No. A-22-774

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

DAVID CARLSON,

Appellant.

APPEAL FROM THE DISTRICT COURT OF

SARPY COUNTY, NEBRASKA

The Honorable George Thompson, District Judge

BRIEF OF APPELLEE

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Statement of the Case

A. Nature of the Case

Carlson is appealing from his conviction for DUI. He was found guilty after a suppression hearing followed by a bench trial in county court, after which he appealed and the district court affirmed the county court's judgment. He now appeals from the district court's judgment. This court has jurisdiction.

B. Issues Before the District Court

For purposes of this appeal, the three issues before the district court on appeal from the county court were:

> (1) Whether the county court erred by denying Carlson's motion to suppress the evidence obtained as result of the stop and detention;
>
> (2) Whether the county court erred by admitting Exhibits 2 – 5; and
>
> (3) Whether there was sufficient evidence for the county court to find Carlson guilty of DUI.

C. How the Issues Were Decided in the District Court

The district court rejected all three claims and affirmed the county court's judgment in all respects. Additional details about these three issues and the lower courts' rulings are set forth below.

D. Scope of Review

When reviewing questions of law, we resolve the questions independently of the lower court's conclusions. *State v. Gonzalez*, 313 Neb. 520 (2023).

Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined by the trial court on a case-by-case basis. *State v. Osborne*, 313 Neb. 726 (2023). A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *Id*.

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Osborne*, 313 Neb. 726 (2023).

Propositions of Law

I.

If a defendant fails to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, they will not

be heard to complain of the alleged error on appeal. See *State v. Lowman*, 308 Neb. 482, 490 (2021).

II.

A continuing objection received during the testimony of one witness does not apply to subsequent witnesses. See § 25-1141; *State v. Pope*, 305 Neb. 912, 929 (2020); *State v. Castillas*, 285 Neb. 174, 182 (2013), disapproved of on other grounds by *State v. Lantz*, 290 Neb. 757 (2015).

III.

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. *State v. Fernandez*, 313 Neb. 745 (2023).

IV.

The four foundational elements that the State must establish as foundation for the admissibility of a breath test in a driving under the influence prosecution are as follows: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services, and (4) that all other statutes were satisfied. *State v. Montoya*, 305 Neb. 581 (2020). Reasonable proof is all that is required to meet the foundational requirements. *Id.*

V.

Under Rule 901, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." See Neb. Rev. Stat. § 27-901; *State v. Newman*, 300 Neb. 770 (2018). Section 27-901 does not impose a high hurdle for authentication or identification. *State v. Newman, supra*. Indeed, a proponent of evidence is not required to conclusively prove the

genuineness of the evidence or to rule out all probabilities inconsistent with authenticity. *Id.* Rather, if the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirements of § 27-901. *Id.*

VI.

It is not necessary for the State to introduce into evidence the actual or a certified copy of an individual's state Department of Health permit to perform a blood, breath, or urine test of a suspect arrested for driving while under the influence of alcoholic liquor. *State v. Obermier*, 241 Neb. 802, 805 (1992).

VII.

A certificate is merely *one of the methods* whereby the fact that a permit has been issued can be determined. See *State v. Obermier*, 241 Neb. 802, 805 (1992); *State v. West*, 217 Neb. 389, 394 (1984).

VIII.

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. *State v. Cerros*, 312 Neb. 230 (2022). On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Branch*, 277 Neb. 738 (2009). Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id.*

IX.

The State is not required to disprove every hypothesis but that of guilt. *State v. Olbricht*, 294 Neb. 974 (2016). 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. *Id.* Circumstantial evidence, like direct evidence, is considered as an

interrelated whole and a criminal conviction may soundly be based solely on circumstantial evidence. See *State v. Warlick*, 308 Neb. 656 (2021). Circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor. *State v. Mowry*, 245 Neb. 213 (1994).

X.

Under § 60-6,196, it is unlawful for "any person to operate or be in the actual physical control" of a motor vehicle while under the influence of alcohol or while having an alcohol content of .08 or more. See Neb. Rev. Stat. § 60-6,196 (Reissue 2010). A person may be found guilty under either theory, i.e., *operating* a motor vehicle or being in *actual physical control* of the vehicle. See *State v. Rask*, 294 Neb. 612, 623 (2016).

XI.

The term "operate," as used in our DUI statutes, refers to the "actual physical handling of the controls of the vehicle while under the influence of intoxicating liquor." See *State v. Baker*, 236 Neb. 261, 264 (1990). A person's operation of a motor vehicle may be established through circumstantial evidence. See *State v. Matit*, 288 Neb. 163, 171 (2014).

