

NO. A-23-561

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

BRIAN K. ADAMS,

Appellant.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Honorable Ryan S. Post, District Judge

BRIEF OF APPELLANT

Respectfully submitted:
Matthew Kosmicki, #21875
140 N. 8th Street, Suite 340
Lincoln, NE 68508
402-441-4848

Attorney for Appellant

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STATEMENT OF THE BASIS OF JURISDICTION

This is a direct appeal in a criminal case following a jury trial with the underlying convictions and sentences of: Count I – murder in the second degree, Neb. Rev. Stat §28-304 (1977) for which appellant received a sentence of fifty (50) to sixty (60) years imprisonment; Count II – use of a deadly weapon to commit a felony, Neb. Rev. Stat. § 28-1205(1)(B) (2009) a consecutive sentence of ten (10) to twenty (20) years and both Counts I and II were ordered consecutive to any other sentence previously imposed on appellant. Sentencing was June 26, 2023. (572:10-22).

Appellant appeals his convictions and sentences pursuant to the authority of *Neb. Rev. Stat. §25-1912*. In a criminal case the judgment from which the appellant may appeal is the sentence. *State v. Fredrickson*, 305 Neb. 165, 171 (2020). Appellant’s notice of appeal was timely filed on July 20, 2023. (Supp.T8).

STATEMENT OF THE CASE

1. **Nature of the case.**

This is a direct appeal by Appellant after being found guilty following a jury trial and sentenced on June 26, 2023, on Count I, Murder in the Second Degree a Class IA felony to fifty (50) to sixty (60) years imprisonment, and on Count II, Use of a Deadly Weapon to Commit a Felony, a Class 2 felony to ten (10) to twenty (20) years. (T169).

Appellant timely filed his Notice of Appeal on July 20, 2023. (Supp.T8).

2. **Issues tried in the court below.**

A) Whether the District Court erred by denying Adams’ Right to Due Process and a Fair Trial because of the refusal to give a jury instruction on self-defense.

B) Whether trial counsel was ineffective in violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution by not objecting at the formal jury instruction conference, and therefore not preserving for review on appeal, that the District Court was not including a self-defense jury instruction.

C) Whether trial counsel was ineffective in violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II

of the Nebraska Constitution by not offering a proposed jury instruction on self-defense at the formal jury instruction conference thus preserving the issue for review on appeal.

D) Whether trial counsel was ineffective in violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution for not producing evidence at the trial through Jeremy Berg, the forensic pathologist and photos of Clark from the autopsy that there was a lack of debris or marking or bruising on Clark's head which would support Adams' testimony that he did not stomp on Clark's head.

E) Whether trial counsel was ineffective in violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution by not introducing into evidence through Adams' testimony that Adams' car was blocked in preventing him from retreating.

F) Whether trial counsel was ineffective in violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution by failing to present evidence to the jury and arguing that Malaki Williams did not stay with Clark or come back to the scene and contact the investigating officer by cross-examining Williams or through the testimony of Lincoln Police Officers that investigated the scene, which would have supported the Adams' defense that Williams removed something from the scene.

G) Whether trial counsel was ineffective in violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution for not producing evidence or arguing that Adams could not see what was in the Clark's hand to strengthen the Adams' self-defense argument.

H) Whether trial counsel was ineffective in violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution for not pursuing 404-character issue/reputation of the Clark nickname of "Trigger Trey" in support of the Clark's propensity for violence and the initial aggressor.

3. How the issues were decided and what judgment was entered by the Trial Court.

A) Adams's trial counsel argued for a self-defense instruction at the informal jury instruction conference. However, the District Court decided not to include an instruction on self-defense in the final instructions given to the jury.

B) Although not an issue in the District Court, Appellant appeals the effectiveness of his attorney's performance and asserts that it was deficient for not objecting at the formal jury instruction conference, and therefore not preserving for review on appeal, that the District Court was not including a self-defense jury instruction.

C) Although not an issue in the District Court, Appellant appeals the effectiveness of his attorney's performance and asserts that it was deficient for not offering a proposed jury instruction on self-defense at the formal jury instruction conference thus preserving the issue for review on appeal.

D) Although not an issue in the District Court, Appellant appeals the effectiveness of his attorney's performance and asserts that it was deficient for not producing evidence at the trial through witnesses Jeremy Berg and photos of Clark from the autopsy that there was a lack of debris or marking or bruising on Clark's head which would support Adams' testimony that he did not stomp on Clark's head.

E) Although not an issue in the District Court, Appellant appeals the effectiveness of his attorney's performance and asserts that it was deficient for not introducing into evidence through Adams' testimony that Appellant's car was blocked in preventing him from retreating.

F) Although not an issue in the District Court, Appellant appeals the effectiveness of his attorney's performance and asserts that it was deficient by failing to present evidence to the jury and arguing that Malaki Williams did not stay with Clark or come back to the scene and contact the investigating officer by cross-examining Williams or through the testimony of Lincoln Police Officers that investigated the scene, which would have supported the Adams' defense that Williams removed something from the scene.

G) Although not an issue in the District Court, Adams appeals the effectiveness of his attorney's performance and asserts that it was deficient for not producing evidence or arguing that the Adams could not see what was in the Clark's hand to strengthen the defendant's self-defense argument.

H) Although not an issue in the District Court, Adams appeals the effectiveness of his attorney's performance and asserts that it was deficient for not pursuing 404-character issue/reputation of the Clark nickname of "Trigger Trey" in support of the Clark's propensity for violence and the initial aggressor.

4. **Scope of Court of Appeal’s review.**

The standard of review for “whether jury instructions given by a trial court are correct is a question of law. *State v. Cerros*, 312 Neb. 230 (2022). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*” *State v. Matteson*, 313 Neb. 435, (2023).

“Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant’s substantial right and, if uncorrected, would result in damage to the integrity, reputation and fairness of the judicial process.” *State v. Mann*, 302 Neb. 804, 809 (2019).

Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only 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. *State v. Clausen*, 307 Neb. 968 (2020).

ASSIGNMENTS OF ERROR

I. THE DISTRICT COURT ERRED BY DENYING ADAMS’ RIGHT TO DUE PROCESS AND A FAIR TRIAL BECAUSE OF THE REFUSAL TO GIVE JURY INSTRUCTIONS ON SELF-DEFENSE.

II. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN VIOLATION OF THE 6TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 3 AND 11 OF THE NEBRASKA CONSTITUTION.

a. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution by not objecting at the formal jury instruction conference, and therefore not preserving for review on appeal, that the District Court was not including a self-defense jury instruction.

- b. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution by not offering a proposed jury instruction on self-defense at the formal jury instruction conference thus preserving the issue for review on appeal.
- c. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution for not producing evidence at the trial through witnesses Jeremy Berg and photos of Clark from the autopsy that there was a lack of debris or marking or bruising on Clark's head which would support Adams' testimony that he did not stomp on Clark's head.
- d. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution by not introducing into evidence through Adams' testimony that Adams' car was blocked in preventing him from retreating.
- e. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution by failing to present evidence to the jury and arguing that Malaki Williams did not stay with Clark or come back to the scene and contact the investigating officer by cross-examining Williams or through the testimony of Lincoln Police Officers that investigated the scene, which would have supported the Adams' defense that Williams removed something from the scene.
- f. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution for not producing evidence or arguing that the Adams could not see what was in the Clark's hand to strengthen the defendant's self-defense argument.
- g. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution for not pursuing 404-character issue/reputation of the Clark nickname of "Trigger Trey" in support of the Clark's propensity for violence and the initial aggressor.

PROPOSITIONS OF LAW

1. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation and fairness of the judicial process." *State v. Mann*, 302 Neb. 804, 809 (2019).
2. The standard of review for "whether jury instructions given by a trial court are correct is a question of law. *g.* On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*" *State v. Matteson*, 313 Neb. 435 (2023).
3. Accordingly, whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence, and it must, on its own motion, correctly instruct on the law." *State v. Brennauer*, 314 Neb. 782, 800 (2023)
4. "To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction." *State v. Johnson*, 314 Neb. 20 (2023); *State v. Urbano*, 256 Neb. 194 (1999); *State v. Kinser*, 252 Neb. 600 (1997).
5. Neb.Rev.Stat. §25-1409(4) provides that the use of deadly force is justifiable when the actor believes that such force is necessary to protect himself against death or serious bodily harm; however, deadly force is not justifiable if "the actor knows that he can avoid the necessity of using such force with complete safety by retreating.
6. A defendant need only produce a slight amount of evidence to satisfy this initial burden of raising the issue of self-defense. *State v. Bedford*, 31 Neb.App. 339 (2022).
7. Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of a counsel's performance or prejudice to a defendant as part of the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 688(1984), an appellate court reviews such legal determinations independent of the lower court's decision. *State v. Davlin*, 265 Neb. 386 (2003).

