filled out part "A" of that form: "Request for test: I hereby direct a test of your ___ blood _x_ breath ___ urine to determine the _x_ alcohol ___ drug content."

Cornwell initially pled not guilty, but later withdrew his not guilty plea and filed a motion to quash the information. As relevant to the issues on appeal, Cornwell's motion to quash alleged a facial challenge to Neb. Rev. Stat. §§ 60-6,197 and 60-6,197.03(6) (Cum. Supp. 2014), asserting that these statutes violated his rights under the Fourth Amendment to the U.S. Constitution and Neb. Const. art. I, § 7, by criminalizing the withdrawal of consent to a search and by aggravating the penalty for a crime for exercising the right to withdraw his consent to a search.

The district court denied Cornwell's motion to quash, and the case proceeded to trial. Following a jury trial, Cornwell was found guilty of driving under the influence and refusing to submit to a chemical test. He was sentenced to 2 to 5 years' imprisonment, and his license was revoked for 15 years. He

was given credit for 7 days' time served and credit for 1 year's license revocation.

ASSIGNMENT OF ERROR

Cornwell assigns, restated, that the district court erred in denying his motion to quash.

STANDARD OF REVIEW

[1] Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.[1]

ANALYSIS

The sole issue presented by this appeal is whether the district court erred in denying Cornwell's motion to quash.

Some background is helpful. Nebraska law prohibits the operation of a motor vehicle "[w]hile under the influence of alcoholic liquor."[2] Section 60-6,197(1) provides:

> Any person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine.

In addition, the refusal to submit to a chemical test is a crime.[3] Thus, a person operating a motor vehicle in Nebraska is deemed to have consented to a chemical test, and refusing such a chemical test is a crime in the same way that driving a motor vehicle while under the influence of alcohol is a crime.

Cornwell was charged with refusing to submit to a chemical test. He argues on appeal that the district court erred in denying his motion to quash, because the chemical test sought was a search under the Fourth Amendment to the U.S.

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[1] See *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

[2] Neb. Rev. Stat. § 60-6,196(1)(a) (Reissue 2010).

[3] See § 60-6,197.

Constitution and Neb. Const. art. I, § 7, and no warrant was obtained to compel that search. Cornwell argued in his motion to quash that the consent and refusal statutes criminalized and aggravated the penalty for the charged crime based upon a driver's decision to withdraw his or her consent to a chemical test.

[2-6] A challenge to a statute asserting that no valid application of the statute exists because it is unconstitutional on its face is a facial challenge.[4] A plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.[5] In order to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.[6] A motion to quash is the proper method to challenge the constitutionality of a statute, but it is not used to question the constitutionality of a statute as applied.[7] Instead, challenges to the constitutionality of a statute as applied to a defendant are properly preserved by a plea of not guilty.[8] Cornwell's challenge in this case is a facial challenge.

In the time since Cornwell filed his appeal, the U.S. Supreme Court decided *Birchfield v. North Dakota*.[9] In *Birchfield*, the Court was asked to determine whether warrantless breath and blood tests incident to arrest for drunk driving were reasonable under the Fourth Amendment. The Court made a distinction between a breath test and a blood test, finding that law

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[4] *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

[5] *Id.*

[6] See *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999).

[7] See *State v. Perina, supra* note 4.

[8] *Id.*

[9] *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

enforcement does not need a warrant to conduct a breath test, but that a warrant is required for a blood test.

The distinction made by the Court was based upon the relative intrusiveness of the tests. A breath test does not "'implicat[e] significant privacy concerns,'"[10] because the physical intrusion is negligible,[11] the test is capable of revealing only how much alcohol is in the subject's breath,[12] and participation in the test is "not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest."[13]

But the Court found a blood test to be "a different matter."[14] Blood testing requires a physical intrusion that is "significantly more intrusive than blowing into a tube."[15] And a blood specimen places in the hands of law enforcement a sample that can be preserved and from which information other than alcohol content can be extracted.[16]

Thus, under *Birchfield*, a suspected drunk driver can be subjected to a breath test without a warrant, but in order to perform a blood test on that same individual, a warrant must be secured. Moreover, where the Fourth Amendment does not require officers to obtain a warrant before demanding a breath test, the individual has no right to refuse that test. We find *Birchfield* dispositive.

In this case, Cornwell makes a facial challenge to the consent and refusal statutes. To show that these statutes are facially unconstitutional, Cornwell must show that no set of circumstances exists under which they would be valid. But, post-*Birchfield*, a warrantless breath test is reasonable and

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[10] *Id.*, 579 U.S. at 461.

[11] *Id.*

[12] *Birchfield v. North Dakota, supra* note 9.

[13] *Id.*, 579 U.S. at 463.

[14] *Id.*

[15] *Id.*, 579 U.S. at 464.

[16] *Id.*

does not run afoul of the Fourth Amendment. Nor do we find that it runs counter to Neb. Const. art. I, § 7, which this court has interpreted to offer no more protection than that offered by the U.S. Constitution.[17] Thus, Cornwell cannot meet the burden imposed by his facial challenge.

In his supplemental brief, Cornwell takes issue with the postarrest chemical test advisement form used in this case, suggesting that a reasonable motorist reading that form would not be sure that only the checked test—here, a breath test and not a blood or urine test—would be given. This argument is apparently based on the portion of the form that provides that the arresting officer may direct that more than one test be given.

It is not entirely clear whether Cornwell is making a facial or as-applied challenge to the form, but we conclude that either challenge fails. If the challenge is an as-applied challenge, it fails, because the record demonstrates that the only test ever required of Cornwell was a breath test. At no time was he ever requested to submit to a blood or urine test. Cornwell cannot demonstrate that his Fourth Amendment rights were violated where the only warrantless test requested of him did not violate the Fourth Amendment.

And to the extent Cornwell makes a facial challenge to the form, it also fails. Even assuming that such a challenge would be valid as to the form, as distinguished from the consent and refusal statutes themselves, we have concluded above that a facial challenge fails, because a breath test is valid and does not violate the Fourth Amendment.

Cornwell's arguments on appeal are without merit.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Stacy, J., not participating.

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[17] See *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986).

Nebraska Supreme Court
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State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Alan D. Martin, respondent.

884 N.W.2d 727

Filed September 16, 2016. No. S-16-740.

Original action. Judgment of public reprimand.

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

Per Curiam.

INTRODUCTION

This case is before the court on the conditional admission filed by Alan D. Martin, respondent, on August 3, 2016. The court accepts respondent's conditional admission and enters an order of public reprimand.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on July 23, 2005. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska.

On August 3, 2016, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent. The formal charges consist of one count against respondent. With respect to this count, the formal charges state that in April 2012, respondent was retained by a client to legalize the immigration status of her husband, who was an undocumented individual. The clients agreed to pay $4,500 in attorney fees plus filing fees. The husband client stated on intake forms for

respondent that he was "'EWI,'" which means "entered without inspection," and "'undocumented.'"

On April 15, 2013, respondent filed the following forms with the Department of Homeland Security (the Department) on behalf of the clients: I-130, "Petition for Alien Relative"; I-485, "Application to Register Permanent Residence or Adjust Status by Applicant"; and I-765, "Application for Employment Authorization." Respondent also filed form G-28, "Notice of Entry of Appearance as Attorney or Accredited Representative." All the forms were signed by respondent.

According to the formal charges, in order to be eligible for an adjustment of status pursuant to the I-485 application, "an alien must: a. [b]e physically present in the United States; b. [h]ave an approved immigration petition (I-130); [and] c. [m]ust not have entered the United States illegally."

On May 8, 2013, the Department issued a request for initial evidence of eligibility to file the I-485 application for the husband client. The request was for evidence of lawful admission or parole into the United States, as well as tax returns and medical information. On July 30, respondent submitted additional information to the Department pursuant to the Department's request.

On August 13, 2013, form I-130, "Petition for Alien Relative," for the husband client was approved. On August 23, the I-485 adjustment of status application was denied because the evidence submitted was not sufficient to establish his eligibility for the benefit sought. Specifically, the husband client had failed to submit evidence of lawful admission or parole into the United States or eligibility for an adjustment of status. On August 23, respondent notified the clients that the I-130 form was approved and that the scope of his representation was completed.

According to the formal charges, in a letter from respondent to the Counsel for Discipline dated September 11, 2014, respondent stated that the clients brought the I-485 form to his office and represented that the husband client was qualified

to file the I-485 form, that he did not know of the husband client's ineligibility to apply for a legal immigration status, and that he failed to properly see and review the document that was brought in by the husband client.

In a letter from respondent to the Counsel for Discipline dated February 17, 2016, respondent stated that he was led to believe that his paralegal was competent in immigration applications and that all respondent needed to do was to review the documents and procedures for his signatures. Respondent stated that his paralegal prepared all of the immigration forms regarding the husband client for respondent's review and signature.

Respondent further stated in his February 17, 2016, letter that between approximately August 2007 and March 2009, respondent closed his practice due to illness. When he reopened his practice, respondent reported that he was very weak and heavily medicated. After respondent had surgery in July 2012, he began to regain his health and no longer required medication.

Respondent also stated in his February 17, 2016, letter that he relied heavily on his paralegal to facilitate intake interviews, but that respondent made all of the decisions for the clients, predicated in part on information provided by his paralegal. Respondent stated in the letter that he knew the husband client would have difficulty qualifying for an I-485 adjustment of status, but respondent believed there were alternative means by which an adjustment of status could be approved.

Respondent went on to state in his February 17, 2016, letter that respondent was not involved in every conversation between his paralegal and the clients, but he claims that his paralegal told him that the clients wanted to proceed with the I-485 application. Respondent relied on comments by his paralegal that other immigration lawyers often filed documents hoping that the Department would approve the documents, without necessarily believing it would. Respondent stated

that he could not say for certain whether the requested additional information was provided to the Department, because respondent stated that "'this period is hazy in my recollection due to my medical condition.'"

Respondent stated in his February 17, 2016, letter that his responsibility in the matter was his reliance on an experienced paralegal's assertion that the husband client was eligible for an adjustment of status. Respondent stated that he signed the forms believing what he was told by his paralegal.

The formal charges state that respondent failed to do any independent research to determine whether the husband client was eligible for an I-485 adjustment of status.

The formal charges allege that by his actions, respondent violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence); 3-501.5(a)(1), (4), and (7) (fees); 3-502.1 (advisor); and § 3-508.4(a) and (c) (misconduct).

On August 3, 2016, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he conditionally admitted that he violated his oath of office as an attorney and professional conduct rules §§ 3-501.1, 3-501.5, 3-502.1, and 3-508.4. In the conditional admission, respondent knowingly does not challenge or contest the truth of the matters conditionally asserted and waived all proceedings against him in connection therewith in exchange for a public reprimand.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's proposed discipline is appropriate under the facts of this case.

ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court,

> the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters conditionally admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.1, 3-501.5, 3-502.1, and 3-508.4, and his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with 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 public reprimand.

Nebraska Supreme Court
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State of Nebraska, appellee, v. Douglas Rothenberger, appellant.

885 N.W.2d 23

Filed September 23, 2016. No. S-14-1160.

1. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court.
2. **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 protections is a question of law that an appellate court reviews independently of the trial court's determination.
3. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
4. **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. 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. **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.
6. **Constitutional Law: Search and Seizure: Arrests: Probable Cause.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government. These constitutional protections mandate that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.
7. **Probable Cause: Words and Phrases: Appeal and Error.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. An appellate court determines whether probable cause existed under an objective standard of reasonableness, given all the known facts and circumstances. The probable cause standard is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.
8. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. Probable cause for a warrantless arrest is to be evaluated by the collective information of the police engaged in a common investigation.
9. **Arrests: Probable Cause: Controlled Substances: Blood, Breath, and Urine Tests.** There is no bright-line rule requiring that the full drug recognition expert protocol be administered as a prerequisite to a finding of probable cause to arrest for driving under the influence of drugs. When determining whether probable cause exists to arrest a suspect for driving under the influence of drugs, the same familiar, commonsense principles which govern all arrests apply.
10. ____: ____: ____: ____. Neither drug recognition expert certification nor a completed drug recognition expert examination is a mandatory prerequisite to forming probable cause to arrest a suspect for driving under the influence of drugs.
11. **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.

12. **Criminal Law: Police Officers and Sheriffs: Drunk Driving: Controlled Substances: Blood, Breath, and Urine Tests.** The material elements of the crime of refusal are (1) the defendant was arrested for an offense arising out of acts alleged to have been committed while he or she was driving or in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs; (2) a peace officer had reasonable grounds to believe the defendant was driving or in actual physical control of a motor vehicle in this state while under the influence of alcohol or drugs; (3) the peace officer required the defendant to submit to a chemical test of his or her blood, breath, or urine to determine the concentration of alcohol or the presence of drugs; (4) the defendant was advised that his or her failure to submit to a chemical test of his or her blood, breath, or urine is a separate offense for which he or she could be charged; and (5) the defendant refused to submit to a chemical test as required by the peace officer.
13. **Criminal Law: Controlled Substances: Blood, Breath, and Urine Tests.** Neither the type of drug suspected to be causing a person's impairment nor the ability of a chemical test to reveal the presence of a particular drug is an element of the crime of refusal.
14. **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.

Petition for further review from the Court of Appeals, Pirtle, Riedmann, and Bishop, Judges, on appeal thereto from the District Court for Scotts Bluff County, Leo Dobrovolny, Judge, on appeal thereto from the County Court for Scotts Bluff County, James M. Worden, Judge. Judgment of Court of Appeals affirmed.

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

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

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

Stacy, J.

After a jury trial in county court, Douglas Rothenberger was convicted of refusal to submit to a chemical test and was sentenced to probation. On appeal, the district court affirmed, as did the Nebraska Court of Appeals.[1] On further review, we find no merit to Rothenberger's assigned errors, and we affirm.

I. FACTS

1. Background

Just after midnight on June 19, 2013, a motorist called the 911 emergency dispatch service to report that a vehicle traveling on Highway 92 near Scottsbluff, Nebraska, was swerving from one edge of the highway to the other and fluctuating between 20 and 60 m.p.h. The motorist followed the vehicle until Deputy Sheriff Jared Shepard arrived.

Shepard followed the vehicle and saw it weave back and forth and cross the centerline twice. Shepard testified the vehicle was traveling 20 to 25 m.p.h. on roads where the posted speed limit was 50 to 65 m.p.h. After following the vehicle for about three-fourths of a mile, Shepard activated the lights on his patrol car to initiate a traffic stop. The vehicle did not stop. Shepard then switched on his siren, and the vehicle pulled onto the right shoulder and stopped.

When Shepard made contact with the driver, Rothenberger, Rothenberger's speech was slow and slurred. Rothenberger appeared confused and had trouble getting his window down and opening his vehicle door. Rothenberger looked in his wallet for 3 to 4 minutes before providing Shepard with his driver's license. He was not able to provide current proof

[1] See *State v. Rothenberger*, No. A-14-1160, 2015 WL 9004823 (Neb. App. Dec. 15, 2015) (selected for posting to court Web site).

of insurance. Dispatch advised Shepard that Rothenberger's license was suspended. However, the parties stipulated at trial that Rothenberger's Nebraska driver's license was actually expired, rather than suspended, and that he had a valid Texas license.

Shepard asked Rothenberger to step out of the vehicle. Rothenberger had difficulty standing and maintaining his balance without holding onto the vehicle. Shepard did not smell alcohol on Rothenberger's breath, but saw that his eyes were watery. Rothenberger was asked to perform standardized field sobriety tests. During the nine-step walk-and-turn test, Rothenberger could not maintain his balance and staggered into approaching traffic, so Shepard discontinued the test for safety reasons. During the one-legged stand test, Rothenberger was unable to maintain his balance or keep his foot raised for more than 2 seconds. His performance on the tests indicated impairment. Shepard administered a preliminary breath test at the scene, which was negative for alcohol. Shepard asked Rothenberger whether he had taken any medications, and he admitted taking Suboxone within the previous 24 hours. Rothenberger was asked whether he had any medical conditions, and he did not indicate he was suffering from any illness or injury. Rothenberger did not request medical help. Shepard testified that based on his investigation, it was his opinion that Rothenberger was impaired, so he arrested him on suspicion of driving under the influence of alcohol or drugs and driving under suspension and transported him to the Scotts Bluff County sheriff's office for a drug recognition expert (DRE) examination.

Sgt. Jeff Chitwood was dispatched to the traffic stop as backup. Chitwood testified that when he arrived, Shepard was talking to Rothenberger outside the vehicle. Chitwood testified that throughout the contact, Rothenberger had to hold onto his vehicle or the patrol car to keep his balance. Chitwood heard Rothenberger tell Shepard he had taken Suboxone "at 10 a.m. earlier that same day." Chitwood watched while

Shepard took Rothenberger through the standard field sobriety tests. Chitwood testified that during the walk-and-turn test, Rothenberger "wandered off into the traffic lane," and that at another point, Shepard had to catch Rothenberger to keep him from falling. Chitwood asked Rothenberger questions in an effort "to ascertain if we had an impairment case or a medical case." Chitwood testified that based on Rothenberger's answers, there was "never any indication that we had a medical case" and "it was obvious we had an impairment case." Chitwood testified that due to Rothenberger's level of impairment, he was arrested and placed in Shepard's patrol car to be transported to the sheriff's station.

Once at the sheriff's station, Rothenberger was turned over to Sgt. Mark Bliss. Bliss had completed training as a DRE and was also a DRE instructor. Bliss performed a DRE examination on Rothenberger and again administered standardized field sobriety tests. According to Bliss, Rothenberger either failed the standardized field sobriety tests or was unable to complete them for safety reasons because he kept falling. Bliss described Rothenberger as cooperative and polite, but noted he appeared "sedated" and was unable to maintain his balance throughout the investigation. Bliss examined Rothenberger's pupil size, because unequal size could indicate a possible head injury; he determined Rothenberg's pupils were equal in size. After Rothenberger waived his *Miranda* rights, Bliss asked him whether he had taken any medications. Rothenberger admitted "he'd been taking Suboxone" and had taken "his regular dose" at approximately 10 a.m. As the final step in his investigation, Bliss asked Rothenberger to submit to a chemical test for drugs. Bliss read Rothenberger the postarrest chemical advisement form, which provided in pertinent part:

> You are under arrest for operating or being in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs. Pursuant to law, I am requiring you to submit to a chemical test or tests of

> your blood, breath, or urine to determine the concentration of alcohol or drugs in your blood, breath, or urine.
>
> Refusal to submit to such test or tests is a separate crime for which you may be charged.
>
> . . . .
>
> . . . I hereby direct a test of your . . . urine to determine the . . . drug content.

Rothenberger refused to sign the advisement form, and he refused to submit to a chemical test of his urine. A copy of the postarrest chemical advisement form was received into evidence.

2. Motion to Quash

Rothenberger was charged with two counts: driving under the influence of alcohol or drugs, second offense, and refusal to submit to a chemical test, first offense. He moved to quash the refusal charge on the ground that Nebraska's refusal statute was unconstitutional under both the U.S. Constitution and the Nebraska Constitution. The county court overruled the motion, and Rothenberger entered not guilty pleas to both counts. For the sake of completeness, we note that Rothenberger has not assigned error to the county court's ruling on the motion to quash and does not argue on appeal that Nebraska's refusal statute is unconstitutional. As such, although we are aware of the U.S. Supreme Court's recent decision in *Birchfield v. North Dakota*,[2] the constitutionality of Nebraska's refusal statute is not an issue before us in this appeal.

3. Motion to Suppress

Rothenberger also moved to suppress evidence on the ground his arrest was not supported by probable cause. He argued Shepard and Chitwood were not DRE-certified

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[2] *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016).

examiners, and so could not form the requisite probable cause to arrest him for driving under the influence of drugs. Rothenberger further argued that because there was no probable cause to arrest, both the evidence later obtained through testing by Bliss and the evidence that Rothenberger refused to submit to a chemical test of his urine should also be suppressed. The county court denied the motion after conducting an evidentiary hearing.

4. Jury Trial

At the commencement of trial, Rothenberger renewed his motion to suppress and was given a continuing objection based on that motion. Rothenberger also made oral motions in limine to preclude the State from offering (1) any testimony from Bliss about Rothenberger's performance on the DRE evaluation or Bliss' opinion regarding the cause of Rothenberger's impairment; (2) evidence Rothenberger told officers he was taking Suboxone to manage a prior addiction to Vicodin; and (3) evidence that when he was stopped, Rothenberger had a pill bottle containing two unidentified pills. The State offered no objection, and the county court sustained Rothenberger's motions in limine. The State then offered evidence consistent with the facts detailed earlier.

(a) Motion for Directed Verdict

At the close of the State's case, Rothenberger moved for directed verdict on both counts. As to the driving under the influence charge, Rothenberger argued that although there was evidence of impairment, there was no evidence the impairment was caused by alcohol or drugs. As to the refusal charge, Rothenberger argued he could not be convicted of refusing a "chemical test," because, under title 177 of the Nebraska Administrative Code, a "chemical test" is defined as a test to detect seven specific drugs.[3] Rothenberger argued that the drug

[3] See 177 Neb. Admin. Code, ch. 7, §§ 001.5 and 001.13 (2007).

he admitted to taking, Suboxone, is not one which a "chemical test," under title 177 would detect.

The county court granted the motion for directed verdict on the driving under the influence charge, reasoning that although there was "clearly a ton of evidence" that Rothenberger was impaired and that alcohol was not causing his impairment, there was insufficient evidence that his impairment was drug related, in part because the State presented no evidence about Suboxone or its effects. The State did not appeal this ruling. The trial court overruled the motion for directed verdict on the refusal charge, reasoning that "there's plenty of evidence for the jury to consider the issue of refusal."

(b) Jury Instructions

Rothenberger requested two jury instructions related to the refusal charge. He asked for an instruction defining a "chemical test" as "one performed according to the method approved by the Department of Health and Human Services [and stating that] [t]he Method Approved by the Department of Health and Human Services for drug testing is set forth in title 177 NAC 7." Rothenberger also asked that the jury be instructed that "Drug for purposes of a chemical test means any of the following: Marijuana, cocaine, morphine, codeine, phencyclidine, amphetamine, and methamphetamine."

The county court declined to give either proposed instruction. Other than a few minor suggestions on wording, there were no objections raised to any of the other instructions.

(c) Verdict and Sentence

Rothenberger did not put on a defense. The jury returned a verdict finding him guilty of refusing a chemical test. The county court imposed a sentence of 6 months' probation, a 60-day license revocation, a $500 fine, and court costs.

5. Appeal to District Court

Rothenberger timely appealed to the district court, assigning that the county court erred in (1) failing to sustain the motion

to suppress, (2) receiving inadmissible hearsay evidence at the motion to suppress hearing, (3) overruling Rothenberger's motion for directed verdict on the refusal charge, and (4) failing to give Rothenberger's proposed jury instructions defining "drug" and "chemical test." The district court found all assignments of error were meritless and affirmed Rothenberger's conviction and sentence.

6. Court of Appeals

On further appeal to the Court of Appeals, Rothenberger assigned three errors. He claimed the district court erred in affirming the judgment and conviction, because (1) there was no probable cause to support Rothenberger's arrest, (2) it was error not to direct a verdict on the refusal charge, and (3) it was error not to give Rothenberger's proposed jury instructions. The Court of Appeals found no merit to any of the assignments of error and affirmed the judgment and conviction. We granted Rothenberger's petition for further review.

II. ASSIGNMENTS OF ERROR

Rothenberger assigns it was error to affirm his conviction and sentence for refusal, because (1) his arrest was not supported by probable cause, (2) the county court should have directed a verdict on the refusal charge, and (3) the county court should have given Rothenberger's proposed jury instructions.

III. STANDARD OF REVIEW

[1] When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court.[4]

[2,3] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment,

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[4] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

an appellate court applies a two-part standard of review.[5] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.[6] When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.[7]

[4] 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.[8] 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.[9]

[5] Whether the jury instructions given by a trial court are correct is a question of law.[10] When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court.[11]

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[5] *State v. Wells*, 290 Neb. 186, 859 N.W.2d 316 (2015).

[6] *Id.*

[7] *State v. Piper*, 289 Neb. 364, 855 N.W.2d 1 (2014).

[8] *State v. Duncan*, 293 Neb. 359, 878 N.W.2d 363 (2016).

[9] *State v. Erpelding*, 292 Neb. 351, 874 N.W.2d 265 (2015).

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

[11] *Id.*

IV. ANALYSIS

1. Probable Cause to Arrest for Driving Under Influence of Drugs

Rothenberger's primary argument is that because neither Shepard nor Chitwood was a certified DRE officer, they could not formulate sufficient probable cause to arrest him for suspicion of driving under the influence of drugs. Specifically, Rothenberger suggests that only DRE-certified officers can rule out the possibility that a suspect's impairment is due to a medical condition, rather than drugs. And Rothenberger further argues that absent a valid arrest for driving under the influence, Bliss had no legal authority to ask Rothenberger to submit to a chemical test to determine the presence of drugs, so evidence of Rothenberger's refusal should have been suppressed.

[6] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.[12] These constitutional protections mandate that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.[13]

[7] Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.[14] We determine whether probable cause existed under an objective standard of reasonableness, given all the known facts and circumstances.[15] The probable cause standard is a practical, nontechnical conception that deals with the factual and practical

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[12] *State v. Piper, supra* note 7.

[13] *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010).

[14] *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014).

[15] *Id.*

considerations of everyday life on which reasonable and prudent persons, not legal technicians, act.[16]

[8] When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.[17] Probable cause for a warrantless arrest is to be evaluated by the collective information of the police engaged in a common investigation.[18]

Rothenberger relies on our analysis in *State v. Daly*[19] to suggest we have approved of a specific DRE protocol which was not followed in the present case. In *Daly*, we said:

> A field DRE examination generally involves making three determinations: first, that a person is impaired and that the impairment is not consistent with alcohol intoxication; second, the ruling in or out of medical conditions that could be responsible for the signs and symptoms; and third, what type of drug is responsible for the impairment. The process is systematic and standardized. A DRE officer uses a "fact sheet" to record his or her observations—a standardized form with prepared entries for the various tests and observations the officer must perform.[20]

But in *Daly*, we were not considering the DRE protocol in the context of determining whether officers had probable cause to arrest for driving under the influence of drugs. Rather, we were considering a challenge to the admissibility of expert DRE testimony at trial to prove the defendant's guilt. Probable cause requires less than the evidence necessary

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[16] *State v. Perry*, 292 Neb. 708, 874 N.W.2d 36 (2016).

[17] *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[18] *Id.*

[19] *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

[20] *Id.* at 910, 775 N.W.2d at 57.

to support a conviction.[21] In *Daly*, we neither addressed nor suggested the role, if any, the standard DRE protocol plays in determining probable cause to arrest a suspect for driving under the influence of drugs.

Rothenberger also relies on the Court of Appeals' opinion in *State v. Kellogg*[22] to suggest that a completed DRE examination by a certified officer is a necessary prerequisite to forming probable cause to arrest for driving under the influence of drugs. In *Kellogg*, a driver was stopped for speeding. The trooper noticed the driver was confused and overactive, had trouble concentrating, and could not sit still. The driver's demeanor made the trooper suspect she was under the influence of a drug. The driver denied drinking any alcohol but admitted she had "'taken some prescription medication.'"[23] The trooper, who was a certified DRE officer, administered standardized field sobriety tests, and the driver displayed impairment on all but one of the tests. The driver submitted to a preliminary breath test, which was negative for alcohol. The trooper asked the driver to submit to a chemical test of her urine to determine the presence of drugs, and she refused. The trooper concluded the driver was impaired and arrested her for driving under the influence of drugs. A subsequent inventory search of her vehicle revealed a baggie of methamphetamine, and ultimately, she was charged with and found guilty of possession of methamphetamine.

On appeal, the driver argued the trial court should have suppressed evidence discovered during the search, because the trooper lacked probable cause to arrest her for driving under the influence of drugs. The Court of Appeals analyzed all the facts and circumstances known to the trooper at the time, and it affirmed the trial court's finding that there was probable

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[21] See *State v. Perry, supra* note 16.

[22] *State v. Kellogg*, 22 Neb. App. 638, 859 N.W.2d 355 (2015).

[23] *Id.* at 640, 859 N.W.2d at 358.

cause to arrest for driving under the influence of drugs. While the Court of Appeals noted the trooper was a certified DRE officer, the court's conclusion that probable cause existed did not turn on the trooper's certification or on the specifics of any particular test performed, but, rather, on the totality of the officer's observations.

[9] We decline to adopt a bright-line rule requiring that the full DRE protocol be administered as a prerequisite to a finding of probable cause to arrest for driving under the influence of drugs.[24] Rather, we hold that when determining whether probable cause exists to arrest a suspect for driving under the influence of drugs, the same familiar, commonsense principles which govern all arrests apply.[25] We expressly reject Rothenberger's argument that only a DRE-certified officer who completes the full DRE protocol can find probable cause to arrest for driving under the influence of drugs. Such a rule would present law enforcement with a legal quandary in cases involving driving under the influence of drugs. Under Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2014), peace officers can require a chemical test only when a driver has been arrested for an offense arising out of acts alleged to have occurred while driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs, and only when

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[24] See, *State v. Kestle*, 996 So. 2d 275 (La. 2008); *Hill v. Director of Revenue*, 424 S.W.3d 495 (Mo. App. 2014). See, also, *People v. Ciborowski*, 2016 IL App (1st) 143352, 55 N.E.3d 259, 404 Ill. Dec. 163 (2016); *Bobolakis v. DiPietrantonio*, 523 Fed. Appx. 85 (2d Cir. 2013); *Wilson v. City of Coeur D'Alene*, No. 2:09-CV-00381-EJL, 2010 WL 4853341 (D. Idaho Nov. 19, 2010) (unpublished opinion); *Leverenz v. Kansas Dept. of Revenue*, No. 112039, 2015 WL 5750535 (Kan. App. Oct. 2, 2015) (unpublished opinion listed in table of "Decisions Without Published Opinions" at 356 P.3d 1077 (2015)); *State v. Rios-Gonzales*, No. 32585-3-II, 2005 WL 2858081 (Wash. App. Nov. 1, 2005) (unpublished opinion listed at 130 Wash. App. 1016 (2005)).

[25] See, *State v. Perry, supra* note 16; *State v. Matit, supra* note 14; *State v. Van Ackeren, supra* note 17.

the officer has reasonable grounds to believe such person was driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs. Under the rule Rothenberger advocates, officers could not arrest a driver for driving under the influence of drugs until after completing the final step in the DRE protocol (a chemical test), but officers could not request the chemical test until after the driver had been arrested.

[10] We hold that neither DRE certification nor a completed DRE examination is a mandatory prerequisite to forming probable cause to arrest a suspect for driving under the influence of drugs. Instead, we determine whether Shepard and Chitwood had probable cause to arrest Rothenberger by considering whether they had knowledge, based on information reasonably trustworthy under the circumstances, which justified a prudent belief that Rothenberger had committed the crime of driving under the influence of drugs.[26]

Applying this standard, we conclude the officers had an objectively reasonable basis to suspect Rothenberger was operating a motor vehicle under the influence of drugs. Rothenberger was observed driving erratically and fluctuating between 20 and 60 m.p.h. He had slow and slurred speech, difficulty multitasking, and trouble maintaining his balance throughout the traffic stop. Rothenberger either failed or was unable to complete standardized field sobriety tests because he kept falling. He appeared "sedated." The officers did not smell alcohol on Rothenberger's breath and ruled out alcohol as a possible cause for his impairment after administering a preliminary breath test, which was negative. Rothenberger was asked whether he had taken any medications and admitted taking Suboxone. Deputies questioned Rothenberger to ascertain whether they "had an impairment case or a medical case" and nothing indicated Rothenberger's impairment was related to

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[26] See *State v. Van Ackeren, supra* note 17.

an illness, an injury, or a medical condition. This information was reasonably trustworthy under the circumstances to justify a prudent belief that Rothenberger was impaired; that his impairment was not the result of alcohol, an injury, or a medical condition; and that he had committed the crime of driving under the influence of drugs. As the county court, the district court, and the Court of Appeals correctly concluded, the officers had probable cause to arrest Rothenberger for driving under the influence. Rothenberger's first assignment of error is meritless.

2. Overruling Motion for Directed Verdict

Rothenberger assigns it was error to overrule his motion for directed verdict on the charge of refusing a chemical test. He concedes there was ample evidence of impairment, but argues there was insufficient evidence that he was impaired by a drug. Additionally, he argues there was no evidence he refused a "chemical test" as that term is defined under title 177 of the Nebraska Administrative Code.

(a) Evidence of Drug Impairment

[11] 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.[27] 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.[28]

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

[28] *Id.*

The offense of refusing to submit to a chemical test is set out in § 60-6,197, which provides in relevant part:

> (1) Any person who operates or has in his or her actual physical control a motor vehicle in this state shall be deemed to have given his or her consent to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine.
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> (2) Any peace officer who has been duly authorized to make arrests for violations of traffic laws in this state . . . may require any person arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs to submit to a chemical test or tests of his or her blood, breath, or urine for the purpose of determining the concentration of alcohol or the presence of drugs in such blood, breath, or urine when the officer has reasonable grounds to believe that such person was driving or was in the actual physical control of a motor vehicle in this state while under the influence of alcoholic liquor or drugs in violation of section 60-6,196.
>
> (3) Any person arrested as described in subsection (2) of this section may, upon the direction of a peace officer, be required to submit to a chemical test or tests of his or her blood, breath, or urine for a determination of the concentration of alcohol or the presence of drugs. . . . Any person who refuses to submit to such test or tests required pursuant to this section shall be . . . guilty of a crime and upon conviction punished as provided in sections 60-6,197.02 to 60-6,197.08.
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> . . . .
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> (5) Any person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this

> section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged. Failure to provide such advisement shall not affect the admissibility of the chemical test result in any legal proceedings. However, failure to provide such advisement shall negate the state's ability to bring any criminal charges against a refusing party pursuant to this section.

[12] As such, the material elements of the crime of refusal are (1) the defendant was arrested for an offense arising out of acts alleged to have been committed while he or she was driving or in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs; (2) a peace officer had reasonable grounds to believe the defendant was driving or in actual physical control of a motor vehicle in this state while under the influence of alcohol or drugs; (3) the peace officer required the defendant to submit to a chemical test of his or her blood, breath, or urine to determine the concentration of alcohol or the presence of drugs; (4) the defendant was advised that his or her failure to submit to a chemical test of his or her blood, breath, or urine is a separate offense for which he or she could be charged; and (5) the defendant refused to submit to a chemical test as required by the peace officer.

Here, the State adduced evidence that Rothenberger was arrested for driving under the influence; evidence suggesting the officers had reasonable grounds to believe Rothenberger was driving while under the influence of drugs; evidence that after additional testing by a DRE officer, Rothenberger was asked to submit to a urine test to determine the presence of drugs; evidence he was given a postarrest chemical advisement form telling him that if he refused the chemical test, he could be charged with a crime; and evidence that Rothenberger refused the test.

Rothenberger argues that because Shepard and Chitwood were not certified DRE officers, they could not eliminate

the possibility that his impairment was caused by a medical condition and thus could not form "reasonable grounds" to believe he was driving under the influence of drugs. We at least implicitly rejected this argument when concluding the officers had probable cause to arrest Rothenberger for driving under the influence, and explicitly reject it now. Viewing the evidence in the light most favorable to the State, we conclude there was evidence presented from which a rational jury could find beyond a reasonable doubt that when Bliss examined Rothenberger and asked him to submit to a chemical test for drugs, he had reasonable grounds to believe Rothenberger had been driving under the influence of drugs. Rothenberger's argument to the contrary is without merit.

(b) Chemical Test

Rothenberger next argues he was entitled to a directed verdict on the refusal charge, because the State never established it was a "chemical test" he refused. Rothenberger's argument in this regard rests on a faulty premise, and improperly conflates the requirements for establishing the admissibility of chemical tests with the elements necessary for proving refusal of a chemical test.

For purposes of determining competent evidence in driving under the influence prosecutions, Neb. Rev. Stat. § 60-6,201(3) (Reissue 2010) provides that "[t]o be considered valid," a chemical test of blood, breath, or urine "shall be performed according to methods approved by the Department of Health and Human Services." Pursuant to this statute, title 177 of the Nebraska Administrative Code contains regulations governing chemical tests.[29] Those regulations define "[c]hemical test" as "an examination which measure's [sic] the presence of a drug by a chemical reaction, or chemical detection using a laboratory instrument" and define "[d]rug" as "any of the

[29] See 177 Neb. Admin. Code, *supra* note 3.

following[:] Marijuana, cocaine, morphine, codeine, phencyclidine, amphetamine, or methamphetamine."[30]

[13] Rothenberger reasons that since the drug he admitted to taking, Suboxone, is not one of the drugs which would be detected by a "chemical test" approved under title 177, he cannot be found guilty of refusing a "chemical test." Obviously, because Rothenberger refused the chemical test, we will never know whether the test would have revealed the presence of one of the seven drugs referenced in the regulations. But more important, while the administrative regulations governing chemical tests impact the admissibility of competent evidence to prove the crime of driving under the influence, they have no relevance to proving the crime of refusal. As both the district court and the Court of Appeals correctly observed, neither the type of drug suspected to be causing a person's impairment nor the ability of a chemical test to reveal the presence of a particular drug is an element of the crime of refusal. The Legislature has made it a crime to operate a motor vehicle while under the influence of "any drug,"[31] and an officer's ability to request a chemical test under § 60-6,197 is not limited to any particular drug. A driver may not evade conviction for refusing a chemical test by claiming to be impaired by a drug which will not be detected by the requested test. Rothenberger's argument in this regard is entirely without merit.

3. Proposed Jury Instructions Defining "Chemical Test" and "Drug"

Rothenberger assigns error to the county court's refusal to give his proposed jury instructions defining "chemical test" and "drug." We conclude, as did the district court and the Court

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[30] *Id.*

[31] Neb. Rev. Stat. § 60-6,196(1)(a) (Reissue 2010).

of Appeals, that the county court correctly refused to give Rothenberger's proposed jury instructions.

