trial

A-15-0668

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

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THE STATE OF NEBRASKA,

Appellee,

vs.

GREGORY DUNCAN

Appellant,

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APPEAL FROM THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Honorable Leigh Ann Retelsdorf, District Court Judge

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BRIEF OF APPELLANT

THOMAS C. RILEY, #13523
Douglas County Public Defender

CINDY A. TATE, #22571
Assistant Public Defender

H05 Civic Center
Omaha, Nebraska 68183
Telephone: (402) 444-7175
Cindy.tate@douglascounty-ne.gov
Attorneys for Appellant

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STATEMENT OF JURISDICTION OF APPELLATE COURT

This is an appeal by Gregory S. Duncan (hereinafter "Appellant"), in which he was convicted of Assault Third Degree, Discrimination Based, under Nebraska Revised Statutes Sections 28-310 and 28-111, a Class IV felony, in CR14-449 during a jury trial before the Honorable Leigh Ann Retelsdorf in the District Court of Douglas County on February 12, 2015, which began February 9, 2015. (747:3-750:6). On June 17, 2015, Appellant was sentenced to twelve to eighteen (12-18) months imprisonment. (764:16-765:19). Appellant was given credit for fifty-three (53) days served. (765:12-14). The sentencing order was filed with the Clerk of the District Court in Douglas County on June 18, 2015. This appeal is authorized by the Nebraska Constitution, Article I, Section 23, and Nebraska Revised Statute Section 29-230. The Notice of Appeal was filed on July 17, 2015 with an Application to Proceed in Forma Pauperis, and an Order Allowing Defendant to Proceed in Forma Pauperis was signed by District Judge Gary M. Schatz on July 17, 2015. The Appellant himself had originally filed a handwritten and notarized letter requesting an appeal with the Clerk of the District Court which was filed July 6, 2015 but was rejected due to form. Subsequently, the Appellant was given a new attorney, who filed the proper, formal appeal paperwork. The Appellant filed for an extension of the brief due date on July 24, 2015 and by order of the Court dated July 24, 2015, appellant's brief due date was extended to October 5, 2015.

STATEMENT OF THE CASE

(a) Nature of the Case

This is a criminal prosecution in which Appellant was charged with Assault Third Degree, Discrimination Based at Case Number CR14-449.

(b) Issues Presented to the Court Below

The main issues presented to the District Court of Douglas County were whether Appellant was guilty of the offense charged beyond a reasonable doubt, and if so, what the sentence should be.

Additional issues included whether there was insufficient evidence to send the case to a jury or support a jury verdict for the alleged assault in the third degree, discrimination based "hate crime".

(c) How the Issues Were Decided and Judgment Entered

After a jury trial, Appellant was found guilty by the jury and thus ultimately adjudged guilty by the below court of Assault Third Degree, Discrimination Based. (747:2-750:22; 764:16-765:18). Appellant was then sentenced to a period of twelve to eighteen months imprisonment, and Appellant was given credit for fifty-three (53) days previously served. (764:16-765:18).

Prior to the verdict, the below trial court, after motions of the Appellant/Defendant, found that there was sufficient evidence to send the case to the jury after both the close of the state's case in chief and the defendant's, therefore the trial court denied motions for a directed verdict of acquittal on the charge (596:7-599:4; 651:10-652:4).

(d) The Scope of Review

The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Garcia*, 281 Neb. 1, 5, 792 N.W.2d 882, 886-887 (2011) (citing *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009).

Once a statute has been analyzed, the appellate court must then determine the sufficiency of the evidence under that statute. The Nebraska Supreme Court has held that "[i]n reviewing a

sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: [The Supreme Court does] not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

The scope of the appellate court's review is error on the record.

ASSIGNMENTS OF ERROR

I.

The District Court erred in its determination of the meaning and reach of the assault third degree, discrimination based "hate crime" statute in Nebraska and its application to this incident with the Appellant.

II.

The District Court erred in not granting the Appellant's motion to dismiss at the close of the State's case because the State presented insufficient evidence to support a conviction.

III.

The District Court erred in not granting the Appellant's motion to dismiss at the close of the Appellant's (Defendant's) case because the State presented insufficient evidence to support a conviction and/or State's evidence had been sufficiently rebutted.

IV.

The District Court erred in denying the Appellant's requested special jury instruction on the definition of sexual orientation stating that a common understanding was sufficient.

V.

The Appellant's trial counsel was ineffective in his assistance to Appellant for his failure to deposition or interview fully and/or at all the witnesses prior to trial which showed on the record in trial and for trial counsel's inconsistent and arguably illogical or demeaning theory of defense and closing around sexual orientation and alleged events in this matter which actually prejudiced the Appellant's defense.

VI.

The District Court abused its discretion when it imposed an excessively harsh sentence on the Appellant.

PROPOSITIONS OF LAW

I.

Nebraska Revised Statute Section 28-310 (1) and (2) provides: a person commits the offense of assault in the third degree if he a) intentionally, knowingly, or recklessly causes bodily injury to another person; or b) threatens another in a menacing manner; assault in the third degree shall be a Class I misdemeanor unless committed in a mutual consent fight or scuffle, in which case it shall be a Class II misdemeanor.

II.

Nebraska Revised Statute Section 28-111 further provides an enhancement for assault in the third degree *if the* ***defendant who commits the assault against another person or a person's property did so because of the person's*** *race, color, religion, ancestry, national origin, gender,* ***sexual orientation****, age or disability* ***or because of the person's association with a person of a certain*** *race, color, religion, ancestry, national origin, gender,* ***sexual orientation****, age or disability* where the defendant shall be punished by the imposition of the next higher penalty

classification than the penalty in the first offense, unless the offense is already a Class IB felony or higher, making assault in the third degree when based on this alleged discrimination a Class IV felony [emphasis added].

III.

The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Garcia*, 281 Neb. 1, 5, 792 N.W.2d 882, 886-887 (2011) (citing *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009).

IV.

The Nebraska Supreme Court has held that "[i]n reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: [The Supreme Court does] not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

V.

Whether a court's jury instructions were correct is a question of law, reviewed independently. *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

VI.

On a question of law, an appellate court is obligated to reach a conclusion independent of determination of the court below. *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

VII.

In a direct appeal, where an evidentiary hearing is not required, the determining factor of a claim of ineffective assistance of counsel is whether the record is sufficient to adequately review the question. *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013) (citing *State v. Freemon*, 284 Neb. 179, 817 N.W.2d 277 (2012)).

VIII.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), one must show that his counsel's performance was deficient and that this deficient performance actually prejudiced his defense. *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

IX.

An appellate court may disturb a sentence imposed within the statutory limits only when the sentencing court has abused its discretion. *State v. Hurbenca*, 266 Neb. 853, 865, 669 N.W.2d 668, 677 (2003) (citing *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003)).

X.

The appropriateness of a sentence is a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude as well as all of the facts and circumstances surrounding the defendant's life. *State v. Kula*, 262 Neb. 787, 792, 635 N.W.2d 252, 256 (2001).

