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**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

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**

The Honorable Ryan S. Post, District Judge

BRIEF OF APPELLEE

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Statement of the Case

A. Nature of the Case

This is Appellant Brian Adams' direct appeal of his convictions, following a jury trial, for Second-Degree Murder, a Class IB felony; and Use of a Deadly Weapon to Commit a Felony, Class II felony.

B. Issue Before the District Court

As relevant to this appeal, the sole issue before the district court was whether Adams was entitled to a self-defense jury instruction. His ineffective assistance of trial counsel claims were not presented to the district court.

C. How the Issue Was Decided in the District Court

The district court concluded that the evidence presented at trial did not support a self-defense jury instruction, and such an instruction was not given to the jury.

D. Scope of Review

Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Case*, 304 Neb. 829 (2020).

Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. *State v. Lowman*, 308 Neb. 482 (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. *Id.*

Propositions of Law

I.

It is incumbent upon an appellant to supply a record which supports his or her appeal. *State v. Custer*, 292 Neb. 88 (2015).

II.

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. Case*, 304 Neb. 829 (2020).

III.

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 (1997).

IV.

If a defendant has unjustifiably placed himself or herself in harm's way, a court may properly find that such facts do not support a lawful claim of self-defense. *State v. Case*, 304 Neb. 829 (2020).

V.

When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record;

otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding. *State v. Mabior*, 314 Neb. 932 (2023).

VI.

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id.*

VII.

The determining factor is whether the record is sufficient to adequately review the question. *Id.*

VIII.

An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court. *State v. Lorello*, 314 Neb. 385 (2023).

IX.

An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. Chairez*, 302 Neb. 731 (2019).

X.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), 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. Cox*, 314 Neb. 104 (2023).

XI.

To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. *State v. Anders*, 311 Neb. 958 (2022).

XII.

To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.*

XIII.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

XIV.

In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *Id.*

XV.

Defense counsel is not ineffective for failing to raise an argument that has no merit. *State v. Devers*, 313 Neb. 866 (2023).

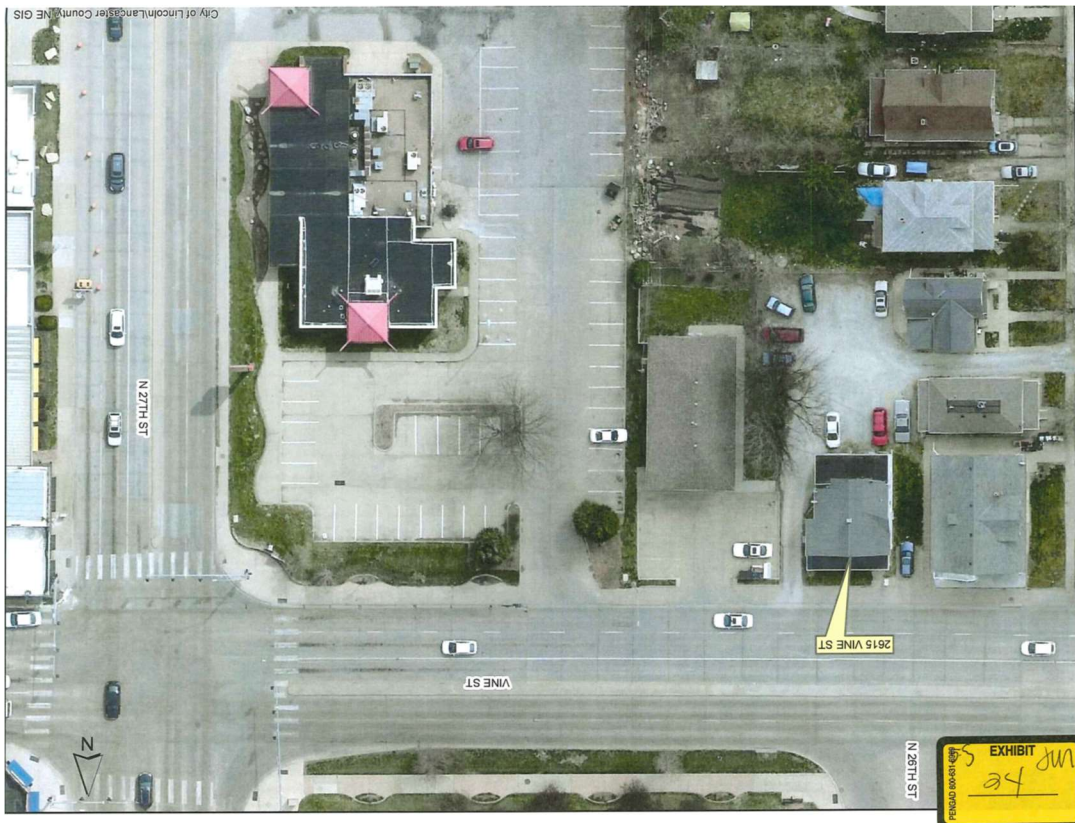
Statement of Facts

On January 19, 2022, Adams was charged by Information in Lancaster County District Court with First-Degree Murder, a Class IA felony, as well as Use of a Deadly Weapon to Commit a Felony, a Class II felony. (T24-29). These charges arose from a physical altercation on the afternoon of October 18, 2021, between Brian Adams and Trevious Clark, in a small apartment parking area near 26th and Vine Street, in Lincoln, Lancaster County, Nebraska. The altercation culminated with

Adams striking Clark in the head with a metal pole—a vehicle jack handle—and when Clark collapsed on the ground, Adams stomped on Clark’s head. The blunt force injuries inflicted on Clark resulted in a series of massive fractures to Clark’s skull that caused his death.

