

CASE NO. A-23-027

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

CHAD W. WRIGHT,

Appellant.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA
Before the Honorable Judge Lori A. Maret

REPLACEMENT BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

Neb. Rev. Stat. § 25-1911 (Reissue 2016) gives appellate courts jurisdiction to review “[a] judgment rendered or final order made by the district court . . . for errors appearing on the record.” For purposes of appellate jurisdiction, “[a] judgment is the final determination of the rights of the parties in an action.” Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2018). In a criminal case, the judgment from which the Appellant may appeal is the sentence. *State v. Ratumaimuri*, 299 Neb. 887, 911 N.W.2d 270 (2018). Appellant Chad Wright (hereinafter, “Appellant”) appeals from the Lancaster County District Court (hereafter “District Court”) affirming the Lancaster County Court (hereafter, “County Court”) judgment and sentence rendered following his conviction for the offenses of Disturbing the Peace and Trespass under the Lincoln Municipal Code. The Order of the District Court dated December 15, 2022 as well as the Order Nunc Pro Tunc issued by the District Court on January 9, 2023, are final appealable orders under Neb. Rev. Stat. § 25-1911 (Reissue 2016). Appellant filed his Notice of Appeal and paid the statutory docket fee on January 11, 2023. (T52).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal from the District Court regards a criminal case where Appellant was charged with Disturbing the Peace and Trespass under the Lincoln Municipal Code. A bench trial was held in County Court, where Appellant was convicted of both charges, and sentenced to a sentence of fines of \$275.00 plus Court costs for said offenses. An appeal was perfected to the District Court, which affirmed the judgment and sentence of the County Court and ordered the costs of the action to be taxed to the Appellant.

B. ISSUES TRIED BELOW

1. Whether there was insufficient evidence adduced to support Appellant's conviction in the Lancaster County Court for Disturbing the Peace and Trespass, under the Lincoln Municipal Code.
2. Whether Defendant received ineffective assistance of counsel at trial.

C. HOW THE ISSUES WERE DECIDED AND THE JUDGMENT ENTERED BY THE DISTRICT COURT

The District Court affirmed the County Court's judgment and sentence. The District Court found that sufficient evidence was adduced at trial to support the County Court's finding Appellant guilty of Disturbing the Peace and Trespass. (T41-43). The County Court found there to be an insufficient record to determine whether the Appellant received ineffective assistance of counsel. (T41-43).

D. SCOPE OF REVIEW

Appellate courts apply the same standards of review applicable to criminal conviction appeals in district court to appeals from criminal convictions in county court. *State v. McCave*, 282 Neb. 500, 507, 805 N.W.2d 290, 301 (2011). Appeals from the county court are generally reviewed for error appearing on the record. *Id.* The inquiry is "whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable." *Id.* Questions of law will be independently reviewed by the appellate court. *Id.*

PROPOSITIONS OF LAW

1. Neb. Rev. Stat. § 25-1911 (Reissue 2016) gives appellate courts jurisdiction to review "[a] judgment rendered or final order made by the district court . . . for errors appearing on the record." For purposes of appellate jurisdiction, "[a] judgment is the final determination of the rights of the parties in an action." Neb. Rev. Stat. § 25-1301(1) (Cum. Supp. 2018). In a criminal case, the judgment from which the Appellant may appeal is the

sentence. *State v. Ratumaimuri*, 299 Neb. 887, 911 N.W.2d 270 (2018).

2. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the question to be asked is whether, after viewing the evidence more favorable to the prosecution, any rational trier of fact could have found that the evidence is sufficient to support the essential elements of the crime beyond a reasonable doubt. *State v. Grant*, 310 Neb. 700, 968 N.W.2d 837 (2022).
3. When a defendant appeals a conviction under a municipal ordinance, claiming insufficient evidence for conviction, the appellate court's consideration of the assignments of error requires examining the specific ordinance involved. *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000), *disapproved on other grounds*; *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).
4. The definition of "disturb" under the Lincoln Municipal Code means "to throw into a disorder or confusion; to interrupt the settled state of." *In re Interest of Elainna R.*, 298 Neb. 436, 904 N.W.2d 689 (2017).
5. The communication element of denying one's presence upon a property implies that the person who has been told he is not allowed to remain on the premises must be afforded a reasonable period of time to leave of their own volition. *Lemon v. State*, 868 N.E.2d 1190, 1196-97 (Ind. Ct. App. 2007); *Curtis v. State*, 58 N.E.3d 992, 994 (Ind. Ct. App. 2016).
6. There is no trespass when a person is not allowed a reasonable amount of time to comply with a request to leave. *Curtis*, 58 N.E.3d at 994 (*citing Lemon v. State*, 868 N.E.2d 1190 (Ind. Ct. App. 2007)).