8. To prevail on claim of ineffective assistance of counsel under *Strickland v. Washington* [*supra*], the defendant must show that his or her counsel's performance was deficient, and that this deficient performance actually prejudiced the defendant's defense. *State v. Cullen* [*supra*]. The two prongs of this test may be addressed in either order, and the entire ineffective analysis should be viewed with a strong presumption that counsel's actions were reasonable. *Id.*

9. Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was clear from the record that such claims were without merit or in the rare case where counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was *fundamentally unfair trial*. *State v. Kipple*, 310 Neb. 654 , 660 (2022).

STATEMENT OF FACTS

I. Procedural Background

On January 19, 2022, the State of Nebraska charged the Appellant with First Degree Murder and Use of a Weapon to Commit a Felony. (T24). Adams entered a plea of not guilty.

Trial began on May 8, 2023 and the matter was submitted to the jury for their deliberations on May 10, 2023. The jury returned a verdict of guilty on 2nd Degree Murder and Use of a Weapon on (566:2-6).

II. Factual Background

On Monday, October 18, 2021, Brian Adams and Trevius Clark were engaged in a physical altercation in a gravel parking lot behind 2615 Vine street. During that altercation both men received injuries. Unfortunately, the injuries to Clark were fatal and resulted in his death. Adams was arrested and charged with Murder and Use of Weapon to Commit a Felony to which he plead not guilty. The matter was tried to a jury over three (3) days in Lancaster County Court in May of 2023. The following is a statement of the facts taken from pretrial hearings and the jury trial.

Actions of Trevius Clark Prior to Altercation

On Monday October 18, 2023, Malaki Williams messaged his cousin, Trevious Clark to drive them both to a store to purchase Black & Mild cigars. (378:13-14) Malaki Williams at the time was seventeen (17) years old and was unable to legally purchase tobacco and needed his older cousin Trevious Clark to make the purchase. (381:7-9) Willams walked to Clark's apartment where both men went to Walgreens for Black & Mild cigars, and thereafter made a stop at McDonald's for a cheeseburger. (380:24-25; 381:1) Clark then drove Williams to purchase Swisher Sweets cigarillos where Williams planned to remove the tobacco from the cigarillos and replace it with marijuana to roll into a blunt. (381:1; 381:21-25) After purchasing Swisher Sweets cigarillos, Clark needed to return to his apartment because he needed to pick up something from his home. (381:2-3) On the way to the apartment, the two men were traveling north on 26th street approaching Vine street, and cut through a gravel parking lot behind 2615 Vine street in an attempt to reach Vine street. (383:5-9) 26th street is not a through street and a common way to reach Vine street is to turn east into a gravel parking lot off of 26th street, then turn north again to reach Vine street. (547:2-3) Clark proceeded to drive his van through the gravel parking lot and stopped driving through the parking lot after recognizing a friend and stopped to talk to said friend. (384:12-17) Malaki Williams testified that Clark had been drinking and was "buzzed". (403:17-24)

Actions of Defendant Prior to Altercation

On the morning of Monday October 18, 2021, Brian Adams called out of work to charge his ankle monitor that had died in the middle of the night. (455:1-3) The ankle monitor takes approximately four (4) hours to charge, and Adams stayed home from work to charge it. (455:10-14) At some point during the day, Adams left his apartment and went to Kevious Bass' apartment at 2615 Vine Street to collect money Adams had lent to Bass previously. (456:1-12) Adams knocked on Bass' door and collected his money. (456:14-15) Adams then drove his van to the store with a passenger, Patrick Harris, to purchase a six pack of beer and a pint of Crown Royal. (456:23-25; 457:1-5) Adams returned to 2615 Vine Street and backed his van into the parking lot behind the apartment. (457:10-11) Adams remained by his vehicle talking and preparing to jack up the vehicle in order to perform maintenance on the vehicle. (457:19-21) Adams was having

mechanical issues with his van and was planning on purchasing a new van with his fiancé as a cosigner. (457:23-25; 458:14-17) Adams remained by his van talking between five (5) and ten (10) minutes before Clark drove his own van into the gravel parking lot behind 2615 Vine street. (457:15-17) At the time that Clark drove into the gravel parking lot, Adams testified that he had not consumed any alcohol. (458:5-7)

First Altercation

Clark drove his van with Williams in the passenger seat into the gravel parking lot where he stopped to converse with a friend. (384:6-8) Adams then approached Clark's van to speak with Clark and Williams. (459:24-25; 459:1-3) Once Clark finished speaking with his friend, Williams testified that Adams approached the driver's side of Clark's van and began making small talk with both Clark and Williams and asked about Williams' new baby daughter. (384:12-17) Williams testified that Adams then began speaking to Clark and said the van was nice and he wanted to purchase this van. (385:14-25) According to Williams, Clark told Adams the van was not for sale, at which point Adams opens the driver's door twice and slams the driver's door twice. (386:9-23)

Conversely, Adams testified that instead he approached the passenger side of Clark's van and asked if he could look inside the vehicle to see if he liked Clark's van enough for Adams to purchase it from Clark. (459:7-24) Adams testified that at some point during the conversation, Clark dropped marijuana in his lap that he was rolling into a Swisher Sweet blunt. (460:9-24) Adams testified that Clark then became irate, and Adams attempted to calm Clark down by stating Clark misunderstood him about purchasing the van and Adams would replace his marijuana. (461:8-14) Clark then attempted to exit his van to which Adams pushed the driver's van door closed approximately twice to prevent Clark from leaving the van because he was so irate and seemed like he wanted to fight. (462:12-18; 463:2-4)

Both Williams and Adams testified that this was the first time that Williams and Adams had met, and the windows of Clark's van were all rolled down. (384:25; 385:1-4; 383:25; 384:1-2; 459:13-17; 461:20-21)

Once Clark was able to exit the van, Clark swung at Adams, and hit Adams in the eye and knocked Adams to the ground. (463:12-14)

Mylijah Wagy, a resident of 2615 Vine street who witnessed the encounter from his apartment window, testified the time between Clark exiting the vehicle and the physical altercation was “quite quick”.(289:7-14) Adams testified that Clark swung immediately, while Williams testified Clark first asked why Adams was slamming the van door. (463:12-14; 387:1-6)

Williams testified that he did not see who threw the first punch as he was rolling a blunt, but heard a thud and witnessed Adams and Clark both upright and swinging at each other. (387:17-25; 388:1) William states that after swinging at each other, Clark punches Adams hard enough to knock Adams to the ground. (388:11-13) Alternatively, Adams testified that the first punch that was thrown was by Clark which knocked Adams to the ground. (463:12-13) Adams then wrapped Clark in a bear hug which pulled Clark to the ground where Adams was behind Clark preventing Clark from continuing to fight. (464:4-14) Wagy testified that he observed Clark and Adams were “jostling around” and were on the ground wrestling. (289:16-17; 290:8-12) Wagy stated that at the point where both parties were on the ground, the blow to Adam’s eye had not occurred yet. (290:8-12)

Adams testified that both Clark and Adams were on the ground for around two (2) minutes before bystanders pulled both men apart. (464:16-18) The bystanders were Kevius Bass (K-Bo), Patrick Harris (P.J.), and Curtis Ray (Mack Ten), all men Adams knew. (464:16-23) Adams testified that after Adams and Clark were pulled a part, the three men attempted to convince both men into leaving. (465:4-7) Adams explained to Kevius Bass that Adams would leave as soon as Clark moved his vehicle, as Adams’ vehicle was blocked in and was unable to go anywhere. (465:6-12) Wagy testimony was generally the same as Adams, where he saw the two men get pulled apart and up off the ground by the other people that were also in the gravel parking lot. (290:13-23)

Williams testified that after Clark knocked Adams to the ground, Clark got back up and Williams did not testify about anyone intervening. (388:1-5) Williams also stated that at the time that Clark stood back up, Williams exited the vehicle and told Clark to “leave it alone” and to drop Williams off at home. (388:6-8)

Second Altercation

After both men were pulled from the ground and separated, Adams testified that Clark “swung around a couple of people” and hit Adams again in his left eye. (465:16-19) This second hit to the eye dropped Adams and dazed him to where it took him fifteen (15) to twenty (20) seconds to get back up. (465:16-25; 466:1) Wagy generally corroborated Adams and stated that after the men were pulled off the ground, one of the men (Clark) landed a “sucker punch” which knocked the other man (Adams) on his back for approximately fifteen (15) seconds. (290:18-25; 291:1-3; 292:15-16)

Williams did not mention this second altercation in his testimony, but instead stated that after Adams and Clark separated after the first altercation, Adams walked back towards his van. (388:3-17)

Third Altercation

After getting up off the ground after the second altercation, Adams walked to his van and retrieved a pole. (466:5-7; 388:11-17; 293:5-24) Williams testified that Adams was approaching with the pole, Williams attempted to convince Clark to walk away from the situation. (391:6-10) Williams testified that as Williams and Clark were walking away, Adams threatened both Williams and Clark stating that he would hit them both with the pole. (391:11-15) Adversely, Adams testified that when he went to get his tire jack, Clark was not walking away but instead was still “right there talking about what he’s going to do” to Adams. (466:10-12) Adams stated his goal was to “shoo” Clark away. (367:3-7) Adams testified he was still unable to leave as his vehicle was blocked in and the blows to his eye made it difficult to see. (467:8-15)

