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**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

CASE NO. A-23-027

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

vs.

CHAD W. WRIGHT,

Appellant.

APPEAL FROM DISTRICT COURT OF LANCASTER COUNTY, NE
HONORABLE LORI A. MARET, DISTRICT COURT JUDGE

BRIEF OF APPELLEE

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BASIS FOR APPELLATE JURISDICTION

Appellee has no additions to the Appellant's Statement of Jurisdiction.

STATEMENT OF THE CASE

A. Nature of the Case.

The only additions to the Appellant's "Nature of the Case" is to clarify that the sentences imposed were: Count I Disturbing the Peace, \$250.00 fine; and Count II Trespassing, \$25.00 fine; plus costs.

B. Issue in the County Court.

Appellee has no changes to Appellant's "Issues" as set forth in Appellant's Brief.

C. How the Issue was Decided.

Appellee's only change to this section of Appellant's Brief is to fix the typographical error in the last sentence of this section (of Appellant's Brief), where it says "County Court" found the record insufficient to determine the ineffective assistance of counsel claim. The reference there should be to District Court.

D. Scope of Review.

Appellant's Scope of Review is sufficient.

PROPOSITIONS OF LAW

1. In reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Pischel*, 277 Neb. 412 (2009).

2. 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. Price*, 306 Neb. 38, 944 N.W.2d 279 (2020).

3. To prevail on a claim of ineffective assistance of counsel, an appellant must show that trial counsel's performance was deficient, and, that this deficient performance actually prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

4. When presented with an ineffective assistance of counsel claim, the court must first determine if a claim has been properly raised, which is a two-part question: first, has the Appellant alleged deficient performance by trial counsel with enough particularity to determine whether the claim can be decided upon the trial record; and second, whether a claim has been made with sufficient particularity that a future court, on postconviction review, would be able to recognize whether the claim had been brought before the appellate court on direct appeal. *State v Stelly*, 304 Neb. 33, 50 (2019).

5. 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 Appellant was or was not prejudiced by counsel's alleged deficient performance." *Stelly*, at 50.

STATEMENT OF THE FACTS

1. The Office Depot, where Appellant's conduct occurred, is within the city limits of Lincoln, Lancaster County, Nebraska. (9:21-10:1).
2. When this event occurred, the Office Depot was open for business and had at least two customers in the store during the Appellant's conduct at issue. (16:10-12); (107:4-5).
3. On May 19, 2021, Office Depot was required to abide by a mask mandate by the Lincoln/Lancaster County Health Department, which Office Depot's manager enforced by not allowing a customer to enter the store and shop without a mask. (75:21-24).
4. Appellant entered Office Depot without a mask on at least two occasions. (13:24-14:4); (12:7-14).
5. The first time Appellant entered, Office Depot employee Pickrel engaged Appellant by the front doors, upon his entry, and told him if he needs a mask, there are some near the door and reminded him of the city-wide mask mandate. (10:20-11:6).
6. Appellant did not don a mask, but rather, mentioned to Pickrel that the CDC says he does not have to wear a mask, and indicated to Pickrel that she did not know his vaccination status. (10:20-11:11).
7. The Appellant then exited the store, only to return, still unmasked, and ask for the manager, whose identity was Tim Homstad. (12:7-10); (14:2-4); (12:23-13:18).
8. Pickrel was wearing a uniform of Office Depot, as was the manager, Tim Homstad. (15:14-16:3).

9. As Appellant and Homstad interacted near the front doors, upon Appellant's re-entry, Pickrel worked at checking out a customer at the cash register near the front door. (18:23-25).

10. Pickrel heard that Homstad and Appellant had an interaction, heard Homstad tell the Appellant four or five times to leave, and described the interaction "loud" and clarified it was "upset" loud as opposed to "happy" loud. (21:1-5); (30:7-11); (22:15-18).

11. The Appellant did not immediately leave when Homstad asked him to leave. (34:19-23).

12. Homstad had noted the interaction with Appellant and Pickrel and had understood the Appellant to say he did not want to wear a mask. (44:4-15). Homstad then saw the Appellant leave. (34:19-20).