MILYJAH WAGY’S TESTIMONY

Milyjah Wagy lived at 2615 Vine Street, Unit 2, the house beside the parking area where the altercation occurred. (282:5-324:23). Unit 2 is the second floor of the residence. (*Id.*). Below is an aerial photo of the location, received as Exhibit 24, where the residence is labeled as 2615 Vine Street, and it shows the driveway to the east of the residence, the parking area behind the residence, and the alleyway going west toward 26th Street. (284:9-286:11; E24).



On the afternoon of October 18, 2021, Wagy was napping when he was awakened by a commotion outside. (283:23-284:5). He looked

out from his second floor window to the south toward the parking area behind the residence to see what was happening. (287:3-288:10). As he watched out the window, he observed most of the altercation between Adams and Clark. (282:5-324:23).

Upon looking out the window, Wagy noticed a commotion and people arguing in the parking area. (288:7-12). Wagy could not hear the argument, but it appeared to be mainly between two individuals. (288:19-289:3). After watching out the window for about a minute and a half, Wagy said the argument became physical, and he observed the same two people jostling around, throwing punches, while still in an upright position. (289:4-19). At some point, both individuals ended up on the ground, wrestling around. (290:8-12).

Some of the other people who were there intervened and pulled the two apart, and after they stood back up, Clark landed a punch on Adams, knocking him to the ground. (290:13-292:11). Wagy testified that Adams laid on the ground for about 15 seconds before he got back up, as everyone else was walking around, assuming the fight was over. (292:12-19). Then he observed Adams walk over to his white van that was parked at the rear of the lot, he opened the driver's side door, and then the back hatch of the van opened, and Adams went to the back of the van and retrieved something from inside. (292:19-293:24).

Exhibit 32 is surveillance video from a camera that was set up in a first floor window almost directly below where Wagy observed the altercation. (208:5-220:17; 294:3-25; E32). This video did not capture the entire incident because the camera is operated by a motion sensor, which apparently was not highly sensitive. (*Id.*). However, the video did capture the immediate aftermath of the initial altercation after it was broken up. (E32 @ 1:10 – 1:40). The individual in the white shirt who picks up the hat off the ground is Trevious Clark. (*Id.*; 295:9-23). Adams is the person who walks back up, holding a metal pole as if he is ready to take a swing. (*Id.*). In the background of the video, Adams can be seen at his van retrieving the pole, like Wagy described, before he walked back towards Clark with the pole. (*Id.*).

Wagy first noticed Adams with the pole as he was coming back from his van, and another person identified as Kevius Bass, who is in the blue sweatpants in the video, tried to intervene and stop Adams from using the pole. (295:1-296:7; E32). Based on the gestures, Wagy believed that Bass was telling Clark to leave, and in the video it does sound like Bass tells Clark, “you got to go,” as Adams is walking back up with the pole. (296:8-24; E32).

Bass and another person intervened by grabbing the metal pole, and from Wagy’s perspective, they appeared to be speaking to Adams and trying to stop him from using the pole. (296:25-297:13). They took the pole away from Adams and put it on the ground about two to five feet behind Clark’s van that was parked in the middle of the lot, and Adams walked back toward his white van parked in the rear of the lot. (297:14-298:9). Wagy observed Clark and his younger passenger, later identified as Malaki Williams, get back into Clark’s van, and he began to move the van toward the driveway leading to Vine Street. (298:10-300:22). At about the same time, Adams turned around, walked back over and picked up the metal pole, then began walking in the direction of Clark’s van. (*Id.*).

Wagy testified that Clark’s van moved about 10 to 15 feet and stopped at about the corner of the house. (*Id.*). Wagy saw Clark get out of the van, and Adams was at the back of Clark’s van when it stopped, only about five feet away from Clark. (302:5-303:24). Wagy switched to another window to get a better view, but he could not see what was happening directly below him. (303:16-305:7). Then he heard a woman screaming, so he instructed his fiancé to call 911, he got dressed, and went downstairs to see if everything was alright. (*Id.*). Before he went downstairs, Wagy saw Adams’ white van drive off west down the alley leading to 26th Street, with its door open. (305:2-306:8). Surveillance video also captured Adams’ van exiting the lot. (E32 @ 1:45 – 2:10).

When Wagy got outside, Clark was laying on the ground, barely moving. (309:4-6). Clark was positioned near the corner of the house, on his back with his head closest to the house. (309:7-14). Wagy stated

Clark had blood coming out of his ears. (310:16-19). He did not notice when Clark's van left the scene, but he later saw it parked next door at the Imperial Palace. (309:15-310:10; 313:3-23). Based on information he received later, Wagy is aware Malaki Williams drove Clark's van away from the scene after Clark was struck by the pole. (321:2-322:7). Wagy did not see anyone with a weapon other than Adams, who had the metal pole. (323:10-15).