[14] 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.[32]

As discussed previously, it is immaterial to the crime of refusal whether the substance impairing the driver is one which will be detected by a chemical test which the driver has refused. Rothenberger's requested instructions were not a correct statement of the law and were immaterial to the crime of refusal. We conclude the county court did not commit reversible error when it refused each of Rothenberger's proposed instructions, and the district court and Court of Appeals correctly rejected this assignment of error as meritless.

V. CONCLUSION

The county court did not err in finding there was probable cause to arrest Rothenberger for suspicion of driving under the influence of drugs, in refusing to direct a verdict on the refusal charge, or in refusing to give Rothenberger's proposed jury instructions. The district court and the Court of Appeals did not err when they affirmed those rulings. On further review, we affirm the decision of the Court of Appeals.

Affirmed.

Connolly, J., not participating in the decision.

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[32] *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016).

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

State of Nebraska, appellee, v. Travis T. Mitchell, appellant.

884 N.W.2d 730

Filed September 23, 2016. No. S-15-086.

1. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion.
2. **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 that 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.
3. **Trial: Testimony: Constitutional Law: Arrests: Impeachment.** A defendant waives his or her Fifth Amendment protections when the defendant takes the stand and testifies which, in turn, allows his or her prearrest silence to be used for impeachment.
4. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
5. **Trial: Prosecuting Attorneys: Appeal and Error.** In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.
6. **Trial: Prosecuting Attorneys.** When a prosecutor's comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense.

7. **Motions for Mistrial: Motions to Strike: Proof: Appeal and Error.** Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.

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.

Joseph D. Nigro, Lancaster County Public Defender, Christopher Eickholt, and Nathan J. Sohriakoff for appellant.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

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

Kelch, J.

INTRODUCTION

Travis T. Mitchell was convicted of driving under the influence (DUI), fourth offense, with refusal to submit to a chemical test, and for driving during revocation. The Nebraska Court of Appeals affirmed, see *State v. Mitchell*, 23 Neb. App. 657, 876 N.W.2d 1 (2016), and we granted Mitchell's petition for further review. Mitchell argues that the district court erred in overruling his motion for mistrial based on the prosecutor's comments to the jury during closing arguments concerning Mitchell's postarrest, pre-*Miranda* silence. We affirm the judgment of the Court of Appeals that affirmed Mitchell's convictions and sentences.

BACKGROUND

On June 6, 2014, after a vehicular pursuit in Lincoln, Nebraska, police apprehended Mitchell in front of his residence. The State charged Mitchell with DUI with refusal to submit to a chemical test and with driving during revocation,

and the district court conducted a jury trial. Mitchell elected not to testify.

Three different officers observed Mitchell's driving before he returned home and was arrested. All three officers testified at Mitchell's trial, and based on their experience and observations, all three opined Mitchell showed signs that he was driving while under the influence of alcohol.

Officer Sarah Williams testified that she was in her cruiser and observed Mitchell's vehicle first, heading northbound on 70th Street; she identified the driver as Mitchell. Williams tried to follow Mitchell, but he was driving erratically, using the middle turn lane to pass other vehicles at a high rate of speed. Williams testified that the speed limit in that area was 35 miles per hour and that Mitchell was traveling 50 miles per hour or more. According to Williams, Mitchell's maneuvers were consistent with someone driving while under the influence of alcohol. Williams testified that she slowed down, because continuing to follow Mitchell would have been unsafe.

Officer James Quandt testified that he observed Mitchell's vehicle stop at the traffic light at the intersection of 70th and A Streets. Quandt identified the driver of the vehicle as Mitchell. Quandt testified that he witnessed Mitchell's vehicle speed, change lanes, and run a red light at Wedgewood Drive and 70th Street. Thereafter, Quandt lost sight of Mitchell's vehicle, but radioed to other officers that Mitchell was northbound and might be headed to his home.

Officer Joseph Keiser testified that he witnessed Mitchell pull into a driveway at a high rate of speed. Keiser noticed the driver's side tires go up onto the grass, "half missing" the driveway, before the vehicle came to a stop. Keiser then approached Mitchell's vehicle and proceeded to conduct a search, which revealed five cans of beer, with at least one can open, and an open bottle of liquor. Keiser also testified at trial that he could smell alcohol on Mitchell. Based on the odor of alcohol, Mitchell's actions, and his manner of driving, Keiser opined that Mitchell was under the influence of alcohol.

Quandt later arrived at Mitchell's home, where he encountered Keiser. Quandt testified that he also observed an odor of alcohol on Mitchell. Quandt testified that Mitchell was staggering as he walked and had difficulty balancing, that Mitchell's eyes were bloodshot, and that his speech was slightly slurred. Quandt testified that based on these observations and his training and experience in "a thousand or more" DUI investigations, he believed Mitchell was under the influence of alcohol. Quandt further opined that Mitchell could not safely operate a motor vehicle at that time and that driving behavior like Mitchell's can be a sign that a person is under the influence of alcohol. Quandt testified that Mitchell was arrested for driving under revocation. After conducting a DUI investigation of the scene, Quandt transported Mitchell to the Lancaster County jail.

Quandt testified that while en route to the jail, Mitchell repeatedly stated that he should not be under arrest, because police did not catch him driving. The district court received, and the jury listened to, an audio recording of the trip to the jail. Mitchell did not deny or affirmatively state that he had been drinking alcohol, and Quandt did not question him about the matter. Quandt testified that at the jail, Mitchell refused to submit to a chemical test. According to Quandt's testimony from an earlier hearing outside the presence of the jury, Mitchell received *Miranda* warnings sometime after he refused the chemical test, but there was no evidence at trial about *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

During closing statements, the State argued:

> Mitchell never says, I'm not drunk. I wasn't drinking. Why are you arresting me for [DUI], I'm not drunk. What he says is, "You didn't catch me driving. You didn't arrest me in my truck." And later, "You didn't breathalyze me in my car." Never once does he say he's not drunk. It's all about where you got me. He never denied that he's drunk . . . .

Mitchell's counsel objected and moved for a mistrial. The court did not specifically rule on Mitchell's motion for mistrial but instructed the jury to disregard the State's comments about what Mitchell did or did not deny.

The jury found Mitchell guilty of DUI with refusal to submit to a chemical test and of driving during revocation. Following an enhancement hearing concerning Mitchell's multiple DUI convictions, the district court sentenced Mitchell to 5 to 10 years' imprisonment and revoked his driving privileges for 15 years.

Mitchell appealed to the Court of Appeals, assigning, among other things, that the district court erred when it overruled his motion for mistrial based on the prosecutor's comment during closing argument that Mitchell did not deny being intoxicated. The Court of Appeals affirmed the convictions and sentences, determining that Mitchell had not suffered actual prejudice as a result of the trial court's denial of his motion for mistrial. See *State v. Mitchell*, 23 Neb. App. 657, 876 N.W.2d 1 (2016).

We granted Mitchell's petition for further review.

ASSIGNMENT OF ERROR

In his petition for further review, Mitchell assigns that the Court of Appeals erred by failing to find that the district court should have declared a mistrial because the State violated due process and the Nebraska and U.S. Constitutions by inappropriately commenting during closing arguments on Mitchell's pretrial silence.

STANDARD OF REVIEW

[1] The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

ANALYSIS

At trial, the jury heard evidence that Mitchell made unsolicited postarrest, pre-*Miranda* statements during the ride to

the jail, in which he repeatedly volunteered that he should not be under arrest because police did not catch him driving. The instant appeal centers on the prosecutor's subsequent statements during closing arguments, which merit repetition:

> Mitchell never says, I'm not drunk. I wasn't drinking. Why are you arresting me for [DUI], I'm not drunk. What he says is, "You didn't catch me driving. You didn't arrest me in my truck." And later, "You didn't breathalyze me in my car." Never once does he say he's not drunk. It's all about where you got me. He never denied that he's drunk . . . .

The district court did not specifically rule on Mitchell's motion for mistrial but did admonish the jury to disregard the comments of the prosecutor. We interpret this as implicitly overruling the motion for mistrial.

[2] Mitchell assigns that the Court of Appeals erred by failing to find that the district court ought to have declared a mistrial. A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that 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. *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011). The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *State v. Daly, supra*.

[3] Mitchell asserts that because he did not testify at trial, and subject himself to cross-examination, he did not waive any right concerning the use of his postarrest, pre-*Miranda* silence. See *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) (defendant waives his Fifth Amendment protections when he takes stand and testifies which, in turn, allows his prearrest silence to be used for impeachment).

The Court of Appeals, in examining the prosecutor's closing remarks about Mitchell's postarrest, pre-*Miranda* silence, relied upon *U.S. v. Frazier*, 408 F.3d 1102 (8th Cir. 2005). In *Frazier*, during the State's case in chief, the prosecutor

questioned the arresting officer about the defendant's reaction to the arrest and about the complete silence of the defendant during the process of arrest. This observation of silence occurred after the defendant had been arrested but prior to being read his *Miranda* rights. The Eighth Circuit stated that "[a]lthough [the defendant] was under arrest, there was no governmental action at that point inducing his silence," because he had not yet been read his *Miranda* rights. 408 F.3d at 1111. The *Frazier* court therefore concluded that the government could utilize the defendant's postarrest, pre-*Miranda* silence as substantive evidence of his guilt.

The Court of Appeals found that the principle in *Frazier* applied "equally to impeachment use of silence as to the use of silence as substantive evidence of a defendant's guilt" and that "[b]ecause his silence occurred pre-*Miranda*, the prosecutor's comment utilizing Mitchell's silence as evidence of his guilt was not improper." *State v. Mitchell*, 23 Neb. App. 657, 670, 876 N.W.2d 1, 11-12 (2016).

However, Mitchell argues (1) that the Court of Appeals incorrectly relied on *Frazier*, because that court narrowly tailored its opinion to the specific facts present in that case, and (2) that the decision in *Frazier* is not consistent with U.S. Supreme Court precedent in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); *Wainwright v. Greenfield*, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986); and *Jenkins v. Anderson, supra*.

Mitchell is partially correct in that the court in *Frazier* did limit its holding to "the facts before" it and further stated, "We are speaking in this case only of the defendant's silence during and just after his arrest." *U.S. v. Frazier*, 408 F.3d at 1111. Despite *Fraizer*'s limited holding, the Court of Appeals used it as guidance in evaluating the closing remarks in this case and in resolving the ultimate issue it presents: whether the comments were overly prejudicial, resulting in an unfair trial. See, *State v. Dixon, supra*; *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

In addition, Mitchell cites *U.S. v. Moore*, 104 F.3d 377 (D.C. Cir. 1997), where the court found that the prosecutor's closing comments regarding the defendant's postarrest, pre-*Miranda* silence violated his Fifth Amendment right against self-incrimination. In *Moore*, the defendant did not testify at trial and the prosecution not only commented on the defendant's postarrest, pre-*Miranda* silence in closing but also presented such evidence during its case in chief. As a result, the court found that "a prosecutor's comment on a defendant's post-custodial silence unduly burdens that defendant's Fifth Amendment right to remain silent at trial, as it calls a jury's further attention to the fact that he has not arisen to remove whatever taint the pretrial but post-custodial silence may have spread." 104 F.3d at 385. Mitchell also points out that other courts have agreed with *Moore*. See, *U.S. v. Hernandez*, 948 F.2d 316 (7th Cir. 1991); *U.S. v. Velarde-Gomez*, 269 F.3d 1023 (9th Cir. 2001) (en banc).

A distinguishing factor separating Mitchell's case from *Moore* is that the *Moore* court, in discussing a defendant's absolute right to remain silent, recognized that "[w]hile a defendant who chooses to volunteer an unsolicited admission or statement to police before questioning may be held to have waived the protection of that right, the defendant who stands silent must be treated as having asserted it." 104 F.3d at 385. Here, Mitchell volunteered statements prior to *Miranda* warnings being given and those statements were presented to the jury. This is not a case where a defendant remained silent at all times, which, under *Moore*, would constitute an assertion of the Fifth Amendment right against self-incrimination. In light of Mitchell's unsolicited statements, it is arguable whether these facts present a situation where Mitchell's postarrest, pre-*Miranda* silence is at issue.

[4,5] But even assuming that Mitchell had asserted his Fifth Amendment rights through his partial inferred silence and that, as Mitchell claims, the prosecutor's comments rose to the level of improper conduct during closing argument, it would

still be necessary to determine whether Mitchell's right to a fair trial was prejudiced. See *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014). Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole. *Id.* We consider the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction. *Id.*

While this court is concerned about the prosecutor's comments because they had the potential to mislead the jury, we must weigh any prejudicial effect in view of the overall circumstances of this case. See *id*. Here, the comments were isolated to closing argument. Further, in this instance, the degree to which the prosecutor's remarks tended to mislead is intertwined with the strength of the evidence supporting Mitchell's conviction. The evidence reflects that Mitchell illegally drove in the middle lane passing cars at a high rate of speed, endangered other drivers, and drove off the roadway. Additionally, three different officers observed Mitchell's driving and each opined that Mitchell showed signs of driving while under the influence of alcohol. Thus, the evidence within the State's case in chief overwhelmingly supported Mitchell's conviction.

[6] Moreover, we observe that Mitchell's state of intoxication was relevant in closing argument. Mitchell himself raised the issue of whether he was intoxicated in opening statements when counsel stated, "And while he was driving on a license that was revoked, he was not driving under the influence." Still, the prosecutor's comments that "Mitchell never says, I'm not drunk. I wasn't drinking" were not based upon evidence directly adduced during the trial. Arguably, the prosecutor based the comments upon a reasonable inference from Mitchell's volunteered statements. When a prosecutor's

comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. *State v. Dubray, supra*.

[7] Additionally, in the instant case, although the district court did not specifically rule on Mitchell's motion for mistrial, it did provide a curative instruction by admonishing the jury to disregard the prosecutor's comments. And error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

After weighing the above factors, we find that although the prosecutor's closing remarks about Mitchell's postarrest, pre-*Miranda* silence are questionable under these facts, they did not prejudice his right to a fair trial. As a result, we find no abuse of discretion by the district court in implicitly overruling Mitchell's motion for mistrial.

CONCLUSION

For the reasons set forth above, we affirm the decision of the Court of Appeals.

Affirmed.

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

Todd Steckelberg, appellant, v. Nebraska State Patrol, appellee.

885 N.W.2d 44

Filed September 23, 2016. No. S-15-879.

1. **Mandamus: Judgments: Appeal and Error.** An action for a writ of mandamus is a law action, and in an appellate review of a bench trial of a law action, a trial court's finding has the effect of a jury verdict and will not be set aside unless clearly erroneous.
2. **Estoppel: Equity: Appeal and Error.** A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
3. **Estoppel: Words and Phrases.** To mend one's hold means that where a party has based his or her conduct upon certain reasons stated by him or her, he or she will not be permitted, after litigation has commenced, to assert other reasons for his or her conduct.
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). 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 records from disclosure.
5. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned.
6. ____: ____. The decision of a district court that is reviewing records in camera under the public records statutes to allow other persons to

review said records is entrusted to the district court's discretion, and is reviewed for an abuse of that discretion.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Affirmed.

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

Douglas J. Peterson, Attorney General, and David A. Lopez for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Heavican, C.J.

INTRODUCTION

Todd Steckelberg filed a public records request under Neb. Rev. Stat. § 84-712 (Reissue 2014), seeking records relating to the interview and selection process for a job opening as an "Executive Protection Trooper" with the Nebraska State Patrol (State Patrol). Steckelberg's request was denied, and he sought a writ of mandamus in the district court. Steckelberg's petition for writ of mandamus was denied. He appealed, and we granted the State Patrol's petition to bypass the Nebraska Court of Appeals. We affirm.

BACKGROUND

Steckelberg is employed by the State Patrol as a trooper. He was an applicant for a lateral transfer to the position of Executive Protection Trooper. Interviews were conducted on March 26, 2015. Another applicant was awarded the position.

On April 5, 2015, Steckelberg requested that he be permitted to review his score sheets and the comments and recommendations from the hiring board. That request was denied, with the State Patrol's human resources division informing Steckelberg that the State Patrol would not provide feedback concerning interviews. That same day, Steckelberg inquired as

to why his own records were not provided to him. Steckelberg was again informed that there would be no feedback given regarding interviews, because such records were considered to be confidential.

On April 9, 2015, Steckelberg made, through counsel, a request under Nebraska's public records laws for "any and all documents regarding the most recent interview for the Executive Protection Trooper position," including "the completed a [sic] score sheet, which each member made notes and comments on, each recommendation and the Board's recommendation to the Superintendent." The State Patrol sent the listing for the open position but otherwise denied Steckelberg's request, with the State Patrol referencing Neb. Rev. Stat. § 84-712.05(15) (Reissue 2014) as the basis for such denial.

On May 6, 2015, Steckelberg sought a writ of mandamus in the Lancaster County District Court, again under Nebraska's public records laws, seeking the records that were the subject of his public records request. Trial on Steckelberg's petition was held on August 14.

The trial court held for the State Patrol and denied Steckelberg's petition for writ of mandamus. The trial court concluded that the records Steckelberg sought could be withheld under § 84-712.05(7), providing that the personal information of personnel could be withheld from examination. The court addressed and rejected Steckelberg's argument that the State Patrol was not permitted to rely on § 84-712.05(7) when its initial denial was purportedly premised on § 84-712.05(15), concluding that its review of the public records request was de novo under Neb. Rev. Stat. § 84-712.03 (Reissue 2014).

Steckelberg appealed. The State Patrol filed a petition to bypass the Court of Appeals, which we granted.

ASSIGNMENTS OF ERROR

Steckelberg assigns, restated and consolidated, that the trial court erred in (1) allowing the State Patrol to rely on

a different exemption than that originally relied upon, (2) finding that Steckelberg had not met his burden of proof to show that the documents were public records, (3) finding the records were exempt under § 84-712.05(7) and accordingly denying his petition for writ of mandamus, and (4) not allowing Steckelberg to review the records that the court reviewed in camera.

STANDARD OF REVIEW

[1] An action for a writ of mandamus is a law action, and in an appellate review of a bench trial of a law action, a trial court's finding has the effect of a jury verdict and will not be set aside unless clearly erroneous.[1]

[2] A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.[2]

ANALYSIS

On appeal, Steckelberg makes three basic arguments: (1) that the district court erred in allowing the State Patrol to rely on a different exception to the public records laws than that originally cited by the State Patrol when it denied Steckelberg's request, (2) that the district court erred in finding that the records sought were exempted from disclosure, and (3) that the district court ought to have allowed him to inspect the records during the court's in camera review.

Some background law is helpful. Section 84-712(1) provides that "all citizens of this state and all other persons interested in the examination of the public records as defined in section 84-712.01 are hereby fully empowered and authorized" to examine such records. Neb. Rev. Stat. § 84-712.01(1) (Reissue 2014) provides in part:

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[1] *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998).

[2] *Id.*

> 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.

Records "which may be withheld from the public" include 18 separate categories.[3] Section 84-712.03 allows a person who is denied "any rights granted by sections 84-712 to 84-712.03" to file suit. Section 84-712.03(2) provides, in part, that the court with jurisdiction "shall determine the matter de novo and the burden is on the public body to sustain its action."

Before the district court, the State Patrol relied upon § 84-712.05(7)—"[p]ersonal information in records regarding personnel of public bodies other than salaries and routine directory information"—to support the withholding of the records from Steckelberg. In initially denying Steckelberg's request, however, the State Patrol relied on § 84-712.05(15), which provides that the following information may be withheld:

> [j]ob application materials submitted by applicants, other than finalists, who have applied for employment by any public body as defined in section 84-1409. For purposes of this subdivision, (a) job application materials means employment applications, resumes, reference letters, and school transcripts and (b) finalist means any applicant (i) who reaches the final pool of applicants, numbering four or more, from which the successful applicant is to be selected, (ii) who is an original applicant when the final pool of applicants numbers less than four, or (iii) who is an original applicant and there are four or fewer original applicants.

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[3] § 84-712.05.

Estoppel

Steckelberg first argues that the State Patrol should not be permitted to change its reliance under state law from § 84-712.05(15) to § 84-712.05(7). In initially denying Steckelberg's request, the State Patrol cited subsection (15). The State Patrol has since conceded that § 84-712.05(15) is inapplicable, but argues that the records are protected by subsection (7). Steckelberg argues that the State Patrol should not be allowed to "mend [its] hold" in this way.[4]

[3] We have little case law on the concept of mending one's hold. But, generally, to mend one's hold means that "where a party has based his conduct upon certain reasons stated by him, he will not be permitted, *after litigation* has commenced, to assert other reasons for his conduct."[5] The phrase comes from 19th-century wrestling parlance, where it meant to "get a better grip (hold) on your opponent."[6] Its origins in the law are traced to the U.S. Supreme Court's opinion in *Railway Co. v. McCarthy*.[7]

We noted this concept in *Enterprise Co., Inc. v. Nettleton Business College*.[8] In that case, we observed that "[t]he principle prohibiting a party from mending his hold is ordinarily applicable only if some previous conduct on his part would render present assertion of the right unjust."[9]

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[4] Brief for appellant at 27.

[5] *Hays v. Christiansen*, 114 Neb. 764, 771, 209 N.W. 609, 612 (1926). See, also, *Brown v. Security Mutual Life Ins. Co.*, 150 Neb. 811, 36 N.W.2d 251 (1949); *State, ex rel. Truax, v. Burrows*, 136 Neb. 691, 287 N.W. 178 (1939); *McDowell v. Metropolitan Life Ins. Co.*, 129 Neb. 764, 263 N.W. 145 (1935).

[6] See *Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 362 (7th Cir. 1990).

[7] *Railway Co. v. McCarthy*, 96 U.S. (6 Otto) 258, 24 L. Ed. 693 (1877).

[8] *Enterprise Co., Inc. v. Nettleton Business College*, 186 Neb. 183, 181 N.W.2d 846 (1970).

[9] *Id.* at 189, 181 N.W.2d at 851.

And we echoed this concept of prejudice in *State ex rel. Neb. Health Care Assn. v. Dept. of Health*.[10] There, we noted that "[t]he doctrine of equitable estoppel . . . will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice."[11] We concluded the relator-appellant had not shown that it was prejudiced by the appellees' delay in issuing their denial of access to certain documents.

We therefore examine this record for prejudice caused as a result of the State Patrol's change in position. We find none. Steckelberg's request for the records was denied within days of making of the request. Initially, § 84-712.05(15) was cited, but by the time the State Patrol filed its answer, it cited to subsection (7). There is nothing in the record to suggest that during the district court litigation of this matter, the State Patrol argued that records were exempted under subsection (15). This conclusion is reinforced by the district court's correct observation that its review of the State Patrol's denial was de novo.

Steckelberg's first assignment of error is without merit.

Access to Records

Steckelberg next argues that the district court erred in finding that he did not meet his burden to show that the records were public records. The district court reasoned both that Steckelberg had not met his initial burden to show that the records in question were public records and that even if that burden had been met, the State Patrol had shown that the records were exempt under § 84-712.05(7).

[4] This is a mandamus action. 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

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[10] *State ex rel. Neb. Health Care Assn. v. Dept. of Health, supra* note 1.

[11] *Id.* at 796, 587 N.W.2d at 108.

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. 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 § 84-712.05 or Neb. Rev. Stat. § 84-712.08 (Reissue 2014) exempts the records from disclosure.[12]

We agree with Steckelberg insofar as he argues that the district court erred in finding that he had not met his initial burden. It is undisputed that Steckelberg is a citizen or otherwise interested party and that he has been denied access to the records sought. Steckelberg has also shown that the records sought were those belonging to the State Patrol, an agency of the State, and thus were public records as defined by § 84-712.01. Indeed, the State Patrol concedes that Steckelberg has met his burden.

We turn next to the question of whether the State Patrol showed that the records fall within an exemption listed in § 84-712.05.

Steckelberg argues that these records do not fit within § 84-712.05(7) for two reasons: (1) The State Patrol's own evidence shows that the records sought are not part of an employee's personnel record, and (2) the records sought fit more neatly into § 84-712.05(15), which the State Patrol concedes is otherwise inapplicable.

Steckelberg's first argument—that the State Patrol's own evidence shows the records are not personnel records—misses the mark. The State Patrol did produce an affidavit stating that the records were not kept with an employee's personnel record, but were kept separately by the State Patrol's human resources division. But § 84-712.05(7) exempts "[p]ersonal information in records regarding personnel." The district court found that

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[12] *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

the information in the records sought did contain personal information. And the information was about employees, otherwise known as personnel,[13] of the State Patrol. There is no requirement in § 84-712.05(7) that in order to be exempt, the records must be kept within an employee's personnel record, as used as a term of art; the records need only be personal information about personnel, defined as persons employed by an organization.[14]

[5] We also note that the records in question are not part of our appellate record, nor did either party request their inclusion in our record. It is incumbent upon the appellant to present a record supporting the errors assigned.[15] To the extent Steckelberg suggests that the district court erred in its finding that the sought-after records contained personal information, we cannot reach that issue, because we do not have those records.

Steckelberg also argues that the records fit more squarely into § 84-712.05(15), which all agree is otherwise inapplicable on these facts. Steckelberg argues that records such as this are not open for examination where the applicants are not finalists, but are open when the applicants are finalists, as is the case here. Though not entirely specific, Steckelberg appears to be arguing that if § 84-712.05(7) is read broadly enough to exempt these materials, then there is no purpose behind the exemption provided by § 84-712.05(15).

This argument is without merit. Section 84-712.05(15) provides that "job application materials" of applicants, "other than finalists," are exempt from examination. Job application materials are defined in subsection (15) as "employment applications, resumes, reference letters, and school transcripts."

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[13] See Webster's Third New International Dictionary of the English Language, Unabridged 1687 (1993).

[14] See *id*.

[15] See *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015).

It is conceded that Steckelberg was a finalist. But even if he had not been, he sought "the completed a [sic] score sheet, which each member made notes and comments on, each recommendation and the Board's recommendation to the Superintendent." These records are not "job application materials" as defined by § 84-712.05(15).

Section 84-712.05(7) does not infringe upon the exemption provided by § 84-712.05(15). As such, Steckelberg's second argument and his second and third assignments of error are without merit.

In Camera Review

Finally, Steckelberg argues that he ought to have been permitted to inspect the records during the district court's in camera review. Section 84-712.03(2) provides in relevant part that "[t]he court may view the records in controversy in camera before reaching a decision, and in the discretion of the court other persons, including the requester, counsel, and necessary expert witnesses, may be permitted to view the records, subject to necessary protective orders."

[6] This decision, then, is entrusted to the discretion of the court. And we review for an abuse of that discretion. We cannot find an abuse of discretion in this case. There was nothing about the nature of these records that required any other person to be present to help the court decipher the meaning of the records in question. To allow Steckelberg to be present for this review would obviate the need for the underlying litigation.

There is no merit to Steckelberg's final assignment of error.

CONCLUSION

The records Steckelberg seeks to view are exempted under § 84-712.05(7). As such, the district court did not err in denying Steckelberg's petition for writ of mandamus. The decision of the district court is affirmed.

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. Corey J. Raatz, appellant.

885 N.W.2d 38

Filed September 23, 2016. No. S-16-194.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
2. **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.
3. **Criminal Law: Statutes: Legislature.** When the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.
4. **Statutes: Appeal and Error.** Statutory language 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. **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.
6. **Statutes: Legislature: Appeal and Error.** 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.
7. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.

8. **Criminal Law: Statutes: Legislature: Intent: Time.** The Legislature did not intend penalty reductions made in 2015 to Class IV felonies to apply retroactively to offenses committed prior to August 30, 2015.
9. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
10. ____. 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 surrounding the defendant's life.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed.

Chelsey R. Hartner, Chief Deputy Madison County Public Defender, for appellant.

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

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

Kelch, J.

INTRODUCTION

Corey J. Raatz appeals his sentence for criminal mischief, a Class IV felony. See Neb. Rev. Stat. § 28-519 (Reissue 2008). He contends that the district court erred in failing to retroactively apply statutory amendments from 2015 Neb. Laws, L.B. 605, which require probation sentences for all Class IV felonies unless there are substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community. Further, he contends that the district court abused its discretion by sentencing him to incarceration rather than a term of probation. Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2014), the case was submitted without oral argument. We find that the changes set forth by L.B. 605 do not apply to Raatz and that the district court did not err in sentencing him to a term of imprisonment. We affirm.

FACTS

On November 5, 2014, Sgt. James Vrbsky of the Madison County Sheriff's Department responded to a report of a vehicle fire in Madison County, Nebraska. He observed what appeared to be a semi-truck on fire. Shortly after Vrbsky arrived at the scene of the fire, a vehicle stopped nearby, and Raatz exited the passenger door. Raatz inquired of Vrbsky if he could proceed on, to which Vrbsky advised that he could. Raatz further inquired whether there was going to be a problem, because he, Raatz, was near the fire. Vrbsky advised Raatz that he should contact the sheriff's office if he had set the fire and that if not, he should leave, whereupon Raatz left. Vrbsky observed indicators that Raatz was under the influence of alcohol at the time of their contact. Thereafter, the vehicle carrying Raatz again passed by the scene.

After Vrbsky had exited the scene, he was dispatched back to the same scene. When Vrbsky arrived, he observed Raatz and a female standing there with a male subject, John Krueger. Again, Vrbsky told Raatz to leave.

Krueger reported to Vrbsky that he had been awoken by a telephone call and that he recognized the caller's voice as that of Raatz, advising Krueger that there was a fire just north of his house. Raatz hung up, but called back, identifying himself as Raatz, and again advised Krueger of the fire. Krueger drove to the area Raatz described. He observed a small fire in the cab area of a semi-tractor and called the authorities. After the authorities arrived, Krueger observed the vehicle carrying Raatz drive by, return, go by again, and then park. Thereafter, Raatz exited the vehicle and approached Krueger.

At the fire scene, investigators determined that one semi-tractor was driven into a fuel trailer, pushing the fuel trailer into a second semi-tractor. A fire then started and consumed both semi-tractors and the trailer.

On March 5, 2015, the sheriff's office interviewed and, later, arrested Raatz for false reporting and criminal mischief. The

State filed an information on April 15, charging Raatz with criminal mischief, a Class IV felony.

A plea agreement resulted in Raatz' pleading no contest to the charge on December 21, 2015. Further, the State agreed to make no recommendation at sentencing and requested the determination of restitution at a later hearing. The district court ordered a presentence investigation and scheduled the sentencing and restitution hearing for February 19, 2016.

At sentencing on February 19, 2016, Raatz requested a term of probation, arguing that with the 2015 addition of L.B. 605, Neb. Rev. Stat. § 29-2204.02 (Supp. 2015) required probation for Class IV felonies absent substantial and compelling reasons that would prevent effective and safe supervision in the community. The district court ruled that because the offense occurred before August 30, 2015—the effective date of L.B. 605—it did not have to find substantial and compelling reasons not to place Raatz on probation, as required by § 29-2204.02. The district court sentenced Raatz to a prison term of 20 to 40 months. Raatz appealed.

ASSIGNMENTS OF ERROR

Raatz assigns that the district court (1) failed to apply § 29-2204.02 in sentencing him and (2) abused its discretion by sentencing him to a term of incarceration rather than a term of probation.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015); *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013).

[2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013); *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

ANALYSIS

Whether District Court Erred in Declining to Apply § 29-2204.02.

[3] Raatz contends that the district court erred in declining to apply § 29-2204.02 in sentencing him, following his conviction for criminal mischief, a Class IV felony. See § 28-519. He relies on what we sometimes refer to as the "*Randolph* doctrine," the proposition that when the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise. See *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971). Upon our review of L.B. 605, we determine that the Legislature specifically provided otherwise in this instance.

[4-7] Our analysis begins with the rules of statutory construction. Statutory language 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. *State v. Sikes, supra*; *State v. Parks, supra*. 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); *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002). 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); *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011). Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent,

harmonious, and sensible. *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012).

Here, Raatz was convicted of criminal mischief, pursuant to § 28-519, in November 2014. His conviction occurred prior to August 30, 2015, the effective date of L.B. 605. Raatz contends that because he was sentenced after the effective date of L.B. 605, *Randolph, supra*, controls and he should have been sentenced to probation as provided by § 29-2204.02(2), which states, in relevant part:

> If the criminal offense is a Class IV felony, the court shall impose a sentence of probation unless:
>
> . . . .
>
> (c) There are substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community, including, but not limited to, the criteria in subsections (2) and (3) of section 29-2260. Unless other reasons are found to be present, that the offender has not previously succeeded on probation is not, standing alone, a substantial and compelling reason.

Raatz' reliance on *Randolph, supra*, is misplaced. He cannot receive the benefit of the amendatory act that lowered the punishment for Class IV felonies, because the Legislature specifically provided otherwise within L.B. 605.

[8] When the Legislature amended the penalty provisions in Neb. Rev. Stat. § 28-105 (Supp. 2015) for Class IV felonies, it included the following language regarding retroactive application: "The changes made to the penalties for Class III, IIIA, and IV felonies by Laws 2015, LB605, do not apply to *any offense* committed prior to August 30, 2015, as provided in section 28-116." § 28-105(7) (emphasis supplied). Further, Neb. Rev. Stat. § 28-116 (Supp. 2015) states in part:

> The changes made to the sections listed in this section by Laws 2015, LB605, shall not apply to any offense committed prior to August 30, 2015. Any such offense shall be construed and punished according to the provisions of law existing at the time the offense was

> committed. For purposes of this section, an offense shall be deemed to have been committed prior to August 30, 2015, if any element of the offense occurred prior to such date.

Section 28-116 goes on to list § 28-519, criminal mischief, as a statute that was amended by L.B. 605. The Legislature was clear by the plain language of § 28-519 that it is not to be applied retroactively to "any offense committed prior to August 30, 2015," and Raatz' offense occurred prior to August 30, 2015. Consequently, § 29-2204.02 is not applicable to his case.

Raatz points out that as part of L.B. 605, the Legislature amended Neb. Rev. Stat. § 83-1,135.02(2) (Supp. 2015), which provides that "sections 29-2262 [and] 29-2266 . . . apply to all committed offenders under sentence, on parole, or on probation on August 30, 2015, and to all persons sentenced on and after such date." Raatz argues, "[I]t is clear, that as far as §§ 29-2262 and 29-2266 are concerned, the Legislature certainly desired to have its changes in probation conditions and procedures for sanctions applied retroactively. The logical inference would be that § 29-2204.02 should apply retroactively as well." Brief for appellant at 17. However, the fact that the Legislature specifically referenced Neb. Rev. Stat. §§ 29-2262 and 29-2266 (Supp. 2015), but not § 29-2204.02, would stand for the opposite conclusion from that opined by Raatz. It is clear that the Legislature did not intend to apply § 29-2204.02 retroactively. Therefore, the district court did not err in declining to apply § 29-2204.02 in sentencing Raatz.

Whether District Court Abused Its Discretion by Sentencing Raatz to Term of Incarceration Rather Than Term of Probation.

[9,10] Lastly, Raatz contends that the district court abused its discretion by electing to sentence him to a term of

imprisonment, rather than probation. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013). 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 surrounding the defendant's life. *Id.* An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *Id.*

The presentence report reflects that Raatz has an extensive criminal history, spanning from 1996 to 2014. It includes four convictions for driving under suspension, one for driving under the influence, one for reckless driving, and one for driving under revocation, the last of these driving offenses occurring in 2012. Raatz has been convicted of trespass twice, most recently in 2012. Raatz' criminal record reflects two convictions for criminal mischief, in addition to the present offense, as well as four convictions for theft and two for assault. In addition, Raatz has been convicted of burglary, fraud, obstructing an officer, unauthorized use of a vehicle, violation of a restraining order, attempt to elude a police officer, possession of a deadly weapon by a felon, disturbing the peace, child abuse, and false reporting. Raatz has been incarcerated 11 times and served terms of probation for unauthorized use of a vehicle, together with trespass and attempt to elude a police officer.

At the time of the present offense, a Class IV felony was punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. § 28-105(1). The sentencing order provided that the district court had reviewed Neb. Rev. Stat. § 29-2260 (Supp. 2015) and found that Raatz was "not a suitable candidate for probation." According to the presentence report, Raatz expressed the desire to continue to provide for his family while on probation and professed that he would not reoffend. But as recounted above, Raatz has an extensive criminal history that shows a consistent lack of respect for

people and property and includes multiple criminal mischief convictions. He has received opportunities for probation in the past and takes no responsibility for the present offense. In light of these facts, we cannot conclude that the district court abused its discretion in sentencing Raatz to incarceration.

CONCLUSION

Although Raatz was convicted of a Class IV felony, § 29-2204.02 does not apply retroactively to his offense, because he committed that felony before the effective date of L.B. 605. We find that Raatz' sentence of 20 to 40 months' imprisonment was within statutory limits and was not an abuse of discretion. Therefore, we affirm.

Affirmed.

Connolly, J., not participating.

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

Donut Holdings, Inc., appellant, v. William Risberg, appellee, and Risberg Stores, L.L.C., intervenor-appellee.

885 N.W.2d 670

Filed September 30, 2016. No. S-15-851.

1. **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 and will not be disturbed on appeal unless clearly wrong.
2. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
3. **Actions: Default Judgments: Proof.** In Nebraska, where a defendant has filed an answer, the fact that the defendant does not appear for trial does not entitle the plaintiff to a judgment without proof of the facts constituting the plaintiff's cause of action, unless the facts admitted by the defendant in the answer make out a prima facie case in the plaintiff's favor.
4. **Contracts: Parties: Intent.** An implied in fact contract arises where the intention of the parties is not expressed in writing but where the circumstances are such as to show a mutual intent to contract. The determination of the parties' intent to make a contract is to be gathered from objective manifestations—the conduct of the parties, language used, or acts done by them, or other pertinent circumstances surrounding the transaction.
5. **Contracts: Intent.** If the parties' conduct is sufficient to show an implied contract, it is just as enforceable as an express contract.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

No appearance for appellee.