STATEMENT OF FACTS

The State of Nebraska filed a Criminal Complaint alleging one charge of Third Degree Assault, Discrimination Based against Appellant, Gregory S. Duncan, pursuant to Nebraska Revised Statute Sections 28-310(1) & (2), and 28-111, a Class IV Felony. The alleged, named

victim of this charge was Ryan Langenegger. On Saturday, October 26, 2013, Ryan Langenegger and two of his friends, Joshua Foo and Jacob Gellinger, went out socially in the Omaha Old Market district, starting out at Flixx, a "gay bar," and ultimately ending up getting food at PepperJax Grill. (171:6-10; 537:2-540:5). Ryan Langenegger is a "straight" heterosexual male, as he testified to in trial. (536:6-12). Ryan had known his friend Joshua Foo for three or four years and he met Jacob Gellinger, who he has known for probably three years and also considers a friend, through Joshua Foo. (535:19-536-5). Joshua Foo and Jacob Gellinger are both "gay" homosexual males as they and Ryan testified to at trial. (197:7-198:17; 439:25-440:2; 536:13-19). As stated in trial, once or twice a week for the last five years Jacob Gellinger sometimes dressed in "drag" as a woman in women's clothing, with makeup and a wig, and Gellinger went by the name "Fendi Blu" when doing such. (440:3-23). On this entire Saturday evening into early Sunday, Gellinger, as he testified to in trial, "was dressed as Fendi Blu ... wearing about three-inch wedges [shoes with platform heels], a two-piece dress that kind of hit [Jacob's] thigh and had a little exposed midriff, and a leather jacket and ... [a wig with] longer brown hair." (441:13-442:1).

Gregory Duncan, Appellant, was also out that Saturday evening into early Sunday morning in the Old Market area as he testified to at trial. (605:17-606:8). That weekend was Halloween weekend and many people were dressed up in costumes. (606:5-8). The Appellant met his friend Joey Adriano down there and then Appellant and Joey ended up meeting with another friend or acquaintance of theirs, Paul Larson. (607:3-8). As Duncan testified to, he, Adriano and Larson started off going to two bars just off 10th Street in the Old Market district before going to a third bar, Capitol, and then finally towards the end of the evening (early Sunday morning) going to the PepperJax Grill for food. (607:10-608:1). The bars that they went

to were not any gay bars and they had not went to Flixx that evening where the other group of three, Ryan, Joshua and Jacob, had been. (608:20-25). The two separate groups were in PepperJax eating at the same time at different tables and the groups both departed at the same time just before 3AM. (544:15-551:10). Ultimately, just outside of the restaurant, a verbal altercation ensued, followed by a physical altercation which led to these charges. (523:18-20).

The State offered Exhibit 1 into evidence via a stipulation of parties with the Defense. (193:17-194:7) Exhibit 1 stated that PepperJax Grill had surveillance cameras inside but not outside of the establishment and there was a DVD made that was a true and accurate depiction of events occurring inside of PepperJax Grill during the times reflected on the videos' date and time stamp, which was Sunday, October 27, 2013 between 2:40 a.m. and 3:00 a.m. (E1, Volume IV Part 1:193, 194). Exhibit 1 was received and accepted into evidence with no objection and then the contents of it were read into evidence. (193:19-195:12). Exhibit 2, the actual DVD surveillance video recording, was also received into evidence with no objection. (E2, Volume IV Part 2:193, 194; 193:19-194:7).

Joshua Foo was the first witness State called to testify. (195:13-196). Foo has known the victim Ryan Langenegger for about two to three years after being friend's with Ryan's brother first. (196:13-21). Foo also knew Jacob Gellinger and Foo considered both Ryan and Jacob to be very good friends. (196:22-197:6; 197:14:16). Albeit ultimately a foundation objection was sustained, Foo testified that he knew the sexual orientations of Ryan and Jacob, and he stated that Jacob was homosexual. (197:17-198:17). Foo also stated that he himself was also "gay" or homosexual. (197:7-9; 198:18-21). Foo testified that Jacob, Ryan and he made plans to go out the evening in question to Flixx, a downtown gay bar, and that they actually did go to Flixx where they watched a couple of drag show performances and kind of hopped around or mingled

in the area. (198:22-200:9). Foo testified that during the time he was at Flixx he only had two Bud Lights (beers) and he remembers that because he was trying to not drink a lot as he was on a diet. (200:10-201:2). Ultimately, after leaving Flixx, Ryan, Jacob and Foo headed to get something to eat and ended up at PepperJax Grill. (201:7-24). PepperJax was located on Howard Street between 12th and 13th Street and the State offered Exhibit 10 as an aerial photograph of the area which Foo said was a fair and accurate depiction; Defense had no objection and the evidence was received. (E10, Volume IV Part 10:202, 202; 201:25-204:15).

When the trio arrived at PepperJax they had to wait in a long line to order food and then they eventually sat together at a table. (208:11-209:7). The State requested "permission to play portions of Exhibit 2 and then ask the witness questions about it" and the Defense stated they had no objection when the court asked if there was any. (209:8-15). Foo testified as the State used the Exhibit 2 surveillance video that you could see him on the video and that Foo himself was wearing a black suit jacket and black scarf, with a black sequin shirt underneath, jeans, and black dress shoes. (209:16-210:19). Foo further testified that you could see Jacob Gellinger on the video and Jacob was dressed as a female, his drag persona, Fendi Blu, and Jacob was wearing a white dress with a pattern on it and a black leather jacket. (210:20-212:2). Ryan came into the video and to the table with Foo and Jacob after he talked to a girl he knew elsewhere in the restaurant; Ryan had on a suit with a Calvin Klein jacket. (212:3-214:11). There was also a man not in either of the two parties of three material to this case that was dressed as a" big baby" presumably given it was Halloween weekend. (214:12-18).

Foo testified that after his party had sat down that a person whom he did not know the name of, later identified as Joey Adriano, eventually approached Ryan, Jacob and Foo and made comments to them and Foo further stated that Adriano was at the restaurant as part of a group of

three. (215:10-22). Before approaching Foo's party alone without the other two people with him, Adriano had also previously walked alone over to some things [chairs] in the restaurant and tried to move them and he was stopped by employees because they were in an area that had been closed off. (215:10-216:15). Gregory Duncan, Appellant/Defendant, was one of the people with Adriano's party and Foo identified him in court as sitting at the table where Adriano sat that night. (216:16-217:20). The tables where the two parties sat were approximately 12 feet or so away from each other according to Foo. (217:16-24). Foo testified that from 2:45 a.m. on the video until 2:54 a.m. nothing eventful happens and the parties are just eating separately, until Foo heads to the bathroom, and coincidentally, Joey Adriano also goes to the restroom, but Foo said that there was no interaction inside the restroom. (217:25-219:11). Foo further testified that when Adriano exits the restroom at 2:56:40 a.m. as seen on the video that Adriano is the same person who was in the Appellant's, Greg Duncan's, group. (219:12-16). Foo himself then exited the restroom at 2:57:00 as seen on the video after Joey Adriano had already exited it. (219:17-20). Foo says that just after he returned from the restroom, he "saw a group of the three guys kind of like joking, kept looking over at our table and things, and my experience in the past … [made him feel worry]", which was objected to as irrelevant and sustained. (219:21-220:23). However, Foo stated that based on his observations of the Appellant, Greg Duncan, and his two friends at the table with the Appellant, Foo "felt uneasy being there at the moment" so he suggested that he, Ryan and Fendi Blu (Jacob) leave because he "kind of just had a really bad vibe at that moment, and so I was trying to get them to come with me, and that's when he, that gentleman [later identified as Adriano alone], came over and started talking" but not only to Foo and Foo's group, but also back to the friends at Adriano's table as Adriano was allegedly saying "Should I, should I?" in a not "very good tone" according to Foo. (220:20-222:15). According to

his testimony, before that Foo and Adriano had not had any type of verbal interaction before Adriano came over and approached Foo and his party. (222:16-222:23).