Adams testified that Kevius Bass (K-Bo) and Curtis Ray (Mack Ten) intervened and grabbed the tire jack away from Adams while trying to convince both Adams and Clark to leave. (469:17-20) Wagy testified that he also saw two individuals take the tire jack away from Adams and place it on the ground, around two (2) to five (5) feet behind Adam’s van. (297:15-24) Conversely, Williams testified that while two people were telling Adams to put the pole down, Adams kept possession of the pole. (391:24-25; 392:1-9)

Adams testified that while Kevius Bass (K-Bo) and Curtis Ray (Mack Ten) were intervening, Clark was continuously threatening Adams while Clark was walking towards his van. (470:25;471:1-6)

Adams stated that Clark threatened to kill him at least five (5) times and that he would come back and “finish [him] off”. (471:4-19) Clark then enters the driver’s seat of his van and Williams enters the passenger seat and commences driving North out of the parking lot towards Vine street. (391:17-23; 392:11; 299:2-8) Adams then picks the tire jack handle back up and started walking back toward his own van and begins talking with Kevius Bass (299:13-17; 471:21-24) Adams testified at this point he believed Clark was leaving (471:22) Wagyu testified after driving approximately ten (10) to fifteen (15) feet North towards Vine street, Clark abruptly stops the van. (299:18-24) Williams testified Clark stopped the van and told Williams he is going to “get this over with”. (393:7-14) Clark then suddenly exits the van. (302:17-21;393:17-21; 472: 1-2)

Adams testified as Clark exits the van, he yells that he is going to finish Adams. (471:25;472:1) At the time that Clark exited his van, Adams was standing in between his own van and Clark’s van, approximately four (4) to five (5) feet from the back of Clark’s van and the front of his own. (521:18-24) Adams van was still blocked in unable to leave. (472:13-15) Unable to drive away and in an attempt to avoid being shot if Clark were to be armed, Adams took cover behind the back of Clark’s van. (472:3-15) Adams was also unable to see out of his left eye due to blood dripping in his eye. (472:25; 473:1-3) Adams could not physically retreat from the situation as a staph infection in 2017 ate away the bones of Adam’s ankles and made it difficult for him to walk. (482:16-20) As Clark approached Adams at the back of Clark’s van, Clark swings at Adams and Adams swings the tire jack at Clark and makes contact. (473:5-9) Adams states he saw something metallic in Clark’s hand, but was unable to see what it was. (473:14-17) After hitting Clark with the tire jack, Adams stomped on Clark’s back in order to force Clark to drop the metallic object in his hand. (475:3-6) Williams then exited the vehicle and Adams is concerned he may be armed with a weapon too and takes cover behind the back of Adam’s van. (475:12-18) Williams then approaches Clark who is laying on the ground, removed the metallic object in Clark’s hand, returns to the van, and drives away. (475:20-22) Adams then entered his own van and quickly drove away down the alley. (476:8-10) The total time between the van pulling up and the time the van left totaled approximately five (5) minutes. (482:9-12) A security camera located in the window of apartment 2615 which points to the parking lot of the

incident periodically captured video when motion is detected. (214:1-6; 215:10-25; 216:1-17) The security camera also shows only minutes passed between when Clark began engaging with Adams and the end of the altercation. (219:1-16)

Williams' testimony differed from Adams and stated that Adams approached Clark's van with a pole in his hand as Clark exited his van. (393:22-25; 394:1-6) Williams states that Clark threw a punch to protect himself and Adams swung the pipe and hit Clark on the top of his head. (394:8-19) Williams then exits the van, walked towards Clark lying on the ground. (395:1-5) One of Adam's friends was standing over Clark's head attempting to convince Adams to leave while Adams spoke to Clark's unconscious body bragging about his actions. (395:17-23) Adams then turned, took four (4) steps, turned back around, and stomped on Clark's head with full force. (396:1-14) At that point Williams testified Clark began bleeding and convulsing. (396:20-24) Adams' friend convinced Adams to leave, when Adams then ran away through the alley. (398:1-13)

Transportation of Adams by Buhrman

At 4:10 on Monday October 18, Lincoln Police Department Matthew Buhrman (Buhrman) was requested to assist in locating Adams. (252:13-19) Adams was placed into police custody by Buhrman at 5:54 p.m. at 1216 South 7th Street, Lincoln, NE. (26:9-16) Due to the injury to Adam's left eye, Adams was transported to Bryan West until he was fit for confinement. (27:6-12) The drive to the hospital was approximately ten (10) minutes and Adams seemed coherent and able to understand the process. (27:13-24)

Interrogation of Adams at the Hospital

After arriving at Bryan West, Adams was triaged and put into a room with Officer Matthew Franken (Franken) and Buhrman at approximately 6:00 p.m. (244:1-9; 235:8-11) Franken attempted to read Adams his Miranda rights and Adams states he would like to speak to his parole officer. (39:9-17) Franken does not proceed with the Miranda warning and instead photographs Adams. (39:20-25) Adams asks Franken whether or not Clark had passed, Franken informed Adams that Clark had passed away and Adams agrees to speak with Franken. (39:24-25; 40:1-7) Approximately 30 minutes after his arrest, Franken reads Adams his Miranda rights and Adams initially waives

his rights (40:8-13) Later, Adams requests to speak with an attorney and the interrogation ceases. (273:20-21)

Medical testimony of the cause of death

On or about October 20, 2021, forensic pathologist Jeremy Berg performed an autopsy on Clark. (430:14-16) Berg followed a standard methodology or a systematic evaluation of the body which includes an external and internal examination of the whole body . His examination quickly led him to an injury to the head. (531:1-13) He noted multiple areas of abrasions and contusions of the scalp area. (431:7-11) Once he began the internal examination he noticed areas of fractures of the skull and contusions to the brain itself. (431:11-13). He documented his findings by taking photos. (434:24-440:23;E26-31;E35-39) Berg determined that the cause of death was blunt force injury of the head. (431:19-24). He authored a report which was received at trial. (431:25-432:21;E34)

SUMMARY OF THE ARGUMENT

Adams will begin with errors preserved at trial. Adams asserts that the District Court committed reversible error by declining to give a self-defense instruction to the jury. Adams' argument is that by failing to include a self-defense instruction the District Court deprived him of his Right to Due Process and a Fair Trial because the jury was not given a set of instructions that was a correct statement of the law. Adams had articulated a cognizable claim that he held a reasonable belief that the force used was immediately necessary and justified to avoid death or serious bodily injury. A trial court must instruct the jury on self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense. The issue is not whether Adams raised enough evidence for a legally cognizable theory of self-defense. Adams need only produce a slight amount of evidence to satisfy the initial burden of raising self-defense. The District Court erred and abused its discretion by declining to give a self-defense instruction to the jury.

Next Adams argues that he was denied the effective assistance of counsel and will breakdown errors which can possibly be determined on direct appeal. Included in this section of his argument is the failure of trial counsel to object at the formal jury instruction conference that the District Court was not including an instruction on self-defense with

the final set that was to be given to the jury thus not preserving the issue for appellate review. Also, Adams's will argue that he was further denied the effective assistance of counsel when his trial counsel did not offer a proposed self-defense jury instruction so that the issue would be properly preserved for appellate review. Adams also argues the that trial counsel was ineffective for failing to argue that the use of Clark's nickname, "Trigger Trey" was admissible under Rule 404 as character evidence that he may have been the initial aggressor.

The final remaining assignments of error identifies claims of ineffective assistance of counsel for which postconviction would be the appropriate forum. Adams will identify issues where he requested that his trial counsel produce evidence of the lack of debris or lack of a bruise in the shape of a shoe print on Clark's head through testimony from the pathologist who performed the autopsy and by photos from the autopsy to show he could not have stomped on Clark's head as described by Williams. Adams' further identifies in his argument that he requested trial counsel to produce evidence and argue to the jury that Adams could not escape because his van was always blocked in preventing his escape. Finally, Adams requested that trial counsel produce evidence and argue in closing that he saw Williams approach Clark's body quickly leave and did not return until much later to support his assertion Williams removed the weapon that Adams saw in Clark's hand.

ARGUMENT

I THE DISTRICT COURT ERRED BY DENYING ADAMS' RIGHT TO DUE PROCESS AND A FAIR TRIAL BECAUSE OF THE REFUSAL TO GIVE JURY INSTRUCTIONS ON SELF-DEFENSE.

The District Court erred and denied Adams his Right to Due Process and a Fair Trial by refusing to instruct the jury on self-defense.