MALAKI WILLIAMS' TESTIMONY

Malaki Williams is the biological cousin of Trevious Clark, and he was present during this incident. (372:2-425:14). Williams testified in exchange for reduced charges related to two felony cases, which he explained to the jury. (372:2-376:8). On October 18, 2021, Williams was 17 years old, and he considered Clark to be like a father figure to him. (376:11-24). Earlier that day, Williams messaged Clark and asked if he would buy him some Black & Mild's, which are a tobacco product, from Walgreens because Williams was not old enough to make the purchase himself. (378:11-381:10). Williams walked to Clark's apartment, and he waited until Clark was ready to go. (*Id.*). They drove to Walgreens to get the Black & Mild's, then got some food at McDonalds. (*Id.*). He then had Clark get him some Swisher Sweets, which he wanted so he could roll marijuana into a blunt. (381:1-25).

As they were out driving around, Clark cut through the parking area behind 2615 Vine Street. (382:6-383:15). They entered the alley from 26th Street, and Clark stopped in the parking area to talk to some of his friends. (*Id.*). This was a nice October day, so the windows were rolled down on the van Clark was driving. (383:8-384:10). Williams did not know who Adams was at the time, but Adams came up to Clark's van and said it was a nice van and he wanted one for his kids. (384:11-385:16). Clark said this was his van. (385:16). Adams said something about wanting to buy the van, and Clark said, no, the van was not for sale. (385:23-386:1). As far as Williams knew, Clark and Adams did not know each other. (387:3).

Williams testified that Adams opened Clark's driver's side door twice and slammed it shut twice. (386:2-23). Then Clark got out of the van and asked Adams why he was slamming his door, and they began arguing. (386:24-387:6). Williams was still sitting in the passenger seat of the van, and he was in the process of rolling a blunt, but he looked over through the window when he heard a thud, and he saw Clark and Adams fighting. (387:7-23). At that point, Clark and Adams were still standing. (387:24-388:1).

Williams saw them swinging at each other, and Clark punched Adams, and Adams fell to the ground. (388:2-13). He then saw Adams get up off the ground and walk over to Adams' van. (288:14-17). At no point during this initial encounter did Williams see Clark or Adams with any type of weapon. (288:18-24). At about this time, Williams got out of the van and tried to get Clark to leave. (388:6-389:5). Williams is on the surveillance video walking outside the van right after the initial fight ends, wearing the white shorts. (389:16-390:9; E32). Williams saw Adams walk back over holding the metal pole. (390:22-391:2).

Williams again told Clark, "let's go." (391:3-10). While Clark and Williams were leaving, Adams threatened them by saying he would hit both of them with the pole. (391:11-15). Clark and Williams got back in their van, and Clark drove forward some distance, which Williams said was about five or six feet. (391:16-23). Williams noticed two individuals standing by Adams telling him to put the pole down, but Adams did not put it down, and Williams never actually saw anyone take the pole away from Adams. (391:24-392:5).

As Clark was about to pull away from the lot, Clark stopped his van by the corner of the house, and Clark said something like he was going to get this over with, and he got out of the driver's seat. (392:10-393:14). Adams was walking up to their van with the pole. (393:15-16). Williams testified that when Clark got out of the van, Adams was only two or three steps away holding the pole, and Clark swung once, then Adams swung the pole down on Clark's head. (393:17-394:9). Williams said that Clark swung to protect himself, and then was hit by the pole

directly on the top of his head. (394:10-23). He explained that Clark had no time to even get to Adams because the pole was already up and swinging. (421:17-24).

After being struck, Clark fell to the ground, and Williams got out of the van. (394:24-395:5). Clark was not speaking at that point, and he was laying on his stomach. (395:6-10). Adams was talking to Clark, saying things like, "I beat your ass. I told you I was going to get you." (395:15-22). Adams began to walk away, then he turned around, came back, and stomped on Clark's head once with full force. (395:23-396:21). That is when Williams first saw all the blood around Clark, and blood coming out of his ears. (*Id.*). Clark then began seizing or convulsing on the ground, which caused him to roll over onto his back. (396:22-397:11). One of the people there told Adams he just killed him, and that is when Adams ran. (397:18-398:9).

Williams testified that he got back into Clark's van and left the scene because he did not know what to do, and he was freaking out. (399:4-400:1). He had never seen someone killed right in front of him before. (425:12-14). Williams went home to his girlfriend for a short time, then he returned and parked in the Chinese restaurant parking lot where watched the paramedics working on Clark. (399:22-401:12). He was interviewed by police the next day. (407:21-408:13). Williams did not take anything from the scene other than the van. (403:1-3).

POLICE INVESTIGATION

When police arrived on scene, individuals present immediately gave police the name of Brian Adams, so they knew who to locate right away. (173:16-174:22). At that time, Adams was on parole, and he had a GPS ankle monitor. (231:18-233:13). After contacting parole, officers were provided with Adams' GPS location, and they were able to locate and arrest him at 5:54 p.m., almost three hours after the incident. (*Id.*; 242:24-243:7). There was no gun or other weapon, except for the metal pole, recovered either from Clark or elsewhere at the scene.