Foo testified that at that time Ryan, Jacob and Foo were leaving the restaurant and he "heard names called while we were walking away. I heard 'fag,' was one of them[,]" and it was loud enough for Foo to hear and Foo stated that Adriano was the one saying the called names. (222:24-223:17). Upon State questioning as to what the Defendant/Appellant was doing as Foo and his party walked past, Foo answered that "I remember them laughing, like, while we were leaving, and as I said, I heard, like, derogatory comments." (223:25-224:4). Foo testified that there was nothing obstructing the Defendant's view of Fendi Blu as Fendi (Jacob) left in the mini dress he was wearing, and Foo also stated that other people were wearing costumes including someone dressed as a big baby as previously stated herein and someone dressed as a doctor, but Foo said that he himself didn't see any other males impersonating women in the restaurant besides Fendi (Jacob). (224:5-225:21). As they left, Ryan stopped to hug his friend there in PepperJax that was a girl and Foo and Jacob got outside and stopped as Foo helped Jacob put on his high heels outside of the door of PepperJax as Jacob (Fendi) leaned against some black railing outside as seen in Exhibit 7. (227:10-228:20). The Appellant, Joey Adriano and Paul Larson came out of the restaurant just after Jacob and Foo and right ahead of or at the same time as Ryan. (229:13-230:22).

Foo testified that after Duncan, Adriano and Larson had walked past Foo, Jacob (Fendi) and Ryan that Duncan's entire group stopped and at that point Adriano walked over to Jacob (Fendi) as Foo and Jacob were still getting Jacob's high heel shoes on and said again "Should I?" back to Duncan and Larson who per Foo were laughing at Adriano's comments. (230:23-232:18). Foo testified that at that point "I remember Fendi kind of looked down and said 'I

know. I am just a boy in a dress[,]" and Adriano replied "Yeah, it's fucking disgusting[.]" (232:19-233:12). After that comment was made by Adriano towards Fendi, according to Foo's testimony, the very next thing was Ryan telling Adriano that Ryan's party just wanted to go home and obviously Adriano had been drinking and Adriano responded something like "Come on, you fucking pussy[,]" and was "kind of doing stuff". (233:13-234:23). Foo testified that as Ryan and Adriano had this verbal altercation, Appellant Duncan and Larson were a couple of steps back behind Adriano standing there laughing. (234:24-235:13). Foo testified that as Ryan was engaged in a verbal conversation with Adriano, supposedly while Ryan was calm, with a normal voice and never raising his fist in anger as Adriano was confronting him that Duncan suddenly "pretty much went and hit Ryan" with just one punch (235:14-237:7; 238:20-239:4). Additionally, Foo testified that he hadn't seen any physical contact, like pushing or punching, between Ryan and Adriano prior to Duncan throwing his punch, and after the punch Duncan and his party immediately left and Foo saw them down the block near Zio's Pizza restaurant as Foo got on his phone and called police. (237:8-241:5).

Police arrived on scene about five to ten minutes later after Foo's call and spoke with Ryan and Foo. (244:8-245:9). Police did not take any photographs of Ryan's injuries at that time. (246:10-13). After leaving the scene and driving back to his house with Ryan, dropping Jacob (Fendi) off on the way, Foo, a photographer by trade, did take pictures of Ryan to "kind of document, like, what happened" and then he took Ryan to a friend upstairs in the medical field to look at Ryan's injuries." (245:10-246:20). The picture Foo took was entered into evidence as Exhibit 9 with no defense objection after Foo stated the picture was a fair and accurate depiction of Ryan as he appeared on the morning of October 27, 2013. (E9, Volume IV Part 9:247, 247; 246:21-248:18). Foo testified that he posted that picture to Facebook that night and later

received back several Facebook comments, contact from news stations who he gave interviews to and contact from the police department who he also spoke with based on them further contacting him. (248:24-250:12).

Under cross examination by defense counsel, Foo did agree that it was correct that the jury couldn't know that he was gay without him having told them and agreed that Foo himself the day before when testifying had dressed similarly, in a suit, as what the Defendant was wearing in court on this day. (252:9-253:7). Foo further stated that "[h]onestly, I don't really know what gay looks like...." (252:24-253:2). He further stated that he had on no identifying mark or pins that would identify him as being gay or belonging to a gay rights organization, only his words had identified him as such in court, and he also stated on the night of the altercation he had no marks of identification and was wearing male clothing like Ryan was as well, not in a dress like Jacob (Fendi) had on the night of the altercation. (253:11-258:23). Foo admits that there was no "objective evidence" of Jacob's sexual orientation the night of the incident as Jacob didn't tell anyone he was gay that night at PepperJax, Jacob did not kiss any other men at the restaurant, and Foo further stated Jacob had on heels and makeup dressed as a woman." (258:11-260:7). Foo admitted that even if a man is dressed as a woman that doesn't necessarily mean he is a homosexual. (260:8-262:4). Foo also admitted under cross examination that his parents didn't know he was actually gay until he told them 3 years earlier when he was 28 years old. (264:17-266:12). Foo testified that he cannot say that Greg Duncan called Foo, Ryan or Jacob (Fendi) any names and that even in the restaurant Greg made no eye contact, verbal contact or any comments towards Foo's group whatsoever and that from the video it didn't appear that Greg Duncan even knew Foo's group was there for most of the time inside the restaurant. (278:21-280:5). Defense Counsel also questioned Foo on whether he left at the time he did the

night of the altercation because it was 3 a.m. closing time, and Foo answered he didn't know what time closing time was and did not see any signs about such as counsel tried to point out as being there and closing time was not the reason he left PepperJax. (282:14-283:19). Additionally, Foo testified under cross examination that it is true that "Ryan and Joey were face to face[,]" it looked like one of them was very upset, Joey was in Ryan's face appearing to try to get him riled up, and Ryan, the straight guy, a marine, who was arguing with Joey got hit by the Appellant Greg Duncan. (324:19-326:12).

In his cross examination questioning of Joshua Foo, Defense Counsel put forth an unsupported theory that since Foo was helping Jacob put on the high heels when Jacob looked like a woman that it would appear to most people that a man and a woman were doing something sexual in public, and Foo said no most people would see that as someone putting shoes on someone's feet. (323:11-324:18). Defense Counsel also questioned or insinuated that Foo took the photograph of Ryan's injuries to say that this was a gay bashing incident, as opposed to documenting the injuries, and counsel further implies that Foo was out to get Mr. Duncan as a gay basher and even implies that Foo, as a photographer, has "morphing" skills where he wanted to portray the photo of Ryan as looking bad and quite possibly smeared blood for the photo, and when Foo rebuts that defense theory as not seeing it that way, counsel cuts him off abruptly right in front of the jury. (330:18-335:11). The State quickly redirects Foo on Defense's theories and accusations where Foo testifies that he put the picture on Facebook, potentially to help with any benefits such as doctor's bills or public awareness for safety of others, without changing or doctoring anything in the photograph so that Ryan would look worse and that the police officer who saw Ryan that night could see the photograph and compare the photograph to how police remembered seeing Ryan that night. (335:16-337:10; 338:17-24). State further rebutted the

whimsical terms or personas of men in dresses used by Defense Counsel such as "Mrs. Doubtfire" and "Tootsie" in that Foo didn't hear those terms being said, he heard someone calling them "queer", "faggot" or "fag". (339:11-340:22).

Joseph Adriano was the next witness the State called to testify in its case at chief. (342:14-343:2). Adriano was a coworker and acquaintance of the Appellant, Gregory Duncan, at the time of the incident, who would sometimes go out to bars with Duncan about twice a month, usually with other friends going as well. (344:20-346:9). Adriano testified that Paul Larson went with them on different occasions including on the night of the incident in this case. (346:13-349:12). Adriano consumed whiskey and beer that night, including shots, at the three different bars the group went to but he could not recall how much he had, but he does remember that Duncan and Larson were also drinking some that evening. (349:16-351:21). Adriano stated several times to several questions that he could "not recall" or remember various details from that evening, including what types of alcohol shots were consumed, what Duncan or Larson was wearing, what their plans were after leaving the bars, who he left with from the bars, where they went after the bars, and more, saying after leaving the bars his next memory was him being on a friend's couch (351:9-360:16). He said he did not remember much from that evening because he was intoxicated, even saying that he had blacked out from drinking that night under State and Defense questioning. (353:6-354-3; 361:23-362:6; 362:17-363:11).