7. A defendant has a claim for ineffective assistance of counsel when the defendant's counsel was shown to be deficient, and such deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Wells*, 300 Neb. 296, 912 N.W.2d 896 (2018).
8. Counsel's performance is deficient when it is not equal to that of a lawyer with ordinary training and skill in criminal law. *Wells*, 300 Neb. at 310. Such deficient performance prejudices the defendant when there is 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. *Id.* at 311.

STATEMENT OF FACTS

On May 19th, 2021, Chad Wright went to the Office Depot in Lincoln, Lancaster County, Nebraska. (137:22-24). The Centers for Disease Control (the "CDC") had just lifted the mask mandate that was implemented during the COVID-19 pandemic. (138:15-16). Because of this, places such as Cass County, which is where Mr. Wright conducts his business, lifted their mask requirements. (138:17-20). Mr. Wright had assumed that the City of Lincoln would be following the CDC's direction. (138:23-25). However, unbeknownst to Mr. Wright, the Mayor of Lincoln still had the mask policy in place for the city, which was set to expire on the 21st of May, 2 days after Mr. Wright visited the Office Depot. (29:17-22).

At the time Mr. Wright entered the Office Depot, the store was "pretty empty," with only three employees and one or two customers in the entire store. (46:1-3; 49:14-18). When Mr. Wright entered the store, an employee, Jeannie Pickrel, informed Mr. Wright that the store had masks available for him because the City's mask mandate was still in effect, but she was not requiring he put one on. (10: 22-24; 27: 23-23). Ms. Pickrel told Mr. Wright that the CDC no longer had a mandate

requiring Mr. Wright to wear a mask. (10:22-25; 11:1-5). Ms. Pickrel testified that the Office Depot's policy was to allow shoppers to shop in the store without wearing a mask. (32:18-20). Mr. Wright had a brief conversation with Ms. Pickrel in a "normal conversational tone" for less than three minutes before he exited the interior doors of the vestibule to the Office Depot building. (27:21-22; 45:24-25; 46:4-8). As Mr. Wright was leaving the store, the store manager, Tim Homstad, yelled across the store, "Have a good evening." (44:19- 20).

About two to five minutes later, Mr. Wright re-entered the store and walked about three or four feet within the store and asked Ms. Pickrel if a manager was present. (14:5-7; 47:1-5; 49:1-11). Mr. Wright did not "seem annoyed" when he initially asked about the presence of a manager and wanted to discuss the mask situation. (52:9-11). The closed-circuit television ("CCTV") footage from the store's security camera, which was accepted by the trial court as Exhibit 1, captured the entire encounter from the time Mr. Wright re-entered the store to the time Mr. Wright left the store for the last time, and showed that Mr. Wright was in the store (the second time) for one minute and thirty-two seconds. (E1; 81:10-14). When Mr. Wright re-entered the store, there were no customers at the cash register with Ms. Pickrel. (13:3-7).

Before Mr. Wright said anything else, the highest-ranking employee in the store at that time, Timothy Homstad, first yelled from about twenty-five feet across the store from where he was stationed at the "tech desk," asking what was going on. (41:6-7; 48:25-49). Mr. Homstad testified that he asked Mr. Wright several questions while the two were still about twenty-five feet away. (50:1-25; 51:1-14). The two discussed whether Mr. Wright was required to wear a mask; both men were talking in raised voices. (19:15-18; 21:1-3).

