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CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS

No. A-20-110

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

CLAYTON M. WILEY,

Appellant.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

The Honorable Kevin McManaman, District Judge

BRIEF OF APPELLEE

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Statement of the Case

A. Nature of the Case

This is Appellant Clayton M. Wiley's ("Wiley") direct appeal from his convictions and sentences for Domestic Assault in the Third Degree – Subsequent Offense, a Class IIIA felony, and Negligent Child Abuse, a Class I misdemeanor, following a jury trial.

B. Issues Before the District Court

As relevant to this appeal, the issues before the district court were whether it should vacate the illegal sentence initially imposed on Count 1 and thereafter hold an enhancement hearing, as well as the proper sentences to be imposed. Wiley's ineffective assistance of counsel claims were not presented to the district court.

C. How the Issues Were Decided in the District Court

During the initial sentencing hearing, the district court inadvertently failed to hold an enhancement hearing on the domestic assault conviction and erroneously sentenced Wiley as if the offense had already been enhanced. Later the same day, the district court realized its error in failing to hold an enhancement hearing prior to imposing sentence and it found the sentence imposed on Count 1 was an illegal sentence. The court vacated the sentences imposed and held an enhancement hearing for Count 1. After receiving enhancement evidence, the district court found Wiley had a valid prior conviction for Domestic Assault in the Third Degree, and it enhanced Count 1 to a subsequent offense. The district court then imposed the same sentences it previously imposed of 2 years' imprisonment and 18 months' post-release supervision for the domestic assault offense, as well as 6 months' imprisonment for negligent child abuse, to be served consecutively. Wiley was granted 91 days' credit for time previously served on Count 1.

D. Scope of Review

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. *State v. Valdez*, 305 Neb. 441 (2020).

Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Munoz*, 303 Neb. 69 (2019). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance. *Id.*

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Manjikian*, 303 Neb. 100 (2019). 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. *Id.*

Propositions of Law

I.

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.

State v. Valdez, 305 Neb. 441 (2020).

II.

When a sentence imposed is unauthorized under law, it is void, and a void sentence is no sentence. *State v. Lotter*, 255 Neb. 456 (1998).

III.

Except in capital cases, a failure of proof at an enhancement hearing is not analogous to an acquittal and such a failure of proof does not trigger double jeopardy protections. *Monge v. California*, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998); *State v. Valdez*, 305 Neb. 441, 447 (2020).

IV.

Double jeopardy protections do not apply to sentence enhancement hearings and do not prevent the presentation of evidence of a prior conviction at a new enhancement hearing on remand. *State v. Valdez*, 305 Neb. 441, 447 (2020).

V.

When a defendant's trial counsel is different from his 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 on postconviction review. *State v. Munoz*, 303 Neb. 69 (2019).

VI.

An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court. *State v. Ash*, 293 Neb. 583 (2016).

VII.

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. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. Ash*, 293 Neb. 583 (2016).

VIII.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Avina-Murillo*, 301 Neb. 185 (2018).

IX.

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 a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Haynes*, 299 Neb. 249 (2018).

X.

When reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics. There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions. *State v. Huston*, 285 Neb. 11 (2013).

XI.

An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal. General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal. *State v. Filholm*, 287 Neb. 763 (2014).

XII.

In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Blaha*, 303 Neb. 415 (2019).

XIII.

The 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 and circumstances surrounding the defendant's life. *State v. Mora*, 298 Neb. 185 (2017).

XIV.

It is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate. So long as the trial court's sentence is within the statutorily prescribed limits, is supported by competent

evidence, and is not based on irrelevant considerations, the sentence imposed is not an abuse of discretion. *State v. Montoya*, 305 Neb. 581 (2020); *State v. Gibson*, 302 Neb. 833 (2019).

Statement of Facts

On October 31, 2019, Wiley was charged in Lancaster County District Court with two counts: Domestic Assault in the Third Degree – Subsequent Offense, a Class IIIA felony, and Negligent Child Abuse, a Class I misdemeanor. (T38-41). During a pretrial hearing on January 2, 2020, Wiley asserted there had been a complete breakdown in communication between him and his trial counsel, and he requested his court-appointed attorney be discharged. (12:7-18:9). Wiley's defense counsel, Mr. Rodell, explained to the court that depositions of various witnesses were scheduled for January 10, 2020, just three days after the jury trial was set to commence, and he had approached Wiley about continuing the trial to the next jury term to complete these depositions, but Wiley refused and chose to proceed to trial without them, including that of the victim. (15:23-16:17).

Mr. Rodell further explained he requested a transcript of the preliminary hearing that occurred October 17, 2019, but it had not yet been prepared, nor would it be prepared prior to the January 7, 2020 trial date. (17:2-15). Despite Wiley's claim he felt Mr. Rodell was stalling on purpose, the record shows Mr. Rodell was appointed September 10, 2019, and thus he had been Wiley's attorney for less than four months at the time of this pretrial hearing and the subsequent jury trial on January 7 and 8, 2020. (T24). The court found no cause to discharge Mr. Rodell and Wiley chose to keep him as counsel. (17:21-18:9). The district court granted Wiley's motion to appear at trial in civilian clothes and it advised Wiley he would have to make arrangements for those clothes. (T51-54; 18:21-19:3).

On January 3, 2020, the State filed a motion to amend the Information, seeking to change the alleged offense date from May 4, 2019 to May 5, 2019. (T59). This motion was heard by the district court on January 7, 2020, where the State explained that a new prosecutor had been assigned to the case, and after he had the opportunity to speak with the witnesses for the first time he realized there was a typographical error in some of the police reports which led to May 4, 2019 being the alleged offense date on the initial complaint; however, the incident actually occurred on May 5, 2019. (21:18-22:9). Wiley objected to the State's request to amend the Information, arguing the discrepancy in the date had been known since the preliminary hearing in October 2019, when the original prosecutor was assigned to the case. (22:11-23:2). The district court found there was no unfair prejudice to Wiley in amending the Information, as both parties were aware of the correct offense date of May 5, 2019, and it granted the State leave to file the Amended Information. (ST1-2; 23:7-15). Wiley waived his right to 24 hour service, he was arraigned on the Amended Information, and he pled not guilty to both counts. (23:22-25:18).

The State also filed a motion in limine on January 3, 2020 that was heard by the district court prior to trial on January 7, 2020. (T56; 25:23-29:2). The State sought an order prohibiting Wiley from eliciting testimony or introducing evidence of (1) any specific instances of violence allegedly committed by Samatha Jacobe, (2) Samatha Jacobe's prior misdemeanor conviction for Attempted Unlawful Acts or Conveyance of an Article to Inmate, and (3) any instances in which Samatha Jacobe was alleged to have possessed or conveyed contraband inside a correctional institution. (*Id.*).

Regarding specific instances of violence, Wiley's trial counsel advised he did not intend to introduce such evidence. (28:20-22). Regarding the other issues, Wiley offered

Exhibit 22, which was a copy of the arrest affidavit related to Jacobe's misdemeanor conviction for attempting to smuggle two SIM cards into the state penitentiary by passing them off to an inmate. (27:7-12). The district court received Exhibit 22 for purposes of this hearing. (27:13-25). Wiley conceded the conviction was a misdemeanor, but argued it was a crime of dishonesty. (27:1-11). The district court found the conviction did not involve a crime of dishonesty within the meaning of Neb. Rev. Stat. § 27-609(1)(b), and it granted the State's motion in limine as to all three issues. (28:5-24).

A jury trial was held on January 7 and 8, 2020. (31:18-168:5). The evidence established the victim, Samatha Jacobe ("Jacobe"), met Wiley on a dating app called "Plenty of Fish" in April 2019. (52:23-53:2; 53:13-19). Wiley messaged Jacobe through the dating app and sent her his phone number. (53:17-22). Jacobe explained she had a profile on "Plenty of Fish" for the purpose of meeting someone in the hopes of developing a relationship. (53:23-54:1). Jacobe responded to Wiley's message around the second week of April and they communicated briefly using the dating app, then they used text messages or phone calls. (54:2-16). During these communications they discussed what each person was looking for in a relationship and the possibility of becoming a couple. (54:17-21; 55:1-3). Wiley told Jacobe he was looking for something real and he wanted a relationship, and Jacobe stated she wanted an exclusive relationship. (54:20-25). Jacobe identified Wiley as the defendant in court. (53:3-12).