Adriano further testified as he was being taken through the video evidence in Exhibit 2 by the State that he could not recall or remember what he was doing at points in the video the State asked about [which were points where Foo alleged that Adriano had went to move chairs and where Adriano came over to the table Foo was sitting at inside of the restaurant] and he could not remember under Defense questioning what he did in the video either. (360:24-362:6;

369:1-372:19). Adriano did not remember calling anybody names, like "fag" or "faggot" at any time during the evening and also testified that he had no recollection of anyone even being assaulted or hit given his condition. (359:5-362:6). He also answered in the affirmative that words such as those are not words that he would use "as a matter of course", because he is good friends with several gay or homosexual people and also has two aunts that are gay women married to two other women, so he holds no animosity towards homosexuals per his testimony, but he did state that "I didn't call anybody faggot." (366:20-370:1; 374:3-375:15). In watching the video, Adriano does say that after coming from the bathroom, "it did look like I stumbled" because he was drunk when it was alleged he made the comments in the restaurant. (377:5-378:22). Adriano did not remember seeing anything that looked like "sex on the sidewalk" coming out of PepperJax but does state that if he had seen such he would have been surprised and probably would have chuckled and told them they were exposing themselves. (381:17-382:7).

Officer Jeremy Zipay testified that he arrived on scene and made contact with Ryan Langenegger and Joshua Foo and that Ryan had facial injuries and was bleeding down his face. (391:6-16). Zipay further stated, upon viewing the photo of Ryan's injuries that Joshua Foo took that was entered into evidence as Exhibit 9, that the photograph was "[a]lmost exactly" how Ryan appeared on the evening of the incident when the officer saw him. (391:12-25). The blood on the photo was in the same spots as he saw the night of the incident. (E9, Volume IV Part 9:247, 247; 392:1-4). Zipay stated that he talked with Langenegger, who declined medical attention, and Foo, got a description of the suspects they had the altercation with and then had the area canvassed without finding any suspects, and that ultimately Langenegger declined to do a report after they were unable to locate any suspects, so Zipay did not take any pictures given

the declination and lack of a criminal case at that time. (392:5-397:15). Zipay did admit that a reason Langenegger gave for not wanting to do a report or record was that he was going into the Marines. (400:23-401:9). And later Zipay saw a news report alleging "gay bashing" after the media got wind of the altercation after the photo posting. (401:12-402:17).

Detective Michael Curd testified that he was given the assignment of following up on the altercation that occurred in this case. (410:20-411:5). Curd went and talked with the manager of PepperJax Grill and already knew that they had a surveillance system so he could watch any video captured, he just had to find out how to watch such. (411:6-413:10). Curd made contact with Langenegger after being advised Ryan had called in to make a report via telephone and upon meeting with Ryan the detective observed some facial injuries and swelling; Curd also interviewed Joshua Foo. (416:2-419:2). After speaking with Ryan and Joshua, Curd watched the surveillance video and was able to establish when someone, later determined to be Paul Larson, purchased food at PepperJax via credit card transaction; Detective Wendi Dye, who was also working with Curd on this case, then contacted Mr. Larson investigating the case to interview him and was made aware of two names Larson provided. (420:12-422:24; 432:23-435:19). Curd then eventually interviewed those two folks, Joseph Adriano at Adriano's home and the Appellant, Gregory Duncan, after an arrest warrant was served on him. (422:25-424:10).

Jacob Gellinger testified that he was friends with Ryan and Joshua, that he himself was gay and that he sometimes went by the alias or alter ego Fendi Blu about once or twice a week for the last five years including the night of the altercation in this case. (439:9-440:20). Jacob recalled that night "somewhat well" and stated he was dressed the entire evening as Fendi Blu with the heels, dress with exposed midriff and longer brown hair wig on. (440:21-442:1). He consumed alcohol including shots and said that he was intoxicated from the drinks at the

multiple bars he went to before going to PepperJax Grill for food with Ryan and Joshua and sitting at a table with them in the restaurant. (442:2-445:9). Jacob did not recall if anyone approached the table at all throughout the time they were sitting there and he did not recall anyone saying or doing anything other than Joshua and Ryan. (445:10-23). Jacob testified that he "remember[ed] Joshua was slightly uncomfortable for some reason and [Joshua] wanted to leave" so they gathered their things and left. (445:24-446:3). Jacob could remember Ryan went to talk to a girl as they were leaving and when asked if he recalled any males approaching them as they were leaving he said "I don't believe so." (446:7-15). He also recalled that a confrontation happened right outside of PepperJax, but because he was intoxicated he could not recall what was said or any description of the other parties, he just remembered that the volume of the voices were "definitely aggressive … as in it was confrontational" and was from people not in his group (448:3-452:12). Jacob remembered that Ryan was hit when Joseph Adriano and Ryan were standing face to face with Adriano talking in "kind of an aggressive tone" and the Appellant Greg Duncan who was standing behind Adriano "sucker punched" Ryan without having any words. (452:13-453:5). It was at that time that Jacob said he jumped in between Ryan and Greg, and he said Greg did not punch or injure Jacob and that Greg did not say anything before or after the punch. (453:5-454:8). Jacob stated that when he dressed like a woman he felt pretty and one can't physically see that he was homosexual and that he did appear as a woman to some. (456:3-463:18). He also testified that when police came out they only talked to Ryan and Joshua because those two had put him in the car prior to police arriving. (467:2-468:4).

Paul Larson testified that he was with Joey Adriano and Greg Duncan during the evening and then separated from them to get his car and head home before getting a call to come back and pick them up and they decided to get food and head to PepperJax Grill. (472:6-481:25). They

sat down to eat together and Larson remembered that Adriano got up from the table at some point and was swaying back and forth in the middle of the restaurant, eventually they decided to leave and Greg stopped outside to have a cigarette. (482:1-488:8). As they were standing outside to smoke, it came to Larson's attention that Joey was standing face to face with Ryan and that the two might get into a fight although they were not physically touching each other and then suddenly Greg punched Ryan without saying anything. (488:9-492:11). Adriano, Duncan and Larson left the area and the next time Larson heard about this incident was after or when police contacted him; Larson told Duncan police were looking for him and stated Duncan said that they don't know who he is and can't find him according to Larson's testimony. (492:12-496:23). Larson further testified that he didn't hear anyone make homophobic comments like "queer", "pussy", "faggot" or any other like term, never laughed at anyone for being gay and it was not discussed in his party at all and that in an instance Joey and Ryan were face to face and it seemed like they were going to fight when Greg suddenly threw the punch. (496:24-525:3). He also said he did not hear any of the comments Joey was alleged to have made about someone being disgusting and that he had no idea that the other group had gay guys in it. (496:24-531:11).