Mr. Homstad testified that he offered to do Mr. Wright's shopping for him and suggested to Mr. Wright that he was free to leave the store if he did not like what was happening. (53:23-25; 54:1-2). Mr. Homstad testified that he did not remember the words he used, but

that he “suggest[ed],” “without demanding,” that Mr. Wright leave the store several times while the two men were still about twenty-five feet away from each other. (54:6-8; 58:6-7). There was contradictory evidence at trial regarding how many times Mr. Homstad suggested Mr. Wright leave. Mr. Homstad testified at trial that he asked Mr. Wright to leave about two dozen times, but Ms. Pickrel testified that Mr. Homstad did so only four or five times. (30:7-11; 54:6-8). When asked whether he “asked” Mr. Wright to leave or whether he “told” Mr. Wright to leave, Mr. Homstad stated “I don’t remember telling him to leave, at all, but I said he needed - - I said I was asking him to leave.” (60:1-8). Mr. Wright asked Mr. Homstad if Mr. Homstad “was going to force him out” of the store, to which Mr. Homstad replied that he was not going to force Mr. Wright out. (60:1-8).

Mr. Homstad finally left his desk and approached Mr. Wright when Mr. Homstad took out his cell phone and recorded a video of Mr. Wright near the entrance to the store. (56:7-12). When Mr. Homstad approached Mr. Wright, Mr. Homstad “got into [Mr. Wright’s] face” within one foot of him. (61:11-15). Mr. Homstad acknowledged that his “size can be very intimidating,” as he is 6’10” and weighed about 360 pounds at the time of the incident. (62:14-20). Mr. Wright never approached Mr. Homstad, but instead had been stationary at about three to four feet within the store entrance. (19:7-11). Ms. Pickrel testified that she was unable to hear the conversation between Mr. Wright and Mr. Homstad up until Mr. Homstad approached Mr. Wright, despite the fact that she was within ten feet of Mr. Wright and the two men were talking loudly enough that they could hear each other from twenty-five feet across the store. (15:5-13; 20:6-15).

At this point, Mr. Wright moved closer to the store’s exit, eventually walking into the vestibule to the store. (82:2-25; 90:1-16). When the two men were in the vestibule to the store, Mr. Homstad demanded that Mr. Wright leave the store and was no longer “suggesting” that Mr. Wright leave. (76:13-24; 90:1- 16). Only four or five seconds passed from the time Mr. Homstad first demanded Mr.

Wright to leave the store to the time the men had exited the store. (88:21-25; 89:1-4). Once Mr. Wright had exited the store with Mr. Homstad, Mr. Wright went to his car and drove away. (148:7-14). Only eighteen seconds passed from the time both men exited the store and the time Mr. Homstad came back in the store. (80:17-24).

At trial, Mr. Homstad claimed that Mr. Wright called Mr. Homstad names and poked Mr. Homstad in the abdomen in the vestibule to the store as both men were exiting the store, and that Mr. Wright “punched” Mr. Homstad in the abdomen after both men had fully exited the store. (67:2-25; 68:1-5). Mr. Wright denied ever touching Mr. Homstad; in fact, at the time of the alleged poking, Mr. Wright had his phone in one hand and had his other hand in his pocket. (147:14- 18; 148:5-14). The videos showing the exchange between Mr. Wright and Mr. Homstad do not show that Mr. Wright physically touched Mr. Homstad. (E1; E2). Mr. Wright denied calling Mr. Homstad names. (79:2-8). Ms. Pickrel testified that she did not hear Mr. Wright call Mr. Homstad names even though she was only four or five feet away from the two at the time, and despite the fact that Mr. Homstad claimed Mr. Wright was speaking loudly during the alleged name-calling. (20:6-15; 64:1-15; 72:9-11). The only other employee in the store at the time besides Ms. Pickrel and Mr. Homstad, Dalton Gregory, stated that he was not afraid and did not feel any personal threat to himself due to Mr. Wright’s actions. (109:19-25; 110:1-2). Mr. Wright’s entire interaction with Mr. Homstad after Mr. Homstad approached Mr. Wright lasted only about eighteen seconds. (145:19-24).

A bench trial was held in County Court, where Appellant was convicted of both charges, and sentenced to a sentence of fines of \$275.00 plus Court costs for said offenses. (T19). An appeal was perfected to the District Court, which affirmed the judgment and sentence of the County Court and ordered the costs of the action to be taxed to the Appellant. (T41-45). Appellant appealed the District Court’s Judgment by filing his Notice of Appeal and paying the statutory docket fee on January 11, 2023. (T52).