Exhibits 5 through 23 depict the scene shortly after the incident and Exhibit 15 is a photo of the metal pole Adams used to strike Clark in the head. (184:1-190:24; E5 through E23). The pole was received as Exhibit 42. (190:25-194:20; E42). Photos were taken at the hospital of Clark's external injuries, which are depicted in Exhibits 26 through 31. (201:22-205:25).

FORENSIC EVIDENCE

Dr. Jeremy Berg, a forensic pathologist, performed the autopsy on Clark. (428:15-447:19). After an external and internal examination, he determined that Clark's cause of death was blunt force injury to the head. (431:19-24). In his external examination, he identified multiple areas of abrasion and contusion on Clark's head and scalp. (431:7-11). Exhibit 34 is the autopsy report that documented Dr. Berg's findings. (E34). Exhibits 35 through 39 are photos depicting the internal exam of Clark's head and the injuries he sustained. (E35 through E39).

Dr. Berg observed several fractures to different areas of Clark's skull, including the frontal bone, left parietal bone, the left temporal bone, and the occipital bone. (433:17-436:5). Exhibits 36, 37, and 38 in particular depict the extent of the internal fracturing that included a depressed skull fracture, meaning a part of Clark's skull was pushed down into his brain. (*Id.*; E36; E37; E38). Dr. Berg also explained Clark sustained left frontal and bilateral parietal subdural and subarachnoid hemorrhages, depicted by the dark red areas on Exhibits 35 and 39. (436:6-437:21; E35; E39).

Cortical contusions are bruises to the brain, which Dr. Berg noted at the site of fracture on the left frontal lobe, and on the inferior surface of the brain, caused by the impact from the brain hitting the base of the skull. (437:22-438:11). Clark further experienced cerebral edema, which is swelling of the brain. (438:12-439:6). In this case, the cerebellum was forced down by the swelling into the frenum magnum, where the spinal cord goes, causing notching, as well as injury to the brain stem characterized by pontine hemorrhage. (*Id.*).

Dr. Berg testified the injuries Clark sustained to his head were consistent with being hit in the head with a metal pole. (442:18-443:3). He also said they were consistent with a head being stomped on. (*Id.*). During the autopsy, Dr. Berg did not observe any broken ribs on Clark. (440:24-441:1).

Brandy Porter is a forensic scientist at Nebraska's State Patrol Crime Lab, and she conducted DNA analysis on several items. (336:3-368:10). Exhibits 40 and 41 are the lab reports containing her testing results. (E40; E41). Because many facts in this case are undisputed, most of the DNA results were expected, although one area of interest was a stain on the interior arch of Adams' left shoe that tested positive for blood. (361:21-364:5). A DNA profile was detected for the blood on the left shoe that was 2.24×10^{35} times more likely to have originated from Trevious Clark than if it originated from an unknown, unrelated individual, which is support that the blood on the arch of Adams' left shoe belonged to Clark. (*Id.*; E41).

ADAMS' FACEBOOK VIDEO

Shortly after Adams left the area of 2615 Vine in his white van, he made a Facebook video while he was driving and posted it online. (480:7-18). This video is in Exhibit 33. (E33). In the video, Adams said that when he left Clark, "he was not breathing." (*Id.*). He also stated, "he hit me in the eye, and I beat his ass." (*Id.*).

ADAMS' POLICE INTERVIEW

After Adams was arrested just before 6:00 p.m., he was taken to the hospital to be medically cleared before going to jail because of the injury near his eye. (232:6-233:10; 254:4-255:10). Exhibits 43 and 44 are photos depicting the injury to Adams' left eye. (236:10-239:2; E43; E44). At the hospital, Adams asked Investigator Franken if Clark was dead, and he was informed that Clark had died. (E2). Adams told the investigator he wanted to talk, and he agreed to provide a Mirandized statement, contained on the body camera video in Exhibit 2. (*Id.*).

Before questioning even began, Adams blurted out that Clark hit him, and he retaliated. (E2 @ 2:00 – 2:15). When the doctor was in the room examining Adams, Adams stated that Clark “put his hands on me, so I put my hands on him.” (E2 @ 6:10 – 6:20). Adams said that Clark pulled up in his van, and he liked the van, so he went over and stuck his head inside, which upset Clark. (E2). Clark told Adams to get away from the van, and Adams said he backed off. (*Id.*). Clark got out of the van wanting to fight, and he hit Adams in the eye twice, which is when Adams went over to his van to give Clark a chance to leave. (*Id.*). Adams stated that he got the metal pole and hit Clark upside the head, knocking him out. (*Id.*). After that, Adams said he didn’t know what to do, and he couldn’t do nothing but go on the run. (*Id.*).

Adams explained in more detail that when he went to his own van, Clark did not follow him. (*Id.*). Adams grabbed the pole, and they got to fighting again. (*Id.*). Adams stated he struck Clark in the head with the pole once, and when Clark went down, Clark was still talking shit, so Adams went over and stomped on him, and Adams thinks that is what did him in. (*Id.*). Adams claimed that he stomped Clark on the chest, and Clark quit moving, which is when Adams knew his “mission was complete.” (*Id.*). Later he said, “this dude just crossed me, and he crossed me in the wrong way.” (*Id.*). Adams claimed that Clark talking shit when he was down is what made Adams stomp him. (*Id.*).