Ryan Langenegger, the victim, testified similarly to Joshua Foo about the sexual orientations of each man in his party where he was straight or heterosexual and Joshua and Jacob were gay or homosexual and that they went to bars and ultimately PepperJax Grill that evening. (533:12-540:8). He said he had on a suit while Joshua had on a black windbreaker and suit jacket and Jacob was dressed in drag as a female. (540:9-541:8). Joshua Foo started urging them to leave so they did, but Ryan himself did not see and was "not aware at all" of any exchange inside the restaurant by Adriano, Duncan or Larson towards Ryan's group. (543:17-549:25; 576:4-583:25)). After leaving the bar he testified that they were "confronted" outside by Joey Adriano

who was calling Joshua Foo and Jacob Gellinger "faggots" so Ryan tried to calm down the situation as Adriano continued to call derogatory names towards the entire group; he and Joey were face to face and then suddenly he was punched by Greg Duncan, the Appellant who hit him without saying anything before or after, and then Duncan, Adriano and Larson left and Ryan could hear laughing coming from one of them. (550:1-559:1). Langenegger testified that police arrived and could not find any suspects, so he did not do a report that evening and went to Joshua's house where he took a photograph and then cleaned up after. (559:2-565:3) He did agree that being a marine was one of the multiple reasons why he didn't want a report filed initially. (569:6-572:3). He also said he only had two Bud Lights (beers) that night so he was not intoxicated and when asked if Joshua helping Jacob put on his heels looked like sex on a sidewalk he said no it does not to defense counsel and the jury, but he did say if someone was having sex on a sidewalk he would agree that would "be [fucking] disgusting". (575:7-22; 594:5-12). Ultimately, Greg Duncan never called him or the others anything derogatory, but he did throw a punch. (592:6-15).

After a motion for a directed verdict was not granted once the State closed its case, the Appellant testified that he lived in Omaha at the time and did go out that Halloween weekend on the night of the incident when he met up with Joseph Adriano and Paul Larson. (605:17-607:8). Duncan testified that during the course of the evening he drank a few beers and a couple of shots here and there but Adriano definitely drank more than he needed to and was definitely drunk. (608:12-609:21). After leaving the bars they went to get food at PepperJax and sat down to eat at a table together during which time Adriano wandered around a bit inside the restaurant. (609:7-610:20). Duncan testified that he sat down at his table and he was actually turned away from the table where Joshua Foo, Ryan Langenegger and Jacob Gellinger were and he never noticed that

other party inside of the restaurant nor did any actions or made any comments towards them as he did not know they were even there. (610:21-612:17). Duncan further testified that he may have glanced over in that direction when Joey was wandering around over there and laughed at Joey, but that he did not notice anything about the other table and at no time did he stare at them, hear Adriano call them "faggots" or anything like that and have a verbal confrontation with them in the restaurant. (612:12-616:21).

Duncan testified that they left the restaurant and as he stopped outside to have a cigarette there were several people outside the restaurant walking around at that time and he looked over and saw Joey face to face with the man that he punched, Ryan Langenegger. (617:17-621:9). Joey and Ryan were face to face and Duncan testified that he saw [or thought he saw] Ryan push Joey so he punched Ryan to defend Joey. (621:7-625:24). Duncan further testified that he did not know anything about the sexual orientation of Ryan nor any other person in Ryan's group and that he never heard any of the derogatory comments alleged to have been made by Joey. (626:3-630:13; 634:9-641:20). Duncan testified that he simply punched Ryan to defend Joey and knew nothing of the sexual orientation aspect or media blitz that came after it. (642:17-646:17).

SUMMARY OF THE ARGUMENTS

The District Court erred in determining the meaning and standard of the assault discrimination-based statute in Nebraska. The evidence adduced in trial through the video and the State's witnesses and also including the testimony of the Appellant was insufficient to support a verdict of guilty and the court should have included the requested jury instruction which would have assisted the jury by answering a question of law for them to use in their deliberations. Trial counsel's pre-trial preparation, or lack thereof , in trial acts and questioning and closing arguments taken separately and combined together was ineffective to Appellant's

case and did so prejudice Appellant's defense. Lastly, the District Court abused its discretion when it imposed an excessive sentence on the Appellant given the circumstances.

ARGUMENTS

I.

THE DISTRICT COURT ERRED IN ITS DETERMINATION OF THE MEANING AND REACH OF THE ASSAULT THIRD DEGREE, DISCRIMINATION BASED "HATE CRIME" STATUTE IN NEBRASKA AND ITS APPLICATION TO THIS INCIDENT WITH THE APPELLANT.

Standard of Review

The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Garcia*, 281 Neb. 1, 5, 792 N.W.2d 882, 886-887 (2011) (citing *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009). That is, the Supreme Court of Nebraska has held that to the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court. *State v. Huggins*, 291 Neb. 443, 447, N.W.2d 80, 83 (2015).

Nebraska Revised Statute Section 28-310 (1) and (2) provides: a person commits the offense of assault in the third degree if he a) intentionally, knowingly, or recklessly causes bodily injury to another person; or b) threatens another in a menacing manner; assault in the third degree shall be a Class I misdemeanor unless committed in a mutual consent fight or scuffle, in which case it shall be a Class II misdemeanor.

Nebraska Revised Statute Section 28-111 further provides an enhancement for assault in the third degree *if the* ***defendant who commits the assault against another person or a person's***

property did so <u>because of</u> the person's *race, color, religion, ancestry, national origin, gender,* ***sexual orientation****, age or disability* ***or <u>because of</u> the person's association with a person of a certain*** *race, color, religion, ancestry, national origin, gender,* ***sexual orientation****, age or disability* where the defendant shall be punished by the imposition of the next higher penalty classification than the penalty in the first offense, unless the offense is already a Class IB felony or higher, making assault in the third degree when based on this alleged discrimination a Class IV felony [emphasis added].

In this case, the Appellant moved for a directed verdict of acquittal on the hate crime charge as it related to the discrimination-based third degree assault and the court made a ruling on the statute and what "because of" meant within it. (596:5-598:16). The Appellant's trial counsel argued that a hate crime could be proven one of two ways and provided examples of when someone during the civil rights era killed someone because of their race, because they were black, or, because they were white or non-black associating with black people. (596:21-597:4). Trial counsel reasoned that because State needed to show some evidence that Appellant "specifically targeted or selected the victim as a result of or because he was associated with ... gay people ..." and did not in this case that the trial court should grant the motion for a directed verdict of acquittal as to the enhanced offense of third degree assault, discrimination based. (596:10-597:14). The State didn't even want to be heard on the matter and just submitted the matter unless the court had any questions for the State, which the trial court did not. (597:15-18).

The trial court admitted that Nebraska does not have a lot of or really any case law regarding what "because of" means as a term, and therefore the trial court did a little bit of research on the matter. (597:19-598:5). In its research, the court saw that other jurisdictions with discrimination-based statutes used different standards where some jurisdictions required that it

must be the "sole reason", some jurisdictions made it a "but for" type of test like Nebraska has in proximate cause civil cases and other jurisdictions had it where the victim was selected "substantially because of their association with a particular sexual orientation." (598:6-16). The trial court, saying it looked at the Nebraska court, said Nebraska law would "probably be in line with the substantial factor case law." (598:17-19). If that is not the proper standard, and one of the other standards is what should be adopted such that discrimination on sexual orientation, or any of the other protected classes, must be the "sole reason" or the "but for" cause of why Appellant punched the victim in the case at hand, the Appellant's conviction must be overturned. Here, it cannot be argued that sexual orientation was the "sole reason" of the punch because other reasons as seen in the evidence included that two parties were looking like they were going to fight and that Duncan hit Ryan Langenegger because of that and/or to defend Joey Adriano, and furthermore it also cannot be argued that sexual orientation was the but for cause here because if the parties were going to fight normally like any bar fight, sexual orientation was not the but for cause, hot heads, arguments and alcohol were involved. The trial court provided no reasoning or cites to case law to show how they determined the standard to be a substantial factor test, which ironically was the most lax making alleged criminal behavior easier to prove, such that a civil case requiring a but for analysis would require more than proof of a crime which contradicts with the standards of proof and being beyond a reasonable doubt. Even under the substantial factor test the trial court used, the appellant should have his conviction on the enhanced charge overturned given the insufficient evidence presented at trial.