No appearance for intervenor-appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Kelch, J.

NATURE OF CASE

This case presents the issue of whether a franchisor has a breach of contract claim against a "holdover franchisee"—a franchisee who continues to receive the benefits of an expired franchise agreement, but fails to make payments to the franchisor per the agreement.

BACKGROUND

Donut Holdings, Inc. (DHI), is the Nebraska parent corporation of LaMar's Donuts International, Inc. (LaMar's). LaMar's is a franchise company with nine franchisees, including one in Springfield, Missouri. In 2002, the Springfield store was purchased by Risberg Stores, L.L.C., a Missouri entity. At that time, the store was operating under the terms of a 1994 franchise agreement entered into by Risberg Store's predecessor. This case arises from DHI's claim against William Risberg, the owner of Risberg Stores, and Risberg Stores, as intervenor (collectively Risberg Stores), for royalty and marketing fees accruing after June 2009. In Risberg Store's answer to DHI's complaint, Risberg Stores took the position that it did not owe DHI any fees because the parties' written agreement ended in 2004. This action was initially filed in county court and after transferring to district court, a bench trial on the matter was held on March 11, 2015. The evidence presented revealed the following facts.

Franchise Agreement and Course of Dealing

The 1994 franchise agreement had a 10-year term and a provision for extending the initial term by written request.

When the term ended in 2004, neither Risberg Stores nor DHI took any action to formally extend the terms of the franchise agreement. Instead, Risberg Stores continued to operate the Springfield store and continued to pay DHI royalty and advertising fees, which DHI accepted.

DHI's reports show that Risberg Stores stopped making payments to DHI on June 7, 2009. In a letter dated June 18, 2009, DHI advised Risberg Stores that, because Risberg Stores had not taken any steps to renew the 1994 agreement, the agreement expired in 2004, and that therefore, Risberg Stores should review the provisions of the franchise agreement relating to its obligations upon the expiration of the franchise. The agreement provided that upon the expiration of the franchise, Risberg Stores was to immediately stop using any methods, procedures, and techniques of Lamar's, as well as any trademarks or service marks bearing the Lamar's name. Despite this letter, Risberg Stores continued to operate using the Lamar's system and continued to report its sales to DHI. However, Risberg Stores did not pay any royalties or marketing fees to DHI after June 2009.

In December 2009, DHI sent Risberg Stores another letter stating that, to the extent that the franchise agreement had not expired by its own terms, DHI was terminating the agreement effective immediately, because Risberg Stores had failed to make royalty payments. DHI requested Risberg Stores to communicate a complete and detailed statement of Risberg Store's cost of equipment, supplies, and other inventory bearing the Lamar's trademarks or service marks, so that DHI could decide whether it would exercise its right under the franchise agreement to assume Risberg Store's lease and purchase all items bearing its marks. Despite these letters from DHI, Risberg Stores continued to operate using LaMar's name, mixes, and "trade dress." It continued reporting sales to DHI until February 2010.

In February 2010, Risberg Stores stopped reporting sales to DHI, but the evidence shows that Risberg Stores continued

to use LaMar's system until at least October 31, 2010. In a letter dated October 22, 2010, Risberg Stores informed DHI of its intent to discontinue its operations as a LaMar's store, effective at the close of business on October 31. On November 24, a customer of the Springfield store sent DHI a message via DHI's "LaMar's . . . Customer Comment Form" about the poor customer service she received at the Springfield store that day. Lamar's responded by apologizing and stating, "The [Springfield store] is no longer a part of the LaMar's . . . family. I am sorry you were led to believe they were still a part of LaMar's. The store is under independent ownership." Below the comment form, DHI noted that further action was needed; DHI's president was to request Risberg Stores to remove LaMar's signage. According to Risberg himself, Risberg Stores continued to use the LaMar's system until October 2011. He testified, "It was a very difficult thing for me to do but, you know, I did have to finally withdraw from the LaMar's system. When I did that, which was, I believe, in October of 2011, I stopped using the LaMar's mixes and took down all of the trade dress . . . ." Risberg also testified that Risberg Stores continued to make and sell donuts of the same consistency and quality until May 2012, when the store was sold to a third party.

Damages

DHI claims that between June 2009 and October 2010, the total amount of unpaid royalties and marketing fees was $33,586 and that by May 2012, the fees accrued to $71,878. Because Risberg Stores stopped reporting its sales in February 2010, DHI calculated the amount of the monthly fees owed after February by averaging the fees from the previous 3 weeks.

Motion for Default Judgment

Although Risberg Stores was initially represented by counsel and filed an answer to DHI's complaint, its counsel withdrew in October 2012. Risberg Stores did not obtain

replacement counsel and did not participate in the remainder of the proceedings. According to DHI, it filed written motions for a default judgment against Risberg Stores in April 2014 and February 2015. DHI twice renewed its motion during the trial—once prior to the presentation of the evidence and once at the conclusion of the evidence. Rather than ruling at trial, the district court took the motion under advisement. In its order filed August 13, 2015, the district court did not explicitly rule on the motion.

Ruling on Fees

The district court found that DHI was not entitled to any royalty or advertising fees from Risberg Stores after June 2009. The district court interpreted DHI's June 2009 letter to Risberg Stores as evidence that DHI did not consider the franchise agreement to have continued beyond that date. The district court therefore found that the agreement ended in June 2009 and that thereafter, DHI was not entitled to any payments under the agreement. DHI appeals. Risberg Stores did not file a brief on appeal.

ASSIGNMENTS OF ERROR

DHI assigns, restated, that the district court erred (1) in failing to grant a default judgment against Risberg Stores, (2) in its findings of fact on the status of the franchise relationship between DHI and Risberg Stores, and (3) in failing to enter judgment in favor of DHI and against Risberg Stores for accrued and unpaid fees under the terms of the parties' franchise agreement.

STANDARD OF REVIEW

[1,2] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.[1] But an appellate

[1] *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

court independently reviews questions of law decided by a lower court.[2]

ANALYSIS

[3] We first address DHI's argument that the district court erred in failing to grant DHI a default judgment against Risberg Stores. In Nebraska, where a defendant has filed an answer, the fact that the defendant does not appear for trial does not entitle the plaintiff to a judgment without proof of the facts constituting the plaintiff's cause of action, unless the facts admitted by the defendant in the answer make out a prima facie case in the plaintiff's favor.[3] Here, DHI is not entitled to a default judgment against Risberg Stores for breach of contract, because Risberg Stores filed an answer, and, as discussed below, the facts admitted therein do not make out a prima facie case in DHI's favor. Risberg Stores admitted that it previously used the LaMar's name and trademark, but did not admit that the parties were operating under any agreement during the relevant time period. Accordingly, this assignment of error is without merit.

The primary issue in this case is whether Risberg Stores breached a franchise agreement with DHI by failing to pay DHI royalty and advertising fees after June 2009. Although the district court did not make any finding as to whether the parties were operating under an implied in fact contract from 2004 to June 2009, that determination is necessary to conduct a clear analysis. We find that the parties were operating under an implied in fact contract.

[4,5] An implied in fact contract arises where the intention of the parties is not expressed in writing but where the circumstances are such as to show a mutual intent to contract.[4]

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[2] *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011).

[3] *Scudder v. Haug*, 201 Neb. 107, 266 N.W.2d 232 (1978).

[4] See *Linscott v. Shasteen*, 288 Neb. 276, 847 N.W.2d 283 (2014).

The determination of the parties' intent to make a contract is to be gathered from objective manifestations—the conduct of the parties, language used, or acts done by them, or other pertinent circumstances surrounding the transaction.[5] If the parties' conduct is sufficient to show an implied contract, it is just as enforceable as an express contract.[6] Here, Risberg Stores acknowledged that it continued to use the LaMar's system after the 1994 franchise agreement expired and DHI continued to accept royalty and advertising payments from Risberg Stores. Thus, it is clear that the parties' conduct showed a mutual intent to contract.

Although the parties were operating under an implied in fact contract after the 1994 franchise agreement expired, the district court concluded that DHI was not entitled to any fees after June 2009, because any agreement between the parties clearly ended with the June 2009 letter, which the district court interpreted as "evidence that [DHI] was not extending [Risberg Stores] the benefits of the franchise relationship." DHI argues that the district court wrongly focused on the June 2009 letter and that the court should have considered that Risberg Stores continued to use its recipes and trademarks after the letter was sent. While that fact might be relevant to a claim for unjust enrichment, DHI did not assign or argue those theories on appeal, so we need not consider them now.[7]

DHI urges us to adopt the rule that "'[w]here a franchisee continues operation of the franchise after the expiration of a franchise agreement, the parties will be found to have mutually agreed to a new contract with terms to be measured by

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[5] See *id.*

[6] *Id.*

[7] See, *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *Ford Motor Credit Co. v. All Ways, Inc.*, 249 Neb. 923, 546 N.W.2d 807 (1996); *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995).

the provisions of the previous contract.'"[8] In our view, this proposed rule is similar to our established rule on implied in fact contracts. Both rules require the court to look to the conduct of the parties in determining whether the parties have agreed to a new contract. However, we need not decide whether to adopt the "new" rule, because we have already determined that the parties entered into an implied in fact contract after 2004. Instead, DHI's hurdle, one which is not addressed by its proposed rule, is when that implied in fact contract ended.

We agree with the district court's finding that the implied in fact contract ended in June 2009 with DHI's letter to Risberg Stores. In the letter, DHI advised Risberg Stores that the 1994 franchise agreement had expired and that Risberg Stores should review the provisions of the franchise agreement relating to its obligations upon the expiration of the franchise. The agreement provided that upon the expiration of the franchise, Risberg Stores was to immediately stop using any methods, procedures, and techniques of Lamar's, as well as any trademarks or service marks bearing the Lamar's name. With DHI directing Risberg Stores to discontinue using the benefits of the franchise agreement, the district court rendered a reasonable reading of the letter that DHI was unwilling to continue to extend benefits. Thus, it was not clearly erroneous for the district court to conclude that DHI's June 2009 letter terminated the implied in fact contract.

DHI also cites *Muller Enterprises, Inc. v. Samuel Gerber Adv. Agcy., Inc.*,[9] for the proposition that "'[w]hen a contract has been executed on one side, the law will not permit the injustice of the other party retaining the benefit without paying unless compelled by some inexorable rule.'" *Muller*

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[8] Brief for appellant at 14, quoting 62B Am. Jur. 2d *Private Franchise Contracts* § 322 (2015).

[9] *Muller Enterprises, Inc. v. Samuel Gerber Adv. Agcy., Inc.*, 182 Neb. 261, 267, 153 N.W.2d 920, 924 (1967).

Enterprises, Inc. is clearly distinguishable, because in that case, the contract had not expired or been terminated. In fact, by the contract's terms, the "duration of the obligation [was] commensurate with [the defendant's] performance."[10] But under the facts of this case, where the contract had been terminated by DHI's own actions, we cannot say that the district court's finding was clearly wrong that Risberg Stores had no contractual obligation to pay DHI fees after June 2009.

CONCLUSION

The district court did not err in failing to grant DHI a default judgment, because Risberg Stores filed an answer and the answer did not make out a prima facie case in DHI's favor. The district court was not clearly wrong in determining that the June 2009 letter terminated the implied in fact contract, and therefore, DHI was not entitled to fees under the contract.

Affirmed.

Stacy, J., not participating.

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[10] *Id.* at 266, 153 N.W.2d at 924.

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

Kristina J. Hartley, appellee, v. Metropolitan Utilities District of Omaha, appellant.

885 N.W.2d 675

Filed September 30, 2016. No. S-15-976.

1. **Directed Verdict: Evidence.** A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
2. **Directed Verdict: Appeal and Error.** In reviewing a directed verdict, an appellate court gives the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.
3. **New Trial: Appeal and Error.** An appellate court reviews a trial court's ruling on a motion for a new trial for abuse of discretion.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
5. **Trial: Evidence: Appeal and Error.** 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.
6. **Fair Employment Practices: Attorney Fees: Appeal and Error.** The amount of attorney fees awarded in an action under the Nebraska Fair Employment Practice Act is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
7. **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. **Discrimination: Proof.** The *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), framework is designed to force an employer to reveal information that is available

only to the employer, i.e., any unstated reasons for taking the alleged discriminatory action, as well as any discretionary factors underlying its decision.

9. ____: ____. At all times in an unlawful discrimination case, the ultimate burden of persuasion by a greater weight of the evidence remains with the plaintiff.
10. **Employer and Employee: Discrimination: Proof.** A prima facie case of discrimination in a failure-to-promote claim consists of demonstrating (1) the employee is a member of a protected group, (2) the employee was qualified and applied for a promotion to an available position, (3) the employee was rejected, and (4) a similarly situated employee, not part of the protected group, was promoted instead.
11. ____: ____: ____. In an employment discrimination action, the plaintiff's prima facie case eliminates the most likely legitimate explanations for the employer's adverse action, such as lack of qualifications and the absence of a job opening.
12. ____: ____: ____. Once the plaintiff has established a prima facie case of discrimination, the burden of production shifts to the employer to rebut the prima facie case by producing clear and reasonably specific admissible evidence that would support a finding that unlawful discrimination was not the cause of the employment action.
13. ____: ____: ____. In an employment discrimination action, after the employer has presented a sufficient, neutral explanation for its decision, the question is whether there is sufficient evidence from which a jury could conclude that the employer made its decision based on the employee's protected characteristic, despite the employer's proffered explanation.
14. **Discrimination: Judgments.** Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors, and courts should not treat discrimination differently from other ultimate questions of fact.
15. **Employer and Employee: Discrimination.** In an employment discrimination action, where the employer contends that the selected candidate was more qualified for the position than the plaintiff, a comparative analysis of the qualifications is relevant to determine whether there is reason to disbelieve the employer's proffered reason for its employment decision.

Appeal from the District Court for Douglas County: Marlon A. Polk, Judge. Affirmed.

Mark Mendenhall, of Metropolitan Utilities District of Omaha, for appellant.

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

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

Wright, J.

I. NATURE OF CASE

Metropolitan Utilities District of Omaha (MUD) appeals from a verdict in favor of Kristina J. Hartley in a gender discrimination action under the Nebraska Fair Employment Practice Act (NFEPA).[1] Hartley sought to prove that she was not promoted because of gender discrimination and that MUD's stated reasons for promoting a male colleague, David Stroebele, instead of her were pretextual. Hartley asserted that she and the two other female applicants, Sherri Meisinger and Shala Chevalier, were better qualified than Stroebele or any of the male applicants. The jury returned a verdict in Hartley's favor. On appeal, MUD asserts that the evidence was insufficient to support the jury's verdict. It claims the district court erred in excluding postpromotional performance evaluations of Hartley. It claims the attorney fees awarded to Hartley were excessive.

II. BACKGROUND

Hartley was a senior engineering technician when the position of supervisor of field engineering was posted. Stephanie Henn was senior plant engineer and Hartley's direct supervisor from 2003 to 2009. Henn was promoted to director of plant engineering in February 2009, and John Velehradsky became Hartley's direct supervisor. Velehradsky reported directly to Henn.

1. Job Description

The supervisor of field engineering position was posted on January 20, 2010. The supervisor was responsible for

[1] Neb. Rev. Stat. § 48-1101 et seq. (Reissue 2010).

planning, directing, and supervising the work of 17 field engineering and utility locator personnel of the plant engineering division.

There were several minimum requirements for the position, including "two years of college in an area related to Engineering. Four-year Engineering, or Engineering Technology degree preferred" and "[m]ust have utility locating experience in the last five (5) years, preferable in an ongoing capacity. Utility Locator operator qualification preferred."

With one notable change, the 2010 posting was similar to the posting for the same position previously in 2003, when another individual was hired as the supervisor. Before the position was posted, Henn added the requirement that the applicant must have recent locating experience, within the past 5 years. Before Henn's changes, locating experience was not required for the position.

Utility locating is the process of locating existing gas or water utilities in the field. Originally, locating was not part of a senior engineering technician's job and was only part of the job of designated utility locators. Locating was added as part of a senior engineering technician's job responsibilities when the designated utility locators became overwhelmed by the demands of new construction.

The meaning of "utility locating experience" as stated in the job description was unclear. Gas and water lines are located either using magnetic field detectors (electronic locating) or referring to "as-built" paper forms that essentially provide a map of where such lines should be (document locating). According to the testimony of MUD employees, one type of locating is not more important than the other. In fact, document locating was utilized more often. Electronic locating was sometimes ineffective due to interference by other power signals nearby.

There was conflicting testimony as to the importance of locating experience for the supervisor of field engineering position. Henn testified that she did not have any locating experience and did not know how to locate. The outgoing

supervisor of field engineering likewise did not know how to locate. Still, Henn opined that it was important for the person filling the supervisor position to have the ability to locate. She explained that this position would supervise the utility locators and engineering technicians who were able to locate. Further, a supervisor who knew how to locate could personally help the claims department verify whether any accidental hits of utility lines were MUD's fault, thereby reducing costs.

As far as the requirement that the locating experience be recent, Henn testified that the software of the electronic locating machines changes over time. Anyone without recent experience would have to learn the new software. But other MUD employees testified that even if electronic locating experience were important, it did not make sense to require that experience to be recent. The basics of locating had not changed over the years. Though equipment was getting better, it was easy to understand how to use the new equipment.

As to the meaning of "two years of college in an area related to Engineering," communications at MUD relating to the supervisor position indicated that it was 60 to 72 hours of coursework, equivalent to 2 years of full-time college. There were no specifically prescribed courses.

2. Applicants

Hartley testified that when she told Henn that she was interested in the supervisor position, Henn seemed to discourage her from applying. Hartley applied anyway. Ultimately, there were 11 applicants. Hartley, Chevalier, and Meisinger were the only female applicants.

There was no argument that any of the seven male applicants not chosen for the promotion were better qualified than any of the three female applicants. Hartley testified that she believed gender discrimination was involved in the decision to hire Stroebele over herself and the other two female applicants, because they were each better qualified than Stroebele. Hartley also asserted there was bias in the job description and

in the manner of handling the female applicants' performance appraisals and interviews.

According to MUD's personnel policies, performance appraisals were to be conducted annually during the month in which the employee's anniversary date for the position occurs. But Henn had not evaluated Hartley's performance through an official performance appraisal in the 7 years she had been Hartley's supervisor. Stroebele had not had a performance appraisal in the past 4 years. Henn testified that she "should have been" conducting annual performance appraisals, but that she "was really busy." In an internal memorandum dated April 20, 2009, human resources encouraged supervisors to get their employee files up to date, noting there had been several job selection grievances that were difficult to evaluate without written documentation of that employee's performance.

Velehradsky testified that he had five employees with overdue appraisals, including Hartley and Stroebele. Because he had never done a performance appraisal, Henn completed the first one, allowing Velehradsky to observe the process. They decided the first performance appraisal would be of Stroebele. Neither Henn nor Velehradsky could explain why they decided to do Stroebele's appraisal first.

(a) Stroebele

Stroebele was one of the newest MUD hires out of the 11 applicants. In fact, he was 10th in seniority out of the 11 applicants for the position of supervisor of field engineering.

Stroebele began working at MUD in 1997 as a pipelayer trainee, an entry-level position for a construction worker. Before working for MUD, Stroebele worked as a laborer with a construction company. Stroebele thought he may have met Hartley as she inspected work he had done while working as a construction worker. Though Stroebele could not be certain it was Hartley, he noted that the inspector was a woman and "there's [sic] not too many females that do that job at MUD."

Stroebele served in the U.S. Naval Reserve from 1998 to 2004, training people on heavy equipment usage.

After 2 years as a trainee at MUD, Stroebele became a pipelayer. Later, he was promoted to machine operator. In 2000, Stroebele was promoted to field engineer II. He did not begin working as senior engineering technician until 2005. The primary difference between a field engineer and a senior engineering technician is supervisory responsibilities, including monitoring third-party contractors.

Stroebele had less formal education than any of the female applicants. He did not receive his 2-year associate degree in applied science, general studies, until May 2011. As of the end of the spring 1999-2000 school term, Stroebele had completed a total of 61.5 credit hours. Forty of those hours were transferred from another community college. At least half of those credit hours were in fields unrelated to engineering, such as psychology, history, astronomy, and English.

Stroebele's performance appraisal was conducted in November 2009, and it was overwhelmingly positive. November was not the month of Stroebele's hiring anniversary date.

It was noted in the appraisal that Stroebele "has not had a preventable injury or accident, not only since his last appraisal, but in his whole [MUD] career (since 1997)! This is highly commendable, as [Stroebele] has worked in 3 different areas since he started with [MUD]." He was described as organized and as completing his work in a timely manner. It was noted that Stroebele was a good example to his coworkers in the manner in which he kept up with paperwork, even helping others when they were behind. He was described as an excellent communicator, who "knows when to call me to get me involved and when he can make the decision on his own." Further, he "portrays a very professional attitude."

But Stroebele had two chargeable locating hits in the last 3½ years. Chargeable locating hits are when errors in locating cause a gas or water line to be hit and damaged. The appraisal cited, "[c]ontinue excellent performance," as the only "performance goals" to be accomplished before the

next appraisal. Stroebele was described as an employee who showed "potential for additional responsibilities through self-motivation, initiative and satisfactory performance of current job duties." No other performance appraisals of Stroebele are in the record.

(b) Hartley

Hartley has a bachelor's degree in interior design. She began working for MUD in customer service in 1984 and at the time of the promotional decision in question, had been working at MUD for 25 years. Hartley had the most seniority of the female applicants for the supervisor of field engineering position.

She was promoted to drafting technician IV in 1986, drafting technician III in 1988, drafting technician I in 1989, senior drafting technician in 1991, and senior engineering technician in plant engineering in 1994. She had continuously worked as a senior engineering technician for the 16 years prior to the posting of the supervisor position at issue.

Hartley testified that when she was hired into the position of senior engineering technician, she was initially hired only part time, because her supervisor was concerned whether a female could do the job. Hartley stated that she had many years of experience locating at MUD, both document and electronic locating. She also had training responsibilities as a senior engineering technician, training any new technicians as they were hired. Hartley testified that she trained three of the senior engineering technicians then working in her department, including Stroebele.

Hartley stated that as senior engineering technician, she, among her peers, was usually given the most difficult assignments. These included rapid-expansion areas that often had electrical interference and that, as a result, required that she call in a locator to use special equipment to which only the dedicated locators had access.

Just 3 days before she interviewed for the position, Hartley received her first performance appraisal in 7 years. It was not

the month of her hiring anniversary date. Velehradsky had been Hartley's supervisor for less than a year when he wrote her performance appraisal, but it referenced events and evaluated performance before Velehradsky was her supervisor.

As a performance goal, Velehradsky identified that Hartley should "[l]isten more effectively and evaluate a situation before coming to any conclusion." Under the communication section of Hartley's appraisal, Velehradsky stated, "Sometimes [Hartley] is more apt to talk than listen. Hartley needs to concentrate on listening more closely before she jumps in to respond." Velehradsky also stated that Hartley "needs to work on improving her listening and communication skills before she would be ready to supervise others at the level of her current position."

Other aspects of the appraisal were positive. It was noted that Hartley had not had any chargeable locating hits since 2005. She was organized, and she accomplished her work in a timely manner, "adjusting her schedule as necessary to accomplish her work on multiple projects on a daily basis." As for safety, it was noted, "Since 2006, [Hartley] has remained accident and injury free. [Hartley] has worked on identifying and avoiding hazardous situations in the field."

Hartley was described as a good problem-solver, willing to take on additional work when needed, having common sense, dealing well with contractors when solving problems in the field, and dealing with problems as they arise so that they are not allowed to "fester." Hartley received a "Meets Standards" for "Communication" and was described as communicating well most of the time. Particularly, Velehradsky noted that Hartley took good notes and kept contractors, coworkers, and customers informed.

Henn testified at trial that "not only did [Hartley] not get behind, she helped others who were behind." But there was no notation in Hartley's appraisal that she was thereby an excellent example for her coworkers.

Hartley testified she was disappointed not only by the content and unusual timing of the appraisal, but its method

of delivery. She described that Velehradsky walked past her cubicle and "threw" the envelope containing the appraisal onto her desk, saying, "'Go ahead and read that, and come get me later when you have time to go over it.'"

Velehradsky viewed the encounter differently. He testified that he gave the appraisal to Hartley in a normal manner. He said that Hartley immediately opened the appraisal and "unprofessional[ly]" started questioning him within earshot of other employees about why the evaluation purported to go back to 2003.

Hartley perceived the sudden appraisal after 7 years as "their way to try to eliminate me from contention." Hartley testified that she had never before heard from anyone at work that she talked more than she listened. And such a criticism, she thought, ran contrary to past evaluations that marked her as meeting job specifications for communication. Velehradsky thought he had mentioned this issue to Hartley once before, but he had no specific recollection or documentation of such a conversation.

In the employee comments section of her appraisal, Hartley expressed concern about the timing, the lack of prior appraisals, and the fact that she had not previously been informed that there were areas of her performance that needed improvement. Hartley testified that when Velehradsky read her comments, he was "red in the face" and "pretty irate" with her.

Velehradsky told Hartley that the comments were unprofessional. He testified that he had concerns about the accusations Hartley was making against Henn and the fact that Hartley and some of her coworkers were apparently discussing their appraisals with each other. He explained at trial that a performance appraisal is supposed to be a "private document." Hartley was later called to the office of the vice president of engineering and construction, where she described that the vice president also "berated" her for an hour in front of Henn and Velehradsky. The vice president told Hartley that he had thought better of Hartley, a "seasoned SPA" (an acronym for

supervisory, professional, and administrative personnel), that she would write a full page of comments.

In 15 earlier appraisals, from 1986 to 2003, Hartley received overwhelmingly positive feedback of her performance. There was no reference in any of these appraisals to communication problems or inappropriate emotional outbursts. To the contrary, it was repeatedly said that Hartley was a friendly person who was easy to work with. It was noted that she worked well with her coworkers and that her coworkers seemed to enjoy working with her. She was described as a "good communicator" and "polite." In one appraisal, her supervisor noted that Hartley "promotes good will by treating others as she wants to be treated. She is professional, courteous and respectful." In another appraisal, it was specifically noted that Hartley "also listens to the answer and follows advice of fellow employees."

There was no reference in these appraisals to Hartley's needing more reassurance and direction than she ought to. To the contrary, it was noted that she required minimal supervision, that she could generally make good field decisions on her own, and that she used good judgment daily. One appraisal summarized, "[Hartley] is very good at working out problems. She solves some herself, asks for a decision on some, and solves some then advises what she did on others. She does a good job deciding which tactic to use." In another appraisal, her supervisor cited that Hartley "has shown good judgement in coming to me when she has a question or a problem in her section that was beyond her control."

In her performance appraisal before the 2010 appraisal written by Velehradsky, Hartley's supervisor had described her as "an all around good example of [a] dedicated employee who sets a great example for her coworkers."

At trial, Hartley's coworkers testified that they had never observed any of the communication or professionalism deficiencies noted in the 2010 performance appraisal. Meisinger testified that Hartley was "[v]ery friendly, very knowledgeable and very helpful, very willing to help others." Another

coworker testified that he never saw Hartley act inappropriately in their weekly meetings. He stated that it was expected that the field engineers would keep their supervisor "in the loop" when working on a project. Stroebele testified that he never saw any problems with Hartley's performance.

(c) Chevalier

Chevalier, one of the three female applicants, obtained a 2-year degree in technical drafting and engineering in 1988. The classes Chevalier took for the degree were equal to 84 credit hours. Chevalier began working for MUD in 1993 in drafting, under design engineering. In 1995, she became a "locator/drafter." She was promoted to field engineer II in 2005. She was a field engineer II for approximately 4 years before being promoted to field engineer I. Chevalier said that it was standard practice at MUD to be a field engineer for 2 years before being promoted to a field engineer I. There was no explanation why her promotion took twice that long. She stated that the promotion was "basically a progressive raise" and that "[a]ll the men in the department had been promoted after two years."

Her performance appraisal took place in March 2010, which was not the month of her hiring anniversary date. Chevalier received largely positive feedback, but there was a comment that she needed to show more "professionalism" in the office. It was explained:

> Could further improve judgement, professionalism, and set a better example to others by spending less time on personal phone calls and when in the office spend less time away from her work station. At times [Chevalier] will disturb others in the office by talking loudly for everyone to hear her when only the person she is talking to needs to hear.

Despite these comments, Chevalier was evaluated as showing "potential for additional responsibilities."

Chevalier's most recent evaluation prior to 2010 was in March 2007. The 2007 appraisal was generally positive and

stated that she met the standards in all functions. There was a comment that she should "[k]eep the number and length of personal phone calls to a minimum" and a goal to "minimize time spent away from [her] work station." The review described Chevalier as showing potential for additional responsibilities, noting, "[Chevalier] is accountable and responsible and willing to help where she can when asked or if she sees where something needs to be taken care of she will take the initiative to look into it and do what she can to help. Her work overall is satisfactory or above."

Other evaluations dating from 1993 to 2004 showed that Chevalier overwhelmingly met or exceeded all expectations. From 2001 through 2004, there were comments along the lines that she should be "more conscious of the conversations in the office so as not to disrupt or offend others" and to "try and remain calm when issues arise such as changing work assignments and discovery of other employee errors." But between 1993 and 2000, annual appraisals commented that Chevalier communicated very well with the public and MUD personnel and that she demonstrated potential for advancement. Other employees at MUD testified that they never observed any lack of professionalism on Chevalier's part.

(d) Meisinger

At the time the supervisor position was posted, Meisinger, another female applicant, was a senior design technician in design engineering. She had worked for MUD for a total of 22 years. Meisinger began working for MUD in 1988 through a 2-year internship in the drafting department while she was in college. In 1990, Meisinger began working as a drafting technician at MUD. In that position, she worked in both plant engineering and design engineering. In 1994, Meisinger was promoted to senior drafting technician, and in 1995, Meisinger obtained an undergraduate degree in design engineering technology and she transferred to a position as field engineer.

As a field engineer, Meisinger worked with construction crews to make sure that the water and gas mains were installed at the proper elevation and not in conflict with any proposed construction projects. Meisinger located using both document and electronic locating. In 1999, Meisinger became a design engineer technician in design engineering. In that position, she performed document locating, but not electronic. She was eventually promoted to senior design engineer, and continued to do document locating in that capacity.

Meisinger testified that she was surprised and concerned by the fact that the 2010 job posting had changed to require locating experience within the last 5 years. She believed herself capable of doing electronic locating and stated that "once you learn it, it's — it's easy." But she technically did not have electronic locating experience in the last 5 years.

Unlike Hartley and Chevalier, who worked directly under Henn, Meisinger received yearly performance appraisals from her supervisor. Her appraisals were overwhelmingly positive.

(e) Interviews and Decision

Hartley, Chevalier, and Meisinger all described their interviews with Henn as seeming to be perfunctory. Chevalier testified that at one point, Henn "kind of sneered and rolled her eyes" at her. Meisinger offered to take the locator-qualified examination, if her locating experience was an issue, but Henn told her that was not necessary.

The three female applicants questioned the unusual timing of their 2010 appraisals. Chevalier doubted that the suddenness of the appraisals was due to the human resources memorandum. She noted the human resources letter came out in 2009. "So if there was a big push, why didn't they do the performance appraisals in 2009?" Rather, Chevalier said, the appraisals were conducted after they applied for the supervisor position.

All three female applicants believed they were passed up for the promotion because of their gender. When Henn later discussed with Meisinger why she did not get the promotion,

Henn explained it was because of Meisinger's lack of recent electronic locating experience. Meisinger testified that she was disappointed, but that she was not that surprised. Meisinger testified that she "knew [Henn] didn't want a female in that position, so I was already prepared at that time." Meisinger testified that because Hartley and Chevalier worked for Henn, they could be eliminated through their 2010 appraisal, but "[m]e, she did not do an appraisal on; so the only way she could eliminate me was by changing the job description or the job posting." Meisinger testified that she had devoted her life to the engineering field, but "it's a lot harder for a female." Meisinger illustrated that at MUD, she had to take special tests to prove she could do certain jobs—tests she later found out her male colleagues did not have to take.

Chevalier testified, "[I]t seems to me that Ms. Henn does not like women. She didn't have any women working for her other than [Hartley] and I. And [Hartley] and I were only under her because we'd been hired by previous supervisors." Chevalier explained that even though women applied for jobs in plant engineering under Henn, no women were hired "out of all the time that Ms. Henn was the supervisor or director of plant engineering"; jobs were "only given to men." In addition, the women who worked for Henn were generally not treated fairly, and she described instances she believed illustrated this point. Henn responded that there had not been other female applicants for positions open under her supervision and noted that only about 10 to 15 percent of engineering employees industrywide are female.

3. Proffered Reasons for Promoting Stroebele Over Other Female Applicants

Henn testified at trial that she hired Stroebele because he was better qualified than any of the female applicants. She thought Hartley was the second-best candidate.

In a letter to human resources, Henn described why she chose Stroebele over Hartley:

[Hartley] has not been able to handle larger or more complex projects. Ms. Hartley requires a lot more help from her supervisor if she encounters anything out of the basic realm of her current position as a Senior Engineering Technician. Mr. Stroebele has taken on larger, more difficult projects and handled them very effectively.

Ms. Hartley has not demonstrated the skills required to be a calm, even-keeled supervisor. On a regular basis, if she encounters a situation that she does not like or gets feedback that is negative, she gets very upset, blows the situation out of proportion, and involves as many coworkers as possible, whether they were involved in the situation or not. This does not demonstrate good judgment or professionalism, which is vital to the Supervisor of Field Engineering position. This does not show that she could be trusted with sensitive information, or handle negative situations well, which are bound to occur in a supervisory position such as this, with 17 subordinates. Mr. Stroebele has exhibited the ability to calmly evaluate a heated and/or negative situation, coolly make a decision, and proceed with action. . . .

Ms. Hartley, by her own admission, struggles with utility locating. As the Supervisor of Field Engineering, checking the locating work of the utility locators and field engineers is crucial. In order to accurately check the work of subordinates, the Supervisor of Field Engineering needs to know the "ins and outs" of utility locating. Ms. Hartley does not currently exhibit these skills, often needing assistance. Mr. Stroebele has been locating utilities skillfully for nearly a decade, making him the superior candidate.

Ms. Hartley talks much more than listens. She is quick to jump to a conclusion prior to evaluating the entire situation. She has been warned about this in the past. Ms. Hartley needs to learn to listen carefully and allow two way communications to happen with others prior to jumping to a decision. Ms. Hartley has not demonstrated good

> listening skills with her coworkers, and therefore this does not bode well for her listening well to her subordinates as the Supervisor of Field Engineering. Mr. Stroebele does not exhibit any of these negative traits.

With regard to "struggl[ing] with utility locating," Henn clarified at trial that Hartley was skilled at locating and had not had a locating hit for 5 years. Hartley's "struggle" was more motivational:

> [Hartley], on a regular basis, complained that she didn't want to do locating. She didn't think she had to do it; she didn't want to. She didn't like it. And she said she wasn't — she even said, "I'm not that good at it, and sometimes I need to call in for help."

Hartley testified, "I didn't say that I didn't want to do it. I said I didn't like to have to do it." Hartley explained that she believed that having field engineers locate draws their attention away from making sure the contractors are doing what they are supposed to be doing. "The contractor knew that if I had to locate something, that came over my inspecting. He could — if he wanted to pull something over me, he could say, [Hartley], I need that located; I need it by tomorrow. I'd have to go do it."

With regard to not handling more complex projects, both Velehradsky and Henn clarified that, in reality, Hartley could and did handle complex projects very competently. Henn testified that Hartley just seemed to want affirmation of her decisions, "like she wanted me nodding my head." Velehradsky testified that Hartley was the "best organized" technician he had at the time Stroebele was promoted. Hartley also had excellent technical skills and experience. But, Velehradsky explained, "I just don't know that she would always use that and try to solve things on her own." Henn testified that she had never told Hartley she should act more independently, because Henn did not mind, and stated that "some of my employees wanted to call me more, I was okay with that." She thought Hartley's need for reassurance would be more problematic if she were a supervisor, however.

With regard to Hartley's talking more than she listens, Henn testified that during their weekly meetings, Hartley "liked to finish other people's sentences. She didn't always want other of her coworkers to talk; she'd jump in pretty quick. And if you're a supervisor running that meeting, it needs to be a collaborative effort. And to me that's really important; that's how you build a team." Velehradsky also observed that Hartley sometimes had a tendency to "try to dominate" the weekly meetings with her coworkers. Velehradsky believed that although Hartley had local, supervisory experience in the drafting section, "she did not have the communication and listening skills to supervise others at her current level."

Finally, with regard to having a tendency to get "upset" or that she "blows the situation out of proportion," Henn and Velehradsky found Hartley's reaction to the 2010 performance appraisal to be unprofessional. The only other incident cited by Henn and Velehradsky for this evaluation of Hartley's character was an incident that took place in early 2008.

In that incident, Henn was called away on a family emergency. Henn told her supervisor that she would not be available, but did not tell her team. Hartley tried to get in touch with Henn with regard to an important issue that had arisen in the field, but was unable to do so. Henn acknowledged that the incident for which Hartley was trying to reach her that day concerned a "very important" problem, where they had run into a lot of ground water in a construction project, and a big change order had to be approved by engineering. Velehradsky recalled that when Hartley could not reach Henn, Hartley "got really agitated about it and raised her voice." Henn testified that the next day when Hartley saw Henn, Hartley told her she was really upset. Hartley wanted to know why she could not reach Henn. Henn "did not appreciate that."