On April 27, 2019, Wiley contacted Jacobe about mid-afternoon, saying he was taking his sister out that night and he wanted Jacobe to meet up with them. (55:4-9). Jacobe agreed, she picked up Wiley at his house, and they went to the bars in downtown Lincoln. (55:10-14). While they were together that night, Wiley held Jacobe's hand and

he kissed her for the first time. (55:18-21). They stayed at the bars until 2 a.m. and then went to an all-night diner and had breakfast together, where they talked more about what each of them wanted in a relationship. (55:25-56:14). Wiley stated he did not want to play games, he wanted to be with just one person, and he wanted someone solid in his life. (56:15-17). They were at the diner for about two hours and then went back to Jacobe's residence at 1435 North 21st Street in Lincoln, Lancaster County, Nebraska. (56:18-57:2). Wiley spent the night with Jacobe in her bed and they had sexual intercourse. (57:3-12).

The next morning, Sunday, April 28, 2019, Wiley stayed at Jacobe's residence for a while and then left to do errands with his brother. (57:13-16). Later that day, Wiley and Jacobe took her three children to "The Mark" in Omaha, a family entertainment center, and stayed there until about 9:30 p.m. (57:17-25). While they were there, Jacobe said Wiley was distant, so on the way home she asked him what was going on. (58:1-11). They started arguing and Wiley threatened Jacobe twice, once outside Elkhorn and once outside Lincoln. (58:7-23). Jacobe testified that outside Lincoln she started to pull her car over and Wiley said, "If you pull over I'll bust you in your face right here." (58:24-59:2). Jacobe stated the other threat was similar. (59:3-5). Jacobe's three children were present in the back seat when these threats were made. (59:6-7).

Jacobe took Wiley home that night and she thought the relationship was over, but Wiley texted her the next afternoon, Monday, April 29, 2019, indicating he wanted to work things out. (59:8-12). They communicated back and forth, deciding Wiley would come to Jacobe's residence and they would talk. (59:11-16). When Wiley came over, he explained he gets upset easily and they resolved the argument. (59:17-20). Wiley again spent the night at Jacobe's residence. (59:24-25).

On April 30 or May 1, 2019, Wiley and Jacobe had another argument. (60:1-17). Wiley confronted Jacobe about $120 he was missing and yelled at Jacobe's 11 year old son, A.E., thinking he and his friends took the money. (*Id.*). Wiley accused Jacobe of playing him out to be the fool and he started packing the things he brought over to her home the previous Monday night (April 29, 2019). (*Id.*). While waiting for Wiley's brother to pick him up, Jacobe testified Wiley's demeanor changed and he started saying, "You're just gonna throw all this away, what we could have had," and before she knew it the argument was over. (*Id.*). Wiley again spent the night at Jacobe's residence. (60:18-19).

During this period, Wiley and Jacobe discussed the two of them being in an exclusive relationship and during arguments Wiley made comments like, "You had me thinking marriage with you somewhere down the road, looking at rings." (60:23-61:2). Jacobe testified Wiley spent every night at her house during the week at the end of April and beginning of May 2019. (61:3-5). Wiley slept in Jacobe's bedroom, she allowed him to live at her residence, she gave him a key to the residence so he could come and go as he pleased, and she stated they engaged in sexual intercourse about five to seven times between April 27, 2019 and May 5, 2019. (61:6-62:4). During this period, Wiley introduced Jacobe to other people, including his sister, as "his girl" or "his girlfriend." (62:5-9).

On Sunday, May 5, 2019, Jacobe woke up and noticed Wiley was sleeping on the couch in the living room, rather than in the bedroom and he would not speak with her. (62:16-20). As Jacobe got the children ready to take them to Omaha, A.E. told her Wiley had taken his phone. (62:20-22). Jacobe asked Wiley where A.E.'s phone was, and Wiley said A.E. would get it back later. (62:22-23). After Jacobe left with the children, Wiley texted her accusing her of making him look like a fool and claiming she was using her

kids to cover up her cheating on him, which is why he took A.E.'s phone. (62:25-63:5). Jacobe tried to convince Wiley she was not cheating on him and she got home so late because she was at work. (63:6-9). They agreed to talk when she got home. (63:9-10).

When Jacobe arrived back home, things were initially fine, but around 2:00 p.m. Wiley left with his brother and later texted Jacobe that he lost $500 or $600 and he wanted Jacobe to help him come up with it. (63:11-14). Jacobe told him she did not have that kind of money and Wiley became angry, saying he was coming back to get his stuff, that he wasn't going to stay there anymore, and Jacobe agreed. (63:14-17). When Wiley came back to the residence, they started arguing, which went on for 2 to 2 ½ hours. (63:17-24). Jacobe testified one minute Wiley would be guaranteed set to leave, then his demeanor would change and he would try to convince her they should not throw this away. (*Id.*).

After two hours of arguing, Wiley said he heard A.E. listening outside the bathroom window, but Jacobe insisted he was not. (64:1-2). A.E. was sitting on the front porch, and Wiley told him to go outside with his friends and stop being nosy. (64:2-4; 84:25-85:3). A.E. snapped back at Wiley and threw the door open, and Wiley chased A.E. across the street, grabbed him by the arm, put his hand around the back of his neck, brought him back across the street, and tossed him on the couch. (64:4-9; 85:4-19). Realizing the situation was getting bad, Jacobe told A.E. go to his room and stay there. (64:10-11). Jacobe and Wiley went to her bedroom to pack his things, and Wiley insisted Jacobe stay with him while he did this. (64:10-15). If she tried to leave, Wiley would grab her arm and pull her back, one time pinning her to the bed, leaving bruises. (*Id.*). When Wiley's things were packed, he again tried to convince Jacobe not to throw away their relationship, but Jacobe said, "No, you need to go. There's nothing to talk about." (64:16-18).

When Jacobe went to get something from the bathroom, Wiley followed her inside and shut the door stating, “Well, I want the money that you stole from me.” (64:19-20). Jacobe told him she did not take his money and she would not pay for it. (64:20-21). Wiley stated, “I’m gonna get my money one way or the other.” (64:21-22). Wiley was blocking Jacobe from exiting the bathroom. (89:1-2). When Jacobe tried to push Wiley aside to get out of the bathroom, Wiley’s hand came up around her throat and he shoved her back against the window, smacking her head against the windowsill. (64:22-24; 65:3-5; 83:22-84:7; 88:10-89:11). Jacobe testified Wiley smacked her in the face with his phone, causing the screen to shatter and the phone to fly out of his hand, then Wiley punched her in the nose, causing it to bleed quite a bit. (64:25-65:2; 84:8-14).

After being punched, Jacobe got Wiley off of her enough to get out of the bathroom, she went to the living room where her children were, and told A.E. to call 911. (65:6-10). Wiley came out of the bathroom chasing after A.E., he grabbed A.E. by the shirt, ripping it off him, and A.E. ran outside to the neighbor’s house. (65:6-12). Wiley took Jacobe’s phone, as his was cracked, and he called his family, saying, “It’s okay if I’m arrested. She’ll be gone too.” (65:15-18). Wiley told Jacobe if he went to jail, she could kiss her life goodbye too. (65:19-20). Jacobe testified she went into survival mode and told Wiley, “No. There’s no cops. I’m not calling the cops. Let’s just go. I’ll take you to your house. Let’s just get out of here. Let’s go get that money you think I took.” (65:20-23).

A short time later, A.E. came back down the street with the neighbor lady, who asked Jacobe if things were okay. (65:24-25; 83:7-16). Jacobe said, “Yes,” and she got A.E back inside. (65:24-66:9; 83:15-16). Jacobe acknowledged she could have told the neighbor, “No, things are not okay, call 911,” but she did not. (83:15-19). They went to an

ATM to get the money Wiley said she stole from him, and then she took Wiley to his family's home. (65:24-66:5). After going to the ATM, Wiley said, "I better not go to jail for this 'cause you'll pay." (66:6-9). Jacobe did not contact the police, but immediately after dropping Wiley off she called her friend Nicole and told her what happened. (66:10-16). Nicole wanted Jacobe to call the police, but Jacobe knew Wiley would probably follow through with his threats, so she refused. (66:15-19; 82:9-12). Jacobe explained her reluctance to call police was due to Wiley's threats, and she felt the best thing to do was get Wiley as far away from them as possible and leave it alone. (90:12-22). Jacobe said when she told A.E. to call 911, Wiley had not yet made any threats to her. (91:3-16).

The next day, Monday May 6, 2019, Nicole came to Jacobe's home. (66:19-22). Jacobe did not report the incident to the police, rather on May 6, the police contacted her about it and she explained what happened. (66:23-67:3; 82:6-8). Jacobe identified Exhibits 1 through 9 as photos of her injuries caused by Wiley on May 5, 2019, and taken by police on Monday, May 6, 2019. (67:4-68:11). Exhibits 1 through 9 were offered by the State, Wiley objected as to foundation, the court overruled the objection, and the exhibits were received. (68:12-20; E1 through E9). As the photographs were published to the jury, Jacobe described the injuries depicted in each photo. (68:24-70:8). Jacobe identified Exhibit 10, a photograph of A.E.'s shirt that Wiley ripped off him, which was also taken by police on May 6, 2019. (70:13-25). Exhibit 10 was offered by the State, Wiley made the same objection, which was overruled, and the exhibit was received. (71:1-6; E10).