II.

THE DISTRICT COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION TO DISMISS AT THE CLOSE OF THE STATE'S CASE BECAUSE THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION.

Standard of Review

"In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: [The Supreme Court does] not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

In this case, the evidence presented through the witnesses by the State in its case in chief is not of the quality required to meet the standard of review. That is because the State failed to provide sufficient evidence to convict Mr. Duncan by proving beyond a reasonable doubt that Mr. Duncan committed the assault on Mr. Langenegger ***because of his sexual orientation or because he was associating with someone of a certain sexual orientation***. The below court seemed to almost come to that conclusion that the evidence was insufficient, and said maybe direct evidence was lacking, as it stated when Appellant moved for a directed verdict at the close of State's case that "although I agree, Mr. Davis [Appellant's trial counsel], there is not direct – necessarily direct evidence of your client's – of your client making outward racial slurs, I think because of Mr. Foo's testimony, there probably is at least an arguable inference for the State, and I think because it is – this is an intent – specific intent crime and it's a specific intent portion of

that, that there is enough for the inference to be argued and, therefore, I am going to let it go to the jury." (598:20-599:4). This reasoning by the lower court was without logic to say that this is a specific intent crime but there is not much there to show Duncan had the specific intent the court refers to. This was after the State had put on all of its eight witnesses, inclusive of Mr. Foo. Thus the below court keyed in on Mr. Foo's testimony specifically, and did not cite the person who got hit, the person who was dressed in drag as a man dressing like a woman nor the person who threw the punch, nor any of the other witnesses, in the court's determination of whether the evidence was sufficient or not. In fact the court seemed to say or imply that the other testimony and evidence that the State had put forth was not enough if not for Foo's testimony, which is why Foo's testimony was listed out in length in the Statement of the Facts. If this decision is affirmed on what amounts to basically Foo's perception and not per se facts, it could lead to a slippery slope and criminalize or enhance behavior where it should not be.

The video in evidence, offered via stipulation of the parties, unequivocally did not show any instance where Gregory Duncan did anything while inside the restaurant by acts, conduct or words towards the victim Ryan Langenegger nor the other two people he was associating with, Joshua Foo and Jacob Gellinger, who happened to be homosexual. Joshua Foo provided no testimony at all that Greg Duncan ever said any verbal derogatory comments or did any other hostile action towards Foo, Jacob or Ryan other than the punch he threw as Ryan and Adriano faced off. Joshua Foo testified as the State used the video that you could see him, Jacob and Ryan on the video as they sat down and ate and when they left the restaurant. (209:16-214:11; 219:11-20; 222:24-223:17). Foo also testified that after his party sat down that Joey Adriano, and only Adriano, eventually came over to the table where Foo, Ryan and Jacob were, which was approximately 12 feet or so away in a noisy restaurant from where Gregory Duncan and Paul

Larson remained and that Adriano made derogatory comments towards all in Foo's party at that time. (215:10-217:24). However, Jacob Gellinger testified that he did not hear and could not recall any such comments while in the restaurant by anyone approaching the table and on their exiting the restaurant while still inside and he was sitting with Foo and walking with Foo during those times in question. (445:10-23; 446:7-15). Ryan Langenegger, the victim who was punched, also testified that Foo urged them to leave but he himself did not see and was "not aware at all" of any exchange inside the restaurant by Adriano, Duncan or Larson towards Ryan's group as he was also sitting with Foo in the restaurant and exited just shortly after Foo and ahead of Duncan, Adriano and Larson. (543:17-549:25; 576:4-583:25). If these parties didn't hear comments Adriano was alleged to have made when in close vicinity with Foo and Adriano, wouldn't it be fair and not out of the question, barring evidence to the contrary, that Duncan also didn't hear any such comments.

Gellinger, who was the one dressed in drag, and who happened to be intoxicated like Joey Adriano was, also testified that he could not recall what was said or by whom outside of the restaurant and only recalled an aggressive confrontation occurred when Joey and Ryan were face to face and Greg Duncan then "sucker punched" Ryan without having any words. (448:3-453:5). Paul Larson even testified that it came to his attention Joey was standing face to face with Ryan and that they might get into a fight and that suddenly Duncan punched Langenegger without saying anything. (488:9-492:11). Larson even further stated that when Greg threw the punch Larson had not heard any of the alleged homophobic comments and their party had not discussed or laughed at anyone for being gay and did not know anyone's sexual orientation. (496:24-525:3). It is also telling that Gellinger said he even jumped into the middle of the fracas after the punch and yet Greg did not attempt to punch or injure him nor did Greg say anything derogatory

towards Gellinger, in a dress, after having punched Ryan. The victim himself ultimately said that the defendant, Duncan, never called him or the others anything derogatory, but he did throw a punch. (592:6-15). That punch was after a confrontation or heated argument was occurring as all said, even though not all knew what words were said as they testified to (Gellinger, Larson, and later Duncan in the Defense's case, for example).

The video and the testimony from the State's witnesses contradicts that Mr. Duncan acted because of the sexual orientation of Ryan Langenegger or because of his association with persons of a certain sexual orientation because it clearly shows that Greg Duncan threw the punch after a sudden quick argument outside a restaurant and bar area when two parties looked aggressive towards each other as stated by multiple parties on scene, the State's witnesses, and later also stated by the Defendant himself. Jacob Gellinger testified to that. (448:3-454:8). Paul Larson testified to that. (488:9-531:11). Ryan Langenegger testified to that. (543:17-593:15). Furthermore, all of the State's witnesses including Foo said that you either could not tell sexual orientation just from the dress that night, without someone telling you and/or that they did not know what the sexual orientation of the parties were that night on either side of the two parties of three. Joshua Foo admitted such under cross examination in his testimony. (252:9-280:5). Jacob Gellinger testified to such and stated that when he dressed like a woman one can't physically see that he was homosexual and that he did appear as a woman to some (456:3-463:18). Paul Larson testified that he didn't even notice Jacob dressed as a woman, know that anyone was gay and what's more Larson stated that it never even was a thought that night ahead of the punch. (503:17-505:3; 506:11-509:4). Ryan Langenegger testified he was aware of the sexual orientations of his friends Joshua Foo and Jacob Gellinger but he had no idea of the sexual orientations of Joey Adriano and Greg Duncan. (536:6-19; 572:4-18). Given the video evidence

and the disparity with other witnesses statements and what they perceived that evening contradictory to what Foo perceived and Foo's feelings that something was amiss, it is clear that the video and State's witnesses show the burden of proving the elements beyond a reasonable doubt was not met. No rational trier of fact could or should find beyond a reasonable doubt that Duncan intended to assault Langenegger because of his sexual orientation or because of his association with persons of a certain sexual orientation as a trier of fact would be hard pressed to even reach a conclusion Duncan knew or was aware of the sexual orientations of the parties at the time he threw the punch, even trying to use circumstantial evidence since others could not make a determination it would be fair to say that Duncan or a reasonable person in his position also could not make such a determination. A rational trier of fact could determine that Duncan simply assaulted Langenegger, a misdemeanor, which he admitted to save for his claim of defense of others when he testified in his case in chief. (642:17-646:17). The evidence adduced in trial is insufficient to support the conviction on third degree assault, discrimination based and therefore the conviction must be overturned. *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015).

III.

THE DISTRICT COURT ERRED IN NOT GRANTING THE APPELLANT'S MOTION TO DISMISS AT THE CLOSE OF THE APPELLANT'S CASE BECAUSE THE STATE HAD PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION AND/OR STATE'S EVIDENCE HAD BEEN REBUTTED SUCH THAT IT WAS INSUFFCIENT.