XII.

"Actual physical control," on the other hand, addresses the risk that a person who is not yet operating a motor vehicle might begin operating that vehicle with very little effort or delay. See *State v. Rask*, *supra*, 294 Neb. at 623. "Actual physical control" is defined as "directing influence, dominion, or regulation of a motor vehicle." See *id.* at 624. A number of factors may be considered in determining 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. See *id.*

Statement of Facts

Background

On September 11, 2020, around 11:00 p.m., Officer Melrose of the Bellevue Police Department (BPD) was dispatched to Baker's supermarket in response to a report about a possible drunk driver. (14:12-22:24; 45:23-58:3) According to the report, which came from employees of Baker's, a white male was stumbling around in the store and then went outside and got into a white Hyundai Elantra in the parking lot. (*Id.*) The employees provided the license plate number of the white Elantra and were waiting in the parking lot and pointing to the vehicle when Officer Melrose arrived. (*Id.*)

Officer Melrose, who did not have his overhead lights on, parked a few stalls down from the Elantra and then walked up to the vehicle, which was not running. (14:12-22:24; 45:23-58:3) Officer Melrose confirmed that the license plates that matched those provided by the Baker's employees and saw that there was a white male sitting in the driver's seat. (14:12-22:24; 45:23-58:3) He made contact with the guy, whom he identified as the appellant, David Carlson, and he could smell alcohol on Carlson's breath. (*Id.*) He asked Carlson if he'd been drinking and Carlson said he had 4 drinks earlier in the night and "didn't think that he should be driving so he was waiting until he was sober enough to drive." (*Id.*) Officer Melrose asked Carlson how he got to Baker's and Carlson said that a friend named Joe brought Carlson and his car to Baker's and then left, but Carlson could not provide any details about Joe's last name, where he lived, or his telephone number. (*Id.*) Carlson said that he contacted Joe using a payphone and gestured toward Baker's, which, according to Officer Melrose, does not have a payphone. (*Id.*) Officer Melrose asked Carlson where the keys to his

vehicle were and Carlson said they were on the ground outside the vehicle, at which point Officer Melrose looked down and saw the keys on the ground near his feet, so he set them on top of the vehicle. (*Id.*)

Another officer, BPD Officer Jezek, arrived at that point and a DUI investigation ensued. (81:12-92:13) Officer Jezek administered a preliminary breath test and observed that Carlson had slurred speech, smelled strongly of alcohol and staggered as he walked. (*Id.*) He did not administer field sobriety tests, however, because Carlson said he had medical issues and became belligerent. (*Id.*) Carlson was arrested for DUI and transported to jail, where a chemical breath test was administered and his alcohol contest was determined to be .112. (*Id.*)

Carlson was charged with DUI and obstructing a peace officer, but the State ultimately dismissed the latter charge. (T5; 31:6-18) Carlson moved to suppress any evidence obtained as a result of the initial stop and detention, which was denied, and then a bench trial took place and the county court found him guilty of DUI. The evidence adduced at the suppression hearing and trial is summarized below.

Motion to Suppress

Carlson's motion to suppress alleged that the initial stop and detention was unlawful because the seizure was not justified by reasonable suspicion. (T33, 42) More specifically, his motion alleged that the seizure was unlawful because the officers lacked sufficient indicia of reliability and corroboration of the anonymous tip. (T42)

The county court held a hearing on the motion and the State's evidence consisted of testimony from Officer Melrose, who testified consistently with the information above regarding the report from the Baker's employees and his interactions with Carlson in the Baker's parking lot. (14:12-22:24) Based on the evidence, the defense argued that the anonymous tip was insufficient to justify the initial seizure of Carlson, citing the U.S. Supreme Court's decision in *Alabama v. White*. (23:17-29:4) The State disagreed. It argued that the initial encounter was a voluntary tier-one counter, as opposed to a tier-two detention, so

no justification was needed for the initial contact with Carlson. (*Id.*) Alternatively, the State argued, even if the initial encounter were viewed as a tier-two encounter, it was nonetheless lawful because the information known to law enforcement provided reasonable suspicion to make contact with Carlson and investigate the situation. (*Id.*)

The county court took the matter under advisement and denied Carlson's motion to suppress via a 5-page written order. (T55-59) It found that the officer's initial contact with Carlson was justified under the community caretaking exception to the Fourth Amendment and then, based on the observations made during the initial contact, there was reasonable suspicion for the continued detention. (*Id.*) As such, it concluded, the entire encounter was lawful and there was no basis for suppressing any evidence obtained by law enforcement. (*Id.*)

Bench Trial in County Court

The State's evidence at trial included testimony from Officers Melrose and Jezek, who testified about the information above regarding the report from the Baker's employees, their interactions with Carlson in the Baker's parking lot, and the DUI investigation that ensued. (14:12-22:24; 45:23-58:3) Carlson objected on the basis of his motion to suppress during the testimony of Officer Melrose, which was again overruled. (45:23-55:6) Carlson did not request or obtain a continuing objection based on his motion to suppress.