As for Stroebele's being better qualified than the other two female candidates, Henn described that Chevalier had not shown that "she has the skills to be a calm, even-keeled supervisor." Henn illustrated that "[w]hen Ms. Chevalier receives

negative feedback, she chooses to make a very big deal out of it, involve as many coworkers as possible, and blow the situation out of proportion." Henn also described Chevalier as "having a difficult time staying at her work station and concentrating on her job." She made "too many personal phone calls, disturbing others in the office . . . . She tends to be away from her work area and not in the field, instead socializing with others." Henn concluded that these behaviors did "not exhibit good judgment or professionalism, which is critical in the Supervisor of Field Engineering position."

Henn testified that the only reason Meisinger was eliminated as the best candidate for the position was because she did not meet the minimum job requirement of having utility locating experience in the last 5 years.

4. Verdict

At the close of the evidence, MUD moved for a directed verdict, asserting that Hartley failed to present sufficient evidence that MUD's stated reasons for hiring Stroebele instead of Hartley were pretexts for unlawful discrimination. The court overruled the motion, and the case went to the jury. The jury returned a verdict in favor of Hartley and awarded her $61,293 in special damages and $50,000 in general damages. MUD's motion for a new trial, making similar insufficiency of the evidence arguments, was overruled. The district court awarded Hartley $56,800 for attorney fees. MUD appeals.

III. ASSIGNMENTS OF ERROR

MUD assigns that the district court (1) abused its discretion by excluding the testimony of Damian Blackwell and Craig Johnson, (2) erred in overruling MUD's motions for directed verdict and new trial, and (3) abused its discretion by ordering attorney fees that were unreasonable and unnecessary.

IV. STANDARD OF REVIEW

[1,2] A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from

the evidence, that is, when an issue should be decided as a matter of law.[2] In reviewing that determination, we give the nonmoving party the benefit of every controverted fact and all reasonable inferences from the evidence.[3]

[3,4] We review a trial court's ruling on a motion for a new trial for abuse of discretion.[4] 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.[5]

[5] 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.[6]

[6] The amount of attorney fees awarded in an action under the NFEPA is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.[7]

V. ANALYSIS

1. Excluded Testimony

We first address MUD's assertion that the district court erred in excluding the testimony of two potential witnesses, Blackwell and Johnson.

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[2] *Scheele v. Rains*, 292 Neb. 974, 874 N.W.2d 867 (2016).

[3] *Id.*

[4] *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

[5] *Id.*

[6] *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000), *abrogated on other grounds, A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[7] See, *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (2013); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006); *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997); *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997); *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984).

During trial, the court had sustained objections by MUD to evidence Hartley sought to adduce concerning her performance after the supervisor of field engineering position was filled. In order to call into question the criticisms of Hartley's performance that were noted in the 2010 performance appraisal, Hartley sought to introduce her performance appraisals after 2010 and after her transfer to another department under a different supervisor. MUD objected on relevance and foundation, noting that the appraisals were for a different position and that the appraisals were subsequent to the selection for the supervisor position. The court sustained the objection. It also sustained MUD's similar objection to the admission of a 2011 performance appraisal of Hartley that was conducted by Velehradsky.

Blackwell and Johnson were coworkers of Hartley who would have testified that they observed her "over-speaking and communicating poorly during weekly team meetings" that took place after the promotion decision at issue. Consistent with its ruling excluding proposed testimony by Hartley, the court excluded the proposed testimony of Blackwell and Johnson on the ground that it was postpromotional.

[7] 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.[8] 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.[9] Because the issue was Hartley's relative qualifications for the supervisor of field engineering promotion, it was not an abuse of discretion for the court to draw a line at evidence of Hartley's performance before that promotional decision was made. And the district court's decision, applied to Hartley and MUD alike, did not unfairly prejudice MUD.

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[8] *Sharkey v. Board of Regents, supra* note 6.

[9] *Moreno v. City of Gering*, 293 Neb. 320, 878 N.W.2d 529 (2016).

2. Sufficiency of Evidence

We turn now to MUD's related assignments of error concerning the denial of its motions for directed verdict and new trial. As to both these assignments of error, MUD argues that there was insufficient evidence to support a finding that MUD's stated reasons for hiring Stroebele over Hartley were pretexts for unlawful discrimination.

The NFEPA states at § 48-1101 that it "is the policy of [Nebraska] to foster the employment of all employable persons in the state on the basis of merit . . . and to safeguard their right to obtain and hold employment without discrimination." The NFEPA provides at § 48-1104(1), in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, disability, marital status, or national origin[.]" The NFEPA is patterned from that part of the Civil Rights Act of 1964 contained in 42 U.S.C. § 2000e et seq. (2012), and it is appropriate to look to federal court decisions construing similar and parent federal legislation.[10] In intentional discrimination cases, liability depends on whether the protected trait actually motivated the employer's decision and had a determinative influence on the outcome.[11]

Hartley's claim is one of disparate treatment—a claim based on an employer's treating some people less favorably than others because of their race, color, religion, sex, or other protected characteristics.[12] The three-part burden-shifting

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[10] See *Airport Inn v. Nebraska Equal Opp. Comm., supra* note 7.

[11] *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993).

[12] See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003).

framework from *McDonnell Douglas Corp. v. Green*[13] is not the exclusive method of proving disparate treatment,[14] but neither party in this appeal contests that *McDonnell Douglas Corp.* frames our analysis of the sufficiency of the evidence to support the jury's verdict.

[8,9] The *McDonnell Douglas Corp.* framework is a procedural device of order of proof and production developed at a time when discrimination cases were tried to judges.[15] It is designed to force an employer to reveal information that is available only to the employer, i.e., any unstated reasons for taking the alleged discriminatory action, as well as any discretionary factors underlying its decision.[16] At all times in an unlawful discrimination case, the ultimate burden of persuasion by a greater weight of the evidence remains with the plaintiff.[17] A greater weight of the evidence is the equivalent of a preponderance of the evidence.[18]

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[13] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See, also, *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015); *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).

[14] See, 1 Barbara T. Lindemann et al., Employment Discrimination Law, ch. 2, § II.A.1 (5th ed. 2012 & Cum. Supp. 2015); Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 Notre Dame L. Rev. 109 (2007). See, also, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003).

[15] See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

[16] *Hinton v. Conner*, 225 F.R.D. 513 (M.D.N.C. 2005).

[17] *McDonnell Douglas Corp. v. Green, supra* note 13. *St. Mary's Honor Center v. Hicks, supra* note 15 (clarifying that *McDonnell Douglas Corp., supra* note 13, allocates burden of production and order for presentation of evidence; ultimate burden of persuasion, however, rests on plaintiff); *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993) (quoting *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988)).

[18] *Flores v. Flores-Guerrero*, 290 Neb. 248, 859 N.W.2d 578 (2015).

[10] Under *McDonnell Douglas Corp.*, first the plaintiff has the burden of proving a prima facie case of discrimination.[19] A prima facie case of discrimination in a failure-to-promote claim consists of demonstrating (1) the employee is a member of a protected group, (2) the employee was qualified and applied for a promotion to an available position, (3) the employee was rejected, and (4) a similarly situated employee, not part of the protected group, was promoted instead.[20] A plaintiff need not prove his or her *relative* qualifications to meet the prima facie burden.[21]

[11] The plaintiff's prima facie case eliminates the most likely legitimate explanations for the employer's adverse action, such as lack of qualifications and the absence of a job opening.[22] "Once that has been done, an inference arises that an employer subjected a protected class member to an adverse employment action more likely than not because of the consideration of impermissible factors."[23]

[12] Once the plaintiff has established a prima facie case of discrimination, the burden of production shifts to the employer to rebut the prima facie case by producing "clear and reasonably specific"[24] admissible evidence that would support a finding that unlawful discrimination was not the cause of the employment action.[25] When the employer articulates a legitimate, nondiscriminatory reason for the decision, raising a genuine issue of fact as to whether it discriminated

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[19] *McDonnell Douglas Corp. v. Green, supra* note 13. See, also, *St. Mary's Honor Center v. Hicks, supra* note 15.

[20] See *Allen v. Tobacco Superstore, Inc.*, 475 F.3d 931 (8th Cir. 2007).

[21] See *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011).

[22] See 1 Lindemann et al., *supra* note 14, ch. 2, § II.A.2.

[23] *Id.* at 2-24 to 2-25.

[24] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

[25] *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); *St. Mary's Honor Center v. Hicks, supra* note 15.

against the employee, the employer's burden of production created by the employee's prima facie case is satisfied and drops from the case.[26]

[13] After the employer has presented a sufficient, neutral explanation for its decision, the question is whether there is sufficient evidence from which a jury could conclude that the employer made its decision based on the employee's protected characteristic, despite the employer's proffered explanation.[27] At this stage, the employee "must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'"[28] "That is, the plaintiff may attempt to establish that he was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'"[29]

On the issue of whether the employer's explanation is pretextual, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom, even though "the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production."[30] It is permissible for the trier of fact to infer the ultimate fact of unlawful discrimination from the same evidence that would allow the trier of fact to disbelieve the defendant's stated legitimate, nondiscriminatory reason for its decision.[31]

Of course, rejection of the employer's asserted reasons for its actions does not, standing alone, mandate judgment for the plaintiff as a matter of law, because it does not

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[26] See *Riesen v. Irwin Indus. Tool Co., supra* note 13.

[27] See *Raytheon Co. v. Hernandez, supra* note 12.

[28] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

[29] *Id.*

[30] *Id.*

[31] *Reeves v. Sanderson Plumbing Products, Inc., supra* note 28.

necessarily establish that the real reason was unlawful discrimination.[32] But proof that the defendant's explanation is unworthy of credence can be "quite persuasive" evidence of intentional discrimination.[33] The trier of fact can infer that "the employer is dissembling to cover up a discriminatory purpose."[34] And "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation."[35]

[14] "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors,"[36] and courts "should not '"treat discrimination differently from other ultimate questions of fact."'"[37] The *McDonnell Douglas Corp.* methodology was "'"never intended to be rigid, mechanized, or ritualistic."'"[38] No matter what test or order of proof is adopted, all relevant direct and circumstantial evidence is considered in its totality in determining whether judgment as a matter of law is warranted in an action alleging unlawful discrimination.[39] "'[T]he ultimate question [is] discrimination *vel non*.'"[40]

MUD conceded that Hartley had made a prima facie case of discrimination. And MUD produced clear and reasonably specific admissible evidence that could support a finding that unlawful discrimination was not the cause of the employment action and that, rather, it promoted Stroebele over Hartley because Stroebele was the better qualified candidate. The

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[32] See *St. Mary's Honor Center v. Hicks, supra* note 15.

[33] *Reeves v. Sanderson Plumbing Products, Inc., supra* note 28, 530 U.S. at 147.

[34] *Id.*

[35] *Id.*

[36] *Id.*, 530 U.S. at 148.

[37] *Id.*

[38] *St. Mary's Honor Center v. Hicks, supra* note 15, 509 U.S. at 519.

[39] See *Orton-Bell v. Indiana*, 759 F.3d 768 (7th Cir. 2014).

[40] *St. Mary's Honor Center v. Hicks, supra* note 15, 509 U.S. at 518.

issue is whether there was sufficient evidence to sustain the jury's implicit finding that this proffered reason was a pretext for unlawful discrimination.

MUD argues that the jury could not reasonably find its stated reason for the employment decision was a pretext, because Hartley admitted that certain events occurred, which Henn cited as supporting her ultimate conclusion that Hartley was less qualified than Stroebele. MUD explains, "Hartley did not refute either the 2008 event or Ms. Hartley's complaints and struggles with utility locating."[41] Without citing to precedent, MUD argues that Hartley "cannot, as a matter of law, admit two of the reasons MUD has given for the adverse employment decision and then still state the true reason is impermissible."[42] We disagree.

First, in Hartley's testimony, she did not admit to the 2008 incident and she denied struggling with utility locating. Hartley presented evidence that although she mentioned to Henn that she did not think it was a good idea to have field engineers locate, Hartley located in a competent manner without continual complaint. And Hartley presented evidence contradicting other proffered reasons upon which Henn said her decision was based. Hartley presented evidence that she did not interrupt others or have communication difficulties with her coworkers. Hartley presented evidence that given the complexity of the projects to which she was assigned, she did not contact her supervisor more than was necessary.

More to the point, MUD's argument confuses the falsity of an occurrence cited in support of the employer's action with the falsity of the employer's statement that the proffered nondiscriminatory reason actually motivated the employer. "If the stated reason for the challenged action did not motivate the action, then it was indeed pretextual."[43] The employee need

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[41] Brief for appellant at 26.

[42] *Id.*

[43] *Forrester v. Rauland-Borg Corp.*, 453 F.3d 416, 417 (7th Cir. 2006).

not show that the proffered explanation had no basis in fact and was only "conjured out of thin air."[44]

The employee may demonstrate pretext either by showing that the employer's explanation is unworthy of credence, because it has no basis in fact, or by persuading the court that a prohibited reason more likely motivated the employer.[45] The specific evidence presented to demonstrate discriminatory animus may vary, and its sufficiency will be considered as a whole.[46] The plaintiff may, for instance, demonstrate pretext by showing that (1) the employer's proffered reasons had no basis in fact, (2) the employer's proffered reasons were against the employer's policy or practice or involved other procedural irregularities,[47] (3) the employer's proffered reasons have changed substantially over time or are inconsistent,[48] (4) the plaintiff was the better qualified applicant,[49] (5) the plaintiff had a laudable prior work history,[50] (6) there was a sharp decline in the plaintiff's performance evaluations near the time of the employer's contested action,[51]

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[44] *Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1084 (8th Cir. 2013). See, also, *Erickson v. Farmland Industries, Inc.*, 271 F.3d 718 (8th Cir. 2001).

[45] *Cox v. First Nat. Bank*, 792 F.3d 936 (8th Cir. 2015).

[46] See, e.g., *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996).

[47] See, *Ridout v. JBS USA, LLC, supra* note 44; *Rudin v. Lincoln Land Community College*, 420 F.3d 712 (7th Cir. 2005).

[48] See, *Hitchcock v. Angel Corps, Inc.*, 718 F.3d 733 (7th Cir. 2013); *Jones v. National American University*, 608 F.3d 1039 (8th Cir. 2010); *Graham v. Long Island R.R.*, 230 F.3d 34 (2d Cir. 2000); *Morgan v. Hilti, Inc.*, 108 F.3d 1319 (10th Cir. 1997).

[49] See *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 126 S. Ct. 1195, 163 L. Ed. 2d 1053 (2006).

[50] *Spengler v. Worthington Cylinders*, 615 F.3d 481 (6th Cir. 2010); *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033 (8th Cir. 2010); 1 Lindemann et al., *supra* note 14.

[51] See, *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782 (8th Cir. (2011); *Davis v. Fleming Companies, Inc.*, 55 F.3d 1369 (8th Cir. 1995), *abrogated on other grounds, Torgerson v. City of Rochester, supra* note 21.

(7) the decisionmaker "'overplayed'" the chosen applicant's strengths,[52] (8) the decisionmaker made statements expressing a discriminatory attitude,[53] (9) statistical analysis demonstrating a pattern and practice of discrimination,[54] (10) comparative evidence that similarly situated persons in a nonprotected class were treated more favorably,[55] and (11) prior instances of disparate treatment of the plaintiff by the defendant in other contexts.[56]

[15] Hartley argues that she presented circumstantial evidence of unlawful discrimination primarily through evidence that she was better qualified for the promotion than Stroebele. Where the employer contends that the selected candidate was more qualified for the position than the plaintiff, a comparative analysis of the qualifications is relevant to determine whether there is reason to disbelieve the employer's proffered reason for its employment decision.[57]

We agree that Hartley presented sufficient evidence upon which the jury could find she was the best qualified candidate for the promotion. Hartley had worked at MUD almost twice as long as Stroebele, and she had worked in the supervisory

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[52] 1 Lindemann et al., *supra* note 14, ch. 2, § II.C.7 at 2-101. Accord *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639 (4th Cir. 2002).

[53] *Erickson v. Farmland Industries, Inc., supra* note 44.

[54] See, *Lujan v. Franklin County Bd. of Educ.*, 766 F.2d 917 (6th Cir. 1985); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983); *Lincoln County Sheriff's Office v. Horne*, 228 Neb. 473, 423 N.W.2d 412 (1988); *Life Technologies Corp. v. Superior Court*, 197 Cal. App. 4th 640, 130 Cal. Rptr. 3d 80 (2011); *Dumont v. City of Seattle*, 148 Wash. App. 850, 200 P.3d 764 (2009).

[55] *McDonnell Douglas Corp. v. Green, supra* note 13; *Conward v. Cambridge School Committee*, 171 F.3d 12 (1st Cir. 1999); *Lincoln County Sheriff's Office v. Horne, supra* note 54; *Dumont v. City of Seattle, supra* note 54.

[56] See, *McDonnell Douglas Corp. v. Green, supra* note 13; *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404 (5th Cir. 1989); 1 Lindemann et al., *supra* note 14, ch. 2, § II.C.7.

[57] *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861 (8th Cir. 1997), *abrogated on other grounds, Torgerson v. City of Rochester, supra* note 21.

position of senior engineering technician for 16 years. She trained Stroebele, who had held that position for only 5 years. Hartley excelled at the job of locating, deemed so essential by Henn, inasmuch as she had no chargeable hits in the last 5 years. In contrast, Stroebele had two chargeable hits in the last 3½ years. Hartley had a 4-year degree in a field related to engineering. It was disputed whether Stroebele even met the minimum education requirements for the position of supervisor of field engineering. Other than Henn's complaints about Hartley's emotionality, neediness, and tendency to interrupt when others were speaking—about which there was contradictory evidence—there was no dispute that Hartley was anything other than extremely competent at performing her job.

Hartley also presented evidence from which the jury could reasonably infer that each of the other female applicants for the promotion to supervisor of field engineering was better qualified than Stroebele. In light of coworker testimony and the similarities in the proffered personality deficiencies, the jury could have disbelieved Henn's statement that Chevalier was less qualified than Stroebele. The jury could have found Chevalier was better qualified than Stroebele due to her superior experience, performance, and education. The jury could have also found that Meisinger was better qualified than Stroebele, because her only alleged deficiency was not having recent electronic locating experience.

Relatedly, the jury could have found upon the evidence presented that there were procedural irregularities that called into question Henn's motivation. The evidence was disputed as to whether recent electronic locating was a legitimate minimum qualification criterion for the promotion. And Henn rejected Meisinger's offer to become certified in electronic locating, while later saying Meisinger's inability to electronically locate was the only reason she was not better qualified than Stroebele. The timing of performance appraisals was also unusual. The jury could have inferred that the sudden appraisals of the applicants for the promotion was a means of creating a paper trail to cover up Henn's discriminatory

decision, rather than simply a response to the memorandum from human resources.

Likewise, the jury could have inferred that Henn's reasons for her decision were pretext for unlawful discrimination when the 2010 appraisal departed so dramatically from so many years of prior, laudable appraisals. At the same time, the jury could have inferred that Stroebele's appraisal overplayed his strengths. Though Henn did not personally write Hartley's appraisal, the jury could have reasonably inferred she influenced it.

The jury could have inferred discriminatory hostility from the manner in which Hartley described being presented with the 2010 appraisal and the response to her complaints.

Lastly, the jury could have inferred dissembling from the factual inaccuracies and exaggerations stated by Henn to human resources to justify her decision that Hartley was less qualified than Stroebele. Only at trial did Henn clarify that Hartley was actually technically competent at locating, that her alleged heightened emotionality "[o]n a regular basis" was supported by only two incidents, and that her cited inability to handle complex projects was really just her need for reassurance.

If there is any evidence that will sustain a finding for the party against whom a motion for judgment as a matter of law is made, we may not second guess the jury's determination.[58] Viewing the evidence as a whole and in a light most favorable to Hartley, we find that there was sufficient evidence to support a reasonable inference that MUD's promotional decision was because of Hartley's gender. Therefore, the court did not err in overruling MUD's motion for a general directed verdict or its related motion for a new trial.

3. Attorney Fees

We turn lastly to MUD's assignment of error concerning the attorney fees that were awarded under § 48-1119(4). As

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[58] See *McLaughlin v. Hellbusch*, 256 Neb. 615, 591 N.W.2d 569 (1999).

in other actions authorizing an award of attorney fees, the amount of the fees awarded in an action under the NFEPA is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.[59]

MUD asserts that the district court abused its discretion in the amount of the fees awarded. MUD states that Hartley's attorney billed at her attorney rate for nonlawyer administrative or paralegal tasks, billed 3 hours in brief preparation that had already been done on another case, billed 2.75 hours preparing jury instructions that were simply model jury instructions, and generally provided insufficient detail in her itemization of $9,556.25 in fees. MUD asserts that a second attorney's involvement in the case was unknown, and "any and all invoicing done by him is wholly unnecessary and excessive."[60]

We find upon our review of the record that both Hartley's attorneys submitted to the district court a detailed itemization of their fees. Hartley's primary attorney explained that she did not have staff to complete all the administrative functions for her and that she did not charge separately any postage, telephone, faxing, or photocopying. Those were built into her hourly rate. The district court did not abuse its discretion in evaluating the amount of attorney fees to be awarded.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

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[59] See cases cited *supra* note 7.

[60] Brief for appellant at 32.

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

State of Nebraska, appellee, v. Eric Benavides, appellant.

884 N.W.2d 923

Filed September 30, 2016. No. S-15-1053.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **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.
4. **Criminal Law: Statutes: Legislature: Time.** Unless an exception applies, where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.
5. **Statutes: Legislature: Intent: Appeal and Error.** A court gives statutory language its plain and ordinary meaning and will not look beyond the statute to determine legislative intent when the words are plain, direct, and unambiguous.
6. **Statutes: Legislature: Intent.** A court gives effect to the purpose and intent of the Legislature as ascertained from the entire language of a statute considered in its plain, ordinary, and popular sense.
7. ____: ____: ____. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
8. **Sentences: Statutes: Time: Probation and Parole.** The nonretroactive provision under Neb. Rev. Stat. § 28-105(7) (Supp. 2015) broadly applies to penalty changes created by 2015 Neb. Laws, L.B. 605, which changes include changes to a penalty of probation.

9. **Sentences: Statutes: Presumptions: Probation and Parole.** The presumption under Neb. Rev. Stat. § 29-2204.02 (Supp. 2015) in favor of probation for Class IV felony convictions unless an exception applies is a penalty change.
10. **Sentences: Statutes: Legislature: Intent: Probation and Parole.** The Legislature did not intend for the penalty changes under Neb. Rev. Stat. § 29-2204.02 (Supp. 2015) in favor of a sentence of probation for Class IV felony convictions to be retroactive.
11. **Sentences.** In imposing a sentence, a sentencing court is not limited to any mathematically applied set of factors. 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 surrounding the defendant's life.
12. **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.

Appeal from the District Court for Madison County: James G. Kube, Judge. Affirmed.

Chelsey R. Hartner, Chief Deputy Madison County Public Defender, for appellant.

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

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

Funke, J.

NATURE OF CASE

Eric Benavides appeals from the district court's order sentencing him for a Class IV felony conviction of domestic assault of a pregnant female. The assault occurred in June 2015. In August 2015, the Legislature's enactment of L.B. 605 became effective,[1] which bill changed many sentencing provisions. One of L.B. 605's provisions requires

[1] See 2015 Neb. Laws, L.B. 605.

courts to "impose a sentence of probation" for Class IV felony convictions unless an exception applies and the court states its reasoning; this requirement is codified as Neb. Rev. Stat. § 29-2204.02(2) (Supp. 2015).[2] In November 2015, the court sentenced Benavides to an indeterminate term of 12 to 18 months' incarceration. Benavides contends that the court erred in sentencing him to a term of incarceration, contrary to the requirements of § 29-2204.02 and general sentencing guidelines.

We granted the State's petition to bypass the Court of Appeals because Benavides' appeal presented an issue of first impression: whether the Legislature's sentencing changes for Class IV felonies are retroactive. We conclude that the issue is controlled by our recent decision in *State v. Aguallo*[3] and that the changes are not retroactive. We affirm.

BACKGROUND

Relevant Sentencing Changes Under L.B. 605

Section 29-2204.02 is a new statute created by L.B. 605.[4] In relevant part, § 29-2204.02 requires a sentence of probation for a defendant convicted of a Class IV felony unless an exception applies and the court states its reasoning on the record:

> (2) If the criminal offense is a Class IV felony, the court shall impose a sentence of probation unless:
>
> (a) The defendant is concurrently or consecutively sentenced to imprisonment for any felony other than another Class IV felony;
>
> (b) The defendant has been deemed a habitual criminal pursuant to section 29-2221; or

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[2] See *id.*, § 61.

[3] *State v. Aguallo, ante* p. 177, 881 N.W.2d 918 (2016).

[4] See L.B. 605, § 61.

> (c) There are substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community . . . .
>
> (3) If a sentence of probation is not imposed, the court shall state its reasoning on the record, advise the defendant of his or her right to appeal the sentence, and impose a sentence as provided in subsection (1) of this section.

But L.B. 605 also created a new subsection in Neb. Rev. Stat. § 28-105 (Supp. 2015): "(7) The changes made to the penalties for Class III, IIIA, and IV felonies by Laws 2015, LB605, do not apply to any offense committed prior to August 30, 2015, as provided in section 28-116."[5]

The newly created Neb. Rev. Stat. § 28-116 (Supp. 2015), in turn, clarifies that if a defendant committed any element of an offense before August 30, 2015, the penalty changes under L.B. 605 shall not be retroactive:

> The changes made to the sections listed in this section by Laws 2015, LB 605, shall not apply to any offense committed prior to August 30, 2015. Any such offense shall be construed and punished according to the provisions of law existing at the time the offense was committed. For purposes of this section, an offense shall be deemed to have been committed prior to August 30, 2015, if any element of the offense occurred prior to such date. The following sections are subject to this provision . . . .

Section 28-116 lists more than 60 statutes that are explicitly subject to the nonretroactive provision.

Procedural History

The State charged Benavides for a Class IV felony domestic assault. The felony charge rested on his knowledge of his girlfriend's pregnancy when he assaulted her.[6] The State

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[5] L.B. 605, § 6.

[6] See § 28-105 (Cum. Supp. 2014) and Neb. Rev. Stat. §§ 28-115 and 28-323(4) (Cum. Supp. 2014).

dismissed two other charges under a plea agreement, and Benavides pleaded guilty to the felony assault charge.

At the sentencing hearing, Benavides argued that he was a good candidate for probation. Alternatively, he argued that even though he committed the assault before L.B. 605 took effect, the court should retroactively apply the penalty changes related to a sentence of probation. From the bench, the court disagreed with his statutory interpretation and determined that the changes were not retroactive.

Court's Order

In its written order, the court stated that Benavides was not a good candidate for probation and that a sentence of less than incarceration would depreciate the seriousness of his conduct. It found that Benavides needed correctional treatment and would present a substantial risk of reoffense on probation. Accordingly, it sentenced him to an indeterminate term of 12 to 18 months' incarceration, with credit for the 33 days he had already served.

ASSIGNMENTS OF ERROR

Benavides assigns that the court erred in failing to apply § 29-2204.02 in sentencing him and in sentencing him to a term of incarceration instead of probation.

STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law.[7] An appellate court independently reviews questions of law decided by a lower court.[8]

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[9]

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[7] See *Aguallo, supra* note 3.

[8] *In re Interest of Alan L., ante* p. 261, 882 N.W.2d 682 (2016).

[9] *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016).

ANALYSIS

Court Was Not Required to Give Retroactive Effect to § 29-2204.02

[4] Benavides contends that under the sentencing doctrine set out in *State v. Randolph*,[10] the court erred in failing to apply the new penalty provisions under § 29-2204.02 for Class IV felonies. Unless an exception applies,[11] *Randolph* holds that "where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise."[12] Benavides argues that the nonretroactive language in § 28-105(7) (Supp. 2015) is limited to the "ranges of imprisonment and post release supervision" for Class III, IIIA, and IV felonies that were committed before August 30, 2015.[13] He argues that § 28-105(7) has no application to probation statutes amended by L.B. 605. Because the nonretroactive provision is absent from § 29-2204.02, he argues that it applies to crimes committed before its effective date. The State contends that *Randolph* does not apply because in § 28-105(7), the Legislature clearly stated that the sentencing changes under L.B. 605 are not retroactive.

[5-7] A court gives statutory language its plain and ordinary meaning and will not look beyond the statute to determine legislative intent when the words are plain, direct, and unambiguous.[14] We give effect to the purpose and intent of the Legislature as ascertained from the entire language of the

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[10] See *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971).

[11] See *State v. Duncan*, 291 Neb. 1003, 870 N.W.2d 422 (2015).

[12] *Randolph, supra* note 10, 186 Neb. at 302, 183 N.W.2d at 228. Accord *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999) (citing cases).

[13] Reply brief for appellant at 5.

[14] *State v. Goynes*, 293 Neb. 288, 876 N.W.2d 912 (2016).

statute considered in its plain, ordinary, and popular sense.[15] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[16]

Benavides' argument is contrary to the plain language of § 28-105(7), which states, "The *changes made to the penalties* for Class III, IIIA, and IV felonies by Laws 2015, LB605, do not apply to any offense committed prior to August 30, 2015, as provided in section 28-116." (Emphasis supplied.)

[8,9] A sentence of probation is one possible penalty for a criminal conviction (unless a defendant is ineligible for probation).[17] The nonretroactive provision under § 28-105(7) broadly applies to penalty changes created by L.B. 605 for Class III, IIIA, and IV felonies, which changes include changes to a penalty of probation. The changes imposed by § 29-2204.02 curtail a court's sentencing discretion by requiring a court to impose a sentence of probation for Class IV felony convictions unless an exception applies. Because the Legislature clearly intended to affect the type of penalty a court could impose, we conclude that the presumption in favor of probation is a penalty change. Notably, Benavides specifically argues that § 29-2204.02 directs a court how to sentence a defendant for a Class IV felony conviction. We conclude that there is no merit to his contention that § 28-105(7) does not apply to the penalty change in favor of probation.

Moreover, we recently decided a similar issue in *Aguallo*.[18] There, the defendant pleaded guilty to third degree sexual

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[15] See *id.*

[16] See *Aguallo, supra* note 3.

[17] See, § 28-105(4) (Cum. Supp. 2014); § 29-2204.02; Neb. Rev. Stat. § 29-2262 (Cum. Supp. 2014).

[18] See *Aguallo, supra* note 3.

assault of a child, a Class IIIA felony. The defendant committed the offense before August 30, 2015, and the court sentenced him after the effective date. The maximum penalty of imprisonment was 5 years before L.B. 605 and 3 years afterward. The trial court concluded that the reduced penalty was not retroactive.

On appeal, we rejected the defendant's argument that the reduced penalty for a Class IIIA felony conviction was retroactive. We recognized that in setting out a nonretroactive restriction in § 28-105(7), the Legislature referred to § 28-116. As explained, § 28-116 clarifies that the nonretroactive restriction for offenses committed before August 30, 2015, applies if any element of the offense was committed before that date and lists statutes that are subject to the restriction. But we rejected the defendant's argument that because the statute proscribing his conduct was not listed in § 28-116, the sentencing change for his Class IIIA offense was retroactive. We concluded that the offense statute was not listed in § 28-116 because L.B. 605 did not substantively change the offense:

> L.B. 605 did not make any changes to the classification or the elements of that crime. L.B. 605 did, however, make changes to the penalties for all Class IIIA felonies, and § 28-320.01 is a Class IIIA felony. It is clear from the plain language of §§ 28-105(7) and 28-116 that the Legislature did not intend the penalty reductions to Class IIIA felonies to apply retroactively to offenses committed prior to the effective date of L.B. 605. It is thus immaterial that the offense [the defendant] committed is not among those listed in § 28-116, and his argument to the contrary is without merit.[19]

[10] Although Benavides' argument is somewhat different, we reasoned in *Aguallo* that nonretroactive provisions in §§ 28-105(7) and 28-116 applied to the penalty changes for Class IIIA felonies regardless of whether the Class IIIA

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[19] *Id.* at 183, 881 N.W.2d at 923.

offense was one of the statutes listed in § 28-116. The same provisions prohibit retroactive application of the changed penalties for Class IV felonies if any element of the offense was committed before August 30, 2015. So our reasoning in *Aguallo* applies here. We conclude that the Legislature did not intend for the penalty changes under § 29-2204.02 in favor of a sentence of probation for Class IV felony convictions to be retroactive. Accordingly, the court did not err in failing to consider them.

Court Did Not Abuse Its Sentencing Discretion

Benavides contends that the court abused its discretion under Neb. Rev. Stat. § 29-2260(2) (Supp. 2015) in imposing a sentence of incarceration instead of probation. Section 29-2260(2) sets out the Legislature's sentencing guidelines for misdemeanor and felony offenses that do not require a mandatory or mandatory minimum sentence of imprisonment. Benavides argues that (1) he was only 19 years old when he committed this crime, (2) he had a limited criminal history, (3) the fetus was not harmed, and (4) he was working to support his family and to address his addiction issues. He also relies on § 29-2204.02's requirement that a court impose a sentence of probation for a Class IV felony unless there are compelling factors weighing against probation. As explained, however, § 29-2204.02 did not apply to the court's sentencing discretion here.

[11,12] In imposing a sentence, a sentencing court is not limited to any mathematically applied set of factors.[20] 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 surrounding the defendant's life.[21] We will not disturb a sentence

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[20] *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

[21] *Id.*

imposed within the statutory limits absent an abuse of discretion by the trial court.[22]

The State correctly argues that because Benavides' offense occurred before the effective date of L.B. 605, § 28-105 (Cum. Supp. 2014) governed the statutory limits for the court's sentence. For Class IV felonies under the pre-2015 version of § 28-105, a court could order a term of imprisonment of up to 5 years, a $5,000 fine, or both. The State argues that the court did not abuse its discretion because Benavides had previously failed at probation, had some criminal history, and committed a violent offense.

At the sentencing hearing, the court stated that it was glad to hear Benavides was seeking addiction treatment and trying to be involved in his child's life. It encouraged him to continue to be supportive of his child.

However, the factual basis indicated that Benavides assaulted his girlfriend by throwing her on a bed and holding her down with his hand over her face, all of which caused her pain. According to his girlfriend's written statement, she was almost 6 months pregnant when the assault occurred. Because his offense involved assaultive behavior toward a pregnant woman that put both her and the fetus at risk, the court believed that a sentence of probation would send the wrong message, depreciate the seriousness of his offense, and promote disrespect for the law.

We conclude that there is no merit to Benavides' contention that the court abused its sentencing discretion.

CONCLUSION

We conclude that the court was not required to retroactively apply the sentencing requirements under § 29-2204.02. Nor did it abuse its discretion in imposing a sentence of incarceration instead of probation.

Affirmed.

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[22] *Id.*

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

State of Nebraska, appellee, v. Jason J. Boche, appellant.

885 N.W.2d 523

Filed October 7, 2016. No. S-15-677.

1. **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.
2. **Constitutional Law: Statutes.** The constitutionality of a statute presents a question of law.
3. **Constitutional Law: Rules of the Supreme Court: Statutes.** Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized.
4. **Pleas: Waiver.** Once a plea of guilty has been accepted, the defendant waives every defense to the charge. All defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.
5. ____: ____. The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
6. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
7. **Constitutional Law: Convicted Sex Offender: Sentences.** The registration requirements of Nebraska's Sex Offender Registration Act do not impose criminal punishment, and thus cannot amount to cruel and unusual punishment.
8. **Convicted Sex Offender: Sentences: Probation and Parole.** Lifetime community supervision under Neb. Rev. Stat. § 83-174.03 (Reissue 2014) is akin to parole and thus is punishment.
9. **Constitutional Law: Sentences.** Under *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), and *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), the first step

in a categorical cruel and unusual punishment analysis is examination of the national consensus on the issue.

10. ____: ____. The second step in a cruel and unusual punishment analysis requires the court to exercise its own independent judgment as to whether the punishment in question violates the Eighth Amendment. The judicial exercise of independent judgment requires consideration of (1) the culpability of the offenders at issue in light of their crimes and characteristics, (2) the severity of the punishment in question, and (3) whether the challenged sentencing practice serves legitimate penological goals.

11. **Constitutional Law: Convicted Sex Offender: Minors: Sentences.** Lifetime community supervision is not cruel and unusual punishment merely because the aggravated offense was committed while a juvenile.

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Affirmed.

Barbara J. Masilko and Chelsey R. Hartner, Deputy Madison County Public Defenders, for appellant.

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

Wright, Connolly, Miller-Lerman, Cassel, and Stacy, JJ., and Moore and Bishop, Judges.

Stacy, J.

Jason J. Boche was convicted of first degree sexual assault committed while he was a juvenile. He was sentenced to 1 year's imprisonment and was found to be subject to both lifetime sex offender registration and lifetime community supervision. Boche contends the lifetime requirements are cruel and unusual punishments because he was a juvenile when the offense was committed. We conclude neither lifetime requirement amounts to cruel and unusual punishment, and affirm the conviction and sentence.

I. FACTS

On December 1, 2014, Boche was charged with first degree sexual assault in the district court for Madison County. The

information alleged he subjected another to sexual penetration without consent on or about January 1, 2005, through December 31, 2008. Boche was a juvenile at the time the alleged acts occurred, but had reached the age of majority by the time charges were filed in district court.

Boche eventually entered into a plea agreement. In exchange for his plea of no contest, the State agreed to recommend a sentence of not more than 1 year's imprisonment and agreed to file no additional charges. Prior to accepting the plea, the court informed Boche that if a jury found the offense was aggravated, he would be subject to mandatory lifetime registration requirements under the Sex Offender Registration Act (SORA) and to mandatory lifetime community supervision by the Office of Parole Administration.[1]

As a factual basis for the plea, the State recited that the victim was born in June 1997, that Boche had penile-vaginal intercourse with the victim on several occasions, and that during a taped interview, Boche admitted he and the victim engaged in oral sex. The sexual acts occurred while the victim was between the ages of 6 and 11 and Boche was between the ages of 11 and 16. Boche waived his right to a jury trial on the aggravation issue, and after an evidentiary hearing, the court concluded it was an aggravated offense under § 29-4001.01, because the victim was under the age of 13. Section 29-4001.01 provides:

> (1) Aggravated offense means any registrable offense under section 29-4003 which involves the penetration of, direct genital touching of, oral to anal contact with, or oral to genital contact with (a) a victim age thirteen years or older without the consent of the victim, (b) a victim under the age of thirteen years, or (c) a victim who the sex offender knew or should have known was mentally or physically incapable of resisting or appraising the nature of his or her conduct.