SUMMARY OF THE ARGUMENT

The District Court's Order of December 15, 2022 should be reversed. There was insufficient evidence presented at trial to convict Defendant of the offenses charged, and Defendant received ineffective assistance of counsel at trial.

The evidence at trial does not support the essential elements of the offenses beyond a reasonable doubt. For a person to "disturb the peace," they must have thrown those around them into a disorder or confusion, interrupting their settled state. The conflicting evidence adduced at trial does not prove beyond a reasonable doubt such disturbance occurred. While Mr. Wright was communicating with the store manager, Ms. Pickrel, a store employee, was able to assist a customer at the checkout register. Despite Mr. Wright's presence, the employee was able to carry out her job duties and the customer bought her items, unphased by any interaction between Mr. Wright and the store manager. They were not confused, in disorder, or unsettled. They conducted business as usual.

Other testimony by an employee, Mr. Gregory, demonstrated the employees were not disturbed while Mr. Wright was on the premises. Mr. Gregory testified he was not afraid, did not feel threatened, and was not disrupted by Mr. Wright being in the building. At most, Mr. Gregory was distracted because he wanted to hear what the store manager was saying to Mr. Wright. This is nowhere near a state of confusion or disorder.

Mr. Homstad, the store manager, testified that Mr. Wright disturbed his peace, but Mr. Homstad's testimony is directly contradicted by video evidence. Despite video footage demonstrating that Mr. Wright had no physical contact with Mr. Homstad while outside, Mr. Homstad claimed that Mr. Wright sucker-punched him and made various statements toward him. The testimony is inconsistent with the physical video evidence.

There was also insufficient evidence to convict Mr. Wright of loitering and trespass. A person should be allotted reasonable time to

leave the premises after being asked to leave. Nebraska caselaw showcases that where a defendant is asked to leave but refuses and remains upon the premises long enough for police to arrive and remove the defendant, the defendant has been given reasonable time to leave. Here, Mr. Wright left within minutes of being asked to leave. He did not remain upon the premises long enough to have to be physically removed. Despite the confusion of testimony and when it was clearly communicated to Mr. Wright that he needed to leave the premises, he nonetheless left the store in a reasonable amount of time and thus did not “remain upon the property” knowing he is not licensed or privileged to do so. Where the defendant leaves the premises within a reasonable period after being asked to leave, there is no trespass.

Finally, Mr. Wright’s counsel was insufficient at trial. Trial Counsel provided deficient performance which as a result prejudiced Mr. Wright. Mr. Wright’s counsel failed to offer into evidence a “Video Police Report” which contained exculpatory material and impeachment material which would have changed the proceeding if offered. At the very least, the Video Police Report could have been used to effectively impeach Mr. Homstad, who was the most important witness for the State. It was crucial that this evidence be offered because it would have impeached Mr. Homstad’s testimony on points that the trial court placed great emphasis on in coming to its decision.

Mr. Wright’s counsel also performed deficiently by failing to move for a new trial. Trial counsel could have moved for a new trial on the grounds that the verdict was not supported by sufficient evidence as discussed above. There is a reasonable probability that the County Court Judge would have granted Mr. Wright’s motion for new trial had his counsel done so. Had Mr. Wright’s trial counsel moved for a new trial, he could have offered the Video Police Report as an exhibit at the hearing, and if accepted, the Video Police Report would have been part of the record on appeal. But for Trial Counsel’s deficiencies, the result of this proceeding would have been different. There is insufficient evidence to support Mr. Wright’s convictions, and Mr. Wright received ineffective counsel at his trial. As such, the District Court’s Order of December 15, 2022, as well as the Order Nunc Pro Tunc issued by the

District Court on January 9, 2023 amending the Order of December 15, 2022 should be reversed.

ARGUMENT

I. There was Insufficient Evidence Adduced to Support the County Court’s Finding Appellant Guilty of Disturbing the Peace and Loitering and Trespass.