Standard of Review

Ordinarily, the failure to include a proposed jury instruction would preclude appellate review, but when the issue

before the appellate court turns on the evidence rather than the wording of the instruction itself, an appellate court can address it. *State v. Bedford*, 31 Neb.App. 339, 467 (2022).

Additionally, both the Nebraska Court of Appeals and the Nebraska Supreme Court have noted and addressed plain error on the record. “Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant’s substantial right and, if uncorrected, would result in damage to the integrity, reputation and fairness of the judicial process.” *State v. Mann*, 302 Neb. 804, 809 (2019).

The standard of review for “whether jury instructions given by a trial court are correct is a question of law. *State v. Matteson*, 313 Neb. 435 (2023). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

“Jury instructions are subject to harmless error review, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. In an appeal based upon a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.” *State v. Greer*, 312 Neb. 351 (2022); *State v. Pope*, *infra*.

The Nebraska Constitution guarantees a fair and impartial trial to every citizen of this state, and this demands that, in the consideration of the evidence, the jury must be guided in its deliberations by a correct statement of the law. Accordingly, whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence, and it must, on its own motion, correctly instruct on the law.” *State v. Brennauer*, 314 Neb. 782, 800 (2023)

The Nebraska Supreme Court has “long recognized that jurors are not lawyers and that instructions must not be of such a nature as to be confusing to those not trained in the law. The purpose of instructions is to furnish guidance to the jury in its deliberations and to aid it in arriving at a proper verdict; and, with this end in view, the jury instructions should state clearly and concisely the issues of fact and the principles of law that are necessary to enable them to accomplish the purpose desired.

Accordingly, a jury instruction that misstates the issues and has a tendency to confuse the jury is erroneous. That is why, on occasion, the language used in jury instructions should be adapted to the understanding of the jury to which it is directed.” *State v. Brennauer, supra* at 811-12.

“To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.” *State v. Johnson*, 314 Neb. 20 (2023); *State v. Urbano*, 256 Neb. 194 (1999); *State v. Kinser*, 252 Neb. 600 (1997).

In order to expand upon this tri-part test as stated in *Johnson*, the second element of whether the instruction is warranted based upon evidence presented, is further expanded upon. *State v. Johnson*, 314 Neb. 20 (2023) “Only where the jury could reasonably find that the defendant's use of force was justified should the trial court instruct the jury on self-defense.” *Id.* “If the trial evidence does not support a claim of self-defense, the jury should not be instructed on it.” *Id.* “To instruct on self-defense, it is not enough that the defendant subjectively believed in the need to use force for self-protection; the defendant must produce evidence that this subjective belief was also objectively reasonable.” *Id.*

The definition of self-defense as an affirmative defense is defined under Neb. Rev. Stat. § 28-1409(1) which states “Subject to the provisions of this section and of section 28-1414, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.” *Neb. Rev. Stat.* § 28-1409(1)

In addition to the defendant needing to have both a subjective and objectively reasonable need for a use of force, the defendant must have had “a reasonable and good faith belief that force was necessary, and the force used in defense must have been immediately necessary and justified under the circumstances. *State v. Urbano*, 256 Neb. 194 (1999); *State v. Marshall*, 253 Neb. 676, (1998).” *State v. Warburton*, No. A-99-1247., 2000 Neb. App. LEXIS 276 (Ct. App. Aug. 29, 2000, Not designated for publication).

Neb.Rev.Stat §28-1409 describes that the use of force is permissible in order to protect oneself. As it relates to the use of deadly force, §25-1409(4) provides that the use of deadly force is justifiable when the actor believes that such force is necessary to protect himself against death or serious bodily harm; however, deadly force is not justifiable if “the actor knows that he can avoid the necessity of using such force with complete safety by retreating. Neb.Rev. Stat. §28-1406(3) also states that a person using force to protect himself may estimate the necessity of such use of force “under the circumstances as he believes them to be when the force is used.” (Emphasis added) NJI 2nd Criminal 7.2 (4) states; before (using deadly force) the defendant either tried to get away or *did not try because (he, she) reasonably did not believe (he, she) could do so in complete safety.* NJI 2d Criminal 7.2 (emphasis added)

A defendant’s use of deadly force in self-defense is justified if a reasonable ground existed under the circumstances for the defendant’s belief that he or she was threatened with death or serious bodily harm, even if the defendant was actually mistaken about the extent of the danger. *State v. Miller*, 281 Neb. 343 (2011).

While the instruction number six (6) was not made a part of the record, from the discussion at the informal jury instruction conference presumably it was from NJI 2d.7.2, which is a correct statement of the law. The parties all refer to it as an instruction on self-defense. (528:15-532:10). The State argued in opposing a self-defense instruction that Adams could have retreated and that he was the aggressor, all of which are elements of NJI 2d. 7.2. (529:20-22). Based upon the record the Court was considering NJI 2d. 7.2. The tendered or proposed instruction was a correct statement of the law. Therefore, the first prong of the test has been met. This appeal turns on the second prong, that the tendered instruction is warranted by the evidence. It is Appellant’s position that he produced enough evidence to make self-defense an issue for the trier of fact and the District Court should have given a self-defense instruction.

While not designated for publication *State v. Warburton*, No. A-99-1247., 2000 Neb. App. LEXIS 276 (Ct. App. Aug. 29, 2000) is instructive. In that case, Warburton was convicted of third-degree assault for punching the victim in the face. The appellate court found the trial court erred by failing to instruct the jury on self-defense when the evidence viewed in the light most favorable to the defendant, the

jury could have reasonably found Warburton's use of force was justified. In the facts of the case, defendant and victim were arguing in their bedroom where victim hit defendant twice in the chest and spit on his face. Approximately 45 minutes later, defendant and victim were arguing in the living room and victim's teeth and fists were clenched, her eyes were fixated on defendant, and took a step towards defendant where at that point defendant slapped the victim in the face. The appellate court ruled that the trial court erred in refusing to instruct the jury on Warburton's claim of self-defense as the jury could have reasonably found that Warburton's use of force against Karen was justified. Further, the Court found that refusal to instruct the jury on the self-defense claim was prejudicial to Warburton because without a self-defense instruction, the jury could not consider the defense during its deliberations.

In *State v. Miller*, a jury found Miller guilty of first-degree murder and use of a deadly weapon to commit a felony. Miller was affiliated with a gang and drove to a gas station with other gang affiliates while armed with a gun to meet a rival gang to settle a dispute over money. The rival gang ambushed Miller's gang with baseball bats and possibly guns outside of the gas station and Miller fired two shots as the rival gang approached. As a result, the victim was hit in the chest and later died of his injuries. The issue for the Court was whether a specific line in the jury instruction on self-defense was a misstatement of law. The instruction stated: "A defendant who is not the initial aggressor but responds to force with more force than is necessary to repel the attack becomes the aggressor at this new and more serious level of force." The issue the *Miller* court determined was not how much force was used but if one who claims self-defense becomes the initial aggressor. The Court of Appeals held that a defendant who is the initial aggressor is not entitled to a self-defense instruction. Essentially, one can use more force than the other person and may still get the benefit of a self-defense justification. What is determinative is if the defendant becomes the aggressor. In that instance the *Miller* Court held a defendant cannot claim self-defense.

The Nebraska Supreme Court has held; "that a trial court is required to give a self-defense instruction where there is any evidence in support of a legally cognizable theory of self-defense." *State v. Kinser*, 252 Neb. 600, 607 (1997). Kinser was convicted by a jury for first degree assault, second degree assault, and use of a weapon in the

commission of a felony. Kinser and the victim had an altercation in a bowling alley and the circumstances surrounding the alleged assault were in dispute. The victim stated that he was sitting at the bar, had a brief conversation with defendant early in the evening and again later in the evening when victim told defendant to leave him alone as defendant was being loud and obnoxious. The victim also stated at the time of the altercation he was facing the bar when he heard sounds of breaking glass and was struck by the defendant and knocked off his barstool and onto the floor. A witness who accompanied defendant to the bowling alley testified that the men were arguing, victim made an aggressive provocative move towards the defendant's neck with a beer bottle, and defendant responded by punching victim with a hand in which he was holding a drinking glass as an attempt to block victim's movement. The issue was whether or not a jury instruction on self-defense is warranted if there was any evidence adduced to support such a defense, without regard to whether the evidence adduced was sufficient as a matter of law to prove self-defense. The Nebraska Supreme Court held that the trial court's refusal to instruct the jury concerning Kinser's claim of self-defense effectively withdrew from the jury's consideration an essential issue to the case. In *Kinser*, the State argued on appeal that the defendant did not produce enough evidence for a legally sufficient theory of self-defense because it was not reasonable to use force, the force was not necessary for protection, and the force was not justified. The Supreme Court held that this assertion was incorrect as the State's argument relied on actual factual disputes raised by evidence rather than arguing that the defendant failed to produce any evidence to constitute a legally cognizable claim. The Court held, questions of fact, should have been an issue for the jury, and if the defendant's witness were to be believed, a jury could have found in favor of Kinser. *Id.* at 607 citing *State v. Stott*, 243 Neb. 967 (1933); *State v. Thomas*, 238 Neb. 4 (1991). In so holding the Supreme Court further elaborated, that it is not the province of trial courts to decide factual issues or disputes when it considers the evidence that was produced in support of one party's claim to be weak or doubtful. *Id.* at 607. The Court concluded because there was evidence which would have supported Kinser's theory of self-defense, the trial court should have instructed the jury accordingly and reversed Kinser's conviction.