Jacobe also identified Exhibits 12 through 21 as photographs taken by another police officer the next day, Tuesday May 7, 2019, further depicting the injuries inflicted on her by Wiley. (71:17-72:17). Exhibits 12 through 21 were offered by the State, Wiley made

the same objection, which was overruled, and the exhibits were received by the court. (72:18-22; E12 through E21). As the photos were published to the jury, Jacobe again described her injuries in each photo. (73:4-74:1). Jacobe identified Exhibit 11, which was a photo Jacobe took of herself on May 10, 2019, further depicting the injuries she sustained as a result of Wiley's actions on May 5, 2019. (74:2-23). Exhibit 11 was offered by the State and received without objection. (74:24-75:2; E11). Jacobe sustained a black eye and other bruising around her neck and chest as a result of Wiley's actions, she testified the injuries were painful, and that she felt terrified during the incident. (75:11-25).

Jacobe described the demeanor of her three children during the assault, including her six year old twins screaming and crying, and A.E. screaming "You're hurting me" at Wiley as he brought him back across the street. (75:18-76:14). Jacobe testified that on May 5, 2019, she felt Wiley and her were in a dating relationship. (76:15-20).

A.E., Jacobe's 11 year old son, testified. (93:24-109:7). A.E. was born in May 2008. (94:5-12). A.E. stated he knew Wiley from when he stayed at their home, and he identified Wiley in court. (94:23-95:11). A.E. remembered his mother (Jacobe) going out on the night of Saturday, April 27, 2019, and he first met Wiley the next morning on April 28 in his mother's bedroom, where Wiley was on Jacobe's bed, talking to her. (95:12-96:6). A.E. described their trip to "The Mark" in Omaha that occurred on Sunday, April 28, and while they were coming home, Wiley said if his mother stopped the car he would hit her. (96:7-18). On April 29, A.E. recalled Wiley came over to say he was sorry. (96:19-24).

A.E. continued to see Wiley at their home between Monday, April 29, 2019 and the following Saturday (May 4, 2019). (96:25-97:2). A.E. said Wiley slept in Jacobe's bedroom during that week, and A.E. saw Wiley and Jacobe holding hands and kissing. (97:3-14).

A.E. described one evening Wiley and Jacobe were arguing and Wiley thought she was going to call the police, so he took her phone and threw it against the wall. (87:15-20). A.E. also described Wiley taking A.E.'s phone on Saturday, May 4, 2019. (97:21-98:6).

On May 5, 2019, A.E. was playing with his friends in the yard, but when they went inside, A.E. came home and sat on the porch. (98:13-16). When A.E. tried to explain to Wiley why he was not out playing with his friends, Wiley cut him off, so A.E. opened the screen door, making a big noise, and Wiley started chasing him. (98:16-99:2). A.E. ran across the street to his neighbor's home, but Wiley grabbed the back of A.E.'s blue tank top, ripping it off. (99:12-100:3). A.E. identified Exhibit 10 as a photo of the tank top Wiley ripped off him. (100:8-17). A.E. testified Wiley hurt his right arm by grabbing him by the right bicep and dragging him back to the house. (100:18-23; 104:25-105:6). After Wiley brought A.E. back the house, he threw him on the couch, and Jacobe told A.E. to go to his room and shut the door. (101:2-5; 102:2-7).

A few minutes later, when A.E. came out of his room and sat on the couch, he heard Wiley and his mother talking about Wiley wanting $120 for something. (102:10-13). Wiley accused Jacobe of stealing the money and he took Jacobe into the bathroom. (102:13-15). A.E. did not see what happened in the bathroom because the door was shut, but he saw Jacobe come out of the bathroom with a bloody nose and a black eye, which is not how she looked when she went into the bathroom. (102:25-103:10; 103:18-23).

When Wiley exited the bathroom, he went after A.E. because Jacobe told A.E. to call 911. (103:5-13). A.E. ran outside and to get help from his neighbors, and A.E. stated he was scared of Wiley coming after him because of what Wiley did to his mother. (103:11-17; 105:9-13). A.E. also explained he did not have his phone when he ran out of

the house, as it was in Wiley's hand at the time. (106:24-107:4). As the neighbor lady walked A.E. back to the house, she had her phone out ready to call 911. (104:4-11). Wiley threatened if Jacobe called the cops he would end her life, and Jacobe told the neighbor everything was all right. (104:13-14; 107:5-7). A.E. never called police. (104:15-16). When A.E. got back to the house, everyone got in the car and went to the bank to get $120, then dropped Wiley off at his family's home. (104:17-19). A.E. stated the incident still worries and upsets him. (105:14-22). A.E. also observed his six year old twin siblings were scared and crying during the incident. (105:23-106:7).

Officer Nathan Svitak, a police officer for the Lincoln Police Department testified briefly that he met with Jacobe on May 7, 2019 and took the photos of her depicted in Exhibits 12 through 21. (112:6-113:13). Officer Svitak testified Jacobe had a black eye and the photos accurately depicted her appearance on that date. (*Id.*).

Officer Troy Aksamit, another police officer for the Lincoln Police Department, also testified. (114:5-118:20). On May 6, 2019, Officer Aksamit responded to a disturbance call, along with Officer Perkins, and spoke with Jacobe. (114:20-115:21; 118:10-20). Officer Aksamit observed Jacobe had a black right eye and other injuries to her neck and right shoulder. (*Id.*). Officer Aksamit testified he took the photos of Jacobe, contained in Exhibits 1 through 9, as well as the photo of A.E.'s ripped shirt in Exhibit 10, and they were fair and accurate depictions. (115:22-25; 116:20-117:23). Jacobe was interviewed and a report was written. (116:1-4). Officer Aksamit testified he had to convince Jacobe to make the report, as she was reluctant to do so. (116:5-8).

Following Officer Aksamit's testimony, the State rested. (119:1). Wiley moved for a directed verdict, which was denied. (119:9-14). Wiley's trial counsel advised he

discussed with Wiley whether he intended to testify or not testify, but before making that decision, the defense recalled Jacobe. (119:15-18). Defense counsel asked Jacobe if she knew anyone by the name of Anthony Mitchell or the street name “Solo Act” or “Solo.” (123:5-11). Jacobe denied knowing anyone by those names. (123:12). Jacobe further denied she met Wiley by selling him pills. (123:13-15). Jacobe was asked about whether she reported Wiley’s threats when she spoke with police and she indicated she did. (124:2-16). Jacobe was also asked about the protection order she obtained against Wiley on May 7, 2019, identified as Exhibit 23, which was offered by the defense and received without objection. (124:17-125:20; E23). The application for protection order contained a summary of the May 5, 2019 incident, and Jacobe acknowledged she did not specifically mention Wiley’s threats about what he would do if she called 911. (125:1-16).

However, on cross-examination, the State pointed out that the space in which to write down the summary of events was only 10 lines and Jacobe had even gone beyond those lines attempting to provide further information, but the space provided was limited and it did not include an exhaustive account of what happened on May 5, 2019. (126:19-127:16). The State further pointed out the consistencies between the summary in the protection order application, Jacobe’s statement to police, and Jacobe’s testimony at trial, including threats made to her by Wiley during their relationship. (127:17-131:7). Following Jacobe’s testimony, the defense rested. (131:12).

Outside the presence of the jury, the following discussion occurred regarding Wiley’s decision not to testify:

> THE COURT: Okay. Counsel, then I take it that Mr. Wiley has decided not to testify; is that correct?

MR. RODELL: That is correct, Your Honor.

THE COURT: And, Mr. Wiley, you're aware you have a right to testify. Are you aware of that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. And your attorney indicates you've chosen not to testify; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Has anybody forced you or threatened you or promised you anything to get you to waive your right to testify – or not to testify?

THE DEFENDANT: No, Your Honor. Um –

THE COURT: I'm just asking.

MR. RODELL: I think he has the right to remain silent, Judge, so.

THE DEFENDANT: No.

THE COURT: All right.

THE DEFENDANT: No. Your Honor, it's just --

THE COURT: Well, Mr. Wiley, hold on. I just asked if you've chosen to not testify if that's your choice.

THE DEFENDANT: You also asked me was I threatened and (indiscernible) so I chose to explain.

THE COURT: All right. And is that a yes? Are you saying yes?