The State's evidence at trial also included information about Carlson's chemical breath test after he was arrested. Officer Abbott, who is one of the maintenance officers for BPD's Datamaster machine, testified that all of the necessary maintenance and calibrations were done on the machine and it was working properly at the time it was used to test Carlson on September 11, 2020. (58:20-77:3) He also testified that he has a Class B permit to operate the machine, which was issued in 2008 and does not expire or require recertification. (*Id.*) Officer Abbott was shown a copy of his Class B permit (E2) and acknowledged that it says "void" on it but explained that it's not void;

it may just be a watermark that appears when a copy of the permit is made. (*Id.*) A copy of the Class B permit was received into evidence over Carlson's foundation objection. (*Id.*; E2)

Officer Jezek, who handled the DUI investigation in this case and ultimately arrested Carlson and administered the breath test, also testified at trial. He testified that his Class B permit (E3) also says "void" on it, which is a watermark that appears anytime a copy is made of the permit, a copy of which was also received into evidence over Carlson's foundation objection. (78:3-92:13; E3) Officer Jezek testified that he followed Title 177's Checklist Technique in administering Carlson's chemical breath test on the night in question and the result was .112. (78:3-92:13) Carlson objected to the Checklist Technique (E4) on the basis of foundation, and he objected to the Datamaster test result (E5) on the basis of foundation and hearsay, after which both exhibits were received over his objections. (78:3-92:13) A copy of Jezek's cruiser camera, which captured the DUI investigation (E6), was also received into evidence without any objection. (93:4-94:14; E6) Carlson did not renew his motion to suppress at any point during Officer Jezek's testimony, nor did he renew it with respect to any of the exhibits introduced during Jezek's testimony.

Based on the evidence at trial, the county court found Carlson guilty of DUI. (97:5-103:18) He was subsequently sentenced to a $500 fine, 7 days in jail (to be served on house arrest), and a 6-month revocation of his driver's license. (111:25-113:2; T77)

Appeal to District Court

Carlson appealed to the district court and alleged three errors on appeal. (T97-108) He alleged that the county court erred by (1) denying his motion to suppress, (2) violating the rules of evidence by receiving Exhibits 2 through 5 into evidence at trial, and (3) finding him guilty of DUI without sufficient evidence. (T108, 115-118) The district court rejected all three claims and affirmed the county court's judgment in all respects. (T115-118)

This appeal followed.

Argument

Assignment of Error 1: Carlson's motion to suppress

Carlson claims that the county court erred by denying his motion to suppress. He argues, as he did below, that he was unlawfully seized in this case because the seizure was not justified by reasonable suspicion given that the officers lacked sufficient indicia reliability and corroboration of the anonymous tip that police received. See Appellant's Brief at 6, 11-14. This claim was not preserved at trial, so it's not properly before this court.

It is well-established that if a defendant fails to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, they will not be heard to complain of the alleged error on appeal. See *State v. Lowman*, 308 Neb. 482, 490 (2021). Here, as the record reflects, Carlson did not object and renew his motion to suppress during Officer Jezek's testimony about his observations of Carlson in the Baker's parking lot, Jezek's interactions with Carlson during the DUI investigation, or the chemic breath test that Jezek administered after Carlson was arrested. There was also no renewal of the motion to suppress with respect to the exhibits that were introduced during Officer Jezek's testimony, which included the Title 177 Checklist Technique that he followed in administering the test (E4), the Datamaster test result (E5), and the copy of Jezek's cruiser camera which captured the DUI investigation (E6). Carlson did not renew his motion to suppress with respect to any of this evidence at trial, so he failed to preserve his motion to suppress.