In a more recent case the holding from *State v. Kinser* was cited by the Nebraska Court of Appeals. *State v. Bedford*, 31 Neb.App. 339

(2022). In *Bedford*, the Court of Appeals further elaborated on the minimum threshold standard to include: “A defendant need only produce a slight amount of evidence to satisfy this initial burden of raising the issue of self-defense. *Id.* That this slight amount of evidence may ultimately be insufficient for the defendant to prevail on his or her claim of self-defense does not bear on whether a self-defense instruction should have been given by the trial court. *Id.* citing *State v. Kinser*, *supra*.”

In *State v. Bedford*, Bedford was charged with count 1, assault by strangulation or suffocation, and counts 2 through 4, third degree domestic assault with a prior conviction, and count 5 of tampering with a witness. Counts 1 and 2 stem from an incident occurring April 2020, count 3 stemmed from an October 5, 2019 incident, count 4 arose from a July 2019 incident, and count 5 related to a phone call while Bedford was incarcerated on October 7, 2019.

On October 5, 2019, regarding count 3, third degree domestic assault, Bedford was living with his on again off again girlfriend Jessica and the two had an argument in their bedroom while Jessica’s children remained in the living room. Jessica stated that during the argument Bedford was packing his possessions and had picked up a pair of boots and while gesturing with his arms while holding the boots and hit the corner of Jessica’s eye causing it to bruise and swell. Jessica initially believed her injury was an accident, but in a later interview told police officers that she had pushed Bedford and been pushed back causing Jessica to fall and be injured. Jessica’s son, age 10, contacted police through a third party when he heard Jessica crying and a “big boom by the wall”. Bedford stated when he began packing his possessions Jessica pushed him to prevent him from leaving to which Bedford told her to stop and continued packing. Jessica then again pushed him and pinned him against the bedroom door which caused shoes on a nearby shelf to fall. Bedford pushed Jessica off of him, Jessica tripped over the shoes, and hit her face on the nearby plastic “bed base”. During the trial the State contended Bedford was unable to show why shoving was necessary to protect himself because he did not testify to the immediate threat posed by Jessica, prior threats followed by physical harm, weapons held by Jessica, injuries caused by Jessica, or her intentions if he did not make physical contact with her. The Court of Appeals disagreed. There was no evidence to show that the force that Bedford used was

disproportionate to the force that Jessica used, Bedford demonstrated that Jessica was angry and emotionally charged, and that Bedford was attempting to leave the situation. These facts combined show that Bedford articulated a cognizable claim that he held a reasonable belief that the force used to push Jessica away was immediately necessary and justified to allow him to leave the residence.

In the present case, Adams stated that he was subjectively in fear for his life and action was immediately necessary in order to protect himself. Prior to the third altercation on October 18, Adams testified that Clark threatened to kill Adams multiple times which Adams took seriously and was scared for his life. (481:6-15) Clark had shown several times throughout the afternoon that he was capable of physical violence by striking Adams in the face repeatedly to the point where Adams had difficulty seeing due to the swelling and amount of blood dripping into his eye. (463:12-14; 465:16-19; 472:25; 473:1-3) At the time of the third altercation, Clark had stopped driving his van and told the passenger he is going to “get this over with”. (393:7-14) Appellant testified that he heard Clark say something similar to that when he stopped the van and stepped out to confront Adams. Adams testified now he knew this was serious because of the threats and Clark stopped his van instead of continuing to drive to Vine Street. Adams felt he could not leave because he was blocked in. Adams testified that the incident happened quickly. Wagey testified it was over in five minutes. Adams testified at the time he believed that either Clark or his cousin had a pistol. (482:1-5) He did not have time to think about how to safely retreat. He knew Clark was “going to get this over with”.

Adams argues to this Court that the evidence at trial satisfied the initial burden for a defendant to request a self-defense instruction. A trial court must instruct the jury on self-defense when there is any evidence adduced which raises a legally cognizable claim of self-defense. *Bedford*, supra; *Kinser*, supra. The issue is not whether Adams raised enough evidence for a legally cognizable theory of self-defense. Adams need only produce a slight amount of evidence to satisfy the initial burden of raising self-defense. *Bedford*, supra; *Kinser* supra. As in *State v. Kinser*, the facts surrounding the altercation are in dispute. There were only three witnesses to the event and Wagey only saw the beginning. Basically, the only two fact witnesses of consequence were Williams and Adams. Whether or not

the self-defense instruction was warranted by the evidence is not a matter of the strength of the evidence offered. It is not the province of a trial court to decide factual issues even when it considers the evidence produced in support of party's claim to be weak or doubtful. *State v. Bedford*, supra. A defendant need only to produce a slight amount of evidence to satisfy this initial burden of raising the issue of self-defense. *Id.* The other evidence may have conflicted with a self-defense instruction but, that is a question for the jury to resolve, not the trial court. *Id.* When the evidence in this case is viewed in the light most favorable to the defendant it is plausible a jury could have concluded Adams reasonably acted in self-defense. The District Court improperly decided the weight of the evidence and invaded the providence of the jury.

When jury instructions read as whole do not make a correct statement of the law the error is not harmless and requires the judgement to be reversed. In the instant case the jury was unable to consider the self-defense theory and Adams was obviously prejudiced by the District Court's refusal to give the tendered instructions.

II. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN VIOLATION OF THE 6TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 3 AND 11 OF THE NEBRASKA CONSTITUTION.

Standard of Review

Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of a counsel's performance or prejudice to a defendant as part of the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 688(1984), an appellate court reviews such legal determinations independent of the lower court's decision. *State v. Davlin*, 265 Neb. 386 (2003).

A claim that trial counsel is ineffective presents a mixed question of law and fact. *State v. Iromuanya*, 282 Neb. 789, 806(2011) ("Iromuanya II").

Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law. *State v. Figures*, 308 Neb. 801(2021); *State v. Wyrick*, 31 Neb. App. 815, 834(2023).

Ineffective Assistance of Counsel Precepts

A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Cullen*, 311 Neb. 383 (2022). To prevail on claim of ineffective assistance of counsel under *Strickland v. Washington* [*supra*], the defendant must show that his or her counsel's performance was deficient, and that this deficient performance actually prejudiced the defendant's defense. *State v. Cullen* [*supra*]. The two prongs of this test may be addressed in either order, and the entire ineffective analysis should be viewed with a strong presumption that counsel's actions were reasonable. *Id.*

To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *Id.* A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather the defendant must show a probability sufficient to undermine confidence in the outcome. *Id.* See, also *Chinn v. Shoop*, - U.S. -, 143 S. Ct. 28, 214 L. Ed. 2d 229 (2022)(Jackson, J., dissenting from denial of certiorari; Sotomayor, J., joins). *State v. Cox*, 314 Neb. 104, 114-15 (2023).

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. *State v. Kipple*, 310 Neb. 654, 659 (2022); *State v. Lowman*, 308 Neb. 482, 496-497 (2021). 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. *State v. Lowman*, *supra* at 489-90 (2021).

Appellate courts have generally reached ineffective assistance of counsel claims on direct appeal only in those instances where it was

clear from the record that such claims were without merit or in the rare case where counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which effect was *fundamentally unfair trial*. *State v. Kipple*, 310 Neb. 654 , 660 (2022).

Trial counsel is afforded due deference to formulate trial strategy and tactics, and an appellate court will not second guess trial counsel's reasonable strategic tactics when reviewing claims of ineffective assistance of counsel. *State v. Lowman, supra* at 498. The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as part of any plausible trial strategy. *Id* at 497. The decision of whether to object at trial is a part of trial strategy. *State v. Huston*, 285 Neb. 11(2013); *State v. Wyrick, supra* at 844.

Adams argues to this Court that his trial counsel was ineffective in one or more of the following ways:

a. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution by not objecting at the formal jury instruction conference, and therefore not preserving for review on appeal, that the District Court was not including a self-defense jury instruction.

The standard of review and general precepts involved in claims of ineffective assistance of counsel are the same as discussed supra.

Appellant argues to this Court that trial counsel was ineffective for not objecting at the formal jury instruction conference that the District Court was not including a self-defense jury instruction.

“In reviewing a claim of prejudice from jury instructions given or refused, the appellant has the burden to show that the allegedly improper instruction or the refusal to give the requested instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the

evidence, there is no prejudicial error necessitating reversal.” *State v. Pope*, 305 Neb 912, 921 (2020)

“Whether jury instructions given by a trial court are correct is a question of law. *State v. Cerros*, 312 Neb. 230 (2022). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*” *State v. Matteson*, 313 Neb. 435, 450 (2023).