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[1] See Neb. Rev. Stat. §§ 29-4001.01 (Supp. 2015), 29-4003 and 29-4005(1)(b) (Cum. Supp. 2014), and 83-174.03 (Reissue 2014).

Boche argued that because he was a juvenile at the time the acts occurred, finding him to be an aggravated offender and thus subject to lifetime registration under § 29-4005(1)(b) of SORA and to lifetime community supervision under § 83-174.03 would subject him to cruel and unusual punishment, in violation of the Eighth Amendment to the U.S. Constitution. The district court found § 29-4001.01 made no distinction based on the age of the offender and sentenced Boche to 1 year's imprisonment, ordered him to register under SORA for life, and found he was subject to lifetime community supervision. Boche filed this timely appeal.

II. ASSIGNMENTS OF ERROR

Boche assigns, restated, that the trial court erred in (1) imposing cruel and unusual punishment on him by sentencing him to lifetime sex offender registration and lifetime community supervision when he committed the aggravated offense as a juvenile and (2) violating the Ex Post Facto Clause when it sentenced him to lifetime community supervision.

III. STANDARD OF REVIEW

[1,2] 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.[2] The constitutionality of a statute presents a question of law.[3]

IV. ANALYSIS

1. Issues Properly Before Us

(a) Applicability of § 2-109(E)

The State contends that neither of Boche's two assignments of error are properly before us because Boche did not file a notice of constitutional question pursuant to Neb. Ct. R. App. P. § 2-109(E) (rev. 2014), which states:

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[2] *State v. Dye*, 291 Neb. 989, 870 N.W.2d 628 (2015); *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[3] *Adams v. State*, 293 Neb. 612, 879 N.W.2d 18 (2016).

> A party presenting a case involving the federal or state constitutionality of a statute must file and serve notice thereof with the Supreme Court Clerk by a separate written notice or by notice in a Petition to Bypass at the time of filing of such party's brief. If the Attorney General is not already a party to an action where the constitutionality of the statute is in issue, a copy of the brief assigning unconstitutionality must be served on the Attorney General within 5 days of the filing of the brief with the Supreme Court Clerk; proof of such service shall be filed with the Supreme Court Clerk.

The § 2-109(E) requirement is driven by the mandates of article V, § 2, of the Nebraska Constitution, which provides in pertinent part:

> A majority of the members [of the Supreme Court] sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges. . . . The judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute . . . .

The § 2-109(E) notice requirement was implemented because it "assists the clerk and this court in ensuring that an appeal involving the constitutionality of a statute is heard by the full court."[4] The rule also ensures the Attorney General is promptly advised of a constitutional challenge to a statute so the appeal may be staffed and handled accordingly.

Here, Boche is not arguing that §§ 29-4001.01, 29-4003, 29-4005(1)(b), and 83-174.03 are unconstitutional on their face and must be judicially invalidated. Instead, he contends the registration and community supervision provisions of those statutes, although valid and enforceable on their face, cannot constitutionally be applied to him. The initial question

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[4] *State v. Johnson*, 269 Neb. 507, 513, 695 N.W.2d 165, 170-71 (2005).

before us is whether a § 2-109(E) notice is required in such a situation.

In *Zawaideh v. Nebraska Dept. of Health & Human Services*,[5] we implied that a § 2-109(E) notice was not required unless a litigant was presenting a facial challenge to the constitutionality of a statute:

> Although [appellant] *is presenting a facial challenge* to the constitutionality of a statute, he did not file a notice of constitutional question pursuant to Neb. Ct. R. App. P. § 2-109(E) (rev. 2008), which requires that a party challenging a statute's constitutionality file and serve notice with the Supreme Court Clerk at the time of filing the party's brief. And we have repeatedly held that strict compliance with § 2-109(E) is required for the court to address a constitutional claim. Therefore, we do not address [appellant's] claims regarding the constitutionality of various statutes. *However, we do consider his claims that the application of those statutes in this instance violated his right to due process*.

Our language in *Zawaideh* has caused confusion, and may explain why no § 2-109(E) notice was filed in the present appeal.

The distinction drawn in *Zawaideh* between facial and as-applied challenges can be important when it comes to determining whether a constitutional issue has been preserved for appellate review. This is because challenges to the constitutionality of a criminal statute as applied to a defendant are preserved by a plea of not guilty,[6] but to bring a constitutional challenge to the facial validity of a statute, the proper procedure is to file a motion to quash, and all defects not raised in

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[5] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 997, 1004-05, 792 N.W.2d 484, 492 (2011) (emphasis supplied). See, also, *Parker v. State ex rel. Bruning*, 276 Neb. 359, 753 N.W.2d 843 (2008) (addressing due process claim but declining to address whether specific statutes were unconstitutional in absence of § 2-109(E) filing).

[6] *State v. Perina*, 282 Neb. 463, 804 N.W.2d 164 (2011).

a motion to quash are taken as waived by a defendant pleading the general issue.[7]

But the distinction between facial and as-applied constitutional challenges is immaterial when it comes to the § 2-109(E) notice. Neither the constitutional provision which prompted our court rule, nor the court rule itself, make any distinction between facial and as-applied constitutional challenges. Nor, in terms of the underpinnings of the court rule, is there any rationale for distinguishing between facial and as-applied challenges; all challenges to the constitutionality of a statute should be heard by a full court, and a supermajority is required to declare any statute unconstitutional, without regard to whether the challenge is facial or as-applied.

[3] In prior cases, we have insisted on "strict compliance" with § 2-109(E).[8] The importance of a constitutional challenge demands our full attention and adherence to constitutional mandates. We take this opportunity to clarify that strict compliance with § 2-109(E) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized. To the extent we suggested otherwise in *Zawaideh*, we expressly disapprove of such language. But because the absence of a § 2-109(E) notice in this appeal may have been prompted by our language in *Zawaideh,* we conclude it is appropriate to consider the as-applied constitutional challenges Boche presents.

(b) Entry of Plea as Waiver of Constitutional Claim

[4,5] Once a plea of guilty has been accepted, the defendant waives every defense to the charge. All defects not raised in a motion to quash are taken as waived by a defendant pleading

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[7] *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012).

[8] *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015); *Parker v. State ex rel. Bruning, supra* note 5; *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006); *Zoucha v. Henn*, 258 Neb. 611, 604 N.W.2d 828 (2000); *State v. Feiling*, 255 Neb. 427, 585 N.W.2d 456 (1998).

the general issue.[9] The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.[10]

Here, Boche entered a plea of no contest to the charge of first degree sexual assault, and in doing so, he waived every defense to that charge, including any as-applied challenge to the constitutionality of Neb. Rev. Stat. § 28-319 (Reissue 2008), the charging statute. But the constitutional challenge Boche presents here is not directed to the statute under which he was convicted and sentenced. Rather, he argues that because he was a juvenile when he committed the offense to which he pled, it would be cruel and unusual punishment under the Eighth Amendment to impose upon him the requirements of lifetime registration and lifetime community supervision mandated by §§ 29-4001.01, 29-4003, 29-4005(1)(b), and 83-174.03. We conclude Boche did not waive an as-applied Eighth Amendment challenge to the constitutionality of these statutes by entering a no contest plea to the charge of first degree sexual assault.[11]

(c) Ex Post Facto Challenge

In his second assignment of error, Boche contends that imposing lifetime community supervision on him amounted to ex post facto punishment. Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.[12]

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[9] See *State v. Burkhardt*, 258 Neb. 1050, 607 N.W.2d 512 (2000).

[10] *Id.*; *State v. Trackwell*, 250 Neb. 46, 547 N.W.2d 471 (1996).

[11] See, *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985); *State v. Newcomer*, 23 Neb. App. 761, 875 N.W.2d 914 (2016).

[12] *State v. Harris, supra* note 7; *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

Lifetime community supervision can only be imposed for offenses committed after July 14, 2006.[13] The information charged a timeframe for the offense which included time both before and after this date. Boche argues the factual basis presented by the State failed to specifically demonstrate his offense occurred after July 14, 2006.

[6] The State argues this assignment of error is not properly before us because Boche did not raise the ex post facto issue to the district court. A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.[14] The record demonstrates Boche never argued to the district court that applying the lifetime community supervision requirement to him would amount to an ex post facto application of the statute because the State failed to show his offense was committed after the punishment was enacted. We therefore agree with the State that the ex post facto challenge is not properly before us, and we do not address it.

2. Cruel and Unusual Punishment

Boche argues that both the mandatory lifetime registration requirement and the mandatory lifetime community supervision requirement imposed on him result in cruel and unusual punishment because he was a juvenile at the time the aggravated offense was committed. In doing so, he articulates thoughtful policy arguments against imposing these requirements on juveniles convicted of aggravated sexual offenses. We emphasize here that the question before us is not the wisdom or efficacy of imposing the lifetime registration and lifetime community supervision requirements on Boche. Rather, our inquiry is limited to whether imposing the requirements violates the Eighth Amendment. In reviewing the constitutionality of a statute, we do not pass judgment

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[13] *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

[14] *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012); *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010).

on the wisdom or the necessity of the legislation or whether the statute is based upon assumptions which are scientifically substantiated; even misguided laws may nevertheless be constitutional.[15]

The principles applicable to a constitutional challenge to a statute are well known. A statute is presumed to be constitutional and all reasonable doubts are resolved in favor of its constitutionality.[16] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[17] The unconstitutionality of a statute must be clearly established before it will be declared void.[18]

(a) Lifetime Registration

Under § 29-4005, any sex offender convicted of a registrable offense under § 29-4003 punishable by imprisonment for more than 1 year and convicted of an aggravated offense shall register for life. Registration involves providing authorities with information about the offender's name, address, place of employment, vehicles, travel documents, telephone numbers, criminal history, fingerprints, and DNA.[19] In *State v. Worm*,[20] we held these registration requirements were not punishment.

Worm concluded the Legislature imposed lifetime registration requirements with the intent to create a civil regulatory scheme to protect the public from the danger posed by sex offenders. We applied the seven-factor test set out by the U.S. Supreme Court in *Kennedy v. Mendoza-Martinez*[21] and

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[15] See *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006).

[16] *Adams v. State, supra* note 3.

[17] *Id.*

[18] *Id.*

[19] See Neb. Rev. Stat. § 29-4006 (Supp. 2015).

[20] *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[21] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

repeated in *Smith v. Doe*[22] to determine whether the effect of the registration requirement was nevertheless so punitive that it should be regarded as punishment. We concluded it was not punishment, in part because registration is rationally connected to a nonpunitive purpose of protecting the public in that "sex offenders present a high risk to commit repeat offenses."[23] *Worm* concluded the purpose and effect of the lifetime registration requirements were not so punitive as to negate the Legislature's intent to create a civil scheme.

Boche urges us not to apply our holding in *Worm* to him because he was a juvenile at the time his aggravated offense was committed. He argues that lifetime registration should be considered punishment as to juveniles, because a primary justification for registration is to prevent recidivism, and that justification does not apply to juveniles. To support this argument, his brief cites general studies examining the risk of juvenile sex offender recidivism and notes that the Supreme Court of Pennsylvania recently recognized these studies.[24] However, Boche did not present these studies to the district court, so that court had no evidence before it related to his argument. Nor does this court. On the record before us, we see no principled reason to depart from our holding in *Worm* that lifetime registration requirements are not punishment. Other jurisdictions which have considered the issue as applied to juveniles have reached the same conclusion.[25]

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[22] *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

[23] Neb. Rev. Stat. § 29-4002 (Reissue 2008). See *State v. Worm, supra* note 20. See, also, *Smith v. Doe, supra* note 22.

[24] See *In re J.B.*, 630 Pa. 408, 107 A.3d 1 (2014).

[25] See, e.g., *U.S. v. Under Seal*, 709 F.3d 257 (4th Cir. 2013); *In re A.C.*, 2016 IL App (1st) 153047, 54 N.E.3d 952, 403 Ill. Dec. 811 (2016); *People in Interest of J.O.*, No. 14CA0622, 2015 WL 5042709 (Colo. App. Aug. 27, 2015); *State ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 909 N.E.2d 783, 330 Ill. Dec. 761 (2009). Accord *U.S. v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012).

[7] Because we conclude the lifetime registration requirements imposed on Boche are not punishment, his argument that these registration requirements amount to cruel and unusual punishment must necessarily fail.

For the sake of completeness, we note that even if the lifetime registration requirements could be characterized as punishment as to Boche, they would not amount to cruel and unusual punishment for largely the same reasons we articulate next with respect to the lifetime community supervision requirements.

(b) Lifetime Community Supervision

[8] In *State v. Payan*,[26] we concluded that unlike lifetime registration, lifetime community supervision in Nebraska is akin to parole and thus is punishment. Although *Payan* involved an adult sex offender, we see no reason why lifetime community supervision would not also be punishment for juvenile sex offenders. As such, we proceed to examine Boche's argument that imposing lifetime community supervision on him amounts to cruel and unusual punishment, because he was a juvenile when he committed the aggravated offense.

Some additional background aids our analysis. According to § 83-174.03(1)(c), any individual who, on or after July 14, 2006, is convicted of an aggravated offense as defined in § 29-4001.01 shall be subject to lifetime community supervision by the Office of Parole Administration. An aggravated offense under § 29-4001.01 is any registrable offense under § 29-4003 which involves the penetration of, direct genital touching of, oral-to-anal contact with, or oral-to-genital contact with a victim under the age of 13 years.[27] Boche committed a registrable offense under § 29-4003 because he meets the definition of "any person who on or after January 1, 1997" is found

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[26] *State v. Payan*, 277 Neb. 663, 765 N.W.2d 192 (2009).

[27] § 29-4001.01(1)(b).

guilty of sexual assault pursuant to § 28-319.[28] The trial court found the sexual assault was an aggravated offense, because the victim was under the age of 13.

Individuals subject to lifetime community supervision undergo a risk assessment and evaluation by the Office of Parole Administration to determine the conditions of the supervision to be imposed "to best protect the public from the risk that the individual will reoffend."[29] Conditions may include drug and alcohol testing; restrictions on employment and leisure activities necessary to minimize interaction with potential victims; regularly reporting to a community supervision officer; providing notice of changes to address or employment; providing access to medical records; agreeing to available medical and psychological treatment, including submission to polygraph examinations; and any other conditions designed to minimize the risk of recidivism, including electronic monitoring.[30] The conditions imposed "shall be the least restrictive conditions available, in terms of the effect on the individual's personal freedom, which minimize the risk of recidivism and are compatible with public safety."[31]

Information considered when determining the requisite conditions to be imposed on an individual includes: a caseworker report detailing the individual's personality, social history, and ability to adjust to authority; the individual's prior criminal record, including reports of probation and parole experiences; the presentence investigation report; reports of any physical, mental, or psychiatric examinations of the individual; relevant information submitted by the individual, his or her attorney, the victim of the crime, or other persons; and such other relevant information concerning the individual as may reasonable be

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[28] § 29-4003(1)(a)(i)(c).

[29] § 83-174.03(3).

[30] § 83-174.03(4).

[31] Neb. Rev. Stat. § 83-1,103.02(1)(d) (Reissue 2014).

available.[32] The individual has a right to appeal a determination or revision of the conditions of supervision.[33] Relevant considerations in any such appeal include whether the conditions reduce the risk of the individual's reoffending and whether less restrictive conditions are available which would equally or more effectively reduce the risk of reoffense.[34]

Boche contends that imposition of lifetime supervision requirements on him results in cruel and unusual punishment because he was a juvenile when he committed the aggravated offense. To support his argument, he relies on two recent decisions from the U.S. Supreme Court: *Graham v. Florida*[35] and *Miller v. Alabama*.[36]

In *Graham*, the Court considered whether the Eighth Amendment prohibited the imposition of a life without parole sentence on a juvenile who committed a nonhomicide offense. In doing so, it recognized that the Eighth Amendment states: "'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.'"[37] The Court recognized that to determine whether a punishment is cruel and unusual, it must look to the evolving standards of decency that mark the progress of a maturing society. This is necessary because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The *Graham* Court observed that the standard itself remains the same, but its applicability must change as the basic mores of society change.[38]

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[32] § 83-1,103.02(1)(e).

[33] Neb. Rev. Stat. § 83-1,103.04 (Reissue 2014).

[34] *Id.*

[35] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[36] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[37] *Graham v. Florida, supra* note 35, 560 U.S. at 58.

[38] *Id.*

Graham recognized that the concept of proportionality is central to the Eighth Amendment. It recognized that the Court's prior cases addressing the proportionality of sentences fell within two general categories: challenges to the length of a term-of-years sentence given all the circumstances and challenges in cases involving categorical restrictions on implementation of the death penalty. It determined that the issue before it was a categorical challenge to a term-of-years sentence and concluded that because it was a sentencing practice itself that was in question, the proper approach was the categorical one.

According to *Graham*, the analysis begins with objective indicia of national consensus, because the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the states' legislatures. *Graham* thus addressed how the various states sentenced juveniles convicted of nonhomicide offenses. The Court ultimately concluded it was quite rare for a state to impose a life sentence without parole on juveniles convicted of a nonhomicide crime and that a national consensus had developed against it.

The Court in *Graham* then noted that community consensus, while entitled to great weight, was not itself determinative of whether a punishment is cruel and unusual. It reasoned that the judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry, the Court also considers whether the challenged sentencing practice serves legitimate penological goals.

As to the culpability of juveniles, the *Graham* Court recognized its prior holding[39] that because juveniles have lessened mental culpability, they are less deserving of the most severe punishments than adults. *Graham* emphasized that juveniles

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[39] *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (holding Eighth Amendment prohibits execution of juvenile convicted of homicide).

> have a "'lack of maturity and an underdeveloped sense of responsibility'"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." . . . "[I]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[40]

As to the nature of the offense at issue, *Graham* recognized a distinction between homicide and other serious violent offenses against the individual. Serious nonhomicide offenses may be "'devastating in their harm . . . but "in terms of moral depravity and of the injury to the person and to the public," . . . they cannot be compared to murder in their "severity and irrevocability."'"[41] *Graham* recognized that the punishment of life without parole is the second most severe punishment permitted by law and that such sentences share some characteristics with death sentences that are shared by no other sentences. It noted that a life without parole sentence for a juvenile means a denial of hope, that good behavior and character improvement are immaterial, and that whatever the future might hold in store for the mind and spirit, the juvenile will remain in prison for the rest of his days. It also noted that the penological justifications for a life without parole sentence for a juvenile were lacking, largely because such a sentence denied the juvenile an opportunity to demonstrate growth and maturity. Ultimately, the Court in *Graham* concluded that due to the limited culpability of juvenile offenders and the severity of the punishment of life without parole, sentencing a juvenile to life imprisonment without parole for a nonhomicide offense was cruel and unusual.

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[40] *Graham v. Florida, supra* note 35, 560 U.S. at 68.

[41] *Id.*, 560 U.S. at 69.

Two years later, in *Miller*, the Court held the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for a juvenile who has committed a homicide.[42] In doing so, it noted that the Eighth Amendment's prohibition against cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. It explained that right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense. It again noted the concept of proportionality is central to the Eighth Amendment and is viewed according to evolving standards of decency that mark the progress of a maturing society.

The *Miller* Court recognized that in the past, it had adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty.[43] It thus reiterated many of the principles enunciated in *Graham*. It further noted that *Graham* likened life without parole for juveniles to the death penalty for adults, thus evoking as to juveniles facing such a sentence additional precedent requiring sentencing authorities to consider the individual characteristics of the defendant before sentencing. It reasoned that based on *Graham* and prior precedent, "in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."[44] But the Court in *Miller* specifically noted that a sentence which is not otherwise cruel and unusual does not become so simply because it is mandatory.

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[42] *Miller v. Alabama, supra* note 36.

[43] See, *Graham v. Florida, supra* note 35; *Roper v. Simmons, supra* note 39; *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[44] *Miller v. Alabama, supra* note 36, 567 U.S. at 477.

(i) National Consensus

[9] Both *Graham* and *Miller* recognize that the first step in a categorical cruel and unusual punishment analysis is examination of the national consensus on the issue. That is, we must look at how common or rare it is for jurisdictions to impose mandatory lifetime community supervision on juvenile sex offenders convicted of aggravated offenses in criminal court.

Boche, however, did not present any evidence, or even argument, to the district court on this prong of the test. Nor does he attempt to undertake any type of analysis of the national consensus in his brief. It is incumbent upon an appellant to supply a record which supports his or her appeal.[45] Absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed.[46] On this record, our ability to thoroughly review this step is thus somewhat restricted.[47]

We note, however, that the Kansas Supreme Court recently attempted to undertake a similar analysis and generally concluded there is no national consensus either for or against imposing mandatory lifetime community supervision on juvenile sex offenders sentenced in criminal court.[48]

(ii) Independent Judgment

[10] The second step in the analysis requires this court to exercise its own independent judgment as to whether the punishment in question violates the Eighth Amendment.[49] The judicial exercise of independent judgment requires

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[45] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015); *State v. Robinson*, 287 Neb. 799, 844 N.W.2d 312 (2014).

[46] *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

[47] *Graham v. Florida, supra* note 35, 560 U.S. at 63 (holding that "it is for the litigants to provide data to aid the Court" on national consensus prong of categorical cruel and unusual punishment analysis).

[48] *State v. Dull*, 302 Kan. 32, 351 P.3d 641 (2015).

[49] See, *Miller v. Alabama, supra* note 36; *Graham v. Florida, supra* note 35.

consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.[50] In this inquiry, the court also considers whether the challenged sentencing practice serves legitimate penological goals.[51]

a. Culpability of Offenders

There is no disputing that Boche's crime was serious. First degree sexual assault is a Class II felony, and sexual assaults against children often have devastating physical and psychological consequences for victims. Boche relies heavily on what *Graham* and *Miller* said generally about the diminished capacity and reduced culpability of juvenile offenders. We agree that the Court's observations in *Graham* and *Miller* about the reduced culpability and diminished capacity of juvenile offenders as a class generally applies to juvenile sex offenders. As the Court noted in *Graham*: "'[F]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.'"[52]

But acknowledging the diminished capacity and reduced culpability of juvenile sex offenders does not lead to the conclusion that all punishment that is constitutionally permissible for adult sex offenders is automatically cruel and unusual punishment as to juveniles. Rather, the additional factors articulated by the Court in *Graham* and *Miller* have to be analyzed in light of the particular punishment at issue.

b. Severity of Punishment

The severity of the punishment at issue is a key factor in the constitutional analysis. *Graham* and *Miller* emphasized that life without parole and death are the two most severe punishments permitted by law in that they deprive the one

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[50] *Graham v. Florida, supra* note 35.

[51] *Id.*

[52] *Id.*, 560 U.S. at 68.

convicted of the most basic liberties without any hope those liberties can be restored. According to *Graham*, a life without parole sentence "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.'"[53]

A punishment of lifetime community supervision is nowhere near as severe as the punishment of life in prison without parole or death. While lifetime community supervision is severe in duration, it does not so restrict a juvenile's basic liberties that he or she has no opportunity, incentive, or means to take steps to improve his or her behavior and character. Simply stated, there is no denial of hope for a juvenile sex offender sentenced to lifetime community supervision. To the contrary, he or she can enjoy many of life's basic liberties and has every opportunity and incentive to demonstrate growth and maturity. As we recognized in *Payan*, lifetime community supervision is akin to parole,[54] and the unavailability of parole to the juveniles in *Graham* and *Miller* was a key factor in the Court's finding that the punishment was cruel and unusual. Here, we think it would be illogical to conclude that a punishment which is very comparable to parole runs afoul of the principles articulated in *Graham* and *Miller*.

Further, as detailed earlier in this opinion, in Nebraska, the actual conditions of community supervision are narrowly tailored to each individual and subject to annual review. Our statutes specify that the conditions imposed are to be the "least restrictive conditions available, in terms of the effect on an individual's personal freedom, which minimize the risk of recidivism and are compatible with public safety."[55] Under our statutes, an individual's good behavior and character

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[53] *Id.*, 560 U.S. at 70.

[54] *State v. Payan, supra* note 26.

[55] § 83-1,103.02(1)(d).

improvement can directly affect the terms and conditions of the supervision, so he or she has additional and direct incentive to improve character, behavior, mind, and spirit. Especially in light of Nebraska's statutory scheme, the punishment of lifetime community supervision is not particularly severe, even though it is imposed for life.

c. Penological Goals

According to *Graham*, there are four legitimate goals of penal sanctions: retribution, deterrence, incapacitation, and rehabilitation. *Graham* reasoned that none of these goals provides an adequate justification for imposing a sentence of life without parole on a juvenile who did not commit homicide, largely because the punishment denies the offender an opportunity to demonstrate growth and maturity.

We do not think the same conclusion is warranted with respect to lifetime community supervision. This is true largely because, as we previously determined, lifetime community supervision differs greatly in severity from lifetime imprisonment or death. A juvenile subject to lifetime community supervision is not denied all hope, and the penological goals of rehabilitation and deterrence justify imposition of lifetime community supervision on sex offenders.

(c) Individualized Sentencing

Boche also relies on *Miller*'s emphasis on individualized sentencing to argue lifetime community supervision is cruel and unusual when applied to juveniles convicted of aggravated sex offenses. *Miller* reasoned that because life without parole was the most severe punishment that could legally be imposed on a juvenile, it was logical to equate that punishment with the most severe punishment that could legally be imposed on an adult—death. *Miller* thus reasoned that the individualized sentencing required in capital cases as to adults equally applied to juveniles sentenced to life without parole. Boche urges us to apply the concept of individualized sentencing in *Miller* to juvenile sex offenders.

We are not convinced that the requirement of individualized sentencing applies to juveniles in cases other than homicides involving a possible sentence of life without parole.[56] But we need not resolve the issue here, because Nebraska's lifetime community supervision statutes already require significant individualized consideration of each person subject to supervision.[57] Such consideration is mandated so that those sex offenders who present a lower risk to the community are supervised accordingly.

As such, the flexibility that was absent in the statutory sentencing scheme considered in *Miller* is mandatory under Nebraska's statutory scheme. Specifically, individuals subject to lifetime community supervision "undergo a risk assessment and evaluation by the Office of Parole Administration to determine the conditions of community supervision to be imposed to best protect the public from the risk that the individual will reoffend."[58] The conditions of supervision imposed must be those which "most effectively minimize the risk of the individual committing another sex offense. The conditions shall be the least restrictive conditions available, in terms of the effect on the individual's personal freedom, which minimize the risk of recidivism and are compatible with public safety."[59] The individual can appeal the supervision conditions imposed.[60] In addition, the conditions of community supervision are reviewed by the Office of Parole Administration on an annual basis and can be revised so that the individual's freedom is not unnecessarily restricted.[61] Nebraska's statutory scheme for lifetime community supervision is individualized, adaptive, and incentivizes rehabilitation.

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[56] See, generally, *State v. Cardeilhac*, 293 Neb. 200, 876 N.W.2d 876 (2016).

[57] *Id.*

[58] § 83-174.03(3).

[59] § 83-1,103.02(1)(d).

[60] § 83-1,103.04.

[61] Neb. Rev. Stat. § 83-1,103.03 (Reissue 2014).

(d) Summary

[11] The U.S. Supreme Court has recognized that juvenile offenders have diminished culpability and in general should be given an opportunity and an incentive to demonstrate positive changes in character, behavior, mind, and spirit. But we conclude a sentence of lifetime community supervision is not a severe restriction on a juvenile sex offender's personal liberties and ability to demonstrate such changes, particularly because that sentence is imposed in Nebraska, and thus is not a sentence that can compare in severity to a sentence of life imprisonment without parole or death. And it is only with respect to those two extremely severe sentences that the U.S. Supreme Court has found a punishment applicable to adults becomes cruel and unusual when applied to juveniles. As such, we hold that sentencing Boche to lifetime community supervision did not amount to cruel and unusual punishment.

We recognize that the Kansas Supreme Court recently held that mandatory lifetime postrelease supervision is cruel and unusual punishment when applied to a juvenile sex offender.[62] In doing so, that court explicitly found the provisions of Kansas' supervision were "'more severe than most other jurisdictions'"[63] and recognized that the provisions resulted in a "sentence that restricts the juvenile's liberty for life without any chance, hope, or legal mechanism of having those restrictions lifted or even reduced."[64] Because the substance of Nebraska's lifetime community supervision requirements differ significantly and materially from that considered by the Kansas Supreme Court, we do not find the Kansas opinion helpful in answering the question presented here.

V. CONCLUSION

For the foregoing reasons, we conclude neither the requirement of lifetime registration nor the requirement of lifetime

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[62] See *State v. Dull, supra* note 48.

[63] *Id.* at 53, 351 P.3d at 655.

[64] *Id*. at 55, 351 P.3d at 657.

community supervision is cruel and unusual punishment as to Boche. We therefore affirm his conviction and sentence.

Affirmed.

Connolly, J., not participating in the decision.
Heavican, C.J., not participating.

Bishop, Judge, concurring.

Based upon the errors assigned and the current state of the law, I concur with the majority's analysis. I write separately to point out a void in our criminal and juvenile statutes to address a situation such as the one presented here where unlawful acts committed by Boche between the ages of 11 and 16 were not charged until he was an adult. Disposition under the juvenile code was no longer an option. See *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011) (juvenile court's jurisdiction ends once juvenile reaches age of majority; whether sex offender registration laws should apply to juveniles not decided). The majority opinion acknowledges that juvenile offenders have diminished culpability and should be given an "opportunity and an incentive to demonstrate positive changes in character, behavior, mind, and spirit"; however, the lifetime sanctions imposed upon Boche provide no such opportunity and incentive. The majority aptly quotes from *Graham v. Florida*, 560 U.S. 48, 68, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), wherein the U.S. Supreme Court states that "'[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.'" For many reasons, Boche should demonstrate that his past childhood character deficiencies have been or can be reformed; nevertheless, he must live his lifetime knowing that such reformation will not impact the duration of his registration and supervision obligations. It concerns me that delays in prosecuting juveniles, whatever the reason for the delay, can result in unnecessarily harsh outcomes not consistent with the goals of the juvenile code—a code that recognizes the

diminished culpability of children and seeks to be more rehabilitative than punitive.

That said, I agree with the majority that the Eighth Amendment's prohibition against cruel and unusual punishment is not the source for relief in this case. And our statutes likewise provide no relief in these circumstances. Neb. Rev. Stat. § 29-2204(5) (Supp. 2015) states that when

> the defendant was under eighteen years of age at the time he or she committed the crime for which he or she was convicted, the court may, in its discretion, instead of imposing the penalty provided for the crime, make such disposition of the defendant as the court deems proper under the Nebraska Juvenile Code.

As previously noted, however, disposition under the juvenile code was no longer an option for Boche because he had passed the age of majority by the time he was charged. Unfortunately for Boche, there is no statutory authority giving a sentencing court any discretion with regard to lifetime registration and supervision in a situation such as this. However, whether or not the criminal and juvenile statutes should address these circumstances is a policy decision for the Legislature, not the courts.

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

State of Nebraska, appellee, v. Dominick L. Dubray, appellant.

885 N.W.2d 540

Filed October 7, 2016. No. S-15-1032.

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: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law, which an appellate court reviews de novo.
3. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
4. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error, while the determination of whether counsel's performance was deficient and whether the defendant suffered prejudice as a result under the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test is reviewed de novo.
5. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a postconviction petition alleging ineffective assistance of counsel is dismissed on the pleadings without an evidentiary hearing, there are no factual findings of the lower court, and thus an appellate court reviews the entirety of the lower court's dismissal de novo.
6. **Postconviction: Constitutional Law.** Under the Nebraska Postconviction Act, a prisoner in custody may file a petition for relief on the grounds that there was a denial or infringement of the prisoner's constitutional rights that would render the judgment void or voidable. This category of relief is very narrow.

7. **Postconviction: Records.** Under Neb. Rev. Stat. § 29-3001(2) (Cum. Supp. 2014), a prisoner is entitled to an evidentiary hearing on his or her claim for postconviction relief, unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief.
8. **Postconviction: Constitutional Law: Proof.** In order to be entitled to an evidentiary hearing, a prisoner must allege facts in the petition for postconviction relief that, if proved, would constitute a violation of his or her rights under the U.S. or Nebraska Constitution.
9. **Postconviction.** A prisoner is not entitled to an evidentiary hearing on the basis of claims that present only conclusory statements of law or fact.
10. **Postconviction: Constitutional Law.** A claim of actual innocence may be a sufficient allegation of a constitutional violation under the Nebraska Postconviction Act.
11. **Postconviction: Evidence.** The essence of a claim of actual innocence is that the State's continued incarceration of such a petitioner without an opportunity to present newly discovered evidence is a denial of procedural or substantive due process. The threshold to entitle a prisoner to an evidentiary hearing on such a postconviction claim is extraordinarily high.
12. **Postconviction: Evidence: Appeal and Error.** Claims of insufficiency of evidence that were or could have been raised on direct appeal are procedurally barred from being raised in a postconviction action.
13. **Postconviction: Appeal and Error.** A petition for postconviction relief may not be used to obtain review of issues that were or could have been reviewed on direct appeal.
14. ____: ____. Any attempts to raise issues at the postconviction stage that were or could have been raised on direct appeal are procedurally barred.
15. **Criminal Law: Constitutional Law: Right to Counsel.** The Sixth Amendment to the U.S. Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his or her defense.
16. **Right to Counsel: Effectiveness of Counsel.** The right to counsel has been interpreted to include the right to effective counsel.
17. **Effectiveness of Counsel: Proof: Appeal and Error.** Under the standard established by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), claims of ineffective assistance of counsel by criminal defendants are evaluated using a two-prong analysis: first, whether counsel's performance was deficient and, second, whether the deficient performance was of such a serious nature so as to deprive the defendant of a fair trial.

18. **Effectiveness of Counsel.** A court may address the two elements of the *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), test, deficient performance and prejudice, in either order.
19. **Postconviction: Effectiveness of Counsel: Proof.** To show that the performance of a prisoner's counsel was deficient, it must be shown that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
20. **Effectiveness of Counsel: Proof.** To establish the prejudice element of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant must show that the counsel's deficient performance was of such gravity to render the result of the trial unreliable or the proceeding fundamentally unfair. This prejudice is shown by establishing that but for the deficient performance of counsel, there is a reasonable probability that the outcome of the case would have been different.
21. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her appellate counsel, all issues of ineffective assistance of trial counsel that are known to the defendant or are apparent from the record must be raised on direct appeal. If the issues are not raised, they are procedurally barred.
22. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Claims of ineffective assistance of appellate counsel may be raised for the first time on postconviction review.
23. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts will often begin by determining whether the defendant suffered prejudice by appellate counsel's failure to raise a claim.
24. ____: ____. If the claimed deficiency of appellate counsel's performance is the failure to raise a claim on appeal, the court will look at the strength of the claim that appellate counsel failed to raise.
25. ____: ____. When a claim of ineffective assistance of appellate counsel is based on the failure to raise a claim on appeal of ineffective assistance of trial counsel (a layered claim of ineffective assistance of counsel), an appellate court will look at whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.
26. **Criminal Law: Evidence: Appeal and Error.** In reviewing a claim of insufficiency of the evidence, an appellate court simply asks 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.

27. **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.
28. **Postconviction: Mental Competency: Effectiveness of Counsel: Proof.** In order to demonstrate prejudice from counsel's failure to investigate competency and for failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was actually incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted.
29. **Postconviction.** Mere conclusions of fact or law are not sufficient to entitle a petitioner to an evidentiary hearing in a postconviction action.
30. **Effectiveness of Counsel: Presumptions: Witnesses.** In cases where counsel completely fails to submit the State's case to meaningful adversarial testing, prejudice to the defendant will be presumed. But when the record shows that the State's witnesses were thoroughly cross-examined consistent with the defense theory, there was meaningful adversarial testing of the prosecution's case.
31. **Postconviction: Effectiveness of Counsel: Witnesses.** In assessing postconviction claims of ineffective assistance of counsel for failure to call a particular witness, an appellate court upholds the dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called.
32. **Insanity: Proof.** The two requirements for the insanity defense are that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong.
33. **Postconviction: Insanity: Proof.** Bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient and justify the summary dismissal of a postconviction proceeding.
34. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her constitutional rights, causing the judgment against the defendant to be void or voidable.

Appeal from the District Court for Box Butte County: Travis P. O'Gorman, Judge. Affirmed.

Dominick L. Dubray, pro se.

Douglas J. Peterson, Attorney General, and Stacy M. Foust for appellee.

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

Wright, J.

I. NATURE OF CASE

This is an appeal from the district court's denial of a petition for postconviction relief by appellant, Dominick L. Dubray. Dubray was convicted in 2012 of two counts of first degree murder and two counts of use of a weapon to commit a felony. The district court granted the State's motion to dismiss the postconviction petition without an evidentiary hearing. Dubray appeals from this dismissal. We conclude that either his claims are procedurally barred, his claims fail to allege sufficient facts to demonstrate a violation of his constitutional rights, or the record and files affirmatively show he is entitled to no relief. We affirm the judgment of the district court.

II. FACTS

The facts of this case are set out in detail in our opinion from Dubray's direct appeal of his convictions.[1] Dubray lived with Catalina Chavez. Mike Loutzenhiser was Chavez' stepfather, and his son lived with Dubray and Chavez.