When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the question to be asked is whether, after viewing the evidence more favorable to the prosecution, any rational trier of fact could have found that the evidence is sufficient to support the essential elements of the crime beyond a reasonable doubt. *State v. Grant*, 310 Neb. 700, 968 N.W.2d 837 (2022). When a defendant appeals a conviction under a municipal ordinance, claiming insufficient evidence for conviction, the appellate court’s consideration of the assignments of error requires examining the specific ordinance involved. *State v. Ruisi*, 9 Neb. App. 435, 616 N.W.2d 19 (2000), *disapproved on other grounds*; *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001).

a. There was insufficient evidence to convict and find Mr. Wright guilty of Disturbing the peace.

There was insufficient evidence presented at trial to support Mr. Wright’s conviction for Disturbing the Peace. Lincoln Municipal Code § 9.20.050 states that it “shall be unlawful for any person to intentionally or knowingly disturb the peace and quiet of any person...” Lincoln Municipal Code § 9.20.050 (2021). The definition of “disturb” under the Lincoln Municipal Code means “to throw into a disorder or confusion; to interrupt the settled state of.” *In re Interest of Elainna R.*, 298 Neb. 436, 904 N.W.2d 689 (2017). In this case, there is conflicting evidence as to whether Mr. Wright’s actions threw the store

employees' peace into disorder, confusion, interruption, or an unsettled state. Thus, the State failed to prove beyond a reasonable doubt that Mr. Wright committed the offense of disturbing the peace.

The testimony of Ms. Jeannie Pickrel, one of the store employees, demonstrates that Mr. Wright did not disturb her peace. As she was working, she did not pay much attention to Mr. Wright and the store Manager, Tim Homstad, as they were discussing Mr. Wright being in the store. (21:2-5). At the time Mr. Wright entered the store for the second time, Ms. Pickrel did not have any customers at her register. (E1). The customer whom Ms. Pickrel assisted while Mr. Wright was in the store approached Ms. Pickrel's checkout register, which was only five to ten feet away from Mr. Wright once Mr. Wright and Mr. Homstad were already talking. (E1). Mr. Wright's actions did not prevent the customer from proceeding to check out and purchase her items and did not interrupt Ms. Pickrel from doing her job, nor did they interfere with the customer buying her items. She was able to finish the customer transaction while Mr. Wright was in the store. (21:2-14; 22:24-23:1).

Ms. Pickrel was able to perform her duties as a store employee despite Mr. Wright's presence in the store. His actions did not throw her into disorder or interrupt her settled state. Ms. Pickrel did not give an indication through her testimony that her peace was disturbed by Mr. Wright's actions which occurred approximately five to ten feet away from her. (20:6-10). When Mr. Homstad re-entered the store after the encounter, Ms. Pickrel was with a customer and did not even pay attention to Mr. Homstad's re-entrance other than noting that he looked "normal." (26:3-19). Moreover, Ms. Pickrel was with this particular customer during the whole transaction and did not testify that the customer was afraid and asked to move behind the counter as Mr. Homstad claimed. (53:9-13). The other employee in the store at the time, Dalton Gregory, never testified that the customer was frightened or asked to stand behind the counter. Only about twenty seconds after Mr. Homstad re-entered the store after the encounter with Mr. Wright,

the customer exited the store; the CCTV footage shows that the customer walked straight out the front doors, through the vestibule, and outside out of view of the camera without hesitating or pausing to look around for fear of Mr. Wright or anyone else. (E1). Any disturbance on the part of the customer can be easily explained as an understandable reaction to a man of six feet, ten inches and 300 pounds yelling in her direction at another customer. (23:2-4; 62:18-19).

Similarly, another employee, Dalton Gregory, gave testimony reflecting that Mr. Wright in fact had not acted in such a way that disturbed his peace. Mr. Gregory testified that he was not afraid when Mr. Wright was in the store. (109:19-20). Moreover, he did not feel threatened while Mr. Wright was in the store. (109:25-110:2). At most, Mr. Gregory was “distracted” for only a few minutes because he wanted to observe Mr. Wright’s conversation with the store manager, Mr. Homstad. (109:6-11). Mr. Gregory must not have found this incident too significant or upsetting, as he did not even remember what was exactly said between Mr. Wright and the store manager. (112: 13-19). Mr. Gregory was not confused, did not feel as though he was in disorder, and did not state that Mr. Wright interrupted his settled state. Mr. Gregory’s testimony does not demonstrate that his peace was disturbed. He was merely “distracted” from his work because he chose to pay attention to what the Store Manager and Mr. Wright were discussing. Furthermore, the police officer that was dispatched to the store did not talk to the customer who was present at the store at the same time as Mr. Wright. (124:12-15). As such, the State failed to prove beyond a reasonable doubt that Mr. Wright committed the offense of disturbing the peace.