A trial court is required to give a self-defense instruction where there is any evidence in support of a legally cognizable theory of self-defense. *State v. Marshall*, 253 Neb. 676 (1998).

In order for the self-defense justification to be applicable, (1) the belief that force is necessary must be reasonable and good faith, (2) the force must be immediately necessary, and (3) the force used must be justified under the circumstances. *State v. Graham*, 234 Neb. 275 (1990).

A defendant’s use of deadly force in self-defense is justified if a reasonable ground existed under the circumstances for the defendant’s belief that he or she was threatened with death or serious bodily harm, even if the defendant was actually mistaken about the extent of the danger. *State v. Miller*, 281 Neb. 343 (2011).

To be able to argue on appeal the failure to give a requested jury instruction a party must offer a proposed jury instruction. “A party who does not request a desired jury instruction cannot complain on appeal about incomplete jury instructions.” *State v. Lotter*, 255 Neb. 456, 508 (1998); *State v. Al-Zubaidy*, 253 Neb. 357 (1997).

Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice. *State v. Esch*, 315 Neb 482 (2023), citing *State v. Erpelding*, 292 Neb. 351 (2015). See *State v. Lee*, 304 Neb. 252 (2019).

The justification of self-defense was central to Adams’ defense. At the conclusion of the evidence an informal jury instruction conference was held where the attorneys and the trial judge discussed preliminary matters regarding a proposed set of jury instructions prepared by the Court. (527:20-535:16). Followed by the formal jury instruction conference. (535:17-544:15). During the informal jury instruction conference, a draft instruction number six (6) was discussed which contained language regarding self-defense. (528:25-532:10). Unfortunately, the draft jury instruction number six (6) was

not offered by trial counsel or made a part of the record. From the dialogue of the parties, it appears that instruction number six (6) was a self-defense instruction. The attorney for the State mentioned that the instruction reads, “that the State has the burden of proof beyond a reasonable doubt, in disproving one or more of the elements of self-defense, which I think is an accurate statement of the law.” (529:24-525:2). Appellant’s trial counsel argued that a self-defense instruction was warranted by the evidence. (528:25-529:18; 530:24-531:7). The District Court then stated that based on the Court’s view of the evidence, a self-defense instruction was not warranted and made the decision not to include it in the set of instructions that would be given to the jury. (231:8-532:5). The Court then revised the remaining jury instructions and the parties met for a formal jury instruction conference. At that jury instruction conference trial counsel did not offer a proposed self-defense jury instruction nor did trial counsel object on the record that a self-defense instruction was not being included in the final set of instructions that would be given to the jury. (535:17-544:10).

Trial counsel was ineffective for failing to object at the informal and formal jury instruction conference, that a jury instruction on self-defense was not being included in the final set being given to the jury. Self-defense was the central theory of Adams’ defense strategy. (453:4-526:8) The performance of Appellant’s trial counsel did not equal that of a lawyer with ordinary training and skill in criminal law. No reasonable explanation can explain why trial counsel would fail to object on the record and therefore preserve for appeal the issue that the District Court was not including an instruction on self-defense in the final set of jury instructions. A lawyer acting within the range of competence demanded of attorneys in such a case would have objected that the District Court removed a self-defense instruction from the final set to be given to the jury. The prejudice to Adams is self-evident. Jury instructions are the parameters of the law with which the jury is to use to decide the case. Without a self-defense instruction being included in the set of instructions the jury had no idea that Adams could be found not guilty because the killing of Clark may have been justified. Consequently, the instructions as a whole were not a correct statement of the law. Prejudice cannot be clearer. Trial counsel’s failure to object to the District Court not instructing the jury on self-defense undermines confidence in the outcome of the

trial. This Court should find that based upon the record that Adams was denied the effective assistance of counsel and enter an order granting Adams relief.

b. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution by not offering a proposed jury instruction on self-defense at the formal jury instruction conference thus preserving the issue for review on appeal.

The standard of review and general precepts involved in claims of ineffective assistance of counsel are the same as discussed *supra*.

A trial court is required to give a self-defense instruction where there is any evidence in support of a legally cognizable theory of self-defense. *State v. Marshall*, 253 Neb. 676 (1998).

In order for the self-defense justification to be applicable, (1) the belief that force is necessary must be reasonable and good faith, (2) the force must be immediately necessary, and (3) the force used must be justified under the circumstances. *State v. Graham*, 234 Neb. 275 (1990).

A defendant's use of deadly force in self-defense is justified if a reasonable ground existed under the circumstances for the defendant's belief that he or she was threatened with death or serious bodily harm, even if the defendant was actually mistaken about the extent of the danger. *State v. Miller*, 281 Neb. 343 (2011).

To be able to argue on appeal the failure to give a requested jury instruction a party must offer a proposed jury instruction. "A party who does not request a desired jury instruction cannot complain on appeal about incomplete jury instructions." *State v. Lotter*, 255 Neb. 456, 508 (1998); *State v. Al-Zubaidy*, 253 Neb. 357 (1997).

The justification of self-defense was the central theory of Adams' defense. As discussed above trial counsel failed to offer a proposed self-defense jury instruction at the formal instruction conference to be included in the record and preserve for appeal that the jury instructions that were given were incomplete. A formal instruction conference was held by the District Court to complete the final set of instructions on the law that would guide the jury in their deliberations. Prior to the formal conference the District Court had

informed the parties that the Court had decided not to include a self-defense instruction. (531:8-532:5). Trial counsel was aware that the Court was not including a self-defense instruction. However, during the formal instruction conference trial counsel did not offer a proposed self-defense instruction or object, on the record that a self-defense instruction was not being included in the final set for the jury. (535:17-544:10).

To preserve the issue for appellate review trial counsel was required to offer a proposed jury instruction at the formal instruction conference. *State v. Lotter*, 255 Neb. 456, 508 (1998); *State v. Al-Zubaidy*, 253 Neb. 357 (1997). Trial counsel was ineffective for failing to offer a proposed self-defense jury instruction at the formal jury instruction conference. Adams' trial counsel was aware from the informal conference that the Court was not intending to include an instruction on self-defense. (531:8-532:5). The justification of self-defense was the central theory of Adams' defense strategy. The performance of Appellant's trial counsel did not equal that of a lawyer with ordinary training and skill in criminal law. No reasonable explanation can explain why trial counsel would fail to offer a proposed self-defense jury instruction and therefore preserve the issue for appeal. A lawyer acting within the range of competence demanded of attorneys in such a case, would have offered a proposed self-defense instruction, especially when at the informal conference trial counsel was informed the Court was not going to give an instruction to the jury, to preserve that issue for appellate review. The prejudice to Adams is self-evident. Jury instructions are the parameters of the law with which the jury is to use to decide the case. Without the self-defense instruction being included in the set of instructions the jury had no idea that the law would allow Adams to be found not guilty because the killing of Clark may have been justified. Prejudice cannot be clearer. This Court should find that based upon the record that Adams was denied the effective assistance of counsel and enter an order granting Adams relief.

c. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution for not producing evidence at the trial through witness Jeremy Berg, the forensic pathologist and photos of Clark from the autopsy that there was a lack of debris or marking or

bruising on the Clark's head which would support Adams' testimony that he did not stomp on Clark's head.

The standard of review and general precepts involved in claims of ineffective assistance of counsel are the same as discussed *supra*.

Adams argues to this Court that trial counsel was ineffective for failing to cross-examine witnesses, specifically the pathologist, Jeremy Berg, who conducted the autopsy for the purpose of producing testimony that Berg did not notice debris like gravel or dirt on Clark's head which would support Adams' testimony that he did not stomp on Clark's head. Furthermore, trial counsel was ineffective for not offering into evidence photos from the autopsy that show there was no debris on the head which support that Adams did not stomp on Clark's head driving it into the gravel. Finally, trial counsel was ineffective for not offering photos from the autopsy or eliciting testimony from the pathologist that there were no markings like a shoe print on Clark's head from the force of being stomped on by Adams, further supporting his testimony that he did not stomp on Clark's head.

