

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

**REPLY
BRIEF OF APPELLANT**

Respectfully submitted:

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PROPOSITIONS OF LAW

- 1) The failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, will not be heard to complain of the alleged error on appeal. *State v. Lowman*, 308 Neb. 482, 490 (2021).
- 2) However, failure to make a jury instruction part of the record is not necessarily fatal and thus prevents appellate review. When the issue before an appellate court turns on the evidence rather than the wording of the instruction itself, as is the case before this Court, an appellate court can address it. *Id.*
- 3) Plain error defined is error plainly evident on the record that prejudicially affects a litigant's substantial right and if left uncorrected, would result in damage to the integrity, reputation and fairness of the judicial process. *State v. Mann*, 302 Neb. 804, 809 (2019).
- 4) 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. §28-1409(4) (emphasis added)
- 5) 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." Neb.Rev. Stat. §28-1406(3). (emphasis added)
- 6) 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)
- 7) 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) (emphasis added).

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 Appellee argues in its brief, that District Court did not err by refusing to instruct the jury on self-defense. The State argument is two-fold. First the issue was not properly preserved for appellate review and the evidence did not support the District Court giving an instruction on self-defense. The Appellee is wrong.

Generally, to preserve an issue with respect to a jury instruction the complaining party must offer the jury instruction and make it part of the record. *State v. Bedford*, 31 Neb.App. 339 (2022). However, failure to make a jury instruction part of the record is not necessarily fatal and thus prevents appellate review. When the issue before an appellate court turns on the evidence rather than the wording of the instruction itself, as is the case before this Court, an appellate court can address it. *Id.* Additionally, Nebraska appellate courts have long held that an appellate court may take note of plain error on the record. Plain error defined is error plainly evident on the record that prejudicially affects a litigants substantial right and if left uncorrected, would result in damage to the integrity, reputation and fairness of the judicial process. *State v. Mann*, 302 Neb. 804, 809 (2019). Adams argues to this Court that the failure by the District Court to instruct the jury on self-defense was plain error on the record and can be addressed by this Court.

The Appellee also argues the District Court was correct in concluding that the evidence did not support an instruction on self-defense. The Appellee's reasoning is flawed and incorrect. First the Adams must address some of the recitations of fact from the Appellee's brief. A lot of emphasis was placed on Exhibit 32, a recording from a security camera by the State at the trial and by the Appellee in its brief. Adams must point out to the Court that the camera was not a continuous recording of the entire event. Jared Minary from the Lincoln Police Department testified at trial that the camera only recorded segments of the event. (214:21-216:3) Minary testified he believed that was because the camera system was motion activated and several factors can cause the camera to not record continuously. For example, the range for detecting motion can be short, glare from the sun, complications from the window glare or wifi connection problems can all cause recording problems. Adams urges this Court to give Exhibit 32 the weight it deserves, which is that it is just segments and not a continuous picture of what actually transpired.

Appellee also cites to portions of testimony by witness Milyjah Wagy. Wagy was in an apartment above the site of the incident and observed most of it through the window of his apartment. In Appellee's Statement of Facts, it was stated that Wagy observed the argument became physical, and he observed the same two people jostling around, throwing punches, while still in an upright position. (Appellees Brief, pg.10) Wagy was actually very specific that he only observed one person land a punch and that was Clark. Wagy testified he considered it a sucker punch and it knocked Adams down. (289:20-24; 290:24-291:9; 291:22-292:16)

Adams argues to this Court that there was not a temporal break in the events as the evidence seems to suggest. Minary testified that the video captured only segments of time. There is some tension in the evidence but also there is agreement in the evidence that Adams was constantly under the threat of harm from Clark. What started out as a verbal argument turned physical quickly where Clark landed several blows on the Adams. One of which cut his eye, caused it to swell and made it difficult for him to see. (472:25-473:3) Clark continually threatened Adams with further harm. (470:2-7; 471:21-472:16). Adams testified that he was particularly concerned when Clark stopped the van, and he heard Clark say he was "going to finish this". Which was confirmed by Williams' testimony. (393:7-14;471:4-472:6). It seems to constantly be overlooked that Clark is the one who stopped the van and said he is gonna finish this and then exits the van to go after Adams. Much has been made that the Adams could have went to his van and left. However, it is also true Clark could have kept driving away but instead he stopped the van to keep attacking Adams. The evidence is clear that Clark was the aggressor. Furthermore, Adams testified that he could not easily walk much less run away due to having a problem with his legs after a serious staph infection. (482:16-20).