Carlson may respond and argue that the renewal of his motion to suppress during Officer Melrose's testimony was sufficient to preserve it with respect to all subsequent witnesses and exhibits. But he did not request or receive a continuing objection on the matter. (48:20-49:3) Plus, even if he had, it's well-settled that a continuing objection received during the testimony of one witness does not apply

to subsequent witnesses. See § 25-1141; *State v. Pope*, 305 Neb. 912, 929 (2020); *State v. Castillas*, 285 Neb. 174, 182 (2013), disapproved of on other grounds by *State v. Lantz*, 290 Neb. 757 (2015). Therefore, Carlson's initial objection and renewal of his motion to suppress was not sufficient to preserve the matter for appeal.

Carlson's motion to suppress is not properly before this court. He is not entitled to relief on this claim.

Assignment of Error 2: Admission of Exhibits 2 through 5

Carlson also claims that the county court erred by receiving Exhibits 2 through 5 at trial. He argues that Exhibits 2 and 3, which are the Class B permits for Officers Abbot and Jezek, were not properly authenticated because the permits say "void" on them and they were not shown to be what they purport to be, i.e., valid permits. Carlson argues that authentication is a condition precedent for the admissibility of evidence, per Rule 901, so Exhibits 2 and 3 should have been excluded due to a lack of proper authentication and then there would have been insufficient evidence to show compliance with Title 177 and, in turn, insufficient foundation for the admission of both the Checklist Technique (E4) and the Datamaster test result (E5). See Appellant's Brief at 6, 14-17. The State disagrees. Exhibits 2 through 5 were properly admitted at trial.

As an initial matter, the State notes that Carlson's argument on appeal revolves entirely around his assertion that Exhibits 2 and 3 were not properly authenticated. He does not argue that foundation was otherwise lacking for Exhibits 2 and 3, nor does he argue that foundation was otherwise lacking for the chemical breath test result. He focuses entirely on whether Class B permits in Exhibits 2 and 3 were sufficiently authenticated, so the State will do the same. See *State v. Fernandez*, 313 Neb. 745 (2023) (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.).

The four foundational elements that the State must establish as foundation for the admissibility of a breath test in a driving under the influence prosecution are as follows: (1) that the testing device was working properly at the time of the testing, (2) that the person administering the test was qualified and held a valid permit, (3) that the test was properly conducted under the methods stated by the Department of Health and Human Services, and (4) that all other statutes were satisfied. *State v. Montoya*, 305 Neb. 581 (2020). Reasonable proof is all that is required to meet the foundational requirements. *Id.*

Under Rule 901, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." See Neb. Rev. Stat. § 27-901; *State v. Newman*, 300 Neb. 770 (2018). Section 27-901 does not impose a high hurdle for authentication or identification. *State v. Newman, supra.* Indeed, a proponent of evidence is not required to conclusively prove the genuineness of the evidence or to rule out all probabilities inconsistent with authenticity. *Id.* Rather, if the proponent's showing is sufficient to support a finding that the evidence is what it purports to be, the proponent has satisfied the requirements of § 27-901. *Id.*

Class B permits are governed by Title 177, which authorizes Class B permit holders to perform chemical breath tests to analyze a subject's alcohol content. See 177 Neb. Admin. Code, ch. 1, § 001.07B. (E1, p.1) Title 177 also provides that all maintenance officers of chemical breath testing devices shall, among other requirements, be a Class B permit holder who is trained and tested on the operation of such devices. See Title 177, ch.1 § 007 through § 009. (E1, pp.8-11) Class B permits are issued by the Department of Health and Human Services and are "nonexpiring permits," although the Department may revoke a permit if it determines that a permit holder is in noncompliance with Title 177's rules and regulations. See Title 177, ch.1 § 003.01 and § 004.01. (E1, pp.3, 5)

Here, as the record reflects, Officers Abbott and Jezek each have a Class B permit which authorizes them to maintain and operate chemical breath testing devices. The copies of their permits that were introduced at trial say "void" on them, as the officers acknowledged, but this is just a watermark that appears when the permits are copied. (58:20-77:3; 78:3-92:13; E2; E3) This does not render the permits void, as they explained, and both officers confirmed that their permits are current and valid. (58:20-77:3; 78:3-92:13) There was sufficient authentication for the permits. Carlson has not shown otherwise.