BRIAN ADAMS’ TRIAL TESTIMONY

Adams testified at trial. (453:2-526:8). He was on parole at the time of the incident and was wearing an ankle monitor. (454:3-21). On the afternoon of October 18, 2021, he went over to 2615 Vine Street to get money from Kevius Bass for a T.V. he gave to him. (455:15-456:12; 486:17-487:4). When he arrived, he got the money from Bass, and then Bass asked Adams to go to the store to get beer and liquor, which he did. (456:13-457:14). When he returned, Adams backed into a parking space at the back of the lot, as is depicted in the surveillance video in Exhibit 32. (*Id.*; E32).

A few minutes later, Clark pulled up in his van, and Adams said he liked the van, so he went over and asked to look inside because this was the van he wanted to purchase. (457:15-459:24). Adams said there were no problems until Clark dropped weed in his lap as he was rolling a blunt, and Clark got irate. (459:25-461:8). Adams testified Clark told him to get away from his van, and the van was not for sale. (461:8-9). Adams said he told Clark, I'm not trying to buy the van, you heard me wrong, and don't worry about the weed because I can buy you more weed if that's the problem. (461:10-14).

As Clark was trying to get out of the van, Adams kept pushing the door in on him to prevent Clark from getting out. (461:15-463:4). Eventually, Clark got out of the van, he struck Adams in the eye, they both fell to the ground, Adams put Clark in a bear hug by holding him around his back, and when other people intervened to pull them apart, Clark swung again and hit Adams in the eye a second time, knocking him down. (462:25-466:3).

At that point, Adams got up and walked to his van, announcing he was going to get the pole. (466:4-12). Adams agreed that Clark was not around him when he went to his van. (496:18-20). Adams admitted his phone was in his van, and he could have gotten in his van, started it, and either waited for Clark to leave as he expected him to, or called 911, but he chose not to do so. (493:1-497:3). Instead, Adams opened his trunk, retrieved the pole—a tire jack handle—and walked back up to Clark to chase him away with the pole. (466:22-469:7). This part is depicted on the surveillance video. (E32). Adams acknowledged that he placed himself back near Clark by reapproaching, and that he was the one who introduced a weapon into the conflict. (496:21-22; 519:13-25).

Adams testified that when he got back up by Clark, Kevius Bass and Curtis Ray intervened, they grabbed the pole, and threw it on the ground. (469:15-22). They were telling both Clark and Adams to leave, but Adams claims he could not leave because Clark's van was blocking him from driving away. (*Id.*).

Adams testified that after the pole was taken away from him, Clark walked away towards Clark's van, but was threatening Adams by saying he was from Mississippi, and he would kill him, and to wait until he got back. (470:2-471:6). Adams testified he did not take these threats seriously, until Clark commented about coming back to finish him off. (471:4-13). Adams testified that he thought Clark was going to leave because he was walking towards his van, so Adams turned back to pick up his pole, and was talking to Kevius Bass. (471:20-24).

Clark got into his van, Adams claims Clark yelled something about coming back to finish him, the van started to leave, but then it stopped, and Clark got back out. (471:25-472:2). Adams offered some conflicting testimony about where he was in the parking area at this time, but it appears he was somewhere between the front of his van, parked in the back of the lot, and the back of Clark's van, up near the corner of the house. (509:25-518:15; 521:6-522:1).

At one point, Adams acknowledged he was quite a distance from the back of Clark's van as it was driving away, but that he closed that distance after it stopped. (*Id.*). Adams said he did this because for some reason he speculated that if Clark had a gun, he could shoot him, but he admitted that he never saw a gun. (472:3-6; 512:11-513:3). Adams also admitted that when Clark moved his van, he could have left in his own van, but he chose not to do that; instead, he approached the back of Clark's van with the pole. (524:3-525:11).

Adams testified that when Clark got out of the van, Clark had something metallic in his hand, Clark swung at him, and that is when Adams intentionally hit Clark once with the pole, and then stomped on him to make sure he let go of whatever he claims was in Clark's hand. (473:4-474:20). Adams stated he did not know whether he stomped on Clark's back or head. (474:21-475:2).

Adams claimed he saw Williams get out of the van and go over to Clark's body to grab whatever Clark had in his hand, then Williams got into the van and drove off. (475:11-476:6). Adams then got into his

van and drove away. (476:7-24). Adams admitted that he never said anything about threats or being afraid for his life in his Facebook video or in his police interview shortly after the incident. (484:5-15; 500:23-503:15; 505:11-509:3; 523:13-524:2).

SELF-DEFENSE JURY INSTRUCTION

Prior to the final jury instruction conference, the parties and court discussed whether a self-defense jury instruction would be given. (528:14-532:5). The State argued the evidence presented at trial did not support a legally cognizable claim of self-defense, in part, because Adams reapproached Clark with a weapon when he could have gotten into his van and avoided a continuation of the conflict. (*Id.*).

The district court stated it took a lot of notes during the trial and Brian Adams' testimony. (*Id.*). The court decided not to give a self-defense instruction based on the evidence presented because (1) there was evidence from Adams that getting beat up by Clark was not that serious and he could have gotten into his own van and called 911, and (2) there was evidence that Clark's van moved 10 to 15 feet toward Vine Street and the corner of the house, and Adams admitted that he had sufficient room to leave in his van down the alley prior to the last interaction, and Adams chose not to do so. (531:8-532:5). The district court concluded that such evidence did not support a legally cognizable claim of self-defense, and it would not give the instruction. (*Id.*).