THE DEFENDANT: No, Your Honor. Never mind.

THE COURT: All right. I just want to make sure that you're freely and voluntarily choosing not to testify.

(132:19-133:20). Following deliberations, the jury found Wiley guilty of both counts, the verdicts were accepted by the district court, and Wiley was found guilty of Domestic Assault in the Third Degree and Negligent Child Abuse. (165:16-167:3). A pre-sentence investigation (PSI) was ordered and sentencing was scheduled. (167:4-10).

On February 6, 2020, Wiley's sentencing hearing was held for this case, as well as another case where Wiley had entered a plea to Attempted Assault on an Officer as part of a plea agreement. (169:1-187:10). The district court stated it reviewed the PSI. (169:21-24). The parties engaged in a lengthy discussion about jail credit related to Wiley's three different cases, and it was determined he had 91 days of credit for the present case. (169:25-174:20). No other corrections, modifications, or additions were made to the PSI. (174:21-24). Defense counsel and the State provided argument to the court as to the appropriate sentence, and Wiley gave allocution. (175:1-178:17). Prior to imposing sentence, the district court made the following comments:

THE COURT: Mr. Wiley, I want to let you know the things that I've considered in determining the appropriate sentences in these two cases.

First, the laws of Nebraska require I examine certain things, like your age, which is only 31.

THE DEFENDANT: Yes, sir.

THE COURT: And your mentality, your education. I know you – I think you said you got through like --

THE DEFENDANT: Ninth grade, Your Honor.

THE COURT: Ninth grade, and then went to work.

THE DEFENDANT: Yes, Your Honor.

THE COURT: And your experience, your social and cultural background. I know you're from the Clarksdale, Mississippi area.

Your past criminal record, which those, you know, I mentioned your age, only 31, but, you know, just starting – lots of assaults and there's DUI's in there and substances – or alcohol, open container, things like that.

But, you know, a domestic assault in 2015, another assault in 2015. The first one was dismissed, the second one you got 20 to 60 months and then domestic assault in the third you got 12 months on that one – on those two at that time.

And then assault by a confined person in 2016 that was dropped to assault in the third degree. 2019 and the domestic assault third degree with priors and a child abuse. And then this assault on an officer in the newer case, which became attempted assault on an officer.

So, you know, I'm looking at the past criminal record and motivation for the offense and nature of the offense, and presence or absence of violence and a lot of violence in both those offenses. And the nature of both of those is violence and the motivation seems to be, you know, when you don't get what you want you get frustrated or angry, and I don't know if there's a great deal of motivation to justify any of this stuff. It doesn't seem like it, but you might have it figured out in your head where you look back on it and think somehow it's justified.

But there's motivation behind it and I think whether you try and justify it or not, there's motivation that you're not getting what you want, somebody's doing something you don't like and you react angrily, violently. And even when you're already incarcerated and, you know, the – you know, it's pretty clear that anything you do there is gonna be seen and reported and there's gonna be consequences, but you still do it.

I mean it's good what you said about, you know, trying to get back in working on some of the anger management, things like that. It doesn't make any sense, you know, that the second case occurred while you were already locked up and the first one didn't really make sense, either, but the second one when you're already locked up doesn't make any sense. Clearly, you're gonna get caught doing that.

So it's – so you have to be highly motivated to strike out like that – to strike out when it's obviously, you know, there are witnesses and cameras, and so I've considered all those things.

I consider all of the information in the PSI. I've gone through it.

In the second case, you know, I'm taking – you know, I agree with Mr. Rodell. Your plea did save trial in that case and you had a pretty good – I mean you've had the ability to be employed and had jobs, you know, and it seemed like you got something out of working and you seemed like you work – at times you've had good jobs and worked hard. I think you worked at the Cold Storage place and that seemed like maybe that was good for you and, you know, all these things.

> …I've got the safety of the community to consider and people have to be deterred from committing violent acts and that's true whether or not we're talking about the safety of the community of the people, you know, on the street, friends and neighbors, or people that are working in Corrections. They're part of the community, too. And you're gonna have people there – you've got people that you see all day, every day you see the same people. They're part of your community, and so their safety is important, too.
>
> So in CR19-1179 defendant having been found guilty of Count 1 domestic assault in the third degree with a prior, and Count 2, child abuse, and having regard for the nature and circumstances of the crimes and the history, character and condition of the defendant, the court finds there is a substantial and compelling reason not to place the defendant on probation, a lesser sentence would depreciate the seriousness of the crime, and a lesser sentence would promote disrespect for the law and the crime caused or threatened serious harm.
>
> There is no reason to excuse or justify the offense and the defendant has not led a law-abiding life for a substantial period of time prior to this offense.

(178:18-181:15). The district court sentenced Wiley to a term of imprisonment of two years on Count 1, followed by 18 months' post-release supervision, as well as a term of imprisonment of 6 months on Count 2, to be served consecutively to one another and the sentence imposed in CR20-50. (181:16-182:185:16). Wiley was granted 91 days credit for time served on Count 1. (*Id.*).

Four hours later, the parties reconvened before the court regarding sentencing. (187:11-194:20). The district court noted an enhancement hearing on Count 1 had not occurred prior to the court imposing sentence earlier in the day, thus making it an illegal sentence and void. (187:22-188:1). The court vacated the previously imposed sentence in this case, and commenced with an enhancement and sentencing hearing. (188:1-11). The State offered Exhibit 24, Wiley's certified prior conviction for Domestic Assault in the Third Degree, which was received without objection. (189:11-20). The district court noted it would consider anything the parties argued during the earlier sentencing proceeding and any such arguments need not be restated. (190:1-16). After reviewing Exhibit 24, the district court found by a preponderance of the evidence the prior conviction was valid, Wiley had been represented by counsel, and it could be used for purposes of enhancement, making the offense of conviction Domestic Assault in the Third Degree – Subsequent Offense. (190:17-191:7). Counsel and Wiley were each given another opportunity to be heard regarding imposition of sentence. (191:12-192:2). The district court then made the following comments:

> All right. And again, Mr. [Wiley], I told you earlier the things the court considers in determining the appropriate sentence in this case. And I've gone through that and I did examine your age, mentality, education, experience, social/cultural background, past criminal record and law-abiding conduct, the motivation for the offense, nature of the offense and the presence of violence. And I did go through the PSI. I'm aware of your plea, your work history and prior employment, children, and safety of the community and treatment needs.

(192:3-10). After reiterating the compelling reasons not to place Wiley on probation, the court imposed the same sentences previously imposed on each count, to be served consecutively, with 91 days' credit on Count 1. (192:11-194:20). This appeal followed.

Argument

I. Assignment of Error #1: The district court did not error by vacating the illegal sentence imposed on Count 1 and proceeding with an enhancement hearing.

Wiley concedes the district court properly vacated the illegal sentence initially imposed on Count 1 and proceeded with resentencing, but he argues the court erred by acting impartially when it held an enhancement hearing. (Brief of Appellant, pp. 18-22). Wiley's argument relies on an overruled opinion from the Nebraska Court of Appeals, *State v. Gray*, 8 Neb. App. 973 (2000), which happens to also be factually distinguishable from the present case. This assignment of error is without merit.

In a proceeding to enhance a punishment because of prior convictions, the State has the burden to prove such prior convictions. *State v. Valdez*, 305 Neb. 441, 445 (2020). Usually, the State will prove a defendant's prior convictions by introducing certified copies of the prior convictions or transcripts of the prior judgments. *Id.* The Nebraska Supreme Court has held that enhancement of various criminal offenses is analogous to habitual criminal enhancement, meaning evidence of a prior conviction must be introduced in order to enhance the sentence. *Id.* at 446. 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. *Id.* When a sentence imposed is unauthorized under law, it is void, and a void sentence is no sentence. *State v. Lotter*, 255 Neb. 456 (1998).

Here, it is undisputed the district court did not receive evidence at the initial sentencing hearing necessary to subject Wiley to the enhanced penalties for Domestic Assault in the Third Degree – Subsequent Offense. (169:1-187:10). Thus, the sentence imposed of 2 years' imprisonment followed by 18 months' post-released supervision, exceeded the statutory limits for a Class I misdemeanor. See Neb. Rev. Stat. § 28-106 (Reissue 2016). As a result, it was plain error for the district court to impose this illegal sentence on Count 1, and it amounted to a void sentence, which Wiley does not dispute.

While not raised in Wiley's appeal, the State notes the sentence initially imposed on Count 2 was a valid sentence from the time of oral pronouncement and it could not be vacated; however, since the later sentence imposed on Count 2 was identical to the initial sentence imposed, it was not modified in any way, and there was no prejudice to Wiley. See *State v. Lotter*, 255 Neb. 456 (1998) (when a valid sentence has been put into execution the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed and any attempt to do so is of no effect and the original sentence remains in force).