Standard of Review

The standard of review after the close of the Defense's (or Appellant's) case at trial is the same as that at the close of the State's case.

"In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: [The Supreme Court does] not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

In this case, the evidence presented through the witnesses by the State in its case in chief is not of the quality required to meet the standard of review as already stated above, but combined with the evidence from the Defense's case the quality required is even more lacking and further shows that the State failed to provide sufficient evidence to convict Mr. Duncan by proving beyond a reasonable doubt that Mr. Duncan committed the assault on Mr. Langenegger ***because of his sexual orientation or because he was associating with someone of a certain sexual orientation***. That is because the proof of Duncan knowing the sexual orientation to do something because of such sexual orientation is even more lacking in evidence. Duncan testified that he sat down at his table actually turned away from the table where Joshua Foo, Ryan Langenegger and Jacob Gellinger were and that he never noticed them inside of the restaurant or did any actions or made any comments towards them. (610:21-612:17). Duncan also further testified that although he might have looked over in that direction as Joey was wandering and doing drunken things that he never heard Joey use any derogatory comments inside or outside of the restaurant nor did knew ever know the sexual orientation of the victim, Ryan, or any other

person in his group prior to throwing the punch. (612:12-616:21; 626:3-630:13; 634:9-641:20). Duncan further testified that he thought he was defending others, i.e. Joey, and subsequently in turn himself that night. (642:17-646:17). Duncan might have acted stupidly and ultimately without merit in that, but that doesn't mean that he did some act because of sexual orientation, and the State has not provided sufficient evidence to show such beyond a reasonable doubt for a conviction under the laws of the State of Nebraska. Therefore, again, the evidence adduced in trial is insufficient to support the conviction on third degree assault, discrimination based and therefore the conviction on such enhanced charge must be overturned. *State v. Covey*, 290 Neb. 257, 859 N.W.2d 558 (2015).

IV.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S REQUESTED SPECIAL JURY INSTRUCTIONS FOR JURY INSTRUCTION NO. 3 ON THE DEFINITION OF SEXUAL ORIENTATION STATING THAT A COMMON UNDERSTANDING WAS SUFFICIENT.

Standard of Review

"Whether a court's jury instructions were correct is a question of law. On a question of law, we are obligated to reach a conclusion independent of the determination of the court below." *State v. McClain*, 285 Neb. 537, 549, 827 N.W.2d 814, 826 (2013) (citing *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011)).

In the case before the Court, the Appellant provided the trial court with some proposed jury instructions on the definition of "sexual orientation" to assist the jury in its determination of the charge of third degree assault, discrimination based. (404:24-405:15). Specifically, trial counsel pointed out that there is not a definition in the Nebraska statutes with respect to sexual

orientation so counsel on behalf of Appellant proposed using the definition of sexual orientation that he had been able to find for different states that did have a definition. (405:17-24). Those other, different states defined "sexual orientation" to mean "heterosexuality, homosexuality, or bisexuality." (405:16-22). Additionally, trial counsel offered the court a federal case that held that "gender identity disorder is unrelated to sexual orientation ..." and counsel argued that using that federal case "basically we're saying that in this case, even if this man was harassed because he was cross-dressing, that's not covered by ... [and] ... that doesn't fall within the definition of sexual orientation..." as "gender identity disorder is unrelated to sexual orientation as per the DSM-IV [Diagnostic and Statistical Manual]" according to trial counsel per that federal case. (405:25-407:9). The court refused to use the jury instructions because the court believed that sexual orientation did not need to be defined and that a common understanding of homosexual versus heterosexual was sufficient to work in this particular case. (653:15-655:3).

The court made that determination and refused the instruction request even after witness testimony in this case defined sexual orientation or statuses differently and without a common understanding. For example, State witness Foo said that he didn't really know what gay looks like. (252:21-253:2). Foo also testified that as far as sexual orientation, there are more statuses than just heterosexual, homosexual or bisexual. (257:13-22). Foo also agreed that it was true that "if a man dresses as a woman, that doesn't necessarily mean he's a homosexual" and Foo stated that "[n]ot everyone that wears women's clothing is gay" which would go right with the instructions counsel was requesting be given to the jury as a helpful and needed instruction and which would be critical to the Appellant's defense and fundamental rights. (261:9-262:4; 405:25-407:9). Furthermore, Jacob Gellinger testified that there was now a range in sexual orientation or homosexuality and people could be "genderqueer", cross-dressing to slightly post transsexual

and more. (461:13-462:11). The victim in this case, Ryan Langenegger, testified that he went to a gay bar and was part of a drag show himself but that didn't mean he was gay or determine his sexual orientation because straight people go to gay bars and perform in shows in gay bars. (573:1-574:11). By not including the requested instruction with the crime charged, the trial court omitted key and vital language in instructing the jury on the elements of the charged offense which could lead to jury confusion and the Appellant being convicted of the charge on something other than sexual orientation, or because of sexual orientation, like cross dressing by itself. *See e.g., State v. Strickland*, 290 Neb. 542, 561-562, 861 N.W.2d 367, 387 (2011).

V.

THE APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE IN HIS ASSISTANCE FOR HIS FAILURE TO DEPOSITION OR INTERVIEW FULLY AND/OR AT ALL THE WITNESSES PRIOR TO TRIAL WHICH SHOWED ON THE RECORD IN TRIAL AND FOR TRIAL COUNSEL'S INCONSISTENT AND ARGUABLY ILLOGICAL OR DEMEANING THEORY OF DEFENSE AND CLOSING AROUND SEXUAL ORIENTATION AND ALLEGED EVENTS IN THIS MATTER WHICH ACTUALLY PREJUDICED THE APPELLANT'S DEFENSE.

Standard of Review

In a direct appeal, where an evidentiary hearing is not required, the determining factor of a claim of ineffective assistance of counsel is whether the record is sufficient to adequately review the question. *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013) (citing *State v. Freemon*, 284 Neb. 179, 817 N.W.2d 277 (2012)).

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), one must show that his counsel's

performance was deficient and that this deficient performance actually prejudiced his defense. *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

In this case the record seems or appears to reflect that counsel did not deposition or interview the witnesses prior to trial given some of the testimony that he elicited in his examination of multiple witnesses. For example, in trial counsel's cross examination of the State's first witness, Joshua Foo, trial counsel questioned or insinuated that Foo "morphed," altered or embellished the injuries of the victim in the photograph Foo took since he wanted to portray Ryan as looking bad, Foo was going on a gay crusade of sorts and counsel also suggested that Foo might have purposely smeared blood in that photograph. (330:18-335:11). Had trial counsel conducted a deposition or interview of Foo prior to trial, or even of the officer, Jeremy Zipay, who went to the scene the night of the incident, trial counsel would have known that Foo did not do such a thing and what's more trial counsel would have known not to suggest that type of bad faith manipulation in front of the jury. Instead, Foo immediately rebutted that defense theory as not seeing it that way even when trial counsel cut him off abruptly right in front of the jury. (330:18-335:11). Then what's more trial counsel gave the State an advantage or point with the jury because the State quickly redirected Foo on Defense's theory of "morphing" in doctoring the photograph and provided credibility to Foo's testimony as a whole when Foo stated that the police officer who saw Ryan that night could see the photograph and compare it to how police remembered seeing Ryan that night (not to mention Ryan could also increase the credibility of the photograph and Foo's testimony and subsequently later did). (335:16-337:10; 338:17-24). Officer Zipay then later testified that on the night of the incident the victim had facial injuries and was bleeding down his face and that the photograph was "almost exactly" how the victim appeared on the evening of the incident when the officer saw him (391:6-16; 392:1-4).