VERDICT AND SENTENCING

Following deliberations, the jury unanimously found Adams guilty of Second-Degree Murder, a Class IB felony, and Use of a Deadly Weapon to Commit a Felony, a Class II felony. (T169; 565:12-566:24). At sentencing on June 26, 2023, the court sentenced Adams to 50 to 60 years in prison for Second-Degree Murder, and 10 to 20 years for use of a weapon, which were required to be served consecutively pursuant to statute. (T172-173; 568:8-573:12). Adams was given credit for 44 days' time served. (*Id.*). This appeal followed.

Argument

I. Assignment of Error #1: The trial evidence did not support a jury instruction for self-defense

Adams claims the district court erred when it refused to give a self-defense instruction. (Brief of Appellant, pp. 15-23). As an initial matter, the Court must resolve whether this issue has been properly preserved for appellate review. The State notes, and Adams admits in his brief, that the proposed self-defense instruction was not included in the appellate record, in either the bill of exceptions or the transcript. (Brief of Appellant, pp. 15-16, 25-29).

The Nebraska Supreme Court has stated that defendants must show their tendered instruction was a correct statement of law and that it is warranted by the evidence. *See State v. Custer*, 292 Neb. 88 (2015). “In order to do so, he needed to include his proposed instruction in the record on appeal. It is incumbent upon an appellant to supply a record which supports his or her appeal.” *Id.* In *Custer*, the Court held that because the defendant did not include the proposed instruction in the record on appeal, “we have no instruction to review in order to determine whether it ought to have been given.” *Id.* However, in that case, the Court assumed, for the sake of argument, that the proposed instruction was a correct statement of the law. *Id.*

To the extent this Court chooses to assume the proposed self-defense instruction, which is not in the record, was a correct statement of the law, the State submits that the district court properly refused to give a self-defense instruction. The undisputed evidence at trial shows Adams chose to unjustifiably place himself in a position of danger by reapproaching Clark and introducing a deadly weapon into the conflict, when Adams admits he could have safely stayed in his van. This does not support a legally cognizable theory of self-defense.

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. Case*, 304 Neb. 829 (2020). Here, the tendered instruction was not warranted by the evidence.

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 (1997). However, if the trial evidence does not support a claim of self-defense, the jury should not be instructed upon it. *State v. Urbano*, 256 Neb. 194 (1999). Nebraska's Supreme Court has held that in making such a determination, trial courts need to determine, without deciding factual issues, whether the trial evidence would support self-defense under Nebraska law. *State v. Case, supra*.

In Nebraska, self-defense is a statutorily defined affirmative defense. *See State v. Smith*, 284 Neb. 636 (2012). Neb. Rev. Stat. § 28-1409(1) (Reissue 2016) provides, in relevant part, that "the use of force upon or towards 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." This has been interpreted to mean a defendant must have a reasonable and good faith belief in the necessity of using force, and the force used in defense must be immediately necessary and justified under the circumstances. *State v. Case, supra*.

Nebraska's Supreme Court has repeatedly held, "If a defendant has unjustifiably placed himself or herself in harm's way, a court may properly find that such facts do not support a lawful claim of self-defense." *State v. Case*, 304 Neb. 829 (2020); *State v. Urbano*, 256 Neb. 194 (1999); *State v. Marshall*, 253 Neb. 676 (1998). In *Marshall, supra*, the Court concluded the defendant voluntarily put himself in a position of danger by going outside of his home to confront two men when there was no evidence that anything prevented him from remaining safely in his home and thereby avoiding the occasion to use force. *See also, State v. Case, supra*.

Likewise, the undisputed facts in *State v. Case, supra*, showed that Case left his jail cell and walked directly up to another inmate, and there was no evidence Case was prevented from remaining safely inside his cell. As a result, the Court found that Case unjustifiably placed himself in harm's way, and such facts did not support a legally cognizable theory of self-defense.

The circumstances here have similarities to *Case* and *Marshall*. After the initial altercation ended, Adams walked over to his van that was parked at the back of the lot. (466:4-12; E32). Adams agreed Clark was not around him when he went to his van and Exhibit 32 clearly shows that Clark did not follow Adams; instead, he was picking up his hat on the opposite side of his van in the middle of the lot. (496:18-20; E32). Adams further admitted his phone was in his van, and he could have gotten in his van, started it, and either waited for Clark to leave as he expected him to do, or called 911, but Adams chose not to do that. (493:2-497:3). Adams even admitted that the situation at the time was not serious because he did not consider being struck by Clark during the initial scuffle as a serious thing. (*Id.*).

Instead, Adams opened his trunk, retrieved the pole and walked back up toward Clark, which is also depicted in the surveillance video. (466:22-469:7; E32). Adams acknowledged that he placed himself back near Clark by reapproaching, and that he was the one who introduced a weapon into the conflict. (496:21-22; 519:13-25).