Adams requested trial counsel to offer into evidence pictures of Clark from the autopsy to demonstrate to the jury that no debris was found on the Clark's head. Adams also implored trial counsel to cross-examine the pathologist to establish that during the inspection of the body no debris was found on Clark's skull. Adams also requested that trial counsel offer the photos and elicit testimony from the pathologist that there were no abrasions or bruising consistent with a shoe print from stomping on Clark's head. Malaki Williams testified that after Clark was struck he fell to the ground and Adams then returned and stomped forcefully on Clark's head. (396:1-14) From the medical testimony the jury could infer that by returning to stomp on Clark's head after striking him that would have further caused Clark's brain to swell and cause his death. (442:18-443:3) Adams testified that he did not think he stomped on Clark's head but on his stomach to make sure that he did not have a weapon or would further come after Adams. (473:5-20;474:18-475:2) Common sense would lead one to expect that if Adams had stomped on Clark's head like it was described to the jury by Williams that some debris like gravel or dirt would be imbedded in or on the skin somewhere. (285:9-286:4) Common sense also would lead one to expect that a stomp on the head

with that kind of force would also leave some kind of imprint on Clark's skin. For example, a bruise in the shape of a footprint. Trial counsel was ineffective for failing to introduce into evidence pictures of Clark from the autopsy and cross-examine the pathologist with respect to the lack of debris and lack of a footprint or bruising on Clark's skull to support Adams' testimony. The performance of Adams' trial counsel did not equal that of a lawyer with ordinary training and skill in criminal law. This was not trial strategy but ineffective assistance of counsel. No reasonable explanation can explain why trial counsel would fail to present evidence that supports a defendant's defense. Evidence in the form of testimony from the pathologist and the pictures of Clark's head at the autopsy would have strengthened his defense. A lawyer acting within the range of competence demanded of attorneys in such a case, would never have failed to explore a client's defenses and failed to present evidence that supports their client's defense. A lawyer acting within the range of competence demanded of attorneys in criminal law would have introduced evidence in the form of pictures from the autopsy to show to the jury that Clark's head did not have debris or a footprint from being stomped on and cross-examined the pathologist regarding the lack of debris or footprint on Clark's head. Failing to do so was not harmless but prejudiced Adams because it denied Adams the opportunity to cast doubt on Williams' testimony and at the same time bolster his testimony that he was the victim and not the aggressor.

Adams concedes that the record is not sufficient to address his claims that trial counsel was ineffective for failing to cross-examine witnesses, like the pathologist or introduce into evidence the photos from the autopsy that show Clark did not have debris like gravel or dirt on his head which would support that Adams' testimony that he did not stomp on Clark's head. Furthermore, trial counsel was ineffective for not offering photos from the autopsy or testimony from the pathologist that there were no markings like a shoe print on Clark's head from the force of being stomped on by Adams. This Court should note that the record, at this time, is insufficient to address them but that Adams raised these claims at the first possible opportunity in order to preserve them for later relief.

d. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II

of the Nebraska Constitution by not introducing into evidence through Adams' testimony that Appellant's car was blocked in preventing him from retreating.

The standard of review and general precepts involved in claims of ineffective assistance of counsel are the same as discussed *supra*.

Appellant argues to this Court that trial counsel was ineffective for not introducing into evidence that Appellant's car was blocked in thus preventing him from retreating.

A person who uses deadly force, not in his dwelling has a duty to retreat if the actor knows that he can avoid the necessity of using deadly force with complete safety by retreating. Neb.Rev.Stat. §28-1409(4)(a)(b)(i). Otherwise commonly referred to as the duty to retreat. *State v. White*, 20 Neb.App. 116 (2012).

There was testimony that this whole event happened very quickly. (289:8-14; 300:16-18; 482:9-12). Appellant testified that he had a staph infection in his legs, and he could not run. (482:16-20) When this began Clark had parked his van blocking Adams' van so that he could not drive away. (465:4-12; 482:13-15) Adams' van was parked, backed into a stall with a fence behind him and Clark parked right in front of his van. (457:9-14; E32) During cross-examination Appellant conceded that now with hindsight he may have been able to get into his van to either call 911 or maybe could have driven away. (493:12-495:3; 524:13-525:11) That is exactly the point Appellant is making to this Court. All of that was conjecture by the State with the advantage of hindsight. The relevant inquiry is whether Adams thought process was reasonable at the time, not with the benefit of hindsight. Appellant testified to his thought process was at the time of the fight and that he felt he was trapped and could not safely escape. However, Appellant's trial counsel did not rehabilitate him on redirect. (521:4-523:10; 525:16-526:8) Appellant asked his trial counsel to call him back to the stand so that he could testify that he did not feel that he could safely retreat or even retreat at all.

Trial counsel was ineffective for declining to agree to Adams' request to call him back to the witness stand so that he could rehabilitate him with respect to the issue of being able to safely retreat and dispel the insinuation created by the State's cross-examination. The performance of Adams' trial counsel did not equal

that of a lawyer with ordinary training and skill in criminal law. This was not trial strategy but ineffective assistance of counsel. No reasonable explanation can explain why trial counsel would fail to present evidence that supports a defendant's defense. In this case that was testimony that explained or showed how the State's insinuation that Appellant could retreat was not reasonable. A lawyer acting within the range of competence demanded of attorneys in such a case would never have failed to explore a client's defenses and failed to present evidence that supports their client's defense. A lawyer acting within the range of competence demanded of attorneys in criminal law would have rehabilitated their client with respect to the issue of being able to safely retreat and dispel the insinuation created by the State's cross-examination that Adams could have retreated. By refusing to do so Adams was clearly prejudiced because the District Court used that specific fact to decide not to instruct the jury on self-defense. Consequently, the jury was not correctly instructed on the law.

Adams concedes that the record is not sufficient to address his claims that trial counsel was ineffective for failing to rehabilitate the insinuation created by the State during cross-examination that he could have safely retreated. The record is insufficient that he asked his trial counsel to correct this issue. This Court should note that the record, at this time, is insufficient to address them but that Adams raised these claims at the first possible opportunity in order to preserve them for later relief.

e. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution by failing to present evidence to the jury and arguing that Malaki Williams did not stay with Clark or come back to the scene and contact the investigating officer by cross-examining Williams or through the testimony of Lincoln Police Officers that investigated the scene, which would have supported Adams's defense that Williams removed something from the scene.

The standard of review and general precepts involved in claims of ineffective assistance of counsel are the same as discussed *supra*.

Appellant argues to this Court that trial counsel was ineffective for not producing evidence during the trial and not arguing in close

that Malaki Williams got out of the vehicle and bent down examined Clark and then quickly left instead of staying with his cousin to get him assistance. (406:19-421:24; 551:24-561:4) Trial counsel also did not produce or argue during closing that Williams did not come back and contact Lincoln Police for several hours. (406:19-421:24; 551:24-561:4) Trial counsel could have produced this evidence through cross-examining Williams or through the testimony of Lincoln Police Officers that investigated the scene. This evidence was important to Adams's defense because it supports that he acted in self-defense by suggesting to the jury that Williams removed a weapon from the scene. Adams asked his trial counsel to produce this evidence for the jury and include it in his closing argument because one would expect if someone close to them has been injured severely, they would stay and help them get emergency medical care. Adams' defense theory was that he acted in self-defense. Adams testified that after being twice attacked by Clark, Clark stopped his van, stepped out and said something to the effect of, "I am just gonna finish this." (470:3-7; 470:25-472:1) Adams testified that he stepped behind Clark's van for cover and when Clark exited the van he thought he saw something in Clark's hand. (473:4-473:20) Adams was unsure if it was a gun, or box cutter but he perceived that Clark was armed with something and intended on hurting him. After Clark was struck and lying on the ground and the other parties broke the fight up. Adams testified he saw Williams exit the van go, walk up to Clark, bend down by his body and then quickly leave the area in the van. (475:12-476:6) Adams asked trial counsel to produce this evidence through Williams and Lincoln Police officers and then argue to the jury that Williams actions suggests he removed something from the scene like a box cutter or other weapon.

Trial counsel was ineffective for trial counsel was ineffective by not producing evidence that Malaki Williams got out of the vehicle and bent down examined Clark and then quickly left instead of staying with his cousin to get him assistance. Trial counsel did not produce evidence or argue during closing that Williams actions supports his theory that Clark had a weapon, but it was removed by Williams. (406:19-421:24; 551:24-561:4) The performance of Adams's trial counsel did not equal that of a lawyer with ordinary training and skill in criminal law. This was not trial strategy but ineffective assistance of counsel. No reasonable explanation can explain why trial

counsel would fail to present evidence that supports a defendant's defense or argue facts that support a defendant's defense theory. A lawyer acting within the range of competence demanded of attorneys in such a case would never have failed to present evidence or argue in closing facts that support their client's defense. A lawyer acting within the range of competence demanded of attorneys in criminal law would have produced evidence that supports their client's defense, in this case that Williams removed a weapon, so that they could then argue to the jury those facts supporting their defense. By refusing to do so Adams was clearly prejudiced because the jury was never presented with the evidence nor was it argued to the jury that Clark was armed with something thus making Adams' response reasonable.

Adams concedes that the record is not sufficient to address his claims that trial counsel was ineffective for not producing evidence or arguing during closing that Williams removed something from the scene thus suggesting Clark was armed. This Court should note that the record, at this time, is insufficient to address them but that Adams raised these claims at the first possible opportunity in order to preserve them for later relief.

f. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution for not producing evidence or arguing that Adams could not see what was in the Clark's hand to strengthen the defendant's self-defense argument.

The standard of review and general precepts involved in claims of ineffective assistance of counsel are the same as discussed *supra*.