Thus, the only issue is whether it was the proper remedy for the district court to proceed with an enhancement hearing after vacating the illegal sentence imposed on Count 1. Contrary to Wiley's assertion, the Nebraska Supreme Court has consistently remanded cases for a new enhancement hearing when the State failed to produce sufficient evidence of the requisite prior convictions for enhancement purposes. *State v. Valdez*, 305 Neb. 441, 446 (2020) (internal citations omitted); see also *State v. Oceguera*, 281 Neb 717 (2011). The Nebraska Supreme Court has held that the proper remedy for a trial court's error in failing to receive evidence of a prior conviction at an enhancement

hearing is for the case to be remanded for a new enhancement hearing, rather than for it to be remanded for resentencing on a reduced charge. *State v. Valdez*, 305 Neb. at 447.

In *State v. Oceguera*, 281 Neb. 717 (2011), when the State failed to present sufficient evidence of three prior DUI convictions to support a fourth DUI, the Nebraska Supreme Court remanded for a new enhancement hearing. In doing so, the Court recognized that neither Nebraska case law nor any federal constitutional law prohibits a new enhancement hearing. See *State v. Oceguera*, 281 Neb. at 722, and *State v. Valdez*, 305 Neb. 447. The United States Supreme Court has said that except in capital cases, a failure of proof at an enhancement hearing is not analogous to an acquittal and that such a failure of proof does not trigger double jeopardy protections. See *Monge v. California*, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998).

In *State v. Valdez*, 305 Neb. 441 (2020), which is analogous to the present case, the issue of enhancement was not addressed at sentencing and no evidence was adduced on the matter, but the trial court treated the offense as enhanced and sentenced Valdez accordingly. The Nebraska Supreme Court, citing to *State v. Oceguera*, *supra*, and *Monge v. California*, *supra*, as well as to several appellate cases from other states, found double jeopardy protections do not apply to sentence enhancement hearings and do not prevent the presentation of evidence of a prior conviction at a new enhancement hearing on remand. See *Valdez*, 305 Neb. at 447. Since the proper remedy in this situation is to vacate the illegal sentence and remand the case for a new enhancement and sentencing hearing, as was done in *Valdez*, it was not erroneous for the district court to vacate the sentence on Count 1, hold an enhancement hearing, and impose a lawful sentence. Such actions were fully consistent with Nebraska Supreme Court precedent.

Wiley does not assert the State waived enhancement, but insofar as any such suggestion is being made by Wiley, *Valdez* resolved that issue as well. A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct. *Valdez*, 305 Neb. at 448-49. A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record. *Id.* at 449. To establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part. *Id.* Further, a waiving party must have full knowledge of all material facts. *Id.* As in *Valdez*, there is no evidence in the record the State intended to forgo enhancing Wiley's sentence, and the enhancement allegation was stated in each of the State's charging documents. (T1-2; T38-41; ST1-2).

It appears from the record that at the beginning of the initial sentencing hearing, the parties became engaged in a lengthy and somewhat confusing discussion about jail credit related to three of Wiley's cases, and the district court inadvertently failed to hold an enhancement hearing prior to proceeding with sentencing after the jail credit issue was resolved. The court failed to recognize enhancement had not been addressed until later the same day, after the sentencing hearing was concluded. Immediately upon the court recognizing the error, the parties reappeared for another hearing, where the sentences were vacated, an enhancement hearing was held on Count 1, and valid sentences were imposed. In order for a waiver argument to apply, Wiley must show the State intended to prosecute him for Domestic Assault in the Third Degree – First Offense, a Class I misdemeanor, which he has not done. Throughout the case, the State maintained its prosecution of Wiley for a Class IIIA felony. Any argument as to waiver is without merit.

Finally, Wiley asserts the district court was impartial by holding an enhancement hearing after the illegal sentence was vacated. Wiley relies heavily on *State v. Gray*, 8 Neb. App. 973 (2000), which is an overruled case that is factually distinguishable from the present case. In *Gray*, the State offered several of the defendant's prior convictions in an attempt to enhance multiple charges. After offering these priors, the State stated it had no further evidence to present and the sentencing hearing was continued to allow the defendant to obtain authenticated copies of prior convictions to offer in rebuttal. Prior to the resumption of the enhancement hearing, the judge became concerned there was not sufficient evidence in the State's exhibits to show Gray waived his right to counsel when he entered his prior pleas. The judge expressed this concern in a letter to each of the parties. The judge then allowed the State to withdraw its rest and present more enhancement evidence after it had pointed out the flaw in the State's exhibits.

Gray is factually distinguishable from the present case, as the district court here never acted impartially the way the court did in *Gray*. In *Gray*, the district court assessed the State's enhancement evidence, determined it was insufficient, advised the State of this insufficiency, and then over defense objection, it allowed the State to offer more evidence to plug up the gaps in its proof, none of which occurred here. In fact, in the present case, the district court could not have done any of this as no evidence was ever provided to the court for it to assess regarding enhancement prior to the court vacating the sentence on Count 1 and then holding an enhancement hearing. At no point did the district court advise the State that certain evidence it offered was insufficient, and then having so advised the State of the problem, allowed it to remedy the lack of evidence. To the contrary, all that happened here is what would have happened in any other case

where the appellate court remanded the case for a new enhancement hearing, as was the case in *State v. Valdez*, *supra*.

Under Nebraska law, "[t]here exists a presumption of judicial impartiality, and a party alleging that a judge acted with bias or prejudice bears the heavy burden of overcoming that presumption." *In re Jamyia M.*, 281 Neb. 964, 976 (2011); *State v. Thomas*, 268 Neb. 570 (2004). Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion directed to a trial judge. *State v. Buttercase*, 296 Neb. 304 (2017); see also Neb. Code of Judicial Conduct § 5-302.11(A). A reasonable person who knew the circumstances of this case would not question the district court judge's impartiality under an objective standard of reasonableness.

Moreover, *State v. Gray*, 8 Neb. App. 973 (2000) is a Nebraska Court of Appeals decision that was overruled by *State v. Nelson*, 262 Neb. 896 (2001), *overruled on other grounds* by *State v. Vann*, 306 Neb. 91 (2020). *Gray* held that where a court, either trial or appellate, determines evidence is insufficient to support a guilty verdict or habitual criminal findings, double jeopardy prevents giving the State another opportunity to prove its case. However, in *State v. Nelson*, *supra*, the Nebraska Supreme Court overruled *Gray*, finding double jeopardy principles do not apply to habitual criminal enhancement proceedings and thus, they do not preclude a subsequent enhancement proceeding upon remand. The *Nelson* Court further noted the protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution, thus, it does not provide greater protection. The finding in *Nelson* has been applied to enhancement of a subsequent offense in multiple cases since 2001, even as recently as in *State v. Valdez*, *supra*, which was released in April 2020 prior to the filing of Wiley's brief.

Ultimately, even if a court found the district court acted impartially, which the record does not support, this would not prevent an appellate court from remanding the case for another enhancement hearing before a different judge. This assignment of error is without merit.

II. Assignments of Error #2 through #12: Ineffective Assistance of Counsel Claims

In his brief, Wiley alleges his trial counsel provided ineffective assistance in eleven respects. The State submits the record is sufficient to resolve six of Wiley's claims.

Standards Applicable to Ineffective Assistance Claims

When a defendant's trial counsel is different from his 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 on postconviction review. *State v. Munoz*, 303 Neb. 69 (2019). An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court. *State v. Ash*, 293 Neb. 583 (2016). The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id.* The determining factor is whether the record is sufficient to adequately review the question. *Id.* An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *Id.*

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), the defendant must show that counsel's performance

was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Avina-Murillo*, 301 Neb. 185 (2018). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide deficient performance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance. *State v. Anderson*, 305 Neb. 978 (2020). The two prongs of the test governing a claim of ineffective assistance of counsel, deficient performance and prejudice, may be addressed in either order. *State v. Alarcon-Chavez*, 295 Neb. 1014 (2017).

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. *State v. Haynes*, 299 Neb. 249 (2018). 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. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Anderson*, 305 Neb. 978 (2020). When reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics. *State v. Huston*, 285 Neb. 11 (2013). There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions. *Id*.

Assignment of Error #2: Failure to object to the State's motion in limine regarding evidence of specific acts of violence by Jacobe.