13. Shortly thereafter, the Appellant reentered the store and asked for the manager. (46:23-25); (48:9-15). Appellant asked Homstad why he needed to wear a mask and Homstad explained to the Appellant he needed to either wear a mask or let Office Depot staff do his shopping for him. (50:14-51:2).

14. Appellant's reply to Homstad was that Homstad should call the police. (50:22-51:2). Homstad found that confusing (51:1-2) and asked the Appellant why he suggested the police be called. The Appellant answered that he wanted the police there to discuss why he needed to wear a mask. (51:20-23).

15. Homstad noticed the Appellant becoming a little agitated and asked him to leave the store. (52:1-8). As Appellant was talking about wanting the police called, he was talking loudly and at the time there was a customer nearby at the front cash register. (52:20-25).

16. During that time, Appellant raised his voice louder and louder and said, “call the police” and “I don’t need to leave,” and appeared angry. (53:5-13)

17. Homstad was concerned that the customer at the cash register was frightened by the Appellant’s conduct, which was a sentiment shared by Pickrel. (53:11-13); (22:24-23:9).

18. Homstad told the Appellant to leave because he was making a scene. Homstad estimated he told him to leave at least ten times. (58:4-12). Eventually, Homstad walked, with his arms behind his back, so as to funnel Appellant out of the store, without touching him. (63:3-6).

19. As the Appellant was being funneled out of the store by Homstad, Appellant was calling him names including “gay,” “fat,” “pussy,” and “big ogre.” The name calling was still in a loud voice and was when at least one customer was present. (64:1-20).

20. As Homstad continued to funnel the Appellant out of store and into the vestibule area that was between the door to the interior of the store and the parking lot, the Appellant used his index finger to poke Homstad in the chest multiple times. (65:25-66:10).

21. When the two men exit the doors from the vestibule to the parking lot, the Appellant “sucker punched” Homstad in the abdomen. (67:6-10).

22. Homstad testified that the Appellant’s conduct was disturbing and caused Homstad concern for the safety of his employees, his customer(s), and himself. (71:22-72:4). Homstad was disturbed enough to call the police. (39:5-10).

23. An employee named Dalton Gregory had been working in the store during the interaction Homstad and Appellant had. Gregory testified that he was in the far front corner of the store, away from the front doors where the Appellant and Homstad had interacted, and that Gregory was working with a customer and was distracted by the disturbance caused by Appellant. Gregory testified to it being a loud interaction that seemed angry and that it disrupted the normal course of his work at Office Depot. (106:22-107:6); (107:22-108:7); (109:16-18).

24. The Appellant understood that he was not allowed shop in the store without a mask, based on his contact with Pickrel and prior to his interaction with Homstad. (140:12-14); (141:11-16).

25. It was within the scope of Homstad's duties to require a customer or individual to leave the store. (57:4-10). The Appellant understood that Homstad told him to leave the store at the beginning of their interaction as Homstad approached when Appellant asked for the manager. (144:16- 45:16).

ARGUMENT

1. Count I of the Complaint, DISTURBING THE PEACE.

As to Count I of the Complaint, the evidence is sufficient to show, beyond a reasonable doubt, that the Appellant disturbed the peace and quiet of Office Depot and/or Timothy Homstad. (T 2 of 56).

Viewed in the light most favorable to the State, the evidence shows that Appellant entered Office Depot, without a face mask, and was quickly informed of a mask mandate requiring him to wear a mask to be in the store. (10:20-11:6). He made a remark about the CDC lifting their mandate, declined to don a mask provided by the store, and then left. (10:20-11:11).

Appellant then re-entered the store, still without a mask, and, when told by Homstad he needed to wear a mask or leave, Appellant told him to call the police. Appellant further explained he wanted to talk to the police about why he needed to wear a mask. (46:23-51:2).

Homstad testified that the Appellant raised his voice louder and louder, appeared angry, and declared “I don’t need to leave.” (53:5-13). This was in close proximity to the front check out stand where Pickrel was checking out a customer. (53:11-13); (22:24-23:9). Homstad estimated that after telling the Appellant to leave at least ten times, Homstad funneled the Appellant out of the store. (58:4-12); (63:3-6). During that time, Appellant called Homstad things like “gay,” “fat,” “pussy,” and “big ogre.” Homstad described that the name calling was in a loud voice when at least one customer was present. (64:1-20).