Mr. Homstad, the store manager, provided conflicting testimony as to what actually occurred that day. There was testimony that Mr. Wright and Mr. Homstad were speaking to each other in raised voices. (19:15-18; 21:1-3). However, Mr. Homstad started the interaction with Mr. Wright by yelling at Mr. Wright from about twenty-five feet across the store; Mr. Wright was simply responding to Mr. Homstad’s

questions loudly enough so that Mr. Homstad would be able to hear. (14:5-7; 47:1-5; 49:1- 11).

The trial court's Order of May 26, 2022 erroneously states that the CCTV footage in Exhibit 1 "shows the Defendant to raise his left arm and extend it toward Mr. Homstad and Defendant is observed to stumble or lose his balance as his arms get fully extended into Mr. Homstad's chest all the while Mr. Homstad's arms are behind his back." (T13). Although the witness claimed he was poked during the time frame the video captured, video does not show Mr. Wright raising his arm poking the defendant, nor the defendant "stumbling" from the alleged poke. (92:19-93:2; 95:3-6). Additionally, Mr. Homstad is a large man, almost a foot taller than Mr. Wright. (62:15-20). Mr. Wright would have had to move his arm extremely high in a large motion, while holding his phone, to poke Mr. Homstad in the chest to the point where Mr. Homstad would "stumble"—the CCTV footage of the incident accepted into evidence does not show that Mr. Wright made any such movement with his arm, and does not show Mr. Homstad stumble. (E1).

Furthermore, Mr. Homstad's testimony is directly contradicted by video evidence. Mr. Homstad claimed that Mr. Wright "sucker punched" him and Mr. Homstad asked "if [Mr. Wright] lost his mind" while outside of the store within the eighteen seconds the two men were outside. (88:4-10). Mr. Homstad also alleged during this time Mr. Wright said he was going to sue and get a lawyer. (70:13-15). However, the approximately eighteen second video capturing the two men outside demonstrates that Mr. Wright in fact did not have any physical contact with Mr. Homstad outside, Mr. Homstad never asked if he lost his mind, and Mr. Wright never made the statements the witness claims he said. (Ex. 2).

Mr. Homstad has provided testimony which is inconsistent, contradictory, and refuted by other evidence, including video footage. There is no evidence that Mr. Wright at any point made physical contact with Mr. Homstad other than Mr. Homstad's own testimony,

which was inconsistent with the other employees present on the day at issue. Further, Mr. Homstad incorrectly testified that Mr. Wright was inside the store for seven to ten minutes, whereas the CCTV video which captured the entire time Mr. Wright was in the store after his re-entrance, shows that Mr. Wright was only inside the store after re-entrance for one minute and thirty-two seconds. (77:1-11; 94:1-22; E1). Mr. Homstad's testimony that Office Depot rules require the wearing of a mask in the store is contradicted by the testimony of his own employee (who actually dealt with customers as they entered the store) that store policy was to allow shoppers to shop in the store without a mask. (32:18-20; 52:14-15). Mr. Homstad provided inconsistent testimony about where Mr. Wright allegedly called him derogatory names; initially he testified that the name calling occurred in the vestibule to the store, but he later claimed that the name calling happened while the two men were inside the store. (67:2-25; 72:9-11). Given these inconsistencies, there was insufficient evidence to find that Mr. Wright did these things let alone disturbed the peace.

b. *There was Insufficient Evidence to Find Mr. Wright Guilty of Loitering and Trespass*

There was insufficient evidence to demonstrate that Mr. Wright was guilty of trespass. Lincoln Municipal Code § 9.24.190 states that "It shall be unlawful for anyone to loiter, enter, or remain upon the property of another, knowing he or she is not licensed or privileged to do so, with notice against trespass given by *actual communication* to the actor..." Lincoln Municipal Code § 9.24.190 (2021) (emphasis added).