Moreover, for the sake of argument, the State notes that a copy of the permits was not even necessary to lay foundation for admission of the breath test result. The Nebraska Supreme Court has explained that "[a] certificate is merely *one of the methods* whereby the fact that a permit has been issued can be determined." See *State v. Obermier*, 241 Neb. 802, 805 (1992); *State v. West*, 217 Neb. 389, 394 (1984). The existence of a valid permit may be shown by other evidence as well, including testimony from the permit holder, so"[i]t is not necessary for the State to introduce into evidence the actual or a certified copy of an individual's state Department of Health permit to perform a blood, breath, or urine test of a suspect arrested for driving while under the influence of alcoholic liquor." See *State v. Obermier, supra*. The court's opinion in *Obermier* expressly overruled two of its prior decisions, *State v. Gerber*, 206 Neb. 75 (1980) and *State v. Kolar*, 206 Neb. 619 (1980), which held to the contrary.

Obermier is still good law. In fact, the Nebraska Supreme Court recently applied this principle in *State v. Sundquist*, 301 Neb. 1006, 1016 (2019) (citing *Obermier* in explaining that "the State is not required to enter the certification into evidence."). So, under *Obermier*, the State was not required to introduce a copy of the Class B permits for Officers Abbott and Jezek in this case, let alone establish authentication for the permits. The officers' testimony that they have valid permits, standing alone, was sufficient to establish this fact.

There was sufficient foundation for the admission of Carlson's chemical breath test result at trial. His argument to the contrary is without merit. He is not entitled to relief on this claim.

Assignment of Error 3: Sufficiency of the evidence

Carlson also claims that the evidence was insufficient to find him guilty of DUI. He claims there was no basis to find that he was in "actual physical control" of his vehicle given that it was turned off and his keys were lying outside the vehicle. Appellant's Brief at 6, 17-18. The State disagrees. The evidence was sufficient.

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. *State v. Cerros*, 312 Neb. 230 (2022). On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Branch*, 277 Neb. 738 (2009). Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id*.

The State is not required to disprove every hypothesis but that of guilt. *State v. Olbricht*, 294 Neb. 974 (2016). 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. *Id*. Circumstantial evidence, like direct evidence, is considered as an interrelated whole and a criminal conviction may soundly be based solely on circumstantial evidence. See *State v. Warlick*, 308 Neb. 656 (2021). Circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor. *State v. Mowry*, 245 Neb. 213 (1994).

Under § 60-6,196, it is unlawful for "any person to operate or be in the actual physical control" of a motor vehicle while under the influence of alcohol or while having an alcohol content of .08 or more. See Neb. Rev. Stat. § 60-6,196 (Reissue 2010). A person may be found guilty under either theory, i.e., *operating* a motor vehicle or being in *actual physical control* of the vehicle. See *State v. Rask*, 294 Neb. 612, 623 (2016).

The term "operate," as used in our DUI statutes, refers to the "actual physical handling of the controls of the vehicle while under the influence of intoxicating liquor." See *State v. Baker*, 236 Neb. 261, 264 (1990). A person's operation of a motor vehicle may be established through circumstantial evidence. See *State v. Matit*, 288 Neb. 163, 171 (2014).

"Actual physical control," on the other hand, addresses the risk that a person who is not yet operating a motor vehicle might begin operating that vehicle with very little effort or delay. See *State v. Rask*, *supra*, 294 Neb. at 623. "Actual physical control" is defined as "directing influence, dominion, or regulation of a motor vehicle." See *id.* at 624. A number of factors may be considered in determining 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. See *id.*

Here, as the record reflects, the evidence was sufficient to find Carlson guilty under either theory. There was evidence to find that he was operating the vehicle prior to arriving at Baker's given that he was alone in his vehicle and his story about a guy named Joe taking Carlson and his vehicle to the store and then leaving was not exactly credible. There was also evidence to find that he was in actual physical control of the vehicle given that he was alone in the vehicle, he was in the driver's seat, they keys were right outside the vehicle, he was in the parking lot of a supermarket, and Carlson himself told the

officers that "he was waiting until he was sober enough to drive." Based on this evidence, any rational trier of fact could have found that Carlson operated the vehicle prior to arriving at Baker's and/or that he was in actual physical control of the vehicle while under the influence of alcohol.

The evidence was sufficient. Carlson's argument to the contrary is without merit. He is not entitled to relief on this claim.

Conclusion

For the reasons above, the State requests that this court affirm the judgment of the district court.

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Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 5,164 words, excluding this certificate. This brief was created using Word Microsoft 365.

s/Nathan A. Liss
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Certificate of Service

I hereby certify that on Monday, March 20, 2023 I provided a true and correct copy of this *Brief of Appellee State* to the following:

David Carlson represented by Cole Stanley Burmeister (27026) service method: Electronic Service to **pubdef1@sarpy.com**

Signature: /s/ Nathan A. Liss (23730)