Wiley asserts his trial counsel performed deficiently by failing to object to the State's motion in limine seeking to exclude evidence of specific acts of violence by

Jacobe. (Brief of Appellant, pp. 22-25). Wiley asserts specific acts of violence by an alleged victim are admissible when demonstrating the Appellant's actions were justified as self-defense. (*Id.*). The State agrees that under Neb. R. Evid. § 27-404(1)(b) evidence of a victim's aggressive and violent character, in some circumstances, may be admissible to show whether the victim was the first aggressor or, if there is also evidence Wiley knew of Jacobe's alleged violent character prior to the incident, that he had a reasonable belief force was necessary. See *State v. Lewchuk*, 4 Neb. App. 165 (1995); R. Collin Mangrum, Mangrum on Nebraska Evidence § 27-404 (2020 Update).

However, Wiley has failed to specifically allege what specific acts of violence were committed by Jacobe, or what opinion or reputation testimony regarding her propensity for violence would have been offered at trial, and by whom. Nor has Wiley alleged that trial counsel was ever made aware of any specific acts of violence committed by Jacobe to introduce at trial. There is no reason why Wiley could not supply the details of these specific facts of violence, as he claims he is aware of them. Without such specifics, this claim is merely a general allegation without specific facts to support that any such propensity for violence evidence exists or that such evidence was admissible under the rules of evidence. As such, the claim lacks the necessary specificity. See *State v. Blaha*, 303 Neb. 415 (2019). An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal. *State v. Filholm*, 287 Neb. 763 (2014). General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal. *Id.*

Assignment of Error #3: Failure to present the justification of self-defense.

Wiley asserts his trial counsel performed deficiently by failing to pursue the affirmative defense of self-defense. (Brief of Appellant, pp. 25-26). However, Wiley has failed to assert any facts supporting such a theory, other than to make the general comment he was aware of Jacobe's violent tendencies. (*Id.*). This allegation merely sets forth a blanket assertion that had defense counsel pursued a theory of self-defense at trial the evidence would have supported such a theory, but he has not provided any facts to support this claim. As such, the claim lacks the necessary specificity. See *State v. Blaha*, 303 Neb. 415 (2019). An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal. *State v. Filholm*, 287 Neb. 763 (2014). General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal. *Id.*

"To successfully assert a claim of self-defense as justification for the use of force, the defendant must have a reasonable and good faith belief in the necessity of such force. The force used must be immediately necessary and must be justified under the circumstances. This necessarily means that the defendant asserting a claim of self-defense may introduce evidence why he or she was justified in being fearful of the alleged victim or that he alleged victim was the first aggressor." See *State v. Goynes*, 278 Neb. 230 (2009). Wiley's assertion that self-defense was a legally cognizable theory is not supported by anything in the record, nor has Wiley alleged facts that, if true, would support such an affirmative defense. He has even failed to allege the specifics of what constitute "Jacobe's violent tendencies" or how such evidence would have been admissible at trial.

It is also notable that Wiley's brief does not allege Jacobe attacked him or that she did anything to make him fearful of her, which is required for a claim of self-defense. Rather than providing any detail, Wiley alleges only conclusions of fact and law, which are insufficient to support a claim of ineffective assistance of counsel.

Assignment of Error #4: Failure to ensure Wiley was dressed in civilian clothes and not in restraints during trial when civilian clothes were available to him.

Wiley asserts his trial counsel performed deficiently by advising him he would appear more sympathetic to the jury if he was wearing an orange jail jumpsuit and restrained during trial. (Brief of Appellant, pp. 26-29). First, there is nothing in the record demonstrating Wiley was restrained during trial, a fact which Wiley concedes. Second, even assuming the record clearly shows Wiley was dressed in an orange jail jumpsuit at trial, Wiley's own claim on appeal indicates this was done because defense counsel's trial strategy was to have him appear in such attire in order to garner sympathy from the jury. This trial strategy is a recognized defense tactic, it should be afforded due deference, and should not be second-guessed. *State v. Huston*, 285 Neb. 11 (2013); see also *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976) (United States Supreme Court noted cases show "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury"); *United States v. Wells*, 162 F.3d 1171 (unpublished opinion) (9th Cir. 1998) (the Court found producing an accused in prison clothing is a valid defense tactic).

Moreover, there is nothing in the record indicating that Wiley made civilian clothes available to his trial counsel for Wiley's use at trial, despite the district court advising Wiley he would need to make such arrangements. (T51-54; 18:21-19:3). Given that trial counsel

did take steps to permit Wiley to appear in civilian clothes at trial through a pretrial motion, which was granted by the district court, the lack of evidence in the record as to why Wiley ultimately appeared in jail clothing at trial renders the record insufficient for this Court to resolve the claim on direct appeal. (T51-54).

Assignment of Error #5: Failure to call "Neighbor Woman" as a witness to test the veracity of other witnesses' testimony.

Wiley asserts trial counsel performed deficiently by not calling "Neighbor Woman" as a witness, despite Wiley appearing to have no knowledge of what she would have said had she been called to testify. (Brief of Appellant, pp. 29-30). While this claim is a conclusory allegation, since Wiley has failed to allege what her testimony would have been, "[o]n direct appeal, [an appellate court does] not need specific factual allegations as to who should have been called or what that person or persons would have said to be able to conclude that any evidence of such alleged ineffective assistance will not be found in the trial record." *State v. Abdullah*, 289 Neb. 123, 133-34 (2014).

Here, there is nothing in the trial record as to what Neighbor Woman would have testified to or whether defense counsel had any strategic reason for not calling her as a witness at trial. Neighbor Woman's testimony may have simply corroborated Jacobe and A.E.'s testimony, further incriminating Wiley, and since Wiley refused to allow his trial counsel to request a continuance in order to complete witness depositions scheduled just three days after the jury trial was to commence, there is ample basis in trial strategy for defense counsel to not call a witness whose testimony is unknown and which may not be helpful to Wiley's defense. (15:23-17:21). The district court even commented that Wiley's choice to proceed to trial without taking the scheduled depositions was his trial strategy.

(*Id.*). Ultimately, because we do not know why "Neighbor Woman" was not called as a witness, the record is insufficient to resolve this claim on direct appeal.

Assignment of Error #6: Failure to call Nicole King as a witness to test the veracity of other witnesses' testimony.

Similar to the argument above, Wiley asserts trial counsel performed deficiently by failing to call Nicole King as a witness, despite Wiley appearing to have no knowledge of what she would have said had she been called to testify. (Brief of Appellant, pp. 30-31). The analysis here is the same as in assignment of error #5. While this claim is a conclusory allegation, since Wiley has failed to allege what the testimony of Nicole King would have been, "[o]n direct appeal, [an appellate court does] not need specific factual allegations as to who should have been called or what that person or persons would have said to be able to conclude that any evidence of such alleged ineffective assistance will not be found in the trial record." *State v. Abdullah*, 289 Neb. at 133-34.

Like Neighbor Woman, there is nothing in the trial record as to what Nicole King would have testified to or whether defense counsel had any strategic reason for not calling her as a witness at trial. Moreover, there is ample basis in trial strategy for any defense counsel to not call a witness whose testimony is unknown and which may not be helpful to Wiley's defense, as Nicole King's testimony may have corroborated Jacobe and A.E.'s testimony, and her deposition was never taken in order to find out what her testimony would have been because Wiley prevented his trial counsel from doing so. (15:23-17:21). Ultimately, because we do not know why Nicole King was not called as a witness, the record is insufficient to resolve this claim on direct appeal.

Assignment of Error #7: Failure to call Officer Perkins as a witness to test the veracity of other witnesses' testimony.

Similar to assignments of error #5 and #6, Wiley asserts trial counsel performed deficiently by failing to call Officer Perkins as a witness, despite Wiley appearing to have no knowledge of what he would have said had he been called to testify. (Brief of Appellant, pp. 31-32). Wiley seems concerned about a typographical error in some of the police reports as to the offense date; however, at trial there was no dispute about when the offense occurred. Both victims were clear the incident happened on Sunday, May 5, 2019. (62:16-76:20; 98:7-106:9). Wiley cannot show prejudice as to the date discrepancy, as the presence of a typo in Officer Perkins' report would not create a reasonable probability of a different result at trial, particularly when the charges allege the offense occurred "on or about" a specific date, which means the State must show the offense occurred on or near the date alleged; however, the State is not required to prove with certainty the exact date of an alleged offense, and here the alleged discrepancy was whether the incident occurred on May 4 or May 5, 2019, just one day apart. (T38-39; T74; ST1-2).

The analysis here is the same as in assignments of error #5 and #6. While this claim is a conclusory allegation, since Wiley has failed to allege what the testimony of Officer Perkins would have been, "[o]n direct appeal, [an appellate court does] not need specific factual allegations as to who should have been called or what that person or persons would have said to be able to conclude that any evidence of such alleged ineffective assistance will not be found in the trial record." *Abdullah*, 289 Neb. at 133-34. Like Neighbor Woman and Nicole King, there is nothing in the trial record as to what Officer Perkins would have testified to or whether defense counsel had any strategic

reason for not calling him as a witness at trial. Thus, the record is insufficient to resolve this claim on direct appeal.