The communication element of denying one's presence upon a property implies that the person who has been told he is not allowed to remain on the premises must be afforded a reasonable period of time to leave of their own volition. *Lemon v. State*, 868 N.E.2d 1190, 1196-97 (Ind. Ct. App. 2007); *Curtis v. State*, 58 N.E.3d 992, 994 (Ind. Ct. App. 2016). There is no trespass when a person is not allowed a reasonable

amount of time to comply with a request to leave. *Curtis*, 58 N.E.3d at 994 (citing *Lemon v. State*, 868 N.E.2d 1190 (Ind. Ct. App. 2007)).

In *Curtis*, the Indiana Court of Appeals dealt with a state statute containing similar language to the municipal code at issue in this case. The statute considered in *Curtis* states that there is trespass when a person, “knowingly or intentionally refuses to leave the real property of another person after having been asked to leave by the other person...” Ind. Code § 35-43-2-2 (2021). Here, the Lincoln Municipal Code requires the person to knowingly “remain upon the property of another...with notice against trespass given by actual communication to the actor...” Lincoln Municipal Code § 9.24.190 (2021). There is an element of communication in the municipal code, and there should be reasonable time given to the actor to leave the premises. It logically follows that when a person asks another to leave, there must be a reasonable time given to in fact leave. It can’t be expected for a person to leave instantaneously.

Nebraska caselaw supports the proposition that a person should be given a reasonable period to leave after being notified they are not welcome on the premises. *See State v. McCave*, 282 Neb. 500, 536, 805 N.W.2d 290, 320 (2011) (Son, after being told twice to leave, refused to leave and remained on the premises until police arrived and subsequently had to arrest him); *See State v. Campbell*, 260 Neb. 1021, 1023, 620 N.W.2d 750, 753 (2001) (Defendant refused to leave tow lot after being asked to, locked herself in her car and remained on said lot until police arrived); *See State v. Wright*, 235 Neb. 564, 565, 456 N.W.2d 288, 289 (1990) (Defendant barged into residence uninvited, was told to leave, refused to leave and had to be forcibly removed from the residence).

In each of these cases, the defendants were asked to leave, but they remained upon the premises long enough that they had to be forcibly removed or for the police to arrive and remove them. The defendants didn’t leave within a few minutes after being asked to. They stayed on the premises long enough for law enforcement to arrive and intervene. These defendants had a reasonable amount of time to leave the premises after being given communication to leave, and because

they remained, there was trespass. Here, Mr. Wright left within minutes of being asked to leave. Because Mr. Wright left within a reasonable time, there was no trespass.

Ms. Pickrel never told Mr. Wright to leave the store, and she testified that it was not store policy to ask customers to leave because they will not wear a mask. (27:22-25; 28:1-4). The first time the store manager asked Mr. Wright to leave, he was only suggesting that Mr. Wright was “free to leave” if he did not like what was happening there. (53:23-54:2). The manager had suggested Mr. Wright leave with no intention to communicate to Mr. Wright that he was no longer privileged to be on the premises and thus trespassing. (54:6-8). The two were having a “discussion” of Mr. Wright leaving the store. (63:15-17). The store manager did not “order” Mr. Wright to leave until he took his phone out to record the interaction. (55:9-10; 76:13-18). Even then, the store manager does not remember if he changed his approach when he subjectively decided he was “ordering” Mr. Wright to leave. (58:4-7).

Overall, Mr. Homstad’s testimony creates confusion as to whether Mr. Wright was no longer licensed or privileged to be in the building until the clear and obvious demand that Mr. Wright leave, which Mr. Wright adhered to. From Mr. Homstad’s very first “suggestion” that Mr. Wright leave the store until Mr. Wright had fully exited the store, only about one minute or less passed, as Mr. Wright was only in the store the second time for a total of one minute and thirty-two seconds. (E1). Thus, even if Mr. Homstad’s very first “suggestion” that Mr. Wright leave the store is deemed to be sufficient notice of trespass, Mr. Wright still left the store in a reasonable amount of time and thus did not “remain upon the property” knowing he is not licensed or privileged to do so.