Appellant argues that trial counsel was ineffective for failing to pursue evidence and argue at closing that he could not see very well out of his eye because of the injury to it from Clark punching it. Appellant testified that his eye was swollen shut, had a cut and blood was oozing into his eye. Appellant told trial counsel that because of the injury he could not see that well and therefore, it was difficult to see what was in Clark's hand when he exited his van. Due to Adams' limited vision, he thought that Clark had something in his hand that could hurt him like a box cutter. This evidence was crucial to whether Adams's belief that his use of force was reasonable. That Adams'

vision was limited by the actions of Clark, i.e. punching him and cutting his eye, was important to the determination that Adams's use of force was reasonable and based upon a good faith belief in the necessity of using force.

Trial counsel should have produced this evidence through the testimony of Adams and in closing arguments to the jury argued that Adams's response was reasonable based upon his impaired vision and his belief that Clark was armed with a weapon. The record is sufficient to adequately review this assignment of error. The undisputed facts contained within the record are sufficient to conclusively determine that trial counsel did not provide effective assistance of counsel.

The record is clear that Adams's constitutional rights were violated. Trial counsel's error was so egregious and resulted in such a high level of prejudice that no tactic or strategy could overcome the effect of the error, which was an unfair trial. The failure to produce the evidence and argue in closing, that the injury to Appellant's eye made his belief reasonable Clark was armed with a weapon reasonable and thus his belief in the use of force was reasonable and necessary was deficient performance. There is no viable trial strategy in failing to produce that evidence and argue it in closing.

The failure to do so was prejudicial. A sufficient probability to undermine the outcome exists. Trial counsel's deficient performance had a devastating consequence on Adams. The error was not harmless. Adams's defense theory was that he acted in self-defense. Without this crucial pieces of evidence the District Court would have made a different decision and gave the self-defense instruction. With this crucial piece of evidence, the jury could have determined that Adams reasonably acted in self-defense. Unfortunately, that did not happen, the jury was not instructed on self-defense and the jury found Adams guilty of 2nd Degree Murder and Use of a Weapon to Commit a Felony. The prejudice by trial counsel's deficient performance affected each of the counts Appellant was convicted on and those convictions should be reversed.

g. Trial Counsel Was Ineffective in Violation of the 6th and 14th Amendments of the U.S. Constitution and Article I, §§ 3, 6 and II of the Nebraska Constitution for not pursuing 404-character issue/reputation of the Clark nickname of "Trigger Trey" in support of the Clark's propensity for violence and the initial aggressor.

The standard of review and general precepts involved in claims of ineffective assistance of counsel are the same as discussed *supra*.

Adams argues that trial counsel was ineffective for failing to pursue evidence of character/reputation of Clark, specifically that Clark's nickname was "Trigger Trey." Character evidence is relevant in the self-defense context for two specific purposes. Nebraska Courts have recognized one purpose is to demonstrate that the defendant was in a reasonable state of mind in acting in self-defense and had a reasonable fear based upon the victim's violent and aggressive character, which was known by the defendant. *State v. Lewchuk*, 4 Neb.App. 165 (1995); See also *Neb.Rev.Stat.* §§27-404, 27-405. The second purpose recognized by Nebraska Courts is that the testimony may be to support the defendant's allegation that the victim was the first aggressor. A demonstration of the victim's violent character makes it more probable that the victim initiated the violence in this instance and was in fact the first aggressor. *State v. Lewchuk*, *supra*. When character evidence is offered for the first purpose, that the defendant was reasonable for being in fear of harm, knowledge of specific acts of the victim's propensity for violence is required. *Id.* However, when offered for the second purpose, that the victim was the initial aggressor, knowledge of specific acts or reputation is irrelevant. *Id.* *Lewchuk* held that a victim's propensity for violence is relevant and admissible under Nebraska Evidence Rules 404(1)(b) and 405(2). *Id.*

During the investigation of this case there was information that Clark's nickname was "Trigger Trey". The State made an oral motion in limine asking for an order to prevent the defense from mentioning or eliciting the nickname "Trigger Trey." (331:1-20) The District Court asked Appellant's trial counsel for what purpose would the nickname be used. Specifically, the District Court asked if it would be offered for Rule 404 purposes. (332:7-13) Trial counsel stated it was not being offered for Rule 404 purposes but would be asking about the Clark's nickname to establish the scene. (332:7-333:12) The District Court then sustained the State's motion in limine. (334:25-335:4)

Trial counsel was ineffective for not pursuing the relevance of Clark's nickname "Trigger Trey" for the purpose of showing that he

was the first aggressor. First the State admits the nickname has negative connotation connected to it, arguing it was prejudicial and could possibly insinuate that the Clark had a gun. However, there was another purpose. There was already evidence the Clark was aggressive. (290:18-25; 291:1-3;412:18-25; 416:21-417:1; 463:12-14;465:16-25; 466:1) Williams represented that his cousin was good at fighting and could handle himself. (412:18-25) Williams further testified that Clark stated to Appellant that he would be back, presumably to finish the fight. (416:14-25; 471:1-9) Also, Williams testified that Clark stopped the car and he said he was going to finish this. (393:7-14) Adams testified that Clark attacked him first and then followed by a “sucker punch”. (465:16-19) Wagey corroborated Adams’s testimony. (290:18-25; 291:1-3; 292:15-16) Both counsel for the State and for Adams overlooked that Clark’s nickname could be offered for the purpose that he was the initial aggressor. Trial counsel should have argued that “Trigger Trey” also would be admissible for the proposition that he was an aggressive person, one who does not take any disrespect and will finish a fight.

Trial counsel was ineffective for failing to recognize that Clark’s nickname was relevant and allowed by Nebraska case law and Nebraska Rules of Evidence for the purpose of showing that Clark was the initial aggressor. The performance of Adams’s trial counsel did not equal that of a lawyer with ordinary training and skill in criminal law. This was not trial strategy but ineffective assistance of counsel. No reasonable explanation can explain why trial counsel would fail to present evidence that supports a defendant’s defense. Testimony or evidence that can be used to show that Clark was the initial aggressor is immensely probative and relevant to Adams’s self-defense argument. A lawyer acting within the range of competence demanded of attorneys in such a case, would never have failed to argue at the oral motion in limine that Clarks nickname, “Trigger Trey” had relevance to his self-defense claim and allowed by case law and the rules of evidence. By refusing to do so Adams was clearly prejudiced because ultimately the District Court did not allow Adams a self-defense instruction and the jury was never informed that Adams could be found not guilty if they believed he acted in self-defense.

Adams argues that the record is sufficient to address his claims that trial counsel was ineffective for failing to recognize that Clark’s

nickname was relevant and can be offered as character evidence that Clark was the initial aggressor. This is an instance where it is clear from the record that his claim has merit or this is one of those rare instances where trial counsel's error is so egregious it produced such a high level of prejudice that no tactic or strategy by trial counsel can overcome the effect of the error, which unfortunately resulted in a fundamentally unfair trial. *State v. Kipple, supra* at 660.

If this Court finds that the record is insufficient to determine this claim of ineffective assistance of counsel. This Court should note that the record, at this time, is insufficient to address them but that Adams raised these claims at the first possible opportunity in order to preserve them for later relief.

CONCLUSION

For the foregoing reasons, Adams requests that this Court find that it was an abuse of discretion and Adams' Right to Due Process and a Fair Trial were violated when the District Court decided to not instruct the jury on self-defense, vacate his conviction and remand this matter for a new trial. For those issues of ineffective assistance of counsel where the record is insufficient, Adams respectfully requests this Court note that the record, at this time, is insufficient to address them but that Adams raised these claims at the first possible opportunity in order to preserve them for later relief.

Respectfully submitted,
Brian K. Adams, Appellant

By: /s/ Matthew K. Kosmicki
Matthew K. Kosmicki, #21875
140 N. 8th Street, Suite 250
Lincoln, NE 68508
402-476-6585
402-476-7499
mattkosmickilaw@gmail.com

CERTIFICATE OF COMPLIANCE

Pursuant to Neb. Ct. R. App. P. §2-103(C)(4), I hereby certify as follows:

1. That the accompanying brief was prepared using Microsoft® Word for Microsoft 365 MSO (Version 2111 Build 16.0.14701.20240) 32-bit;
2. That the accompanying brief complies with the typeface requirements of Neb. Ct. R. App. P. §2-103(A)(3)&(4); and
3. That the accompanying brief contains 16,078 words, excluding this Certificate of Compliance.

In certifying that the accompanying brief complies with Neb. Ct. R. App. P. §2-103(C)(3)(a), I have relied on the word count of the word processing software identified above.

/s/ Matthew K. Kosmicki

Certificate of Service

I hereby certify that on Thursday, January 04, 2024 I provided a true and correct copy of this *Brief of Appellant Adams* to the following:

State of Nebraska represented by Michael Thomas Hilgers (24483) service method: Electronic Service to **katie.beiermann@nebraska.gov**

Signature: /s/ Matthew Kosmicki (21875)