Appellant used his index finger to poke Homstad in the chest and, later, “sucker punched” Homstad in the abdomen. (65:25-66:10); (67:6-10). Homstad testified that Appellant’s conduct was disturbing to him and caused concern for the safety of customers, employees, and himself. (71:22-72:4). Homstad was disturbed enough to call the police. (39:5-10).

Employee Gregory testified that Appellant’s delivery of words to Homstad was aggressive and that the two seemed angry with one

another. (108:21-109:3). Gregory further testified that Appellant's conduct disrupted the normal course of his work at Office Depot and he felt he needed to monitor Appellant's conduct to be sure it did not escalate into something worse. (109:8-18). Gregory described the interaction with Appellant and the manager, Homstad, as "a very heated argument or discussion." (112:20-25).

The evidence is sufficient to support a conviction that the peace and quiet of Timothy Homstad was disturbed. The evidence is also sufficient to support a conviction that the peace and quiet of Office Depot was disturbed.

2. Count II of the Complaint, TRESPASS.

As to Count II of the Complaint, the evidence is sufficient to show, beyond a reasonable doubt, that the Appellant trespassed at Office Depot. (T2 of 56).

It is uncontroverted that the Appellant entered Office Depot during a time the store was required to abide by a mask mandate of the Lincoln-Lancaster County Health Department. (9:16-20). It is uncontroverted that the Appellant entered the store without a proper mask or face covering of any sort and that, as he entered, he was told by store employee Jeannie Pickrel, that he needed to have a mask on and that there were masks available for him. (9:3-6); (10:20-11:6). It is uncontroverted that rather than put on a mask, Appellant's retort to Pickrel was to ask if she knew his vaccination status and referred to the CDC. (11:7-11). It is uncontroverted that after being told of the mask mandate by Pickrel, Appellant left the store rather than put on a mask. (12:7-11). It is uncontroverted that soon thereafter, Appellant re-entered the store, still without a mask, and indicated he wanted to talk to the manager. (13:1-18).

Stopping right there in the facts suffices to show that Appellant did enter or remain on the Office Depot property knowing that, without a mask on, he was not licensed or privileged to do so. He entered a store without a mask, during a time the store was subject to a mask

mandate; he was told he needed to wear a mask to be in the store; he left; he then chose to re-enter the store, still without a mask, despite having just been put on actual notice that he was not permitted to be in the store without a mask. That is trespassing.

At no point did his further conduct better the situation: After re-entering, Appellant was told multiple times by the manager, Tim Homstad, that he needed to leave. (34:1-7); (34:19-23). Rather than leave, Appellant wanted the police called so he could debate the mask policy with them. (51:20-23). All of this while he stood, unmasked, in Office Depot where the public would have to enter and exit to get to and from the parking lot. Again, he knew he was not welcome within the store due to not wearing a mask, and nonetheless entered and then remained after being told numerous times by Homstad to leave.

The State has met its burden on Count II, the Trespassing charge, and the conviction should be affirmed.

3. The record is not sufficient for the Court to determine the matter of Ineffective Assistance of Counsel on Appeal.

Appellant points to a “Video Police Report,” which is not in the record, and asserts that had that been offered in the trial court, the result would have been different. The record before this court does not support such a finding and the District Court’s ruling on the matter of Ineffective Assistance of Counsel should be affirmed.

CONCLUSION

There was no error below and the convictions should be affirmed.

STATE OF NEBRASKA, Appellee

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Appellee complies with Neb. Ct. R. App. P. § 2-103. It was generated on Microsoft Word Version 2301 and contains 2553 total words in Century 12 pt. type.

By: /s/ Connor L. Reuter

Connor L. Reuter, #19692

CERTIFICATE OF SERVICE

On 25th day of April, 2023, the above Brief of Appellee was served upon the Counsel for the Appellant, Sam Baue, by electronic service to sam@mchenrylaw.com.

By: /s/ Connor L. Reuter

Connor L. Reuter, #19692

Certificate of Service

I hereby certify that on Tuesday, April 25, 2023 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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