Assignment of Error #8: Failure to emphasize to the jury the inconsistent dates of the offense as testified to by the witnesses and thereby call into question their veracity.

Wiley asserts trial counsel performed deficiently by failing to emphasize to the jury the inconsistency in the date of offense testified to at trial. (Brief of Appellant, pp. 21-33). However, this claim is refuted by the record because the trial witnesses did not testify inconsistently to the offense date. Jacobe was absolutely clear in her testimony that Wiley's offense conduct occurred on Sunday, May 5, 2019, and the police contacted her on Monday, May 6, 2019. (62:16-76:20). A.E. was also clear in his testimony that the offense conduct occurred on Sunday, May 5, 2019. (98:7-106:9).

Officer Svitak testified he took photos of Jacobe's injuries on May 7, 2019, which was consistent with Jacobe's testimony of when those photos were taken. (71:17-74:1; 112:14-113:13). Finally, Officer Aksamit testified he and Officer Perkins met with Jacobe on May 6, 2019 to take her statement about what happened as well as take photographs of her injuries, which is again consistent with Jacobe's trial testimony. (66:23-71:16; 114:20-118:20). As there was no inconsistent testimony at trial regarding the offense date, trial counsel could not have been deficient in emphasizing an inconsistency that did not exist in the jury trial evidence. See *State v. Martinez*, 302 Neb. 526 (2019) (defense counsel is not ineffective for failing to raise an argument that has no merit).

It appears Wiley is suggesting trial counsel should have somehow informed the jury the State initially charged the offense date as May 4, 2019, which according to the record occurred because of a typographical error in some of the police reports, and this

error was later discovered by a newly assigned prosecutor and corrected in the Amended Information, or that trial counsel should have confronted one of the witnesses about the typo in the police reports. (21:21-23:21). The trial record does not contain the police reports, and although at least some of the reports are included in the PSI, the record does not disclose whether any other police reports exist. (PSI, pp. 138-150). There are two reports in the PSI that indicate the assault occurred on May 4, 2019; however, since these reports were authored by Officer Perkins, and he was not a witness at trial, Wiley has failed to provide any rule of evidence that would allow his trial counsel to question another witness about this discrepancy in the offense date. (PSI, pp. 138, 147-148).

Even assuming such a confrontation with at least one of the witnesses who testified at trial was possible under the rules of evidence, Wiley cannot show prejudice in his trial counsel's failure to do so. The Amended Information alleges the offense conduct occurred "on or about May 5, 2019" and the jury instructions indicate that means the State must establish beyond a reasonable doubt that the offense charged occurred "on or near the date alleged." (T74; ST1-2). "It is not necessary that the proof establish with certainty the exact date of an alleged offense." (T74). Thus, even if the typographical error had been explored during trial, the evidence from the victims clearly established the offense conduct occurred on Sunday, May 5, 2019, as charged in the Amended Information. Wiley cannot establish that had the jury been made aware of the typo, this would have amounted to a reasonable probability that the result of the trial would have been different.

Assignment of Error #9: Failure to present evidence that Jacobe was a confidential informant for the Lincoln Police Department and she was involved in the sale of prescription pills in order to show why Jacobe would falsify the report.

Wiley asserts his trial counsel was deficient for failing to present evidence Jacobe was a confidential informant, and that such evidence would have demonstrated to the jury Jacobe had a reason to be untruthful. (Brief of Appellant, pp. 33-34). However, again, Wiley has failed to specifically allege what evidence exists demonstrating Jacobe was a confidential informant for the Lincoln/Lancaster Task Force, when she was engaged in this role, how such evidence is probative of her credibility regarding this assault, and upon what basis and through which witness such evidence would have been admissible at trial. Even assuming Jacobe was a confidential informant for police at some point, Wiley asserts no facts as to why her role in that capacity would have any effect on her credibility regarding whether Wiley assaulted her on May 5, 2019; he simply makes a blanket assertion that it does. The offenses for which Wiley was charged certainly are not based upon Jacobe being a confidential informant.

Without specific facts showing not only that Jacobe was a confidential informant, but how being in this role establishes a lack of credibility in her testimony, this claim is merely a general allegation, and thus it lacks the necessary specificity. See *State v. Blaha*, 303 Neb. 415 (2019). An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal. *State v. Filholm*, 287 Neb. 763 (2014). General allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to raise an ineffective assistance claim on direct appeal. *Id.* Yet again, rather than providing any detail, Wiley alleges only conclusions of fact, which are insufficient to support a claim of ineffective assistance of counsel.

Assignment of Error #10: Advising Wiley not to testify in his own defense.

Wiley asserts his trial counsel was deficient when he advised Wiley not to testify in his own defense. (Brief of Appellant, pp. 34-36). However, the record reflects Wiley voluntarily chose not to testify, and Wiley cannot show such advice from his trial counsel was unreasonable. The colloquy regarding Wiley's decision not to testify is as follows:

> THE COURT: Okay. Counsel, then I take it that Mr. Wiley has decided not to testify; is that correct?
>
> MR. RODELL: That is correct, Your Honor.
>
> THE COURT: And, Mr. Wiley, you're aware you have a right to testify. Are you aware of that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. And your attorney indicates you've chosen not to testify; is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. Has anybody forced you or threatened you or promised you anything to get you to waive your right to testify – or not to testify?
>
> THE DEFENDANT: No, Your Honor. Um –
>
> THE COURT: I'm just asking.
>
> MR. RODELL: I think he has the right to remain silent, Judge, so.
>
> THE DEFENDANT: No.
>
> THE COURT: All right.
>
> THE DEFENDANT: No. Your Honor, it's just --

THE COURT: Well, Mr. Wiley, hold on. I just asked if you've chosen to not testify if that's your choice.

THE DEFENDANT: You also asked me was I threatened and (indiscernible) so I chose to explain.

THE COURT: All right. And is that a yes? Are you saying yes?

THE DEFENDANT: No, Your Honor. Never mind.

THE COURT: All right. I just want to make sure that you're freely and voluntarily choosing not to testify.

(132:19-133:20). The right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone. *State v. Iromuanya*, 282 Neb. 798 (2011). The record shows trial counsel did not interfere with Wiley's decision not to testify, Wiley clearly advised the district court he understood he had a right to testify and he was choosing not to testify, and he further indicated this decision was made without force, threats, or promises to get him to waive his right to testify. Thus the only issue is whether counsel's advice was unreasonable.

The Nebraska Supreme Court has held that defense counsel's advice not to testify, after discussing it with his client, as Wiley concedes trial counsel did with defendant in this case, was not ineffective assistance where defendant's prior criminal record could have been used against him. *State v. El-Tabech*, 234 Neb. 831 (1990); *State v. Journey*, 207 Neb. 717 (1981). The fact "[t]hat a calculated trial tactic or strategy fails to work out as planned will not establish that counsel was ineffective." *State v. Iromuanya*, 282 Neb. 798 (2011). Wiley has a lengthy criminal record, including at least one prior felony conviction that could have been used to impeach him at trial if he had chosen to testify,

resulting in the jury hearing that he had engaged in prior felonious criminal conduct. Trial counsel's advice was not deficient performance.

Assignment of Error #11: Failure to object to the district court allowing the State to present evidence of enhancement after the initial sentence had been pronounced.

Wiley asserts his trial counsel was deficient for failing to object to the district court holding an enhancement hearing on Count 1 after the illegal sentence was vacated, during which the State presented evidence of Wiley's prior domestic assault conviction. (Brief of Appellant, pp. 36-38). However, as discussed above in assignment of error #1, the proper remedy for a trial court's error in failing to receive evidence of a prior conviction at an enhancement hearing was for the case to be remanded for a new enhancement hearing, rather than for it to be remanded for resentencing on a reduced charge. *State v. Valdez*, 305 Neb. 441 (2020). Under the circumstances of this case, it was only proper for the district court to vacate the illegal sentence it had imposed on Count 1 and proceed to a new enhancement hearing, during which the State could present evidence of Wiley's prior domestic conviction. This is exactly what the district court did here.