By Adams' own admission, he voluntarily placed himself in a position of danger after the initial altercation ended by reapproaching Clark with a deadly weapon, rather than simply staying in a location of safety by or in his van. Based on the undisputed evidence, there was no justification for Adams to walk back up to Clark with the metal pole when he could have stayed safely in his van. Such facts do not support a legally cognizable theory of self-defense; thus, the district court did not err by refusing to instruct the jury on self-defense. This assignment of error is without merit.

II. Assignment of Error #2: Ineffective assistance of trial counsel claims

Adams asserts his trial counsel provided ineffective assistance in seven respects. The State submits the record is sufficient to reject all seven claims on direct appeal.

Standards Applicable to Ineffective Assistance Claims

When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record; otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding. *State v. Mabior*, 314 Neb. 932 (2023). The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id.* The determining factor is whether the record is sufficient to adequately review the question. *Id.*

An ineffective assistance of counsel claim is raised on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court. *State v. Lorello*, 314 Neb. 385 (2023). An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. Chairez*, 302 Neb. 731 (2019).

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), 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. Cox*, 314 Neb. 104 (2023). To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. *State v. Anders*, 311 Neb. 958 (2022). Moreover, to show prejudice,

the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In determining whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably. *Id.*

Claims 1 and 2: Trial counsel performed deficiently by failing to object to the trial court's refusal to give the self-defense instruction at the formal jury instruction conference and offer a proposed self-defense jury instruction

There is only deficient performance here if this Court finds that trial counsel failed to preserve the self-defense jury instruction issue by either failing to formally object or offer a proposed jury instruction for the record. However, even assuming for the sake of argument that there was deficient performance in that regard, Adams cannot show prejudice when he was not entitled to a self-defense instruction based on the undisputed trial evidence, as explained in the first argument. Defense counsel is not ineffective for failing to raise an argument that has no merit. *State v. Devers*, 313 Neb. 866 (2023).

Claim 3: Trial counsel performed deficiently by failing to adduce evidence at trial through Dr. Berg that there was a lack of debris or bruising on Clark's head to support Adams' testimony that he did not stomp on Clark's head

Adams argues that his trial counsel was ineffective by failing to adduce testimony from Dr. Berg that he did not notice debris or gravel on Clark's head, which would support Adams' testimony that he did not stomp on Clark's head. (Brief of Appellant, pp. 30-31). He further argues there were no shoe print markings on Clark's head, supporting Adams' claim he did not stomp on Clark's head. (*Id.*).

However, Adams never denied stomping on Clark's head in his trial testimony. (474:25-475:2). When he was specifically asked about the stomp, Adams stated, "I thought I kicked him – I mean, I stomped

him on his back. But, like I said, I really couldn't see, so I really don't know if it was his head or his back." (*Id.*). Moreover, Adams refers to there being "no debris on the head which supports that Adams did not stomp on Clark's head *driving it into the gravel.*" (Brief of Appellant, p. 30). But the crime scene photos show the pool of blood where Clark fell and was stomped is not on gravel; it is on concrete. (E10; E14). A lack of gravel debris does not prove where on Clark's body he was stomped when Clark was not on gravel at the time.

There was additional evidence from Dr. Berg that Clark did not have any broken ribs, for example, from someone stomping on either his chest or back. (440:24-441:1). There was also a blood stain on the arch of Adams' left shoe, and DNA analysis showed this was Clark's blood. (362:16-364:3; E41). At that point, Clark had only been struck on the head with the pole, so Clark's head was the only part of his body where there was blood to transfer to the arch of Adams' shoe. (474:10-475:10). The evidence shows massive injuries to Clark's head, and the only injuries to any other part of his body were some minor abrasions to his right elbow, right hand, and left knee. (E26 through E31; E34 through E39). No injuries were noted to his chest or back. (*Id.*).

The State submits Adams cannot show that inquiring into this area with Dr. Berg would have resulted in the answers he speculates could have been adduced; thus, he cannot show there was any deficient performance or prejudice. But, if the Court disagrees, then the record is insufficient to review the claim on direct appeal because additional testimony would be required to establish Adams' claims.

Claim 4: Trial counsel performed deficiently by failing to adduce evidence at trial through Adams that his white van was blocked in, which prevented him from retreating

This claim is without merit because it is affirmatively refuted by the record. Adams testified at length that his van was initially blocked in by Clark's van, and he could not drive away until Clark moved his

van just before the fatal blow. The following are some of the exchanges during Adams' testimony:

[DEFENSE COUNSEL]: Did you think you could leave at that point?

[ADAMS]: No. He was still blocking me in.

...[ADAMS]: And you know they was trying to tell Trevious to leave, and they was trying to tell me to leave. And I'm explaining to them that I can't go nowhere because I'm locked in, and I have to wait on him.

...[DEFENSE COUNSEL]: Did you feel like you could get into your van and leave?

[ADAMS]: No, I couldn't. Blocked in.

...[STATE]: All right. What are we seeing here?

[ADAMS]: Now, that's Trevious Clark. And I'm blocked in.

[STATE]: Okay. Explain to me how you're blocked in.

[ADAMS]: I'm blocked in. I cannot go straight, and I cannot go to the alley. This is the alleyway right here; I cannot make it there.

[STATE]: You're telling me, your vehicle wouldn't fit between those cars parked –

[ADAMS]: No, it would not.

...[STATE]: And it couldn't go out towards Vine Street?