1. Murders of Chavez and Loutzenhiser

On February 10, 2012, in Alliance, Nebraska, Dubray, Chavez, and Loutzenhiser were drinking alcohol at a club and at another person's home from around 8 p.m. to 6 a.m. the next morning. Loutzenhiser, who lived in Scottsbluff, Nebraska, was visiting for the weekend. About 6 a.m., Dubray, Chavez,

[1] *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

and Loutzenhiser walked back to the house where Dubray and Chavez lived.

At 6:49 a.m., Dubray called his cousin Carlos Reza and told him that he had two dead bodies in the house and was going to kill himself. He said, "'I love you, Bro. Take care of my daughter.'" Reza immediately drove to Dubray's house and arrived minutes later.

Reza entered through the front door and saw Loutzenhiser's dead body in the living room, with a lot of blood underneath him. He found Dubray lying motionless on the floor in the bedroom. Reza began screaming for Dubray, who got up in response to Reza's yelling and went into the kitchen with him. Dubray stood with his hands on the kitchen table, crying and shaking his head. Dubray told Reza that Chavez was going to leave him. Dubray said, "'Look, Bro, I tried to kill myself and it didn't work. I don't want to go to prison.'" He showed Reza a stab wound to his chest and said, "'I tried to kill myself right here.'" Dubray grabbed a clean knife off of the kitchen counter and said, "'I'm going to kill myself.'" He came back to the kitchen table, where he and Reza sat down. Dubray set the kitchen knife down at his side.

About 5 to 10 minutes after Reza arrived, another cousin, Marco Dubray (Marco), came to the house. When Marco saw Loutzenhiser's body, he asked what happened. Dubray said, "'I don't know. I snapped. And I just [want to kill] myself,'" "'I can't believe what I have done,'" and "'I just want to die. I don't want to go to prison.'" Reza hugged Dubray. Dubray then said, "'Just go, Bro. Just go. Get the fuck out of here. Just go.'"

Reza and Marco left the house and called their uncle Lonnie Little Hoop for help, telling him that Dubray was trying to kill himself. While waiting outside for Little Hoop to arrive, Reza heard a loud scream coming from the bedroom that sounded as if it came from Dubray. Little Hoop arrived, went into the house with Reza, and found Dubray lying in the bedroom between the bed and the wall. Dubray had a knife sticking

out of his back. When Little Hoop called out to him, Dubray began moving and tried to pull himself up onto the bed. Little Hoop told him not to move and directed Reza to call for an ambulance. When Dubray tried to sit up, Little Hoop noticed Chavez' dead body beneath him. Dubray faced Little Hoop and said, "'I don't want to live anymore. I don't want to go to jail.'" Reza flagged down a nearby police cruiser. The police requested an ambulance and then went to the house.

When the police entered the home, they found Loutzenhiser's body with multiple stab wounds and no signs of life. One officer testified that Loutzenhiser's neck was nearly severed. The police then entered the bedroom and found Dubray and Chavez' body. Dubray still had a knife in his back. He was lying between the bedroom wall and the bed, on top of Chavez' body. Dubray began to move and moan and pulled the knife out of his back. He was then taken to a local hospital.

Police found three knives at the scene: one underneath Dubray and next to Chavez' body between the bed and bedroom wall, a second that was found on the bed, and a third that had been in Dubray's back. A knife block was located on the kitchen counter. There were four open slots in the knife block. The three knives recovered by police appeared to be kitchen knives that matched the knives remaining in the knife block.

Dubray was treated at the local hospital's trauma center and then transferred to a hospital in Denver, Colorado, for further care. Dubray had 17 lacerations or stab wounds. After being treated and examined, it was determined that only the stab wound to his chest was life threatening. Most of his wounds were superficial. When in the hospital in Colorado, Dubray told Reza that he had "fucked up."

2. Dubray's Trial and Convictions

Dubray was tried for two counts of first degree murder. He was also charged with two counts of use of a weapon to commit a felony. He did not testify at trial.

The forensic pathologist who performed the autopsies of the two victims testified that Loutzenhiser had 22 stab wounds. Several of the wounds in his chest were 7 to 9 inches deep, reaching his lungs. Several other stab wounds to Loutzenhiser were in his back. His spinal cord was cut. He also had a defensive wound on his left wrist. The blood flow patterns indicated that many of his wounds were inflicted when he was hunched over. Chavez had 19 stab wounds. Several stab wounds to her neck severed her trachea and esophagus and cut an artery in multiple places. She also had a defensive wound and bruising on her right hand. Other stab wounds were found in the back of her neck and her back. The bloodstains on her clothing indicated that most of her wounds were inflicted after she was on the ground.

The surgeon who treated Dubray testified that Dubray had a total of 17 wounds, most of which were superficial "'slash wound[s].'" Only three wounds were potentially life-threatening stab wounds: one in his abdomen and two in his chest. After further exploration by the surgeon, only one was determined to be life threatening: a stab wound to his chest.

Based upon the physical evidence of the number and force of the stab wounds, the State argued that the killings were premeditated and not in self-defense. The State also argued against the defense's theory of self-defense, because most of Dubray's wounds were superficial, which supported the State's theory that they were self-inflicted.

Dubray's defense was based on a theory of self-defense or manslaughter based upon a "sudden quarrel." Dubray's family members testified that he had bruising on his face when he was in the hospital. The defense claimed that Dubray's 17 stab wounds or lacerations showed that he must have acted in self-defense.

Dubray was convicted of both counts of first degree murder and both counts of use of a weapon to commit a felony. He was sentenced to two life sentences for the murder convictions and 30 to 40 years' imprisonment for each of the convictions for

use of a weapon to commit a felony, all to run consecutively. After his convictions, Dubray brought a direct appeal.

3. Dubray's Direct Appeal

Dubray's assignments of error on direct appeal were categorized by this court as trial court error, prosecutorial misconduct, and ineffective assistance of counsel.[2]

Dubray claimed ineffective assistance of counsel on the basis of several alleged errors of his trial counsel. All of these claims but one were rejected, and the convictions were affirmed.

We concluded that Dubray's claim that he was prejudiced because his trial counsel failed to call Megan Reza (Megan) as a witness could not be decided on direct appeal. Dubray contended that Megan would have testified that Chavez kept a knife hidden under her mattress for her protection. Dubray claimed this testimony would have helped to negate the premeditation charge and would have supported his theory of self-defense or sudden quarrel. We declined to address the issue on direct appeal. We affirmed Dubray's convictions and sentences.

4. Postconviction Action

Dubray filed a timely petition for postconviction relief. He alleged various claims of actual innocence, ineffective assistance of trial counsel, ineffective assistance of appellate counsel, trial court error, and prosecutorial misconduct.

The State moved to dismiss Dubray's petition without an evidentiary hearing, on the bases that the petition failed to allege sufficient facts which would constitute a constitutional violation of his rights, that the claims were procedurally barred, that the case file and record affirmatively showed that Dubray was not entitled to relief, and/or that the petition alleged only conclusions of fact or law. The district court sustained the State's motion.

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[2] See *id.*

III. ASSIGNMENTS OF ERROR

Dubray asserts that the district court erred when it dismissed his petition for postconviction relief without an evidentiary hearing. More specifically, he asserts that the court erred in dismissing without an evidentiary hearing his claims of (1) actual innocence, (2) ineffective assistance of trial counsel, (3) ineffective assistance of appellate counsel, (4) error by the trial court, and (5) prosecutorial misconduct.

IV. STANDARD OF REVIEW

[1,2] 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.[3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law, which an appellate court reviews de novo.[4]

[3-5] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[5] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error, while the determination of whether counsel's performance was deficient and whether the defendant suffered prejudice as a result under the *Strickland v. Washington*[6] test is reviewed de novo.[7] When a postconviction petition alleging ineffective assistance of counsel is dismissed on the pleadings without an evidentiary hearing, there are no factual findings

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[3] *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015).

[4] See *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

[5] *State v. DeJong*, 292 Neb. 305, 872 N.W.2d 275 (2015).

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

[7] See *State v. DeJong, supra* note 5.

of the lower court, and thus we review the entirety of the district court's dismissal de novo.[8]

V. ANALYSIS

[6] Dubray claims that the district court erred by dismissing his petition for postconviction relief without an evidentiary hearing. Under the Nebraska Postconviction Act,[9] a prisoner in custody may file a petition for relief on the grounds that there was a denial or infringement of the prisoner's constitutional rights that would render the judgment void or voidable.[10] This category of relief is "very narrow."[11]

[7-9] Under § 29-3001(2), the prisoner is entitled to an evidentiary hearing on the claim, unless "the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief." In order to be entitled to an evidentiary hearing, a prisoner must allege facts in the petition for postconviction relief that, if proved, would constitute a violation of his or her rights under the U.S. or Nebraska Constitution.[12] A prisoner is not entitled to an evidentiary hearing on the basis of claims that present only conclusory statements of law or fact.[13]

1. Dubray's Claim of Actual Innocence

[10,11] A claim of actual innocence may be a sufficient allegation of a constitutional violation under the Nebraska Postconviction Act.[14] The essence of a claim of actual

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[8] See *State v. Dragon*, 287 Neb. 519, 843 N.W.2d 618 (2014).

[9] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2008 & Cum. Supp. 2014).

[10] § 29-3001(1).

[11] *State v. Harris*, 274 Neb. 40, 45, 735 N.W.2d 774, 779 (2007).

[12] See *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

[13] See, *State v. Abdulkadir*, 293 Neb. 560, 878 N.W.2d 390 (2016); *State v. Banks*, 289 Neb. 600, 856 N.W.2d 305 (2014).

[14] See *State v. Phelps, supra* note 12.

innocence is that the State's continued incarceration of such a petitioner without an opportunity to present newly discovered evidence is a denial of procedural or substantive due process.[15] The threshold to entitle a prisoner to an evidentiary hearing on such a postconviction claim is "'extraordinarily high.'"[16] Such a petitioner must make a strong demonstration of actual innocence because after a fair trial and conviction, the presumption of innocence vanishes.[17]

[12] Dubray has not met the extraordinarily high standard. He presents no new facts that would support his claim of actual innocence. He contends that the evidence at trial was not sufficient, stating that "it is at the most self-defense." He asserts that "[t]he only reason he was charge[d] is he was the one that lived." To the extent that the allegations in Dubray's petition are based on the insufficiency of the evidence at trial, they are procedurally barred. Claims of insufficiency of evidence that were or could have been raised on direct appeal are procedurally barred from being raised in a postconviction action.[18] Merely attempting to relitigate issues decided at trial and affirmed on appeal does not make a viable claim of actual innocence. Because Dubray could have asserted a claim of insufficiency of the evidence on direct appeal, he is procedurally barred from doing so now, even if the claim is labeled as one of "actual innocence."

The only allegation made by Dubray that even approaches an allegation of new facts in support of actual innocence is that he "woke up and [saw] 2 individuals dead, [and] had no clue [] what took place." But a lack of memory does nothing to show that he did not murder the two victims. He just did not remember doing so. On his direct appeal, we found that

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[15] *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[16] *State v. Phelps, supra* note 12, 286 Neb. at 94, 834 N.W.2d at 791-92.

[17] *State v. Phelps, supra* note 12.

[18] *State v. Nesbitt, supra* note 4.

the evidence against him at trial was strong.[19] Instead of making a strong demonstration of actual innocence, Dubray has made none.

2. Dubray's Claims of Error by Trial Judge

[13,14] Dubray raises several claims of error by the trial judge. It is well established that a petition for postconviction relief may not be used to obtain review of issues that were or could have been reviewed on direct appeal.[20] Any attempts to raise issues at the postconviction stage that were or could have been raised on direct appeal are procedurally barred.[21] The district court concluded that these claims were procedurally barred because Dubray could have raised them in his direct appeal. We agree. All of his claims of trial error are procedurally barred.

3. Dubray's Claims of Prosecutorial Misconduct

Dubray's claims of prosecutorial misconduct are also procedurally barred. Dubray alleges numerous instances of prosecutorial misconduct. However, Dubray had the opportunity to raise these issues on his direct appeal and did in fact raise several claims of prosecutorial misconduct.[22] Dubray is procedurally barred from raising additional claims of prosecutorial misconduct at this postconviction stage.

4. Dubray's Claims of Ineffective Assistance of Trial Counsel

[15-18] The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his

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[19] See *State v. Dubray, supra* note 1.

[20] *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

[21] See *id.*

[22] See *State v. Dubray, supra* note 1.

defen[s]e." The right to counsel has been interpreted to include the right to *effective* counsel.[23] Under the standard established by the U.S. Supreme Court in *Strickland v. Washington*, claims of ineffective assistance of counsel by criminal defendants are evaluated using a two-prong analysis: first, whether counsel's performance was deficient and, second, whether the deficient performance was of such a serious nature so as to deprive the defendant of a fair trial.[24] A court may address the two elements of this test, deficient performance and prejudice, in either order.[25]

[19,20] To show that the performance of a prisoner's counsel was deficient, it must be shown that "counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area."[26] To establish the prejudice element of the *Strickland v. Washington* test, a defendant must show that the counsel's deficient performance was of such gravity to "render[] the result of the trial unreliable or the proceeding fundamentally unfair."[27] This prejudice is shown by establishing that *but for* the deficient performance of counsel, there is a "reasonable probability" that the outcome of the case would have been different.[28]

(a) Trial Counsel's Failure to Call Megan as Witness

Dubray's postconviction petition claims that his trial counsel was ineffective:

> Trial counsel was ineffective for failing to present the fact from Megan . . . that she knew and [Chavez, the

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[23] *Strickland v. Washington, supra* note 6.

[24] *Id.* See, also, *State v. Nolan, supra* note 3.

[25] *State v. Nolan, supra* note 3.

[26] *State v. Lopez*, 274 Neb. 756, 760-61, 743 N.W.2d 351, 356 (2008).

[27] *State v. Dragon, supra* note 8, 287 Neb. at 524, 843 N.W.2d at 624. Accord *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013).

[28] *State v. Nolan, supra* note 3, 292 Neb. at 130, 870 N.W.2d at 819.

> victim] showed her a kitchen knife that she kept hidden between the mattresses in the bedroom for protection. Megan was subpoenaed as a witness . . . but never testified regarding these matter[s]. Trial counsel knew about this but, never introduced it []as evidence, this prejudiced Dubray from presenting a defense, and for the attorney failing to present this fact is ineffective assistance of counsel.

The district court concluded that Dubray was not entitled to an evidentiary hearing on this claim. Dubray's petition does not establish how Megan's testimony regarding the knife would have helped his defense. Defense theories at trial were that Dubray acted in self-defense or that the killings resulted from a sudden quarrel without premeditation. We conclude that there is not a reasonable probability that Megan's testimony would have made a difference in the outcome of the case. There was no evidence offered at trial or at postconviction that Chavez actually used a knife when she was killed. The probative value of whether the victim kept a knife under her bed for protection is minimal.

On direct appeal, we found that the "evidence against Dubray was strong" and that "[t]he most damning evidence of Dubray's guilt was his own statements to witnesses who had no reason to lie about them."[29] Dubray made numerous incriminating statements. He indicated his motive: that Chavez was going to leave him. He showed a guilty conscience—expecting to go to prison and trying to kill himself to avoid this. He said, "I can't believe what I have done."

Beyond Dubray's own words, the physical evidence at trial was very strong. The two victims were stabbed numerous times with great force. Dubray suffered numerous superficial wounds. His only life-threatening wound—the stab wound to his chest—was one that he admitted to inflicting upon himself. The severity of the victims' wounds and the superficial nature

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[29] *State v. Dubray, supra* note 1, 289 Neb. at 228-29, 854 N.W.2d at 605.

of most of Dubray's wounds strongly supported that he was the aggressor and that his injuries were self-inflicted.

In light of the record, we conclude that the failure of Dubray's trial counsel to call Megan as a witness did not prejudice him, because such testimony could not have made a difference in the outcome of the trial. Because there was no prejudice here, this claim of ineffective assistance of trial counsel is without merit.

(b) Other Ineffective Assistance of Trial Counsel Claims

Dubray raises various other claims of ineffective assistance of trial counsel. These claims include the failure to properly question prospective jurors in the voir dire, failure to call a DNA expert witness, and failure to pursue an insanity defense, among others.

[21] When, as is the case here, a defendant's trial counsel is different from his or her appellate counsel, all issues of ineffective assistance of trial counsel that are known to the defendant or are apparent from the record must be raised on direct appeal.[30] If the issues are not raised, they are procedurally barred.[31] Because Dubray could have raised all of his various claims of ineffective assistance of trial counsel on direct appeal, they are now procedurally barred.

5. Dubray's Claims of Ineffective Assistance of Appellate Counsel

[22] Dubray also raises various claims of ineffective assistance of appellate counsel. Claims of ineffective assistance of appellate counsel may be raised for the first time on postconviction review.[32]

[23,24] When analyzing a claim of ineffective assistance of appellate counsel, courts will often begin by determining

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[30] *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

[31] *Id.*

[32] *State v. Sellers, supra* note 20.

whether the defendant suffered prejudice by appellate counsel's failure to raise a claim.[33] If the claimed deficiency of appellate counsel's performance is the failure to raise a claim on appeal, the court will look at the strength of the claim that appellate counsel failed to raise.[34] Much like claims of ineffective assistance of trial counsel, the defendant must show that *but for* counsel's failure to raise the claim, there is a "reasonable probability" that the outcome would have been different.[35] The prejudice must be of such severity that it "renders the result of the trial unreliable or the proceeding fundamentally unfair."[36]

[25] When a claim of ineffective assistance of appellate counsel is based on the failure to raise a claim on appeal of ineffective assistance of trial counsel (a "layered" claim of ineffective assistance of counsel), an appellate court will look at whether trial counsel was ineffective under the *Strickland v. Washington* test.[37] If trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.[38]

Dubray raises 18 individual claims of ineffective assistance of appellate counsel, many of which are related or overlapping. We summarize and address these below.

(a) Motion for Rehearing

Dubray's petition claims that his appellate counsel was ineffective by failing to file a motion for rehearing in his direct appeal. As the district court correctly noted, Dubray's counsel did file a motion for rehearing. This claim is contradicted by the record of his direct appeal and is without merit.

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[33] *Id.*

[34] *Id.*

[35] See *id.*

[36] *State v. Edwards, supra* note 15, 284 Neb. at 393, 821 N.W.2d at 693.

[37] *State v. Sellers, supra* note 20, 290 Neb. at 25, 858 N.W.2d at 585.

[38] *Id.*

(b) Actual Innocence

Dubray asserts that his appellate counsel was ineffective for "failing to appeal the actual innocence claim of the first degree murder charges." We have discussed Dubray's claim of actual innocence made in this postconviction action and determined it to be without merit. Appellate counsel was not ineffective for not raising the issue on direct appeal.

(c) Sufficiency of Evidence

[26] Dubray claims that his appellate counsel was ineffective for failing to raise a claim of insufficiency of evidence on direct appeal. In reviewing a claim of insufficiency of the evidence, an appellate court simply asks 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.[39]

While Dubray's counsel did not challenge his convictions on the basis of insufficiency of evidence, this court necessarily considered the sufficiency of the evidence when evaluating his many claims on direct appeal. As we said in our opinion, "the State correctly argues that evidence against Dubray was strong and that the credibility of witnesses was not at issue. The most damning evidence of Dubray's guilt was his own statements to witnesses who had no reason to lie about them."[40] As opposed to being so insufficient that no rational trier of fact could have found him guilty, the evidence in this case was strong. Dubray's appellate counsel was not ineffective for failing to raise a meritless challenge to the sufficiency of the evidence.

(d) Competency

[27] Dubray also asserts that his appellate counsel was ineffective for failing to raise the issues of whether the trial court erred in not conducting a competency hearing and

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[39] See *State v. Samayoa*, 292 Neb. 334, 873 N.W.2d 449 (2015).

[40] *State v. Dubray, supra* note 1, 289 Neb. at 228-29, 854 N.W.2d at 605.

whether trial counsel was ineffective for not requesting one. 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.[41]

[28] In order to demonstrate prejudice from counsel's failure to investigate competency and for failure to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was actually incompetent and that the trial court would have found the defendant incompetent had a competency hearing been conducted.[42] Dubray's petition merely asserts that he was not provided with a competency hearing and that he was "tried while incompetent." His statement that he was tried while incompetent is a conclusory assertion of law. He alleges no facts that would show that he was, in fact, incompetent to stand trial. The district court was correct in concluding that these allegations were insufficient and that Dubray was not entitled to an evidentiary hearing on them.

(e) Motions for Mistrial, Directed Verdict, and New Trial

[29] Dubray raises a layered claim of ineffective assistance of counsel based on the failure of his trial counsel to file motions for a mistrial, for a directed verdict, and for a new trial. The petition does not set forth any basis upon which these motions would be granted other than the conclusory statement that "the judge erroneously instructed [the] jury." Mere conclusions of fact or law are not sufficient to entitle a petitioner to an evidentiary hearing in a postconviction action.[43] Dubray has not made sufficient allegations to show

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[41] *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016).

[42] *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

[43] See *State v. Abdulkadir, supra* note 13.

that he was prejudiced by the failure to raise these motions because he has not alleged any basis upon which the motions could be granted.

(f) Suppression of Evidence

Dubray presents another layered ineffective assistance claim based on his trial counsel's failure to move to suppress the three knives introduced at trial and failure to preserve the issue for direct appeal. As the district court correctly noted, Dubray's motion failed to "allege[] any basis in law or fact which would support suppression of the evidence." Because Dubray has not alleged any basis for the suppression of this evidence, he has not made a viable claim of ineffective assistance of counsel for not raising the issue.

(g) Juror Bias

Dubray brings another layered claim on the allegation that his trial counsel failed to strike "pro-prosecution jurors" and that his appellate counsel failed to raise the issue that his "conviction was unconstitutional because biased jurors deprived [him] of the right to a fair and impartial trial." Beyond his conclusory allegations about biased jurors, Dubray makes only one factual allegation, which is that one juror "was in fact a federal security officer." Employment as a security officer alone does not raise even an inference of bias. The district court correctly rejected this claim.

(h) Meaningful Adversarial Testing

[30] Dubray presents a layered claim of ineffective counsel based on the claim that his trial counsel did not put the prosecution's case to "meaningful adversarial testing." In cases where counsel completely fails to submit the State's case to meaningful adversarial testing, prejudice to the defendant will be presumed.[44] But when the record shows that the State's witnesses were thoroughly cross-examined consistent with the

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[44] *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003).

defense theory, there was meaningful adversarial testing of the prosecution's case.[45]

Dubray specifically claims that his trial counsel failed to cross-examine many of the State's witnesses and failed to object to any evidence. But his allegations are directly refuted by the record of his trial. Dubray's trial counsel conducted cross-examinations of most of the prosecution's witnesses in a thorough manner and consistent with the defenses of self-defense or sudden quarrel. His counsel further objected to several pieces of evidence, including through a pretrial motion in limine. The prosecution's case was put to meaningful adversarial testing. Because there was meaningful adversarial testing, the district court was correct to reject this claim.

(i) Failure to Call Expert or Character Witnesses

Dubray asserts another layered claim based on his trial counsel's failure to call any expert witnesses or character witnesses. However, he fails to make any allegations as to what any of these witnesses would have testified.

[31] In assessing postconviction claims of ineffective assistance of counsel for failure to call a particular witness, we have upheld the dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called.[46] Dubray has given us no indication as to what testimony such witnesses would have given or what exculpatory evidence may have been uncovered by the retention of experts. Dubray's allegations are insufficient to show a reasonable probability that the outcome would have been different but for the failure to call expert or character witnesses.

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[45] *State v. Quezada*, 20 Neb. App. 836, 834 N.W.2d 258 (2013).

[46] *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013); *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

(j) Insanity Defense

Dubray asserts a layered claim based on trial counsel's failure to investigate and assert an insanity defense. The district court rejected these claims, stating that "[t]here is no allegation that would suggest [Dubray] had any basis for an insanity defense."

[32] Nebraska follows the *M'Naghten* rule as to the defense of insanity.[47] The two requirements for the insanity defense are that (1) the defendant had a mental disease or defect at the time of the crime and (2) the defendant did not know or understand the nature and consequences of his or her actions or that he or she did not know the difference between right and wrong.[48]

[33] As we have said, "bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient and justify the summary dismissal of a post conviction proceeding."[49] On their own, Dubray's assertions are conclusory and fail to allege any facts that would tend to show insanity. Moreover, the record shows that these claims of insanity are without merit. As this court said when discussing the issue of intoxication in Dubray's direct appeal:

> [T]he evidence shows that Dubray was not wholly deprived of reason immediately before or after the murders. As explained, Dubray, Chavez, and Loutzenhiser walked back to Dubray's house around 6 a.m. No witness testified that Dubray was behaving unreasonably at his aunt's house at this time. By 6:49 a.m., Dubray had killed Chavez and Loutzenhiser and called Reza to take care of his child. By the time Reza arrived a few minutes later, Dubray had also attempted suicide for the first time. But his concern for his daughter and his conduct

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[47] *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

[48] *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011).

[49] *State v. Flye*, 201 Neb. 115, 119, 266 N.W.2d 237, 240 (1978).

> after the murders showed he was contemplating how to respond to his imminent arrest. He specifically told Marco and Reza that he intended to kill himself to avoid prison, and he insisted that they not call Little Hoop so that he could carry out this plan. He was clearly reasoning and anticipating the consequences of the acts he had just committed.[50]

The record belies Dubray's conclusory claims of insanity. Because these claims are without merit, Dubray did not suffer prejudice by his trial counsel's failure to raise the issue.

(k) Other Claims

[34] Dubray asserts several other miscellaneous claims of ineffective assistance of appellate counsel that are too vague to understand what error is being alleged. For example, he alleges that his appellate counsel was ineffective for "failing to raise a dead-bang winner." In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her constitutional rights, causing the judgment against the defendant to be void or voidable.[51] The vague claims in Dubray's petition do not sufficiently allege any facts that, if true, would constitute ineffective assistance of counsel or any other constitutional violation.[52]

VI. CONCLUSION

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

Affirmed.

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[50] *State v. Dubray, supra* note 1, 289 Neb. at 240, 854 N.W.2d at 612.

[51] § 29-3001(1); *State v. Phelps, supra* note 12.

[52] See *State v. Phelps, supra* note 12.

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

State of Nebraska, appellee, v. Cyrus H. Kantaras, appellant.

885 N.W.2d 558

Filed October 7, 2016. No. S-15-1157.

1. **Sentences: Probation and Parole: Appeal and Error.** Whether a condition of probation imposed by the sentencing court is authorized by statute presents a question of law.
2. **Appeal and Error.** Plain error may be found on appeal when an error, plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
3. **Criminal Law: Legislature: Courts: Sentences.** The power to define criminal conduct and fix its punishment is vested in the legislative branch, whereas the imposition of a sentence within these legislative limits is a judicial function.
4. **Sentences.** A sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.
5. **Sentences: Probation and Parole.** When a court sentences a defendant to probation, it may only impose conditions of probation that are authorized by statute.
6. **Probation and Parole.** The power of a court to impose conditions of probation must be strictly construed from the applicable statutes.
7. **Sentences: Probation and Parole.** A sentencing court has no power to impose a period of imprisonment as a condition of probation in the absence of a statutory provision specifically setting forth such power.
8. **Sentences: Appeal and Error.** The Nebraska Supreme Court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.
9. **Criminal Law: Statutes: Legislature: Time.** If the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that

provided by the amendatory act unless the Legislature specifically provided otherwise.

10. **Constitutional Law: Criminal Law: Legislature: Notice.** The Ex Post Facto Clause of U.S. Const. art. I, § 9, does not concern an individual's right to less punishment, but, rather, the lack of fair notice and governmental restraint when the Legislature increases punishment beyond what was prescribed when the crime was consummated.
11. **Sentences: Time: Appeal and Error.** If a court attempts on remand to increase a sentence from that originally imposed, it should affirmatively provide objective information concerning identifiable conduct on the part of the defendant, occurring after the time of the original sentencing proceeding, upon which any increased sentence is based.

Appeal from the District Court for Buffalo County: William T. Wright, Judge. Sentence vacated, and cause remanded for resentencing.

Aaron M. Bishop, Deputy Buffalo County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

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

Wright, J.

I. NATURE OF CASE

On September 23, 2015, Cyrus H. Kantaras was convicted of distribution of a controlled substance, marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 2014), a Class III felony. The conviction was based on acts that took place on December 23, 2014. On November 12, 2015, Kantaras was sentenced to probation. Kantaras appeals the terms of his probation as excessive. An issue, raised by the State, is whether the district court exceeded its statutory authority by sentencing Kantaras to 180 days' "incremental" jail time as part of his sentence of probation, contingent upon any possible future violations of the terms of probation.

II. BACKGROUND

1. Charge

Kantaras was originally charged with distribution of a controlled substance in a school zone, in violation of § 28-416(4)(a)(ii), a Class II felony. On September 22, 2015, the charge was amended to one count of distribution of a controlled substance, marijuana, in violation of § 28-416(1)(a), a Class III felony.

2. Plea Agreement

On September 22, 2015, Kantaras pled no contest pursuant to a plea agreement in which the State agreed that it would not object to a sentence of probation if Kantaras requested probation. If Kantaras did not request probation, the State would recommend a sentence of 2 to 5 years' imprisonment. The State agreed it would not pursue any potential other charges discovered as a result of the investigation into the matter. Kantaras' plea was accepted, and he was adjudged guilty in an order filed on September 23.

3. Presentence Investigation Report

The presentence investigation report indicated that Kantaras was previously convicted as a juvenile of minor in possession, attempted theft by receiving stolen property, four counts of theft by unlawful taking, and being an uncontrollable juvenile. For the uncontrollable juvenile conviction, Kantaras was sentenced to probation. He was released from probation unsatisfactorily. Kantaras was sentenced to the care and custody of the Office of Juvenile Services for the other convictions, which occurred subsequently to the uncontrollable juvenile conviction.

4. Sentence

(a) Sentencing Hearing

The court pronounced its sentence at the sentencing hearing. It expressed concern that Kantaras had a history of criminal

conduct and that his record did not indicate Kantaras would be very successful on probation. The court explained that it was imposing probation, but with "fairly significant terms and conditions."

At the hearing, the court outlined the terms and conditions of Kantaras' probation, including not associating with persons having a known criminal record or in possession of nonprescribed controlled substances, participating in six counseling programs and six described classes, refraining from consuming liquor or any nonprescribed controlled substance, refraining from frequenting establishments that sell or distribute alcohol except grocery stores or convenience stores, and serving 180 days in the Buffalo County Detention Center, with 2 days' credit, "incremental only."

The court explained that the 180-day "incremental sentencing" was something hanging over Kantaras' head for the entire period of his probation. The court said:

> By incremental sentencing, I mean this, you got 180 days hanging over your head for the entire period of your probation. You screw up, you are going to get sanctioned. You are going to serve some portion of that 180 days. It might be a weekend, it might be a week, it might be a month, it might be the entire 180 days, depending on how badly you screw up.
>
> But what I will tell you is this, if you screw up badly enough, that is, you commit another significant crime, most likely probation isn't going to seek sanctions, they are going it [sic] seek revocation. And if I revoke your probation, we start over from square one as though this hearing never happened, and most likely, you go to prison.

Thus, the court explained that if Kantaras violated his probation "badly enough," it was most likely that the Office of Probation Administration would seek revocation of Kantaras' probation rather than sanctions.

(b) Sentencing Order

The court issued its sentencing order, which imposed 4 years of probation.

(c) Commitment Order

The commitment order stated in relevant part:

> [Kantaras] was sentenced by the Honorable William T. Wright as follows: Serve 180 days in the Buffalo County Detention Center with credit for 2 days. All service to be incremental only on the recommendation of probation and the order of the Court. [Kantaras] will serve an immediate 72-hour sanction for any positive test, curfew violation, or failure/refusal to test.

5. Jail Time as Condition of Probation Under § 29-2262(2)(b)

The confines of probation are set forth in the Nebraska Probation Administration Act (the Act),[1] which has twice been recently amended. It was amended on August 30, 2015, after Kantaras' crimes but before sentencing, by 2015 Neb. Laws, L.B. 605. It was again amended during the pendency of this appeal, on April 19, 2016, by 2016 Neb. Laws, L.B. 1094.

(a) General Conditions of Probation

Section 29-2262(1) of the Act, which has remained unchanged by the recent legislative bills, states in part that "[w]hen a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life." Section 29-2262(2) then presents a list of 20 things that "[t]he court may, as a condition of a sentence of probation, require [of] the offender." Those conditions include things such as undergoing psychiatric treatment,[2] undergoing vocational

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[1] See Neb. Rev. Stat. §§ 29-2246 to 29-2269 (Reissue 2008, Cum. Supp. 2014 & Supp. 2015) and 2016 Neb. Laws, L.B. 1094, §§ 20 to 22.

[2] § 29-2262(2)(e).

training,[3] refraining from frequenting unlawful or disreputable places or consorting with disreputable persons,[4] and possessing no firearms.[5]

(b) Jail Time as Part of Sentence of Probation

Section 29-2262(2)(b) also sets forth, as a condition of probation, the possibility of requiring the offender to "be confined periodically in the county jail or to return to custody after specified hours." No other section in the Act, either before or after L.B. 605 and L.B. 1094, specifically addresses the power of the court to order jail time as part of a sentence of probation. Section 29-2262(2)(b) was changed by both L.B. 605 and L.B. 1094.

(i) Jail Time as Condition of Probation Before L.B. 605

At the time Kantaras committed the crime of distribution of a controlled substance, before L.B. 605 or L.B. 1094, § 29-2262(2)(b) (Cum. Supp. 2014) allowed the court, as a condition of a sentence of probation, to require the offender to be confined periodically in the county jail or to return to custody after specified hours, but not to exceed, (1) for misdemeanors, the lesser of 90 days or the maximum jail term provided by law for the offense, and (2) for felonies, 180 days.

(ii) Jail Time as Condition of Probation Under L.B. 605

When the Act was amended by L.B. 605 on August 30, 2015, the only change to § 29-2262 was in subsection (2)(b). Under L.B. 605, § 29-2262(2)(b) stated that as a condition of a sentence of probation, the court may require the offender,

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[3] § 29-2262(2)(f).

[4] § 29-2262(2)(h).

[5] § 29-2262(2)(i).

for misdemeanors, to be confined periodically in the county jail or to return to custody after specified hours, but not to exceed the lesser of 90 days or the maximum jail term provided by law for the offense. The statute no longer provided for jail time as a possible condition of a sentence of probation for persons convicted of felonies.

Neb. Rev. Stat. § 83-1,135.02(2) (Supp. 2015) stated that the changes made to § 29-2262 by L.B. 605 shall "apply to all committed offenders under sentence, on parole, or on probation on August 30, 2015, and to all persons sentenced on and after such date."

(iii) Jail Time as Condition of Probation After L.B. 1094

As amended by L.B. 1094, § 29-2262(2) now states that the court may, as a condition of a sentence of probation, require "*the offender* . . . (b) [t]o be confined periodically in the county jail or to return to custody after specified hours but not to exceed the lesser of ninety days or the maximum jail term provided by law for the offense." (Emphasis supplied.) Thus, the 90-day maximum jail time applies equally to persons convicted of felonies and those convicted of misdemeanors.

L.B. 1094 also added new subsections (3) and (4) to § 29-2262, which now provide:

> (3) When jail time is imposed as a condition of probation under subdivision (2)(b) of this section, the court shall advise the offender on the record the time the offender will serve in jail assuming no good time for which the offender will be eligible under section 47-502 is lost and assuming none of the jail time imposed as a condition of probation is waived by the court.
>
> (4) Jail time may only be imposed as a condition of probation under subdivision (2)(b) of this section if:
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> (a) The court would otherwise sentence the defendant to a term of imprisonment instead of probation; and
>
> (b) The court makes a finding on the record that, while probation is appropriate, periodic confinement in

> the county jail as a condition of probation is necessary because a sentence of probation without a period of confinement would depreciate the seriousness of the offender's crime or promote disrespect for law.

As for the retroactivity of L.B. 1094, a new subsection (3) was added to § 83-1,135.02. Section 83-1,135.02(3) states that it was the Legislature's intent that the changes made to § 29-2262 "apply to all committed offenders under sentence, on parole, or on probation on or after April 20, 2016, and to all persons sentenced on and after such date."

III. ASSIGNMENT OF ERROR

Kantaras assigns that the district court abused its discretion by imposing an excessive sentence.

In its brief, the State points out that the portion of the commitment order imposing an incremental jail sentence may be in violation of § 29-2262 (Supp. 2015), as amended by L.B. 605. The State's brief was filed before the passage of L.B. 1094.

IV. STANDARD OF REVIEW

[1] Whether a condition of probation imposed by the sentencing court is authorized by statute presents a question of law.[6]

V. ANALYSIS

[2] We agree with the State that the district court committed plain error by imposing 180 days' "incremental" jail time. An appellate court always reserves the right to note plain error that was not complained of at trial or on appeal.[7] Plain error may be found on appeal when an error, plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[8] A sentence

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[6] *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000).

[7] *State v. Samayoa*, 292 Neb. 334, 873 N.W.2d 449 (2015).

[8] See *id.*

that is contrary to the court's statutory authority is an appropriate matter for plain error review.[9]

[3-6] We begin with the principle that the power to define criminal conduct and fix its punishment is vested in the legislative branch, whereas the imposition of a sentence within these legislative limits is a judicial function.[10] Accordingly, a sentence is illegal when it is not authorized by the judgment of conviction or when it is greater or less than the permissible statutory penalty for the crime.[11] Likewise, when a court sentences a defendant to probation, it may only impose conditions of probation that are authorized by statute.[12] The power of a court to impose conditions of probation must be strictly construed from the applicable statutes.[13]

Section 29-2262(1) states generally, in part, that "[w]hen a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life," and § 29-2262(2)(r) states that the court may require the probationer "[t]o satisfy any other conditions reasonably related to the rehabilitation of the offender." Nevertheless, these general provisions do not confer the power to impose jail time as part of sentences of probation; nor do they confer the power to impose the kind of "incremental" sentence the district court described.