From when the store manager *ordered* Mr. Wright to leave the store, it took four to five seconds for Mr. Wright to leave the store. (88:21-89:1-3). The store manager himself testified that Mr. Wright left within four to five seconds of him demanding that he leave. (88:21-

89:1-3). This is a reasonable amount of time for a person who was notified to leave the store to get out of said store. It was not until this point that the store employee's "suggestions" to leave became an order communicating that Mr. Wright was no longer welcome in the store. Mr. Wright promptly left after that order. As such, there is insufficient evidence supporting the inference that he knowingly remained on the premises after being told he is not allowed to stay. Rather, the evidence presented supports that Mr. Wright promptly left once he was put on notice that he was not welcome there and would be trespassing if he remained on the premises. There is not enough evidence to support that the essential elements of "trespassing" under the Municipal Code were satisfied beyond a reasonable doubt.

II. Mr. Wright Received Ineffective Assistance of Counsel at Trial.

Mr. Wright received ineffective assistance of counsel at his trial. A defendant has a claim for ineffective assistance of counsel when the defendant's counsel was shown to be deficient, and such deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Wells*, 300 Neb. 296, 912 N.W.2d 896 (2018). Counsel's performance is deficient when it was not equal to that of a lawyer with ordinary training and skill in criminal law. *Wells*, 300 Neb. at 310. Such deficient performance prejudices the defendant when there is 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. *Id.* at 311.

Mr. Wright's trial attorney rendered deficient performance by failing to offer certain evidence at trial. As part of discovery, the State provided Mr. Wright's attorney with a twelve minute and forty second video (the "Video Police Report") of the body camera footage from the police officer who visited the Office Depot after Mr. Wright had left the store. The Video Police Report contained exculpatory material and impeachment material which would have changed the result of the

proceeding if offered. Because of Mr. Wright's trial attorney's deficient performance, the Video Police Report was not offered as an exhibit at trial, and thus it is not part of the record on appeal.

If offered and received into evidence, the Video Police Report would have refuted Mr. Homstad's testimony that Mr. Wright allegedly poked him in the chest, punched him, and called him derogatory names. At the very least, the Video Police Report could have been used to effectively impeach Mr. Homstad, who was the most important witness for the State. This is especially important, considering there is no evidence that Mr. Wright made physical contact with Mr. Homstad other than Mr. Homstad's testimony. It was vital that the Video Police Report be used to contradict and impeach Mr. Homstad's testimony on these points because the trial Judge placed great emphasis on the allegations that Mr. Wright punched, poked, and called Mr. Homstad derogatory names. (172:5-9; T13-14). As such, Mr. Wright's trial attorney's failure to offer the Video Police Report into evidence constituted ineffective assistance of counsel.

Moreover, Mr. Wright's trial counsel performed deficiently by failing to move for a new trial. Mr. Wright's trial counsel could have moved for a new trial on the grounds that the verdict was not supported by sufficient evidence as discussed above. As such, there is a reasonable probability that the County Court Judge would have granted Mr. Wright's motion for new trial, and Mr. Wright's trial attorney's failure to move for a new trial amounts to ineffective assistance of counsel. In addition, had Mr. Wright's trial counsel moved for a new trial, he could have offered the Video Police Report as an exhibit at the hearing, and if accepted, the Video Police Report would have been part of the record on appeal.

CONCLUSION

For the above stated reasons, Appellant respectfully requests this Court to reverse the District Court's Order dated December 15, 2022 as well as the Order Nunc Pro Tunc issued by the District Court

on January 9, 2023, and remand this matter to the District Court with directions to reverse the Orders of the County Court dated May 26, 2022, and June 3, 2022, and to dismiss the State's Complaint against Mr. Wright.

Respectfully submitted,

CHAD W. WRIGHT, Appellant

By: /s/ Sam Baue

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CERTIFICATE OF WORD COUNT

This brief complies with the word count and typeface requirements of Neb. Ct. R. § 2-103. This brief was prepared using Microsoft Word Office Home and Business 2016.

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Certificate of Service

I hereby certify that on Friday, August 11, 2023 I provided a true and correct copy of this *Replacement Brief of Appellant Wright* to the following:

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