[ADAMS]: No.

...[STATE]: And that standard size van is blocking in your – and you're about right here?

[ADAMS]: That's correct.

[STATE]: Blocking you from going this way?

[ADAMS]: Yep.

...[STATE]: So, at the same time, it's also blocking you from going this way?

[ADAMS]: That's correct.

...[ADAMS]: Okay. If I keep straight right here, that is Vine. You see, I cannot go through there to get to Vine. You see I cannot go through there to get to the west side.

...[ADAMS]: That is blocked in. Trevious is blocking that in.

...[STATE]: So, again, I want to make sure I'm understanding. This one vehicle is blocking both exits?

[ADAMS]: That's true.

(467:8-472:15; 489:12-492:13). Adams was very clear that Clark's van was blocking his van from leaving when it was parked in the middle of the lot. The testimony cited in Adams' brief where Adams testified he could have gotten into his van and driven away was in reference to the situation after Clark moved his van forward, which is supported by the video because if Clark's van moved 10 to 15 feet up to the corner of the house, Adams' van had plenty of room to leave. (524:13-525:11; E32).

On redirect, defense counsel clarified that Adams did not leave before Clark stopped his vehicle because he was talking to Bass, and there was no need for defense counsel to question Adams further as to whether there was space for him to leave after Clark moved his van because the surveillance video clearly showed there was space for him to leave, and Adams already explained why he did not do so. It appears Adams is complaining that trial counsel did not have him repeat what he testified to earlier. Since the jury already heard Adams' testimony, asking the same thing again was not deficient performance, nor can Adams show prejudice. This claim has no merit.

Claim 5: Trial counsel performed deficiently by failing to adduce evidence at trial that Malaki Williams did not stay with Clark or come back to the scene and contact an officer, which would have supported Adams' claim that Williams removed something from the scene

This claim is without merit because it is affirmatively refuted by the record. Adams testified Williams got out of Clark's van after Clark was hit with the pole, and Williams took something off of Clark before Williams left in the van. (475:11-476:6). There was also evidence from both Wagy and Williams that Williams came back to the scene a few minutes later, but he did not talk to police until the next day. (309:15-310:10; 313:3-23; 399:4-402:5; 407:21-408:13).

The jury heard evidence on the exact issues being raised in this claim; thus, there was no deficient performance, and Adams cannot show prejudice. This claim has no merit.

Claim 6: Trial counsel performed deficiently by failing to adduce evidence at trial that Adams could not see what was in Clark's hand to strengthen his claim of self-defense

This ineffective claim is also affirmatively refuted by the record. Multiple witnesses testified that Adams sustained an injury to his eye when Clark punched him in the face during the initial altercation, and the injury is documented in Exhibits 43 and 44. (289:15-291:20; 463:11-466:3; E43; E44). Adams further testified that he had difficulty seeing because of that injury. (474:24-475:2; 476:18-24). Finally, Adams said when Clark stopped his van by the corner of the house and got out, he saw something metallic in Clark's hand, but he did not know what it was. (473:10-17). He testified it could have been a gun or a box cutter, but he did not know for sure. (*Id.*).

Again, the jury heard the evidence that Adams complains was not presented. Thus, there was no deficient performance, and Adams cannot show prejudice. This claim has no merit.

Claim 7: Trial counsel performed deficiently by failing to pursue 404 character evidence that Clark's nickname was "Trigger Trey" to support a claim that Clark had a propensity for violence and was the initial aggressor

Adams argues that his trial counsel was deficient by failing to pursue the admission of Clark's nickname, "Trigger Trey", as character or reputation evidence. (Brief of Appellant, pp. 37-39). However, the State asserts this argument would have failed; thus, Adams cannot show his trial counsel performed deficiently or that he was prejudiced.

First, to the extent Adams is claiming that character evidence other than Clark's nickname should have been adduced at trial, he has failed to specifically state what character evidence he believes should have been pursued; thus, he has failed to preserve any such claim for subsequent post-conviction review. Such an allegation is insufficiently specific to preserve the claim.

Second, as for Clark's nickname specifically, there is nothing in the record, or in Adams' brief, explaining how the name "Trigger Trey", in and of itself, is evidence Clark had a violent or aggressive character. A person's nickname alone is not evidence of a person's character, or a trait of character, either as reputation or opinion testimony, nor is it evidence based on specific instances of conduct that said person was the first aggressor. *See* Neb. Rev. Stat. § 27-405 (Reissue 2016); *State v. Lewchuk*, 4 Neb. App. 165 (1995). Adams has failed to provide any evidence of the nickname's origins that might speak to a character for violence or aggressiveness, or how the name alone is relevant to show Clark was the initial aggressor.

As noted above, defense counsel is not ineffective for failing to raise an argument that has no merit. *State v. Devers*, 313 Neb. 866 (2023). As a result, Adams cannot show that trial counsel performed deficiently or that he was prejudiced. This claim has no merit.

Conclusion

For the reasons noted above, the appellee respectfully requests that this Court affirm the judgment of the district court.

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Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 8,587 words, excluding this certificate. This brief was created using Word Microsoft 365.

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Certificate of Service

I hereby certify that on Friday, April 05, 2024 I provided a true and correct copy of this *Brief of Appellee State of NE* to the following:

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