[7] We held in *State v. Nuss*[14] that despite these general provisions, the sentencing court has no power to impose a period

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[9] See, e.g., *State v. Bartholomew*, 258 Neb. 174, 602 N.W.2d 510 (1999); *State v. Bensing*, 249 Neb. 900, 547 N.W.2d 464 (1996); *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981).

[10] *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985).

[11] *State v. Alba*, 13 Neb. App. 519, 697 N.W.2d 295 (2005).

[12] See *State v. Escamilla*, 237 Neb. 647, 467 N.W.2d 59 (1991).

[13] See, *In re Interest of Dustin S.*, 276 Neb. 635, 756 N.W.2d 277 (2008); *State v. Sundling*, 248 Neb. 732, 538 N.W.2d 749 (1995).

[14] See *State v. Nuss*, 190 Neb. 755, 212 N.W.2d 565 (1973). See, also, e.g., *In re Interest of Dustin S., supra* note 13.

of imprisonment as a condition of probation in the absence of a statutory provision specifically setting forth such power. At the time *Nuss* was decided, the Legislature had not yet passed the first version of § 29-2262(2)(b) that specifically allowed jail time as a condition of probation. We held that unless there is specific statutory authority to the contrary, a trial court may not on the one hand grant probation and on the other hand impose institutional confinement or a jail sentence as a condition of that probation.[15]

At the time Kantaras was sentenced, under the amendments passed by L.B. 605, there was no statutory authority to impose jail time as a condition of probation for felony offenders. Although before L.B. 605, the Act allowed for up to 180 days' jail time for felony offenders, the retroactivity provision of § 83-1,135.02(2) provided that L.B. 605 was controlling at the time of sentencing. Section 29-2262(2)(b) under L.B. 605 set forth the possibility of jail time as part of the sentence of probation only for misdemeanor offenders.

It is true that L.B. 605 introduced for felony offenders "custodial sanctions" as another tool in the Office of Probation Administration's "matrix" of rewards for compliance and of graduated sanctions for substance abuse and technical violations by those persons sentenced to probation.[16] Before L.B. 605, there was no reference in the Act to jail time as a sanction for a probation violation, as opposed to jail time as part of the original sentences of probation. The Office of Probation Administration was limited in its response to probation violations to seeking revocation of probation. The amendments to the Act indicate the Legislature's intent to allow for intermediate measures to be taken by the Office of Probation Administration before revocation is resorted to.[17] The recent

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[15] *State v. Nuss, supra* note 14.

[16] See §§ 29-2252(18) and 29-2266(7) and (8).

[17] See L.B. 1094, § 22.

amendments provide for detailed procedures by which these custodial sanctions may be imposed.[18] But a "custodial sanction" under these provisions is distinct from jail time under § 29-2262(2)(b).

It is possible that the sentencing court, in imposing 180 days' "incremental" jail time, was attempting to make some form of advisement as to the possible custodial sanctions under L.B. 605, rather than conditionally imposing such sanctions as part of Kantaras' sentence. But the fact of the matter is that 180 days' "incremental" jail time was pronounced as part of Kantaras' sentence and 180 days' jail time was memorialized in the commitment order.

Even if we were to assume that the Legislature intended the custodial sanctions introduced by L.B. 605 to be retroactive and, further, that such retroactive application of custodial sanctions would not violate ex post facto principles, L.B. 605 did not contemplate that custodial sanctions would entail a prior order as a part of the original sentence of and commitment to probation. The custodial sanctions introduced into the Act by L.B. 605 are set forth in separate statutes concerning the powers of the Office of Probation Administration to reward and sanction its probationers.

There is no reference in the Act, either before or after recent amendments, to "incremental" jail time as described by the sentencing court. The jail time described by § 29-2262(2)(b) has always been for a determinate period, up to the number of days authorized by the statute, imposed because of the severity of the crime or the defendant's criminal history. Jail time under § 29-2262(2)(b) may be ordered to be served "periodically" (sometimes referred to as "intermittently"[19]), but it is a predetermined, periodic service of a definite term of jail time.

[8] In sum, at the time of sentencing, there was no statutory authority to impose jail time, conditional or otherwise, as part

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[18] See *id.*, §§ 21 and 22.

[19] See *State v. Salyers*, 239 Neb. 1002, 1006, 480 N.W.2d 173, 176 (1992).

of a sentence of probation for felony offenders. Therefore, the portion of Kantaras' sentence imposing jail time as part of his sentence of probation was in excess of the sentencing court's powers and was invalid.[20] We must vacate that portion of the sentence imposing jail time and remand the cause for resentencing.[21] This court has the power on direct appeal to remand a cause for the imposition of a lawful sentence where an erroneous one has been pronounced.[22]

[9] We note that the version of § 29-2262 that controls the court's powers to resentence on remand is that provision as amended by L.B. 1094. The Legislature provided under § 83-1,135.02(3) that the changes made to § 29-2262 by L.B. 1094 were to retroactively "apply to all committed offenders under sentence, on parole, or on probation on or after April 20, 2016, and to all persons sentenced on and after such date." Moreover, § 29-2262 would be applicable to resentencing under the doctrine elucidated in *State v. Randolph*,[23] which requires that if the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.

At the time Kantaras committed the crime in question, § 29-2262(2)(b) permitted up to 180 days' jail time for

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[20] See, e.g., *State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010); *State v. Lee*, 237 Neb. 724, 467 N.W.2d 661 (1991); *State v. Rolling*, 218 Neb. 51, 352 N.W.2d 175 (1984); *State v. McDermott*, 200 Neb. 337, 263 N.W.2d 482 (1978); *State v. Gaston*, 193 Neb. 259, 226 N.W.2d 355 (1975); *State v. Alba, supra* note 11.

[21] See *id*.

[22] See, *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005); *State v. Mentzer*, 233 Neb. 843, 448 N.W.2d 409 (1989); *McCormick v. State*, 71 Neb. 505, 99 N.W. 237 (1904).

[23] *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971). Accord, *State v. Duncan*, 291 Neb. 1003, 870 N.W.2d 422 (2015); *State v. Bartholomew, supra* note 9.

felony offenders. As amended by L.B. 1094, § 29-2262(2)(b) permits only up to 90 days' jail time for either felony or misdemeanor offenders. As pertains to jail time as a condition of probation for felony offenders, L.B. 1094 mitigated the punishment that was possible under the Act as it existed at the time Kantaras committed the crime. All other provisions of § 29-2262 remained the same. And if a defendant appeals his or her sentence, the sentence is not a final judgment until the entry of a final mandate.[24]

Granted, § 29-2262(2)(b) as it existed at the time of Kantaras' sentencing, provided for no jail time as a condition of probation for felony offenders. Furthermore, the court attempted to impose a conditional custodial sanction, less onerous than the determinative period of jail time of up to 90 days now authorized by L.B. 1094. But no rights attached to the district court's invalid and nonfinal sentence such as would prevent resentencing under L.B. 1094.[25]

[10] The Ex Post Facto Clause of U.S. Const. art. I, § 9, does not bar application of L.B. 1094, because the Ex Post Facto Clause bars only application of a law that "'changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'"[26] The Ex Post Facto Clause does not concern an individual's right to less punishment, but, rather, the lack of fair notice and governmental restraint when the Legislature increases punishment beyond what was prescribed when the crime was consummated.[27] At the time Kantaras committed the crime, § 29-2262 allowed up to 180 days' determinate, but periodic, confinement in the county jail as part of and as a condition of the felony offender's

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[24] *State v. Duncan, supra* note 23.

[25] See *Breest v. Helgemoe*, 579 F.2d 95 (1st Cir. 1978).

[26] *Johnson v. United States*, 529 U.S. 694, 699, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000).

[27] See *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

sentence of probation. Now, § 29-2262(2)(b) allows up to only 90 days of such confinement. This is not an increase in punishment from the punishment available at the time Kantaras committed the crime.

[11] On remand, the only constitutional restraint is that the court not act vindictively in resentencing.[28] If the court attempts on remand to increase the sentence from that originally imposed, it should affirmatively provide objective information concerning identifiable conduct on Kantaras' part, occurring after the time of the original sentencing proceeding, upon which any increased sentence is based.[29]

Because we remand the cause for resentencing, we do not address Kantaras' excessive sentence argument.

VI. CONCLUSION

Insofar as the court issued a conditional term of 180 days' jail time as part of its sentence of Kantaras to probation, that portion of the sentence is vacated. We remand the cause for resentencing in conformity with this opinion.

Sentence vacated, and cause remanded for resentencing.

Stacy, J., concurs.

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[28] See, *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled in part, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *Bledsoe v. U.S.*, 384 F.3d 1232 (10th Cir. 2004); *Breest v. Helgemoe, supra* note 25; *Com. v. Greer*, 382 Pa. Super. 127, 554 A.2d 980 (1989).

[29] See *id*.

Nebraska Supreme Court
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State of Nebraska, appellee, v. Cody Olbricht, also known as Cody Olbrich, appellant.

885 N.W.2d 699

Filed October 14, 2016. No. S-15-404.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **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 credibility of witnesses, 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.
3. **Criminal Law: Minors: Proof.** The provisions of Neb. Rev. Stat. § 28-707 (Cum. Supp. 2014) do not require the State to prove a minor child was in the exclusive care or custody of the defendant when the child abuse occurred.
4. **Criminal Law: Minors: Intent.** There is no requirement under Nebraska law that the defendant be physically present when the child abuse occurs, or that the defendant be the only person present, so long as he or she knowingly, intentionally, or negligently permits the child abuse.
5. **Criminal Law: Minors: Circumstantial Evidence: Proof.** Evidence showing a child was in the defendant's sole care during the timeframe when the child suffered injuries is circumstantial evidence from which it can reasonably be inferred that the defendant caused such injuries,

but proof of sole or exclusive care is not a necessary prerequisite to proving child abuse.

6. **Circumstantial Evidence: Proof.** A fact proved by circumstantial evidence is nonetheless a proven fact.
7. **Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct evidence.
8. **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.
9. **Motions to Dismiss: Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.
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. **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.
12. **Sentences.** When a sentence orally pronounced at the sentencing hearing differs from a later written sentence, the former prevails.
13. ____. Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court.
14. **Sentences: Appeal and Error.** 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.
15. **Judgments: Words and Phrases.** 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.
16. **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.

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 Scotts Bluff County, Randall L. Lippstreu, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Leonard G. Tabor for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

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

Stacy, J.

NATURE OF CASE

After a bench trial in the district court for Scotts Bluff County, Cody Olbricht, also known as Cody Olbrich, was convicted of knowing and intentional child abuse resulting in serious bodily injury. The Nebraska Court of Appeals reversed the conviction and vacated the sentence, holding the evidence was insufficient to support the conviction.[1] We granted the State's petition for further review. Because we conclude the evidence was sufficient to sustain the conviction, we reverse the Court of Appeals' decision and remand the matter with directions to affirm Olbricht's conviction and sentence, as modified.

FACTS

On September 28, 2014, 3-year-old A.M. was admitted to an emergency room in Scottsbluff, Nebraska, with bruising on her face, torso, arms, and legs. A.M. was not interactive, appeared sleepy, and had bleeding in the white part of her left

[1] *State v. Olbricht*, 23 Neb. App. 607, 875 N.W.2d 868 (2016).

eye. Due to A.M.'s symptoms, doctors suspected she was suffering from a subdural hemorrhage (brain bleed). A CAT scan revealed a brain bleed and infarct in A.M.'s brain. Further examination revealed A.M. had a laceration on the left lobe of her liver. She was transferred by helicopter to a hospital in Denver, Colorado, for further treatment.

The emergency room doctor in Scottsbluff suspected A.M. had been abused and notified the authorities. Olbricht, the live-in boyfriend of A.M.'s mother, was subsequently charged with knowing and intentional child abuse resulting in serious bodily injury.[2] The operative information alleged the crime occurred "[o]n or about March, 2014 through September, 2014." Olbricht waived a jury trial, and the matter was tried to the court.

Evidence at Trial

Cassandra Miller, A.M.'s mother, testified for the State. In addition to testifying about the events leading up to A.M.'s hospitalization, Miller testified about prior injuries A.M. had received while in Olbricht's care. According to Miller, in March 2014, A.M. sustained a cut to her bottom lip while in Olbricht's care. And in separate instances in September, A.M. incurred burns to her lips and face, various bruises on her cheek and hips, and retinal bleeding while in Olbricht's care. There were no rule 404[3] objections to this testimony.

On the evening of September 27, 2014, the day before A.M. was admitted to the hospital, Miller and Olbricht took A.M. to a fast-food restaurant and then to a babysitter. A.M. vomited after leaving the restaurant. Miller changed A.M.'s clothes, and then she and Olbricht left A.M. with the babysitter for the night.

The babysitter noticed A.M. had bruises on her face, neck, and back. According to the babysitter, A.M. was lethargic and

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[2] Neb. Rev. Stat. § 28-707(1) and (7) (Cum. Supp. 2014).

[3] Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014).

vomited several more times that night. The babysitter took a photograph of A.M.'s bruises and sent it to A.M.'s grandmother, Lynelle Pahl. Pahl was at work when she received the photograph via text message and said she would take A.M. to the hospital first thing in the morning if A.M. was not better. The babysitter also testified, over objection, that when she informed A.M. that her grandmother was going to pick her up, A.M. became very upset and seemed scared to go home:

> She seemed terrified and she didn't want to go home. She kept expressing to me she didn't want to go home.
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> . . . .
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> . . . And then when I asked her if somebody was hurting her at home and she explained to me that, yes, and I said who and she said, "daddy." And I said, "where does daddy hurt you?" She pointed to her shin and she pointed to her foot. And I had rubbed her head and I felt lumps all along her head and I said, "did he hit your head, too," and she said yes.

The evidence showed A.M. referred to Olbricht as "daddy."

A.M.'s regular daycare provider testified that between March and September 2014, A.M. regularly came to daycare with bruises on her face, arms, back, and legs. When Olbricht came to pick up A.M. from daycare, A.M. would become upset and cry, because she did not want to go home with him. In April, after noticing A.M.'s face was "really swollen," seeing bruises down her back, and seeing a distinctive mark across her left buttocks, A.M.'s daycare provider called the Department of Health and Human Services to report her concerns. The provider testified that after A.M. was released from the hospital into Pahl's care, she has had no injuries or bruises.

Two doctors testified for the State. Dr. Jeffrey Salisbury, A.M.'s emergency room doctor, testified that the subdural hemorrhage and infarct in A.M.'s brain and the laceration to A.M.'s liver were injuries that presented a substantial risk of death. According to Dr. Salisbury, there was no way to tell

exactly how old A.M.'s brain injury was, but it was his opinion that the brain injury was "acute," meaning it could have been anywhere from 5 minutes to 2 weeks old.

Dr. Andrew Sirotnak, a forensic pediatrician and a member of the medical team that treated A.M. at the hospital in Denver, testified that in his opinion, A.M.'s brain injury occurred "a day or two" or a "few days" prior to her hospitalization. Dr. Sirotnak testified that A.M.'s brain injury was "clearly something that was inflicted" and that the injury was likely the result of being "thrown from something or thrown by something." Dr. Sirotnak could not tell when the liver injury occurred. Dr. Sirotnak diagnosed A.M. as a "battered child," meaning "a child that's been injured in a multi system manner over time." According to Dr. Sirotnak, A.M.'s injuries were likely nonaccidental because some occurred over soft tissue and others displayed a bruising pattern that indicated they were inflicted with an object. It was Dr. Sirotnak's opinion that A.M. had been hit with a wire hanger because the bruises on her legs and hip were triangular in shape. With respect to what caused the liver laceration, Dr. Sirotnak testified it was likely caused by blunt trauma akin to the amount of force seen in a car accident. Dr. Sirotnak opined that based on A.M.'s medical history, there was no accidental explanation for her liver injury.

At the close of the State's case, Olbricht moved for a directed verdict. The court overruled the motion, and Olbricht proceeded to call numerous family members and acquaintances who testified that A.M. was always healthy, happy, and clean and that Olbricht had never abused her. Olbricht also called Miller to testify for the defense. Miller testified that, in addition to the times A.M. was injured while in Olbricht's care, A.M. also had been injured while in Miller's care. Miller testified that in August or September 2014, she and Olbricht were home when A.M. fell down the stairs. Miller also testified that on September 16, she was with A.M. at the park when A.M. was hit in the head by a swing.

Olbricht testified in his own defense. He did not dispute that A.M. had a history of prior injuries while in his care as described by other witnesses. Instead, Olbricht denied that he caused A.M.'s injuries and offered a variety of explanations for how the injuries occurred, all of which either suggested A.M. was responsible for her own injuries or another child had inflicted the injuries.

The district court found the brain bleed and the liver laceration created a substantial risk of death and were serious bodily injuries. The court recounted the evidence and concluded that the injuries were nonaccidental and that "[t]he majority, if not all, of [A.M.'s] documented injuries occurred when she was in the sole physical care of . . . Olbricht." Based on this evidence, the court found Olbricht guilty of knowing and intentional child abuse resulting in serious bodily injury.

After the court imposed sentence, Olbricht timely appealed, assigning that the trial court erred in (1) finding him guilty, (2) denying his motion for directed verdict, (3) overruling his evidentiary objections, (4) overruling his motion for new trial, and (5) imposing an excessive sentence.

Court of Appeals

The Court of Appeals held the evidence was insufficient to support Olbricht's conviction, "because the evidence presented never showed, directly or circumstantially, that A.M.'s serious bodily injuries occurred during a discrete timeframe when Olbricht was the only adult in her presence."[4] That court laid out its reasoning as follows:

> According to the evidence at trial, the timeframe in which A.M.'s serious bodily injuries were inflicted was broad. Specifically, Dr. Salisbury testified that A.M.'s brain injury was "acute," meaning it could have occurred anywhere from 5 minutes to 2 weeks before she came to the emergency room. Dr. Sirotnak testified that A.M.'s

[4] *State v. Olbricht, supra* note 1, 23 Neb. App. at 615, 875 N.W.2d at 874.

> brain injury occurred within "a day or two" of her hospitalization. Neither doctor provided a specific timeframe in which the liver injury occurred.
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> A.M. was not in Olbricht's sole care for the week or the "day or two" before she was hospitalized. For example, Miller was with both Olbricht and A.M. during the afternoon and evening of September 27, 2014, the day before A.M. was hospitalized. Additionally, A.M. was alone with Pahl for approximately an hour 6 days before her hospitalization. Furthermore, the night before her hospitalization, A.M. was in the care of the babysitter and neither Olbricht nor Miller was present. Therefore, pursuant to Dr. Sirotnak's opinion that the injury occurred within "a day or two" of A.M.'s hospitalization, Olbricht, Miller, and the babysitter cared for A.M. during the relevant timeframe. Pursuant to Dr. Salisbury's opinion that A.M.'s brain injury was between 5 minutes and 2 weeks old, Olbricht, Miller, the babysitter, and Pahl all cared for A.M. during the relevant timeframe. With respect to A.M.'s liver injury, neither doctor provided a timeframe during which the injury was inflicted, thereby making it impossible to establish that Olbricht was A.M.'s sole caregiver when the liver laceration occurred. . . . Here, the lack of evidence that Olbricht had exclusive custody of A.M. during the time when her substantial injuries were inflicted prevents the conclusion that Olbricht committed child abuse.[5]

The Court of Appeals acknowledged there was circumstantial evidence that Olbricht had caused A.M.'s injuries, but found that this evidence was insufficient to support the conviction:

> It is true that Olbricht and Miller testified about a number of injuries that occurred while Olbricht was supervising A.M. However, the record does not support a finding

[5] *Id.* at 618-19, 875 N.W.2d at 875-76.

> that Olbricht caused either of the two injuries that could have supported his conviction: A.M.'s brain bleed and lacerated liver. Specifically, the State failed to adduce evidence that A.M. was in Olbricht's sole care at the time she received the injuries that led to the brain bleed or lacerated liver.
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> We note that there was some circumstantial evidence that A.M. was afraid of Olbricht, that she said Olbricht hurt her, and that she had previously suffered injuries while in Olbricht's care. However, this evidence is insufficient to overcome the fact that at least two other individuals could not be excluded as having caused the brain bleed and lacerated liver that are of significance in this case.[6]

Because the Court of Appeals concluded the evidence at trial was legally insufficient, it held the Double Jeopardy Clause barred retrial. And because it reversed Olbricht's conviction and vacated the sentence, it did not address his other assignments of error.

We granted the State's timely petition for further review.

ASSIGNMENT OF ERROR

The State assigns that the Court of Appeals erred in concluding the evidence was insufficient to support the conviction.

STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[7]

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[6] *Id.* at 619, 875 N.W.2d at 876.

[7] *State v. Juranek*, 287 Neb. 846, 844 N.W.2d 791 (2014); *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

ANALYSIS

Sufficiency of Evidence

The State charged Olbricht with knowing and intentional child abuse resulting in serious bodily injury under § 28-707. That statute provides in relevant part:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
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> . . . .
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> (b) Cruelly confined or cruelly punished;
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> . . . .
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> (7) Child abuse is a Class II felony if the offense is committed knowingly and intentionally and results in serious bodily injury as defined in . . . section [28-109].

Under Neb. Rev. Stat. § 28-109(20) (Reissue 2008), "[s]erious bodily injury" is defined as "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."

As such, because Olbricht was charged with intentional child abuse resulting in serious bodily injury, the State was required to prove beyond a reasonable doubt that (1) Olbricht caused or permitted A.M. to be cruelly confined or cruelly punished; (2) he did so knowingly and intentionally; (3) he did so on, about, or between March and September 2014, in Scotts Bluff County, Nebraska; (4) at the time Olbricht did so, A.M. was a minor child; and (5) as a result, A.M. sustained a serious bodily injury.

Olbricht's appellate brief does not point to any material element of the crime which lacked evidentiary support, but instead argues generally that the circumstantial evidence adduced at trial lacked probative value. Through a variety of arguments, Olbricht emphasizes that he was not the only person to have access to A.M. during the timeframe when her injuries likely occurred, and he suggests the testimony of Miller and Pahl was not credible.

[2] As is often the case in child abuse prosecutions, the evidence at trial was largely circumstantial. But whether the evidence is direct, circumstantial, or a combination thereof, our standard of review is the same: An appellate court does not resolve conflicts in the evidence, pass on credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[8] 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.[9]

In analyzing the sufficiency of the evidence in the present case, the Court of Appeals reasoned that "the lack of evidence that Olbricht had exclusive custody of A.M. during the time when her [serious bodily] injuries were inflicted prevents the conclusion that Olbricht committed child abuse."[10] The Court of Appeals thus implied that proof of exclusive custody or care is required to support a conviction for knowing and intentional child abuse resulting in serious bodily injury. But no such requirement is found in the child abuse statute, and no such requirement is compelled by precedent.

[3,4] The provisions of § 28-707 do not contain any requirement that the State must prove a minor child was in the exclusive care or custody of the defendant when the child abuse occurred. To the contrary, under Nebraska law, one can commit child abuse if he or she "knowingly, intentionally, or negligently causes *or permits* a minor child" to be abused in one of the ways prohibited under § 28-707(1). (Emphasis supplied.) There is no requirement under Nebraska law that the defendant be physically present when the child abuse occurs, or that the defendant be the only person present, so long as he or she knowingly, intentionally, or negligently permits the child abuse.

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[8] *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

[9] *Id.*

[10] *State v. Olbricht, supra* note 1, 23 Neb. App. at 619, 875 N.W.2d at 876.

Nor have our cases reviewing child abuse convictions imposed an exclusive care requirement. In its analysis, the Court of Appeals cited to several cases in which we affirmed child abuse convictions.[11] In those cases, we noted there was evidence that the child had been in the sole care of the defendant during the timeframe when the injuries occurred, but we did so in the context of analyzing whether the evidence, construed in the light most favorable to the State, would permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. In those cases, we did not hold that, absent proof of exclusive or sole care, the evidence would have been insufficient to support a finding of guilt. And recently, in *State v. Cullen*,[12] we affirmed a conviction for knowing and intentional child abuse resulting in death, despite evidence that the defendant was not the only person with access to the child during the timeframe when the fatal injuries occurred.

[5] As such, our prior holdings illustrate that evidence showing a child was in the defendant's sole care during the timeframe when the child suffered injuries is circumstantial evidence from which it can reasonably be inferred that the defendant caused such injuries,[13] but that proof of sole or exclusive care is not a necessary prerequisite to proving child abuse.[14]

In this case, the Court of Appeals acknowledged there was circumstantial evidence that Olbricht caused A.M.'s serious bodily injuries, including evidence that A.M. was afraid of Olbricht, that A.M. said Olbricht hurt her, that A.M. had suffered previous injuries while in Olbricht's care, and that

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[11] See, *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011); *State v. Robinson*, 278 Neb. 212, 769 N.W.2d 366 (2009); *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

[12] *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

[13] See cases cited *supra* note 11.

[14] See *State v. Cullen, supra* note 12.

Olbricht had cared for A.M. during the timeframe when she sustained serious bodily injuries. But it concluded this circumstantial evidence was "insufficient to overcome the fact that at least two other individuals could not be excluded as having caused the brain bleed and lacerated liver that are of significance in this case."[15] In other words, the Court of Appeals concluded the circumstantial evidence was insufficient to support the conviction, because the State had not disproved the possibility that others with access to A.M. may have caused the injuries. The suggestion that the State has a different or more onerous burden of proof in order to convict on circumstantial evidence is one with which appellate courts, including this court, have struggled historically.

Prior to 1981, when reviewing circumstantial evidence on appeal, we followed what was often referred to as the "accused's rule."[16] That rule required an appellate court to apply the inference most favorable to the accused when confronted with two inferences deducible from circumstantial evidence.[17] The accused's rule had the effect of requiring the State "to disprove every hypothesis of nonguilt in order to convict" using circumstantial evidence.[18]

But in *State v. Buchanan*,[19] we expressly overruled the accused's rule, observing that it "'lead[s] to serious departures from the proper appellate role in evaluating the sufficiency of evidence.'" In rejecting the accused's rule, we recognized "[c]ircumstantial evidence is entitled to be treated by the trier of facts in the same manner as direct evidence" and "'"the implied distrust of circumstantial evidence is not warranted." . . .'"[20] We then stated:

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[15] *State v. Olbricht, supra* note 1, 23 Neb. App. at 619, 875 N.W.2d at 876.

[16] See *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

[17] *Id.*

[18] *Id.* at 545, 537 N.W.2d at 329.

[19] *State v. Buchanan*, 210 Neb. 20, 26, 312 N.W.2d 684, 688 (1981).

[20] *Id.*

> We believe that we must once and for all abandon any notion that before an accused may be convicted on the basis of circumstantial evidence alone, the State must disprove every hypothesis but that of guilt. One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt.[21]

Despite our strong language in *Buchanan*, the accused's rule crept back into our jurisprudence in *State v. Trimble*,[22] prompting us to again reject the rule in *State v. Morley*,[23] where we noted:

> [O]n occasion the ghost of a dead rule of law returns to temporarily haunt the halls of justice. In an effort to exorcise this mischievous spirit, we hereby reject the *Trimble* language which improvidently proclaims that a criminal conviction based solely on circumstantial evidence can stand only if the State has disproved every hypothesis but that of guilt.

Even after our pronouncement in *Morley*, the accused's rule proved difficult to eliminate. More than once, when reviewing convictions premised only on circumstantial evidence, we breathed life back into the discredited rule by evaluating circumstantial evidence using a standard of review which required inferences from such evidence to be construed in favor of the accused.[24] Under such a standard, we reversed criminal convictions premised on circumstantial evidence unless we were

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[21] *Id.* at 28, 312 N.W.2d at 689.

[22] *State v. Trimble*, 220 Neb. 639, 371 N.W.2d 302 (1985), *overruled, State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991).

[23] *State v. Morley, supra* note 22, 239 Neb. at 149, 474 N.W.2d at 667.

[24] See, *State v. Skalberg*, 247 Neb. 150, 526 N.W.2d 67 (1995), *overruled, State v. Pierce, supra* note 16; *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992), *abrogated, State v. Pierce, supra* note 16.

able to conclude the inference of guilt was stronger than the inference of nonguilt.[25]

[6,7] In *State v. Pierce*,[26] we were confronted with our inconsistent holdings. We chronicled the history of our efforts to eliminate the accused's rule and acknowledged that after expressly rejecting the rule in *Buchanan* and *Morley*, we had allowed it to reenter our jurisprudence. We then, once again, rejected the accused's rule and expressly overruled those cases which had applied the rule in one form or another. We explained:

> "'Courts following the [accused's] rule exhibit a noticeable tendency to divide the evidence into separate lines of proof, and analyze and test each line of proof independently of others rather than considering the evidence as an interrelated whole. The sufficiency of the evidence is often tested against theoretical and speculative possibilities not fairly raised by the record, and inferences are sometimes considered which, though entirely possible or even probable, are drawn from evidence which the jury may have disbelieved.'"[27]

We noted in *Pierce* that "a fact prove[d] by circumstantial evidence is nonetheless a proven fact,"[28] and we emphasized:

> Circumstantial evidence is not inherently less probative than direct evidence. . . . Whether evidence is circumstantial or direct, "a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference." . . . "If the jury is convinced beyond a reasonable doubt, we can require no more."[29]

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[25] *Id.*

[26] *State v. Pierce, supra* note 16.

[27] *Id.* at 547, 537 N.W.2d at 330, quoting *State v. Buchanan, supra* note 19.

[28] *State v. Pierce, supra* note 16, 248 Neb. at 547, 537 N.W.2d at 330.

[29] *Id.* (citations omitted).

And finally, we reiterated in *Pierce* that the proper standard of review is the same whether we are reviewing a conviction based on direct or circumstantial evidence:

> 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:
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> "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 properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction."[30]

In the present case, the Court of Appeals' analysis revived the accused's rule by requiring the State to disprove every hypothesis of nonguilt in order to convict Olbricht using circumstantial evidence. For all the reasons we articulated in *Buchanan*,[31] *Morley*,[32] and *Pierce*,[33] we again reject the suggestion that a different standard of review should be applied to circumstantial evidence in a criminal case.

Applying the correct standard of review and considering the material elements of the offense, we find the evidence was sufficient to support Olbricht's conviction for knowing and intentional child abuse resulting in serious bodily injury. Medical testimony supported a finding that A.M. was a battered child who had been injured in a multisystem manner

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[30] *Id.* at 548, 537 N.W.2d at 330-31.

[31] *State v. Buchanan, supra* note 19.

[32] *State v. Morley, supra* note 22.

[33] *State v. Pierce, supra* note 16.

over time. Medical testimony indicated her injuries were intentional and not accidental. Evidence showed A.M.'s brain bleed and liver laceration were serious bodily injuries. The evidence also showed A.M. received a variety of suspicious prior injuries while in Olbricht's care, and her serious bodily injuries were inflicted during a timeframe when she was in Olbricht's care. The babysitter testified that when she asked A.M. who hurt her, A.M. said her "daddy" did. Since being removed from Olbricht's care, A.M. has not suffered bruising or other injuries. While Olbricht offered numerous explanations for A.M.'s various injuries, it can be presumed from the court's verdict that it did not find Olbricht's testimony in that regard credible.

Viewing this evidence in the light most favorable to the prosecution, we find it is sufficient to support the verdict. We therefore reverse the Court of Appeals' decision.

[8] 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.[34] We thus proceed to consider Olbricht's remaining assignments of error.

Directed Verdict

[9] Olbricht asserts the trial court erred in denying his motion for directed verdict at the close of the State's case. The record confirms that after the motion was denied, Olbricht proceeded to put on evidence. A defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's

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[34] *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010); *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009).

overruling the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence.[35]

By proceeding to introduce evidence after the motion for directed verdict was overruled, Olbricht waived the right to challenge the trial court's ruling on appeal.

Evidentiary Objections

Olbricht's brief cites to six instances in the record where testimony was allowed, or exhibits were received, over his objections. He assigns these evidentiary rulings as error, but presents no argument as to how or why the court erred, or how he was prejudiced thereby.

[10] 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.[36] 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.[37] Olbricht's assignment of error regarding the district court's evidentiary rulings is not properly presented for appellate review, and we do not address it further.

Motion for New Trial

[11] Olbricht asserts the district court erred in refusing to grant his motion for new trial. 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.[38]

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[35] *State v. Graff*, 282 Neb. 746, 810 N.W.2d 140 (2011).

[36] *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015); *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[37] *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

[38] *State v. Parnell, ante* p. 551, 883 N.W.2d 652 (2016).

Our record on appeal does not contain Olbricht's motion for new trial, so we are unable to determine whether it was timely filed or on what grounds a new trial was requested. It is incumbent upon the defendant who appeals his or her conviction to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court as to those errors will be affirmed.[39]

Excessive Sentence

Olbricht claims his indeterminate prison sentence of 18 to 30 years is excessive. Before considering this assignment of error, we pause to address a sentencing issue raised by the State.

During the sentencing hearing, the court announced a sentence of incarceration for a term "of not less than 15 years, not more than 30 years." The subsequently filed written order, however, reflects a sentence of imprisonment "for a period of not less than 18 yrs, nor more than 30 yrs."

[12] We have held that when a sentence orally pronounced at the sentencing hearing differs from a later written sentence, the former prevails.[40] Thus, on this record, the law requires that the minimum term of Olbricht's prison sentence be modified to reflect the district court's oral pronouncement of 15 years.

[13-15] Olbricht was convicted of a Class II felony.[41] A sentence of 15 to 30 years' imprisonment is within the statutory limits for such a conviction.[42] Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court.[43] Where a sentence imposed within the statutory

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[39] *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

[40] *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

[41] See § 28-707(7).

[42] See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014).

[43] See *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

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.[44] 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.[45]

[16] 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.[46]

Here, the presentence investigation report indicated Olbricht was 25 years of age at the time of sentencing. He had completed the ninth grade and was unemployed. His criminal history included juvenile delinquency adjudications and an unsatisfactory release from juvenile probation. As an adult, Olbricht had been convicted of several misdemeanors, including third degree domestic assault and third degree assault. He had another unrelated felony charge pending in district court at the time of sentencing, and the presentence investigation report scored him as a "'Very High'" risk to reoffend.

The district court indicated it had read and considered the information contained in the presentence investigation report, had considered all the evidence adduced at trial, and had considered the relevant sentencing criteria. The court emphasized

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[44] *State v. Carpenter*, 293 Neb. 860, 880 N.W.2d 630 (2016); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[45] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[46] *State v. Carpenter, supra* note 44.

the serious nature of the crime and the serious and lasting nature of the injuries inflicted on A.M., and it concluded this was not an appropriate case for a sentence of probation.

We find no abuse of discretion in Olbricht's sentence of 15 to 30 years' imprisonment.

CONCLUSION

For the foregoing reasons, we find the evidence was sufficient to sustain the conviction, and we reverse the Court of Appeals' decision. We find no merit to Olbricht's remaining assignments of error. The matter is remanded with directions to affirm Olbricht's conviction and modify his sentence to reflect the district court's oral pronouncement of a term of incarceration of 15 to 30 years.

Reversed and 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. Richard Pester, appellant.

885 N.W.2d 713

Filed October 14, 2016. No. S-15-530.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Judgments: 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. When reviewing a judgment for errors 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. But an appellate court independently reviews questions of law in appeals from the county court.
3. **Judgments: Pleadings: Appeal and Error.** Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
4. **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.
5. **Convictions: 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. 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.

6. **Constitutional Law: Search and Seizure: Warrantless Searches: Blood, Breath, and Urine Tests: Arrests.** A warrantless breath test administered as a search incident to a lawful arrest for driving under the influence does not violate the Fourth Amendment's prohibition against unreasonable searches and seizures.
7. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the state.
8. **Arrests: Search and Seizure: Probable Cause.** An arrest constitutes a seizure that must be justified by probable cause to believe that a suspect has committed or is committing a crime.
9. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
10. **Probable Cause: Appeal and Error.** An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.
11. **Criminal Law: Motor Vehicles: Words and Phrases.** Under Neb. Rev. Stat. § 60-6,196 (Reissue 2010), being in "actual physical control" is distinct from "operating" a motor vehicle and is interpreted broadly to address the risk that a person not yet operating a motor vehicle might begin operating that vehicle with very little effort or delay.

Appeal from the District Court for Scotts Bluff County, Randall L. Lippstreu, Judge, on appeal thereto from the County Court for Scotts Bluff County, James M. Worden, Judge. Judgment of District Court affirmed.

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

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

Matthew A. Dodd, of Dodd Law Firm, P.C., and Bradley P. Roth, of McHenry Haszard Law, for amicus curiae National College of DUI Defense.

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

Miller-Lerman, J.

NATURE OF CASE

Richard Pester appeals the decision of the district court for Scotts Bluff County in which the court affirmed his convictions following a jury trial in Scotts Bluff County Court for driving under the influence (DUI) and refusal to submit to a chemical test, both second offenses. The county court had overruled Pester's motion to quash the charge of refusal to submit to a chemical test; Pester had argued that criminalizing refusal was a violation of the constitutional rights to be free of unreasonable searches and seizures. The county court had also overruled Pester's motion to suppress evidence obtained as a result of his arrest; Pester had argued that there was not probable cause to support his arrest. On appeal, Pester assigns error to the district court's affirmance of such rulings and to its conclusion that the evidence was sufficient to support his convictions. We affirm the district court's order.

STATEMENT OF FACTS

Shortly after midnight on July 3, 2012, Scotts Bluff County Deputy Sheriff Kristopher Still found Pester slumped over the steering wheel of a vehicle parked in the lot of a farm implement dealership. The dealership was not open for business at the time. The lot of the dealership was bordered by three public highways, and there was no access to the lot other than by one of the three public highways. There were no gates or locks on the entrances, and the general public could drive onto the lot in order to enter the dealership building.