Moreover, contrary to Wiley's claims, there was no judicial impartiality in following this procedure as the district court never commented on the sufficiency of the State's evidence. In fact, it could not do so, as no evidence had yet been offered by the State. Nor did the court ever instruct the State as to what evidence it should offer for purposes of enhancement. At no point in the proceedings did the district court become an advocate for either party. It simply vacated an illegal sentence and proceeded with an enhancement hearing as should have been done at the initial sentencing hearing, and as would have been done had the error been found on appeal and the case remanded for enhancement

and resentencing as required by *State v. Valdez*, *supra*. As the Nebraska Supreme Court has held that vacating the illegal sentence and holding a new enhancement hearing is the proper procedure for such circumstances, defense counsel's failure to make an objection was not deficient performance as defense counsel is not ineffective for failing to raise an argument that has no merit. *State v. Martinez*, 302 Neb. 526 (2019).

Assignment of Error #12: Failure to communicate with Wiley and thus being unprepared for trial.

Wiley asserts his trial counsel performed deficiently by failing to communicate with him about his case, which he believes left defense counsel unprepared for trial. (Brief of Appellant, pp. 38-40). This claim has not been raised with sufficiently particularity and it amounts to a conclusory allegation that lack of communication between defense counsel and Wiley resulted in counsel being unprepared for trial. Even assuming a lack of communication occurred, Wiley does not specifically allege what new facts or law he would have provided to trial counsel had they engaged in further communication, or how this information would have better prepared counsel for trial, nor does he provide any argument as to the admissibility of such evidence. Wiley's failure to specifically argue how his trial counsel's actions were deficient leaves this Court to speculate as to how a failure to further communicate prior to trial was either deficient or prejudicial to Wiley.

When making an ineffective assistance of counsel claim on direct appeal, allegations of prejudice are not required. *State v. Ash*, 293 Neb. 583 (2016). However, a defendant is required to make specific allegations of the conduct that he claims constitutes deficient performance. *Id*. The Court has repeatedly stated that a generalized and vague assignment of error that does not advise an appellate court of the issue

submitted for decision will not be considered and is no different than a claim not stated at all. *State v. Abdullah*, 289 Neb. 123 (2014).

The Nebraska appellate courts have considered similar assignments of error in other cases related to trial counsel's failure to adequately communicate. In *State v. Mora*, 298 Neb. 185 (2017), the defendant claimed counsel failed to adequately communicate with him to prepare a defense and explore his options and contended his counsel "only met with him a few times with an interpreter prior to the commencement of the jury trial" and counsel "did not engage in meaningful conversations about the State's evidence and what evidence [the defendant] had to rebut the charges he faced." *Id.* The Nebraska Supreme Court found these statements were not sufficient allegations of deficient performance. *Id.* A general allegation trial counsel failed to communicate sufficiently with Wiley before the trial, without any assertion as to how further communication would have impacted the trial, is insufficient to preserve a claim trial counsel performed deficiently.

As in *State v. Mora*, *supra*, the only claim as part of this assignment of error that appears to be sufficiently alleged is that trial counsel "did not provide the Appellant with copies of discovery, further complicating the preparation of the case for trial." (Brief of Appellant, p. 39). Since the record does not reflect whether this allegation is true or whether prejudice resulted, the record is insufficient to resolve this claim on direct appeal.

III. Assignment of Error #13: The district court did not impose excessive sentences

Wiley argues the district court abused its discretion by imposing excessive sentences. (Brief of Appellant, pp. 40-42). Wiley acknowledges the sentences imposed

were within statutory limits, but asserts the district court ignored many of the relevant sentencing factors. (*Id.*). This claim is without merit.

Wiley was convicted of Domestic Assault in the Third Degree – Subsequent Offense, in violation of Neb. Rev. Stat. §§ 28-323(1) and (4) (Reissue 2016), a Class IIIA felony, and Negligent Child Abuse, in violation of Neb. Rev. Stat. §§ 28-707(1) and (3) (Reissue 2016), a Class I misdemeanor. A Class IIIA felony carries a maximum sentence of 3 years' imprisonment, 18 months' post-release supervision, a $10,000 fine, or all of the above. Neb. Rev. Stat. § 28-105 (Reissue 2016). There is no minimum sentence required, but if imprisonment is imposed, there is a minimum of 9 months' post-release supervision. (*Id.*). Wiley was sentenced to 2 years' imprisonment and 18 months' post-release supervision for the offense of Domestic Assault in the Third Degree – Subsequent Offense, a Class IIIA felony, which is well within the statutory limits. A Class I misdemeanor carries a maximum sentence of one year imprisonment, a $1,000 fine, or both, and there is no minimum required. Neb. Rev. Stat. § 28-106 (Reissue 2016). Wiley was sentenced to 6 months' imprisonment for Negligent Child Abuse, a Class I misdemeanor, which is also well within the statutory limits.

Because the sentences imposed were within the applicable statutory ranges, the question is whether the court abused its discretion. 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. *State v. Manjikian*, 303 Neb. 100 (2019). In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past

criminal record or law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *State v. Blaha*, 303 Neb. 415 (2019). However, the sentencing court is not limited to any mathematically applied set of factors. *State v. Mora*, 298 Neb. 185 (2017). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

There was no abuse of discretion in the sentences imposed. Wiley asserts the district court failed to consider many of the sentencing factors, including his partial acceptance of responsibility, his education and employment, and his need for substance abuse treatment. (Brief of Appellant, p. 41). However, the record affirmatively refutes this claim. During both sentencing hearings, the district court stated it reviewed the PSI and it considered Wiley's age, mentality, education, experience, social and cultural background, past criminal history, motivation to commit the offense, the nature of the offense, and the presence or absence of violence. (169:20-22; 178:18-181:15; 192:3-19).

Moreover, the Nebraska Supreme Court has rejected the argument that a sentencing court did not adequately consider all of the sentencing factors simply because it did not discuss each one of them during the sentencing hearing or in its sentencing order. *See State v. Blaha*, 303 Neb. 415 (2019). The district court discussed Wiley's age; education; employment; background; criminal history, which included several crimes of assault and violence; his motivation in committing the offenses; his issues with anger management; as well as the need to protect the community. (178:18-181:15). The district court also stated it was taking into consideration everything argued by the parties at both

sentencing hearings. (190:7-16). The record clearly shows the district court considered the information referenced by Wiley, as it was included in the PSI. (PSI, pp. 14, 17-18).

Wiley's argument amounts to an assertion that this Court should reweigh the sentencing factors in favor of lesser sentences than those imposed by the district court based on the assertion that he has partially accepted responsibility; he only completed 9th grade; and he has a substance abuse problem. (Brief of Appellant, pp. 41). However, it is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate. *State v. Montoya*, 305 Neb. 581 (2020); *State v. Gibson*, 302 Neb. 833 (2019). So long as the trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, the sentence imposed is not an abuse of discretion. *Id.*

A further review of the PSI supports the sentences imposed. On the Level of Service/Case Management Inventory (LS/CMI), Wiley scored as an overall "very high" risk to reoffend with a total score of 37, including scores in the "high" or "very high" risk ranges in seven of the eight LS/CMI domains. (PSI, pp. 13-22). On the Domestic Offender Matrix (DV Matrix), he scored in the high risk range to reoffend. (PSI, p. 20). While Wiley claims he has partially accepted responsibility in this case, there is nothing in the PSI or elsewhere in the record supporting that assertion; to the contrary, the PSI indicates Wiley denied the incident ever happened and he said that is why he took it to trial. (PSI, p. 18). The PSI further noted Wiley does not appear to be accepting responsibility for either offense and appears to be in the pre-contemplative stage of change. (PSI, p. 21).

Wiley's criminal history is lengthy with several instances of assault. (PSI, pp. 7-11, 23-48). His convictions include, DUI – 1st (fine); DUI – over .15 – 2nd (30 days' jail, fine);

Refusal to Submit to Test with one prior (90 days' jail, $1,000 fine); Attempted Domestic Assault in the First Degree (20 to 60 months' prison); Domestic Assault in the Third Degree (12 months' prison); Third Degree Assault (amended down from Assault by a Confined Person) (270 days' jail); as well as the subsequent offense in CR20-50 for Attempted Third Degree Assault of an Officer, a Class IV felony. (*Id.*). Wiley has also incurred numerous misconduct reports while incarcerated. (PSI, pp. 70, 76-77; 95-125).

The sentences imposed by the district court were not excessive and do not constitute an abuse of discretion. The record before this Court shows that the district court reviewed the PSI and considered all appropriate sentencing factors. (169:20-22; 178:18-181:15; 192:3-19). The comments made by the district court at sentencing do not indicate it considered any inappropriate factors in determining the sentences to be imposed. (*Id.*). As a result, Wiley cannot show an abuse of discretion by the district court.

Conclusion

For the reasons noted above, the appellee respectfully requests that this Court affirm the judgment of the district court.

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Certificate of Service

I hereby certify that on Monday, September 28, 2020 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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