Whether the use of force by Adams was justified turns on whether his belief was reasonable. Neb.Rev.Stat §28-1409(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. (emphasis added) 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) (emphasis added).

Under the circumstances as Adams perceived them, he had been attacked, injured, threatened with harm and then when Adams thought it was over Clark stopped his van and made the final chilling threat, “that he was going to finish it.” It was reasonable for Adams who was injured and unable to run or walk away to perceive that Clark intended to seriously injure him or kill him. Even if Adams was mistaken what Clark intended to do to him, Adams’ belief in the use of deadly force was reasonable.

Consequently, Adams satisfied the initial burden for a jury instruction on self-defense. Adams was only required to produce a slight amount of evidence to support an instruction on self-defense. The jury may have determined that he did not produce enough evidence to find his use of force was justified but that was an issue for the jury to determine not the trial court. It is not the province of a trial court to decide factual issues even when it considers the evidence produced in support of a party’s claim to be weak or doubtful. *State v. Bedford*, 31 Neb.App. 339, 356 (2022) That factual determination is only for the jury to make.

The District Court erred by not including an instruction on self-defense. The error is not harmless and this Court should vacate the conviction and remand this matter for a new trial.

II. 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 Appellee argues in its brief, that Adams argument would have failed and that Adams has failed to demonstrate that his trial counsel performed deficiently or that he was prejudiced. (Brief of Appellee, pg.21) Appellee's argument is again two-fold. First the Appellee contends that Adams' did not specifically state what character evidence should have been pursued. (Brief of Appellee, pg. 30) Secondly Appellee claims that Adams' has not demonstrated that the nickname "Trigger Trey" is evidence that Clark had a violent or aggressive character. (Brief of Appellee, pg. 30).

First Adams' disagrees that he has not specified what character evidence should have been pursued. Adams argued in his brief that "Trigger Trey" is Clark's street nickname which has connotations that he is a violent and aggressive person. (Brief of Appellant, pg 38) Furthermore, had trial counsel's pursued character evidence, through any of the witnesses, of Clarks aggressive reputation surely it would have included his nickname "Trigger Trey". The nickname speaks for itself and when combined with the evidence that Clark was a fighter and finished fights it supports Adams' theory that Clark was the initial aggressor. The evidence was relevant under Neb.Rev.Stat. §§ 27-404, 27-405, regardless of whether it was that Clark usually carried a gun or was a violent person who finishes fights. That Adams was aware of either or both is relevant and admissible to support Adams' allegation that Clark was the aggressor. *State v. Lewchuk*, 4 Neb.App. 165 (1995); Neb.Rev.Stat. 27-404(1)(b) and 27-405(2). Adams was clearly prejudiced because relevant evidence that supported his theory that Clark was the aggressor and that he reacted reasonably to that aggression was not presented to the jury.

Therefore, the Appellee is incorrect. Adams would have been successful had trial counsel pursued the relevant and admissible evidence of Clarks reputation for violence that would have included his nickname. As a result of trial counsel's failure, the jury was not presented with important, material and relevant evidence in support of his claim of self-defense. The record is clear that the failure by trial counsel prejudiced Adams' theory of his defense.

CONCLUSION

For the reasons stated in Adams brief and reply, Adams respectfully requests that this Court find that it was an abuse of discretion and a violation of Adams' Right to Due Process and a Fair Trial when the District Court decided to not instruct the jury on self-defense, to 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,
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CERTIFICATE OF COMPLIANCE

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

1. That the accompanying reply brief was prepared using Microsoft® Word for Microsoft 365 MSO (Version 2403 Build 16.0.17425.20124) 64-bit;
2. That the accompanying reply brief complies with the typeface requirements of Neb.Ct.R.App.P. §2-103(A)(3)&(4); and
3. That the accompanying brief contains 2,293 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.

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Certificate of Service

I hereby certify that on Monday, April 15, 2024 I provided a true and correct copy of this *Reply Brief Appellant Adams* to the following:

State of Nebraska represented by Jordan Marie Osborne (25084) service method: Electronic Service to **jordan.osborne@nebraska.gov**

Signature: /s/ Matthew Kosmicki (21875)