Still was driving past the back side of the business when he observed a quick flash of brake lights in the lot. Because of the time of night and the fact that the business was not open, Still pulled into the lot to check on the vehicle. Still

got out of his patrol car and walked up to the vehicle. As he approached the vehicle, Still observed a man, later identified as Pester, hunched over the steering wheel. When he got closer, Still observed a partially filled whiskey bottle and a partially filled beer can on the front passenger-side floorboard. He also observed that the keys were in the ignition, although the engine was not running.

Still knocked on the vehicle's window several times and announced his presence before Pester responded. Still asked him to roll down a window so that they could talk. Still saw Pester turn the key in the ignition and roll down a power window. When Pester opened the window, Still smelled a strong odor of alcohol coming from the vehicle; he also observed that Pester had bloodshot eyes and a flushed face and that he slurred his speech. In response to Still's questioning, Pester said that he had been drinking. He also said that he was not the owner of the property on which he was parked but that he was tired and had stopped there to sleep.

Still asked Pester to get out of the vehicle so that Still could administer field sobriety tests. After Pester got out of the vehicle, Still could smell an "[o]verwhelmingly strong" odor of alcohol on his breath. Pester initially refused to give a breath sample, but Still eventually was able to get Pester to perform a preliminary breath test, which showed a result of .126. After Pester failed field sobriety tests, Still arrested Pester for DUI.

Still transported Pester to the Scotts Bluff County correctional facility. Still began preparations to administer a postarrest chemical test of Pester's breath, and he read a postarrest chemical test advisement form to Pester. When Still asked Pester to sign the form, Pester told Still that he would not submit to the chemical test of his breath.

The State charged Pester in county court with DUI, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010), and refusal to submit to a chemical test, in violation of Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2014). Both were charged as second

offenses. Pester filed a motion to quash the charge of refusal to submit to a chemical test. Pester also filed a motion to suppress evidence obtained as a result of his arrest.

In the motion to quash, Pester asserted that the charge of refusal to submit to a chemical test pursuant to § 60-6,197 was "unconstitutional and in violation of the Fourth and Fourteenth Amendment[s] of the U.S. Constitution and [art. I,] § 7 of the Nebraska Constitution." After a hearing in which Pester argued, inter alia, that § 60-6,197, criminalizing refusal of a chemical test, violated his constitutional right to refuse consent to a search, the county court overruled Pester's motion to quash.

In the motion to suppress, Pester asserted that his arrest and search were not based on "reasonable and articulable suspicion that a crime had been committed or was about to be committed." Still testified at a hearing on the motion to suppress. At the end of the hearing, Pester's counsel stated that he did not take issue with the "stop or the initial contact" and that Still did not do anything improper by checking out the vehicle in the lot or the person sleeping inside the vehicle. Pester's counsel argued instead that "this rises to the level of an illegal arrest for DUI, an illegal investigation for DUI, and doesn't rise to the level of probable cause." He generally asserted that because the area where Pester was parked was "not open to public access," Pester could not have committed DUI, and that therefore it was improper for Still to arrest him for DUI and to require him to submit to a chemical test. In its order overruling Pester's motion to suppress, the county court stated that the State presented evidence that Pester "was in a parking lot open to public access . . . , he was in control of a motor vehicle, the officer noted multiple signs of alcohol consumption, and [Pester] failed field sobriety tests."

At the jury trial, the State presented evidence, including Still's testimony. After the State rested, Pester moved for a "directed verdict." He generally argued that the State failed to prove DUI, because it failed to present evidence that he

was on private property which was open to public access. The county court overruled Pester's motion. Pester presented evidence in his defense, including his own testimony to the general effect that he did not begin drinking until after he had parked his vehicle in the lot and that he did not drive the vehicle after he began drinking. On cross-examination, Pester admitted that he was drunk when Still found him, that he was sitting in the driver's seat with the keys in the ignition and was touching the steering wheel, and that he was sure that Still saw the brake lights on his vehicle illuminate when Still drove by the lot. After he rested his defense, Pester renewed his "motion for a directed verdict," and the court again overruled the motion.

The jury found Pester guilty of DUI and refusal to submit to a chemical test. After an enhancement hearing, the county court found that both convictions were second offenses, and it later sentenced Pester on both convictions.

Pester appealed his convictions and sentences to the district court. He assigned as error the county court's overruling of his motion to quash and his motion to suppress. He also asserted that there was insufficient evidence to support his convictions, that the county court improperly enhanced the refusal conviction, and that the county court imposed excessive sentences. The district court rejected Pester's arguments regarding the motion to quash, the motion to suppress, insufficiency of the evidence, and enhancement. With regard to sentencing, the district court concluded that the sentence for DUI, second offense, was not excessive; however, the district court noted that the State conceded that the county court improperly imposed a sentence for the refusal conviction as a Class I misdemeanor rather than as a Class W misdemeanor. The district court therefore affirmed both convictions, the enhancement of both counts, and the sentence for DUI, but it remanded the cause for resentencing on the refusal conviction.

Pester appeals the district court's order.

ASSIGNMENTS OF ERROR

Pester claims, restated, that the district court erred when it (1) affirmed the order overruling his motion to quash the charge of refusal to submit to a chemical test, (2) affirmed the order overruling his motion to suppress, and (3) concluded that there was sufficient evidence to support his convictions. Pester does not assign error to the district court's conclusions regarding enhancement and sentencing.

STANDARDS OF REVIEW

[1,2] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion. *State v. Kleckner*, 291 Neb. 539, 867 N.W.2d 273 (2015). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *Id*. When reviewing a judgment for errors 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. *Id*. But we independently review questions of law in appeals from the county court. See *id*.

[3] Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court. *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

[4] 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. *State v. Milos, ante* p. 375, 882 N.W.2d 696 (2016).

[5] 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. 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. *State v. Gonzales, ante* p. 627, 884 N.W.2d 102 (2016).

ANALYSIS

The District Court Did Not Err When It Affirmed the Order of the County Court Overruling Pester's Motion to Quash Charge of Refusing to Submit to a Chemical Test of His Breath.

Pester first claims that the district court erred when it affirmed the county court's order overruling his motion to quash the charge of refusal to submit to a chemical test. Pester had argued that the charge of refusal to submit to a chemical test pursuant to § 60-6,197 was unconstitutional and in violation of his federal and state constitutional rights to be free of unreasonable searches and seizures. Because Pester was asked to give a breath sample, we conclude, based on the U.S. Supreme Court's recent decision regarding warrantless breath tests, that the county court did not err when it overruled Pester's motion to quash and that the district court did not err when it affirmed that order.

[6] As we noted in *State v. Cornwell, ante* p. 799, 884 N.W.2d 722 (2016), the U.S. Supreme Court recently held in *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), that a warrantless breath test administered as a search incident to a lawful arrest for DUI does not violate the Fourth Amendment's prohibition against

unreasonable searches and seizures. The Court in *Birchfield* made a distinction between breath tests and blood tests and determined that breath tests do not implicate significant privacy concerns. The Court stated that because "the physical intrusion is . . . negligible," "breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath," and that the giving of a breath sample is "not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest." 579 U.S. at 461, 462, 463. In the *Birchfield* opinion, the Court decided three cases, one of which involved a defendant who was criminally prosecuted pursuant to a statute similar to § 60-6,197 for refusing a warrantless breath test: *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015). With respect to the breath test case, the Court in *Birchfield* concluded that because the breath test was a permissible search incident to a lawful arrest for DUI, "the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and [the defendant] had no right to refuse it." 579 U.S. at 478.

In *Cornwell*, we rejected the defendant's facial challenge to § 60-6,197. Based on *Birchfield*, we determined that warrantless breath tests do not run afoul of the Fourth Amendment, and we further determined that warrantless breath tests do not run counter to Neb. Const. art. I, § 7, which we interpreted to offer no more protection than that offered by the U.S. Constitution. The defendant in *Cornwell* had been directed to take a breath test; accordingly, we in effect concluded that there was a set of circumstances as to which § 60-6,197 was not unconstitutional and that therefore the defendant's facial challenge failed.

Pester also made a challenge to the charge of refusal of a chemical test directed at § 60-6,197. Based on our holding in *Cornwell*, we conclude that Pester's challenge similarly fails. Because Pester had no constitutional right to refuse the breath test, § 60-6,197 is not unconstitutional as to breath tests and it was not improper for the State to prosecute him for refusing

the breath test pursuant to § 60-6,197. For completeness, we note that both this case and *Cornwell* involved refusal of breath tests, and therefore we are not required to consider the validity of § 60-6,197 as it pertains to refusal of a blood test. Because Pester's constitutional challenge to § 60-6,197 and the corresponding charge of refusal of a chemical test of his breath is without merit, we conclude that the county court did not err when it overruled Pester's motion to quash and that the district court did not err when it affirmed the county court's order.

The District Court Did Not Err When It Affirmed the Order of the County Court Overruling Pester's Motion to Suppress Evidence Obtained as Result of Arrest.

Following the Court's filing of *Birchfield*, we ordered additional briefing regarding the application of *Birchfield* to the present case. In *Birchfield*, the Court specified that a warrantless breath test may be administered as a search incident to a *lawful* arrest for DUI. In his supplemental brief, Pester generally argues that it was improper to criminalize his refusal of the breath test, because he was not driving on a public highway, his arrest was not lawful, and therefore he was not required to submit to the test. Pester's new arguments, although ostensibly directed to the motion to quash, are aimed at whether his arrest was lawful and are better considered with respect to Pester's claim regarding the motion to suppress.

Pester claims that the district court erred when it affirmed the county court's order overruling his motion to suppress evidence obtained as a result of his arrest for DUI. In the lower courts, Pester had argued that Still lacked probable cause to arrest him for DUI and to require him to give a breath sample in connection with that arrest. As explained below, because there was probable cause for Pester's arrest for DUI, we conclude that the county court did not err when it overruled

Pester's motion to suppress and that the district court did not err when it affirmed that order.

[7-10] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the state. *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014). An arrest constitutes a seizure that must be justified by probable cause to believe that a suspect has committed or is committing a crime. *Id*. Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *Id*. We determine whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances. *Id*.

Pursuant to § 60-6,196(1)(a), it is unlawful "to operate or be in the actual physical control of any motor vehicle . . . [w]hile under the influence of alcoholic liquor or of any drug." In addition, Neb. Rev. Stat. § 60-6,108(1) (Reissue 2010) provides that § 60-6,196 "shall apply upon highways and anywhere throughout the state except private property which is not open to public access." Although Pester does not dispute that Still had probable cause to think that he was "under the influence of alcoholic liquor," as we understand it, he contends that he was not operating a motor vehicle and that, in any event, he was on private property, and therefore abiding by the law.

[11] To the extent that Pester contends that he was not "operating or in actual physical control of a motor vehicle," we note that being in "actual physical control" is distinct from "operating" a motor vehicle and is interpreted broadly "to address the risk that a person not yet operating a motor vehicle might begin operating that vehicle with very little effort or delay." *State v. Rask, ante* p. 612, 623, 883 N.W.2d 688, 697 (2016). In the present case, Still testified that he saw the brake lights of Pester's vehicle flash and that when he approached the vehicle, he saw Pester in the driver's seat with the keys in the ignition. Still further testified that when he asked Pester

to roll down the window, Pester turned the key in the ignition and rolled down a power window. These observations gave Still probable cause to think that Pester could begin operating the vehicle with very little effort or delay and that therefore he was in actual physical control of the vehicle.

Pester's main argument is that he was on "private property which is not open to public access" and that therefore Still did not have probable cause to think that § 60-6,196 applied. He asserts that the portion of the parking lot upon which he was parked was the private property of the farm implement dealership, and he claims that it was not open to public access. He further indicates that he was parked where customers of the dealership would not normally park and that the dealership was not open for business at the time Still found him. Pester directs our attention to the record wherein Still stated that part of the reason he investigated the presence of the vehicle in the lot at that time of night was to determine whether someone was trespassing. Pester argues that because he could not have been trespassing unless he was on private property, it is inconsistent to conclude both that a trespass may have occurred while also maintaining that Still had probable cause to think Pester was in a place with public access. We do not agree with Pester's contention.

With regard to whether private property is open to public access, in *State v. Prater*, 268 Neb. 655, 658, 686 N.W.2d 896, 898 (2004), when applying a city ordinance with language similar to § 60-6,108, we stated that "the phrase 'open to public access' means that the public has permission or the ability to enter." In *Prater*, we determined that an apartment complex's parking lot was open to public access because, even though a sign indicated that the lot was private, the lot was also used by maintenance workers and guests of residents. Similarly, in *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014), we found probable cause for an arrest when the defendant's vehicle was found parked on a paved area between the sidewalk and the street in front of an apartment complex, in part because the

arresting officer testified to his knowledge that both residents and nonresidents of the apartment complex used the area for parking.

In contrast to the foregoing cases, in *State v. McCave*, 282 Neb. 500, 516, 805 N.W.2d 290, 307 (2011), we determined that a residential driveway was not open to public access, because it was open only to those who had express or implied permission of the owner, members of the general public had no right or implied permission to use the driveway, and members of the general public did not have "the 'ability to enter' the driveway in the same sense that a member of the public might drive through or use a private parking lot by custom." We noted in *McCave* that the intent behind § 60-6,196 was "to prohibit intoxicated persons from operating or being in control of a vehicle even on private property if other motorists might access that property and be endangered by their conduct." 282 Neb. at 515, 805 N.W.2d at 307.

In the present case, Still testified that the lot where Pester parked was bordered by three public highways, that access to the lot was solely by one of three public highways, that there were no gates or locks on the entrances, and that the general public could drive onto the lot in order to enter the dealership. Despite Pester's argument that customers would not normally park in this location, Still's testimony shows that the general public was able to access the area; therefore, the area was "private property" "open to public access," § 60-6,108(1), and the concerns of § 60-6,196 were implicated.

With respect to the private character of the location where Still encountered Pester, as the foregoing analysis illustrates, the location can be both private property giving rise to trespass concerns and "private property . . . open to public access," § 60-6,108(1), giving rise to concerns about "preserving the safety of . . . public highways." *Mackey v. Montrym*, 443 U.S. 1, 17, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979). We find no inconsistency amongst Still's initial concern for the protection of private property against trespass, his welfare check of

Pester's vehicle curiously parked with a flash of brake lights in the middle of the night at a closed place of business, and his concern for the safety of other motorists. Therefore, a finding that Pester's vehicle was on private property with public access is not inconsistent with Still's justification for the initial investigation of Pester's vehicle.

We conclude that the county court did not err when it determined Still had probable cause to arrest Pester for DUI and when it therefore overruled Pester's motion to suppress and that the district court did not err when it affirmed the county court's order.

The District Court Did Not Err When It Determined That the Evidence Was Sufficient to Support Pester's Convictions.

Finally, Pester claims that the district court erred when it concluded that there was sufficient evidence to support his convictions. We conclude that the district court did not err in this regard.

Pester's argument that the evidence was not sufficient to support his convictions mirrors his argument with regard to the motion to suppress—that is, that the evidence did not support a finding that he was on private property with public access. As discussed above, Still's observations regarding the parking lot on which Pester was found support a finding that Pester was on private property with public access. Still's testimony regarding his observations also provided sufficient evidence for the jury to find that Pester was on private property with public access, that Pester operated or was in actual physical control of his vehicle, and that he was guilty of DUI and refusal to submit to a chemical test. Viewing the evidence in the light most favorable to the prosecution, a rational jury could have found the essential elements of the crimes beyond a reasonable doubt. See *State v. Gonzales, ante* p. 627, 884 N.W.2d 102 (2016). We conclude therefore that the district

court did not err when it determined that there was sufficient evidence to support Pester's convictions.

CONCLUSION

We conclude that the county court did not err when it overruled Pester's motion to quash and his motion to suppress and that therefore the district court did not err when it affirmed such rulings. We further conclude that the district court did not err when it determined that there was sufficient evidence to support Pester's convictions. We therefore affirm the district court's order in its entirety.

Affirmed.

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

Brenton R. Stewart and Mary M. Stewart, appellants, v. Nebraska Department of Revenue, an agency of the State of Nebraska, and Leonard J. Sloup, in his official capacity as Acting Tax Commissioner, appellees.

885 N.W.2d 723

Filed October 14, 2016. No. S-15-700.

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.
2. ____: ____: ____. 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.
3. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Statutes: Appeal and Error.** Statutory language 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. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
6. **Statutes: Legislature: Intent.** In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.

7. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
8. **Statutes: Legislature: Intent.** The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.
9. **Statutes: Legislature: Presumptions.** The Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.

Appeal from the District Court for Lancaster County: Jeffre Cheuvront, District Judge, Retired. Reversed and remanded with directions.

Tracy A. Oldemeyer and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

Douglas J. Peterson, Attorney General, and L. Jay Bartel for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Cassel, J.

INTRODUCTION

Two taxpayers sold their capital stock of a corporation and, in order to qualify for a special capital gains election,[1] structured the transaction to comply with the literal terms of a definitional statute.[2] The disallowance of the election was upheld below. In this appeal, we must decide whether either the "economic substance" doctrine or the "sham transaction" doctrine provided a basis to disallow the taxpayers' election. Because the statute is not open to interpretation and the plain language demonstrates that the Legislature intended to confer

[1] See Neb. Rev. Stat. § 77-2715.09(1) (Reissue 2009).

[2] Neb. Rev. Stat. § 77-2715.08(2)(c) (Reissue 2009).

this tax benefit, the answer is no. We reverse, and remand with directions the contrary decision below.

BACKGROUND

In determining a resident taxpayer's liability for state income tax, the Nebraska Revenue Act of 1967[3] allows the taxpayer to make one election during his or her lifetime to exclude from federal adjusted gross income those capital gains from the sale of "capital stock of a corporation acquired by the individual (a) on account of employment by such corporation or (b) while employed by such corporation."[4] This exclusion is known as the special capital gains election.

Brenton R. Stewart and Mary M. Stewart, both residents of Nebraska, attempted to make this election regarding their sales of capital stock in Pioneer Aerial Applicators, Inc. (Pioneer), to Aurora Cooperative Elevator Company (Buyer).

Sale of Pioneer Stock

On February 26, 2010, the Stewarts and the one other shareholder of Pioneer (collectively the Sellers) signed a contract to sell their combined shares of Pioneer to Buyer. The contract closing date was scheduled for March 1. Throughout this appeal, all of the parties before us have asserted that the closing date—March 1—is the relevant date. We limit our discussion accordingly.

The structure of the sale was critical to the tax exclusion. Without additional shareholders, the sale was not eligible for the special capital gains election because, otherwise, Pioneer was not a qualified corporation. A qualified corporation is one that

> at the time of the first sale or exchange for which the election is made, [has] (i) at least five shareholders and (ii) at least two shareholders or groups of shareholders

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[3] See Neb. Rev. Stat. § 77-2701 et seq. (Reissue 2009, Cum. Supp. 2014 & Supp. 2015).

[4] § 77-2715.09(1).

> who are not related to each other and each of which owns at least ten percent of the capital stock.[5]

Before the agreement was made, Pioneer had only three shareholders. Thus, it did not meet element (i) of the definition. Prior to the closing date, Mary was to sell one share of stock to each of three officers of Buyer. This was to be done so that Pioneer was a qualified corporation for the underlying stock purchase with Buyer.

The purchase agreement explicitly laid out the restructuring intended to make the Sellers' sale to Buyer eligible for the special capital gains election:

> Ownership of Stock at Closing. It is the intention of the parties to structure the transaction in a manner that complies with the requirements of Neb. Rev. Stat. §§ 77-2715.08 and 77-2715.09 (R.R.S. 2009) in order to permit Sellers to subtract the capital gain from the sale of the Stock from their federal adjusted income pursuant to Neb. Rev. Stat. § 77-2715.9 [sic] (R.R.S. 2009) and exclude such gain from Nebraska income tax. Accordingly, at least three (3) days prior to the Closing, Mary [M.] Stewart agrees to transfer One (1) share of the Pioneer Stock to each of [three officers of Buyer] in exchange for non-recourse notes in an amount equal to .011% of the Stock Purchase Price, which notes shall be due and payable at the Closing; secured by a first lien in the Pioneer Stock so transferred; and be subject to the terms of this Agreement . . . .

On February 26, 2010, pursuant to the plan in the purchase agreement, Mary entered into separate agreements for the sales of stocks with the three officers, and Pioneer issued new stock certificates for the four of them to reflect the sale. At closing, on March 1, the Sellers and the officers executed stock powers with Buyer and Buyer issued and delivered checks to each in return.

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[5] § 77-2715.08(2)(c).

Stewarts' Special Capital Gains Election

For the 2010 tax year, the Stewarts filed their federal and state income tax returns as married filing jointly and, on their state return, made a special capital gains election on the sale of their shares of Pioneer stock to Buyer. The Stewarts chose not to make the election on Mary's February 26, 2010, sale of shares of Pioneer stock to the three officers of Buyer, and Mary paid capital gains tax for that sale.

The Nebraska Department of Revenue (Department) disallowed the Stewarts' special capital gains election for the sale of capital stock to Buyer, on the basis that the capital stock was not issued from a qualified corporation. With this disallowance, the Department issued the Stewarts a "Notice of Deficiency Determination" for a tax deficiency of $499,732.42, plus additional penalties and interest. The total amount assessed was $549,158.01. The Stewarts contested this finding and filed a petition for redetermination.

Tax Commissioner's Decision

After an administrative hearing, the Tax Commissioner entered an order denying the Stewarts' petition for redetermination. The Tax Commissioner concluded that at the time of the sale for which the election was made, there were only three shareholders of Pioneer and that Pioneer was not a qualified corporation. In reaching this conclusion, the Tax Commissioner acknowledged that the purchase agreement between the Sellers and Buyer intended to add three more shareholders through an additional stock transaction prior to the closing date. However, the Tax Commissioner disregarded Mary's sale of stock to the three officers by applying the federal common-law "economic substance" and "sham transaction" tax nonavoidance doctrines.

On appeal, the district court for Lancaster County affirmed the order of the Tax Commissioner and his application of the federal tax doctrines in reaching his decision. Thereafter, the

Stewarts timely appealed, and we granted their petition to bypass review by the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

The Stewarts assign, consolidated and restated, that the district court erred in applying the economic substance and sham transaction doctrines in determining whether they were entitled to the special capital gains election.

STANDARD OF REVIEW

[1,2] 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.[6] 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.[7]

[3] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[8]

ANALYSIS

[4-6] Resolution of the Stewarts' assignment of error requires statutory interpretation. Thus, we begin by recalling basic principles of statutory interpretation. Statutory language is to be given its plain and ordinary meaning, and an appellate

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[6] *Valpak of Omaha v. Nebraska Dept. of Rev.*, 290 Neb. 497, 861 N.W.2d 105 (2015).

[7] *Id.*

[8] *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb. 653, 844 N.W.2d 276 (2014).

court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[9] It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.[10] In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.[11]

Plain Meaning Review

One statute defines a qualified corporation for the purposes of a special capital gains election as one that

> *at the time of the first sale or exchange for which the election is made*, [has] (i) at least five shareholders and (ii) at least two shareholders or groups of shareholders who are not related to each other and each of which owns at least ten percent of the capital stock.[12]

We note that the statute does not include any language discussing the context or the purpose for creating the qualified corporation. Rather, the statute merely sets forth certain requirements for the shareholders at one *specific point in time* for the special capital gains election. Namely, the shareholder requirements must be met *at the time of the first sale or exchange for which the election is made*. Similarly, the statute authorizing the election[13] contains no language discussing underlying sales and transactions or requiring a purpose for taking actions to comply with the statute other than qualifying for the election.

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[9] *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal.*, 290 Neb. 726, 861 N.W.2d 718 (2015).

[10] *Id.*

[11] *Synergy4 Enters. v. Pinnacle Bank*, 290 Neb. 241, 859 N.W.2d 552 (2015).

[12] § 77-2715.08(2)(c) (emphasis supplied).

[13] § 77-2715.09.

For these reasons, we find no support in the plain language of either statute to review transactions that came before the "first sale or exchange for which the election is made" for a special capital gains election. The plain language of the statute defining a qualified corporation has clearly focused on the single point in time of the first sale for which the election is made. Here, the parties agree the relevant date is March 1, 2010. Accordingly, the transactions occurring on February 26 are outside the scope of the statute.

Nonavoidance Doctrines

Nonetheless, the Department and the Tax Commissioner argue that the economic substance and sham transaction doctrines require us to find a legitimate business purpose and economic substance in the creation of the qualified corporation. This would require us to consider events leading up to and in anticipation of the first sale or exchange for which the election is made. In support of this argument, they allege that the doctrines "do not alter or modify plain statutory language, but, rather, are judicial doctrines applied to effectuate the purpose of a tax statute even if a transaction falls within the literal language of a statute."[14]

[7] We do not find this persuasive. The language of each statute is clear and unambiguous. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[15] Therefore, we are precluded from looking beyond the words of the statute to apply additional elements for the special capital gains election or a qualified corporation.

Our previous decisions in *Kerford Limestone Co. v. Nebraska Dept. of Rev.*[16] and *Cargill Meat Solutions v. Colfax*

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[14] Brief for appellees at 19.

[15] *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012).

[16] *Kerford Limestone Co. v. Nebraska Dept. of Rev., supra* note 8.

Cty. Bd. of Equal.[17] support this analysis. We briefly explain each one.

In *Kerford Limestone Co.*, the taxpayer purchased a motor grader for use in its limestone mining and manufacturing business and claimed the motor grader was exempt from sales and use tax under a Nebraska statute. The statute provided a personal property tax exemption for machinery or equipment "purchased, leased, or rented by a person engaged in the business of manufacturing for use in manufacturing."[18] Upon review of the exemption, the Department rejected the taxpayer's claim on the grounds that the motor grader was not exempt manufacturing machinery or equipment. A revenue ruling provided: "'If machinery and equipment has [sic] uses in addition to its manufacturing use, the manufacturing use must be greater than 50% of total use to qualify for the exemption.'"[19]

The Department did not base this rejection upon preexisting Department regulations. Rather, it engaged in an ad hoc interpretation of the statute, and, consequently, we granted no deference to the agency's proposed interpretation.

In our review of the statute, we determined that the Department's ruling was contrary to its plain language, because the statute did not establish a percentage of total use that the machinery or equipment had to be used for manufacturing in order for it to qualify for the exemption.[20] Instead, we found that the Department had added this requirement and that it lacked the authority to add to the language of the statute. Because this court likewise could not do so in the guise of statutory interpretation, we concluded that the taxpayer was entitled to the exemption.

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[17] *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal., supra* note 9.

[18] § 77-2701.47(1) (Supp. 2005).

[19] *Kerford Limestone Co. v. Nebraska Dept. of Rev., supra* note 8, 287 Neb. at 655, 844 N.W.2d at 279 (emphasis omitted). See Nebraska Department of Revenue Ruling 1-05-1 (Oct. 12, 2005).

[20] *Kerford Limestone Co. v. Nebraska Dept. of Rev., supra* note 8.

Similarly, in *Cargill Meat Solutions*, we refused to allow a county board of equalization to add words to a statute. A statute allowed a county board of equalization to "meet at any time for the purpose of assessing any omitted *real* property . . . and for correction of clerical errors . . . that result in a change of assessed value."[21] The county board invoked this statute to place mistakenly omitted *personal* property on the tax rolls. However, the statute did not specify "personal" property; it referred only to "real" property. Accordingly, we determined that the county board was essentially attempting to add the words "or personal" into the statute and that we could not read the statute in that manner.

Once again, we confront an attempt to read additional words into a clear and unambiguous statute. As in *Kerford Limestone Co.* and *Cargill Meat Solutions*, the statutes before us are not ambiguous. The Department and the Tax Commissioner would have us insert business purpose and economic substance requirements where the Legislature has not. We decline this invitation. To do so would be contrary to the plain meaning of the statute and our established precedents.

Legislative Intent

For the sake of completeness, we note that the application of these federal tax doctrines in this case is also not supported by the legislative intent plainly evident in the words of the statute. The parties agree that these tax doctrines had been in place at the federal level for over 50 years by the time the special capital gains election statutes were enacted. Despite these long-established and well-known concepts, the Legislature did not include any language invoking either of them.

[8,9] The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.[22] Additionally, the Legislature is presumed

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[21] Neb. Rev. Stat. § 77-1507(1) (Cum. Supp. 2014) (emphasis supplied).

[22] *Kerford Limestone Co. v. Nebraska Dept. of Rev., supra* note 8.

to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.[23] If the Legislature wanted to impose either of these additional requirements, it could have done so. And, indeed, in other instances, the Legislature has expressly invoked two similar concepts—"economic activity" and "business purpose."[24] Its omissions here are significant.

Mid City Bank

Finally, the Department and the Tax Commissioner suggest our prior application of another federal tax doctrine in *Mid City Bank v. Douglas Cty. Bd. of Equal.*[25] should guide us to adopt the economic substance and sham transaction doctrines in this case. However, our decision in *Mid City Bank* was driven by the facts of that case. And, even if our holding in *Mid City Bank* could be applied to other cases, we do not find it controlling here.

Mid City Bank involved a conflict between two state statutes that both applied to personal property of a taxpayer. The personal property originally received a favorable tax treatment under one state statute[26] that allowed it to be assessed at a lower value with a concurrent transfer of stock. However, the taxpayer then made a federal tax election that treated the stock transferred as an asset sale instead of a sale of stock—valuing the personal property at a higher rate for federal tax purposes. This triggered the application of a second state statute[27] that

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[23] *Id.*

[24] See, e.g., Neb. Rev. Stat. §§ 77-4931(6), 77-5540(6), and 77-5724(6) (Reissue 2009).

[25] *Mid City Bank v. Douglas Cty. Bd. of Equal.*, 260 Neb. 282, 616 N.W.2d 341 (2000).

[26] Neb. Rev. Stat. § 77-122 (Reissue 1996).

[27] Neb. Rev. Stat. § 77-118 (Reissue 1996).

allowed the county board of equalization to adjust property values for state tax purposes to reflect the federal valuation of the property.

This court ultimately was called upon to determine which of these two state statutes controlled in light of the federal tax election. Therefore, to give effect to both state statutes, we invoked a federal tax doctrine to aid in our construction. Here, we have no conflict between statutes or ambiguous language. And no federal statutes apply in our analysis. We see no reason to apply our reasoning in *Mid City Bank* to the case before us.

CONCLUSION

Because the statutes at issue are clear and unambiguous, we limited our review to the plain language. Pioneer was a qualified corporation at the time of the first sale or exchange for which the Stewarts made their special capital gains election. Having met all the statutory requirements, the Stewarts were entitled to make the election. We therefore reverse the decision of the district court and remand the cause to the district court with directions to reverse the decision of the Tax Commissioner disallowing the special capital gains election.

Reversed and remanded with directions.

Stacy, J., not participating.

HEADNOTES
Contained in this Volume

Actions 29, 326, 715, 735, 861
Administrative Law 46, 1010
Agency 326
Agents 83
Alimony 346
Annexation 604
Appeal and Error 1, 29, 46, 83, 106, 123, 138, 152, 162, 177, 185, 197, 204, 215, 237, 248, 261, 294, 311, 326, 346, 361, 375, 386, 400, 407, 417, 475, 492, 516, 535, 551, 586, 604, 612, 627, 657, 668, 684, 715, 735, 747, 755, 766, 784, 799, 810, 832, 842, 852, 861, 870, 902, 912, 937, 960, 974, 995, 1010
Arrests 375, 810, 832, 995
Attorney and Client 400
Attorney Fees 83, 346, 870
Attorneys at Law 551, 627

Blood, Breath, and Urine Tests 612, 810, 995

Child Custody 346, 417
Child Support 346
Circumstantial Evidence 974
Claims 400, 604, 735
Collateral Attack 29
Collateral Estoppel 326
Constitutional Law 29, 46, 123, 204, 261, 311, 361, 375, 475, 516, 684, 735, 784, 799, 810, 832, 912, 937, 960, 995
Contempt 106
Contractors and Subcontractors 215
Contracts 215, 326, 386, 861
Controlled Substances 810
Convicted Sex Offender 417, 912
Convictions 162, 627, 684, 810, 974, 995
Courts 106, 185, 237, 516, 586, 735, 766, 810, 960, 974, 995
Criminal Law 1, 162, 177, 197, 375, 551, 612, 627, 668, 684, 810, 832, 852, 902, 937, 960, 974, 995

Damages 215, 326, 386, 715, 735
Declaratory Judgments 735
Deeds 535
Default Judgments 861
Directed Verdict 810, 870, 974
Discrimination 870
Dismissal and Nonsuit 586
Divorce 106, 138, 204, 346

Double Jeopardy 311, 668
Drunk Driving 612, 810
Due Process 46, 261, 551, 627

Effectiveness of Counsel 1, 29, 248, 311, 361, 492, 551, 766, 937
Election of Remedies 215
Employer and Employee 586, 870
Equal Protection 46
Equity 106, 152, 215, 535, 715, 842
Estoppel 46, 215, 842
Evidence 162, 185, 237, 248, 326, 361, 375, 417, 475, 492, 535, 551, 612, 627, 657, 684, 715, 766, 810, 870, 937, 974, 995
Expert Witnesses 407, 551

Fair Employment Practices 870
Federal Acts 204, 684
Final Orders 400, 755
Forbearance 215
Foreclosure 535
Foreign Judgments 152
Fraud 407, 535

Garnishment 294

Habeas Corpus 668
Habitual Criminals 668, 684
Homicide 311, 475, 627, 684

Impeachment 832
Implied Consent 612
Indictments and Informations 29, 311
Initiative and Referendum 123
Insanity 937
Insurance 386
Intent 83, 152, 162, 177, 197, 294, 326, 516, 586, 627, 852, 861, 902, 974, 1010
Interpreters 248
Invitor-Invitee 237

Judges 1, 138, 612, 684, 870
Judgments 29, 46, 261, 294, 326, 417, 551, 604, 612, 627, 668, 715, 747, 755, 766, 810, 842, 861, 870, 912, 974, 995, 1010
Judicial Notice 311
Judicial Sales 535
Juries 237, 475, 612, 627
Jurisdiction 106, 152, 400, 586, 604, 755
Jury Instructions 326, 551, 612, 627, 810
Justiciable Issues 29
Juvenile Courts 261, 784

Legislature 46, 83, 177, 197, 294, 417, 516, 586, 852, 902, 960, 1010
Lesser-Included Offenses 627

Liability 237, 294, 386, 407
Libel and Slander 715
Liens 535

Malpractice 407
Mandamus 842
Mental Competency 937
Minors 912, 974
Modification of Decree 417
Mortgages 535
Motions for Continuance 551
Motions for Mistrial 627, 832
Motions for New Trial 83, 551, 684, 974
Motions to Dismiss 123, 735, 974
Motions to Strike 832
Motions to Suppress 375, 684, 747, 810, 995
Motor Vehicles 612, 995
Municipal Corporations 516

Natural Resources Districts 46
Negligence 237, 407, 535
New Trial 870
Notice 237, 535, 668, 715, 960

Ordinances 46, 516
Other Acts 475, 551

Parent and Child 152
Parental Rights 784
Parties 400, 604, 861
Partition 755
Pensions 138, 204
Photographs 475, 684
Pleadings 1, 29, 123, 215, 294, 326, 586, 715, 735, 995
Pleas 185, 248, 311, 492, 766, 799, 912, 937
Police Officers and Sheriffs 375, 810
Political Subdivisions 516
Political Subdivisions Tort Claims Act 715
Postconviction 1, 29, 311, 361, 492, 551, 766, 937
Presumptions 106, 407, 417, 516, 551, 784, 902, 937, 1010
Pretrial Procedure 684, 810
Principal and Agent 326
Prior Convictions 684
Prisoners 735
Probable Cause 612, 810, 995
Probation and Parole 261, 902, 912, 960
Proof 1, 29, 46, 83, 106, 138, 162, 185, 215, 248, 294, 311, 326, 361, 386, 407, 417, 475, 492, 516, 551, 604, 612, 627, 684, 735, 766, 784, 810, 832, 842, 861, 870, 937, 974
Property 46
Property Division 138, 204, 346

Prosecuting Attorneys 361, 492, 551, 627, 684, 832
Proximate Cause 237
Public Health and Welfare 46
Public Policy 237, 417

Quantum Meruit 326
Quiet Title 152

Ratification 83
Real Estate 535
Records 492, 551, 684, 842, 937
Recusal 400
Res Judicata 261, 294, 326
Right to Counsel 29, 185, 937
Robbery 684
Rules of Evidence 475, 551, 586, 684
Rules of the Supreme Court 29, 715, 912

Sales 326, 535
Search and Seizure 375, 684, 810, 995
Self-Defense 612, 766
Sentences 106, 177, 668, 684, 852, 902, 912, 960, 974
Service of Process 294
Social Security 204
Speedy Trial 29, 747
Standing 400, 604
States 152, 684
Statutes 46, 83, 123, 162, 177, 197, 294, 311, 326, 417, 516, 535, 586, 612, 684, 735, 747, 766, 799, 852, 902, 912, 960, 1010
Stipulations 492, 535
Substantial Performance 326
Summary Judgment 83, 237, 386, 407

Taxes 535
Testimony 657, 832
Theft 162
Time 177, 261, 294, 492, 551, 627, 735, 852, 902, 960
Title 535
Trial 248, 361, 375, 475, 492, 551, 612, 627, 657, 684, 715, 810, 832, 870, 937
Trusts 535

Uniform Commercial Code 326

Value of Goods 162
Verdicts 475, 612, 684

Waiver 311, 799, 912, 974
Warrantless Searches 375, 995
Warranty 326, 535
Wills 152
Witnesses 248, 475, 684, 937

HEADNOTES

Words and Phrases 1, 46, 106, 123, 138, 152, 162, 177, 237, 294, 311, 326, 361, 407, 417, 492, 535, 551, 604, 612, 627, 684, 715, 735, 766, 784, 810, 842, 870, 974, 995
Workers' Compensation 586, 657