And the morphing was only one of the things trial counsel did which seemed to push the envelope a bit. Trial counsel also put forth a "sex on a sidewalk" theory as to what might have happened when Foo was helping Gellinger put on the high heels when Adriano, Langenegger, Foo or even Larson said they saw no such a thing, and even the Appellant didn't support such, and thus making the theory unsupported and like the defense was grasping at straws or throwing darts at a board to see what sticks so to speak when taken with the morphing and other things. (323:11-324:18; 381:17-382:7; 575:7-22; 594:5-12).

Furthermore, trial counsel's closing was demeaning and disparaging to the victim and the State's witnesses as counsel said and put forth the following statements or ideas in all their ridiculousness in defending this case:

1. It's not about gay rights but about the rights of the Defendant (as if both couldn't have rights simultaneously). (691:10-13).
2. Ridiculed how a marine would be in a drag show and that's why he wouldn't want to make a report of a fight. (695:16-22).
3. Told the jury to consider the witnesses the State is relying on – the man in drag, another gay man that lived a lie until he was 28, and a person who has a political agenda (like their testimony meant less because of those things or was driven by them). (700:17-20).
4. Stated could you believe these people, could you believe a person in drag, a guy named Joshua Foo who has got a political agenda and that that was what this was about, and whether you could believe such people in a "serious transaction of life" (as if such people lacked seriousness and candor because of such). (700:21-701:10).
5. The jury would have to listen to some "skewed interpretation" to believe that Adriano used the term "faggot" or the like and that such term was a slur. (702:1-13).

6. Trial counsel stated "You got – their witnesses all were involved and they've got gay agendas." (706:20-23).
7. Trial counsel also stated "You have to believe them, the people with this gay agenda. You have to believe them beyond a reasonable doubt. So this is totally not pieces at all [to a jigsaw puzzle example putting together what happened in a case]." (706:2-5; 707:4-7).
8. "[G]ay rights don't mean anything in this case. My client's rights do." (714:5-6).
9. This case is about one man's gay agenda, Josh Foo, to turn this into a case about sexual politics as a battle cry for gay rights and to seek media attention which was stated in such a way like this was only being done for ill-conceived reasons. (725:5-18).
10. And more.

The State then got up in rebuttal and stated:

"[Appellant's trial counsel] said at one point the State doesn't have very good witnesses ... Look at who the persons are that the State has. Can you believe them? They have a man in drag, someone who lived a lie, and a marine that performed in a drag show ... [n]ow, I think when you look at the credibility instruction that the judge read to you, it doesn't say you can't find them believable if they dress in drag or if they're gay or if it took them a while to get the courage to come out. Don't buy into those unfortunate and shameful stereotypes. ... They came in here and answered every single one of all of the intimate and embarrassing questions that you can imagine, asking what their sexual orientation is, asking what kind of underwear they're wearing. They came in here and that's what they did."

State further said in its rebuttal part of closing that "[a]nd I thought that once Mr. Duncan admitted that he didn't see anyone getting their shoes put on, that we would no longer hear

anything about this alleged sex on the sidewalk, but [Appellant's trial counsel], of course, went into that again."

Trial counsel's illogical and/or demeaning theory of defense and characterization of the victim and witnesses in this case was more than just ill conceived, it actually prejudiced Appellant's defense. Overall trial counsel's pre-trial preparation combined with what happened in trial as he threw darts at the wall and with closing was ineffective and such performance did so prejudice Appellant's defense.

VI.

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT IMPOSED AN EXCESSIVELY HARSH SENTENCE ON THE APPELLANT.

Standard of Review

An appellate court may disturb a sentence imposed within the statutory limits only when the sentencing court has abused its discretion. *State v. Hurbenca*, 266 Neb. 853, 865, 669 N.W.2d 668, 677 (2003) (citing *State v. Segura*, 265 Neb. 903, 660 N.W.2d 512 (2003)).

In this case, Appellant argues that the sentencing court has abused its discretion given its unduly harsh sentence under the circumstances. In imposing a sentence, a court is not limited in its discretion to any mathematically applied set of factors. *State v. Kula*, 262 Neb. 787, 792, 635 N.W.2d 252, 256 (2001). The appropriateness of a sentence is a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude as well as all of the facts and circumstances surrounding the defendant's life. *State v. Kula*, 262 Neb. 787, 792, 635 N.W.2d 252, 256 (2001). But, "[t]here must be some reasonable factual basis for imposing a particular sentence." *State v. Hamik*, 262 Neb. 761, 775, 635 N.W.2d 123, 134 (2001).

Here, Appellant has been sentenced to twelve to eighteen months in prison even though the court specifically said after the verdict at sentencing that "[t]his crime did not involve significant violence." (764:8-20). Prior to the case going to the jury the court felt that it was a "close call" that there was even enough there to go to the jury on the enhancement and make this more than a misdemeanor crime. (596:7-599:4; 651:10-652:4). The evidence presented at trial brought the court to that statement and the Appellant admitted as part of his defense that he did hit the alleged victim but maintained steadfastly even in apologizing to the court at sentencing that "[i]n absolutely no way was it intentionally to harm someone because of their sexual orientation." (758:24-25). The Appellant stated at sentencing how this conviction as an enhanced crime, a felony, has destroyed his life and costs him income, money, his career, and to have this felony on his record. (759:19-24). The Appellant's criminal convictions record was minimal, as presented on the record, as dispositions were unknown to know if cases of arrests led to anything and combined with the court's observations of what the crime constituted Defense counsel asked for no more than one year in jail and made the argument that Appellant had served some time already. (752:13-765:18). With the court's reservations on the enhancement aspect, jail time as a sentence as opposed to prison time or probation available, Appellant was unduly sentenced to an imprisonment term, under the circumstances an unduly harsh sentence and justice warrants that it be reduced on appeal. Even considering demeanor, where lateness of the Appellant and other acts might be considered, such demeanor would usually lead only to jail time and should not lead to a bump in imprisonment as here should that be cited thereto.

CONCLUSION

For the aforementioned reasons, the Appellant respectfully requests that the Appellate Court overturn the jury verdict from the District Court of Douglas County, hold that there was

insufficient evidence to support a conviction, especially under the discrimination based enhancement statute, and reverse and remand the case for a judgment, and/or reduction in sentencing of the unduly harsh sentence, in accordance with such or a new trial consistent with the Nebraska Supreme Court rulings.

Respectfully Submitted,

THOMAS C. RILEY, #13523

Douglas County Public Defender

CINDY A. TATE, #22571

Assistant Public Defender

KOREY T. TAYLOR, #25853

Attorney Law Clerk

Attorneys for Appellant

IN THE COURT OF APPEALS FOR THE STATE OF NEBRASKA

THE STATE OF NEBRASKA,	)	NO. A-15-0668
	)	
	)	
Appellee,	)	
	)	
vs.	)	**PROOF OF SERVICE**
	)	
GREGORY DUNCAN,	)	
	)	
Appellant.	)	

STATE OF NEBRASKA)
) SS.
COUNTY OF DOUGLAS)

CINDY A. TATE, one of the Attorneys for the Appellant herein, being first duly sworn on oath, deposes and states that on the 14th day of October, 2015, true copies of the Brief of Appellant were served upon Doug Peterson, Attorney General of the State of Nebraska, by regular U.S. Mail, and on the Clerk of the Nebraska Court of Appeals, by U.S. Express mail, to the State Capitol Building, Lincoln, Nebraska 68509.

THOMAS C. RILEY,
Douglas County Public Defender
Attorney for Appellant,

By _____
CINDY A. TATE, #22571
Assistant Public Defender
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 13th day of October, 2015.

Jacqueline Callahan
Notary Public

GENERAL NOTARY - State of Nebraska
JACQUELINE CALLAHAN
My Comm. Exp. May 5, 2016