NO. A-15-668

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

GREGORY S. DUNCAN,

Appellant.

APPEAL FROM THE DISTRICT COURT

OF DOUGLAS COUNTY, NEBRASKA

The Honorable Leigh Ann Retelsdorf, District Judge

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

A. Nature of the case

Duncan is appealing from his conviction for third degree assault, discrimination based, a Class IV felony. He was found guilty after a jury trial. This is a direct appeal.

B. Issues before the district court

For purposes of this appeal, the issues before the district court were: (1) whether the evidence was sufficient to accept the jury's guilty verdict, (2) whether to give Duncan's proposed instruction on the definition of "sexual orientation," and (3) the determination of an appropriate sentence.

C. How the issues were decided in the district court

The district court declined to give Duncan's proposed jury instruction; accepted the jury's guilty verdict; and sentenced Duncan to a period of 12 to 18 months' imprisonment.

D. Scope of review

In reviewing a claim that the evidence was insufficient to support a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Davis*, 290 Neb. 826 (2015).

Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Stricklin*, 290 Neb. 542 (2015).

Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Ortega*, 290 Neb. 172 (2015). Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Abdullah*, 289 Neb. 123

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Custer*, 292 Neb. 88 (2015).

PROPOSITIONS OF LAW

1.

In a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. *State v. Seberger*, 284 Neb. 40 (2012).

2.

When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. *State v. Sing*, 275 Neb. 391 (2008).

3.

The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Sing*, 275 Neb. 391 (2008).

4.

Whether a defendant possesses the requisite state of mind is a question of fact and may be proved by circumstantial evidence. *State v. Nguth*, 13 Neb. App. 783 (2005).

5.

In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor. *State v. Sexton*, 240 Neb. 466 (1992).

6.

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Dominguez*, 290 Neb. 477 (2015).

7.

All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Watt*, 285 Neb. 647 (2013).

8.

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. Armagost*, 291 Neb. 117 (2015).

9.

To prevail on a claim of ineffective assistance of counsel under *Strickland,* a defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show deficient performance, the defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. 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. *State v. Vanderpool*, 286 Neb. 111 (2013).

10.

In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts surrounding the defend ant's life. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Sikes*, 286 Neb. 38 (2013).

STATEMENT OF FACTS

On the night of October 26, 2013, Ryan Langenegger went to a couple bars in downtown Omaha with two of his friends, Joshua Foo and Jacob Gellinger. (533:6-543:22) Ryan is heterosexual, and both Joshua and Jacob are homosexual. (536:6-19) When Jacob goes out, he often dresses up in women's clothing and goes by the name of Fendi Blu, which is Jacob's "drag persona," or his alter ego as a homosexual crossdresser. (438:16-441:10; 457:7-462:11)

On this particular night, October 26, Ryan, Joshua and Jacob went to a drag show at a gay bar in downtown Omaha. (438:16-442:1) Ryan was wearing a suit and tie. (213:23-214:11; 257:4-258:3) Joshua was wearing jeans, a scarf, a women's shirt with sequins, and a black suit jacket. (210:15-19; 256:12-17) And Jacob, who is 6'5" and was dressed as his drag persona Fendi Blu, was wearing 3-inch heels, a two-piece dress that went to the middle of his thighs and showed off his midriff, makeup, and a women's wig. (201:25-212:2; 258:15-259:2; 273:4-13; 441:11-442:1)

After the drag show, at about 2:00 or 2:30 a.m., Ryan, Josh and Jacob went to a nearby PepperJax Grill to get some food. (197:10-201:24; 533:6-543:22) The three of them ordered their food and sat down to eat, and while they were eating, Joshua noticed that there were three guys at a nearby table, about 12 feet away, who were joking and looking at Ryan, Joshua, and Jacob's table. (212:25-220:12) It is undisputed that the three guys at the other table were Joey Adriano, Paul Larson, and the appellant, Gregory Duncan.

Joshua testified that at one point as they were eating, one of the three guys, later identified as Adriano, came up to their table and then looked back at his friends and said, "Should I? Should I?" (220:13-222:9) Josh did not like the tone of Adriano's voice, so he told Ryan and Jacob that they should leave. (222:10-15) Joshua and Jacob gathered up their stuff to leave, but Ryan, who testified that he did not realize the severity of the situation, went to talk with a girl he knew in the restaurant while Joshua and Jacob went outside. (222:16-229:22; 533:6-543:22) Joshua testified that, as he and Jacob left, he heard derogatory comments such as "fag" coming from the area of Adriano, Larson and Duncan's table. (222:16-224:4)

When Joshua and Jacob got outside, Joshua helped Jacob put on his high heels and then Ryan came out at the same time as Adriano, Duncan and Larson. (224:5-229:22) Ryan, Joshua and Jacob started discussing whether they should take an alternate route to their car, and then Adriano came up to them and called them "queer" and "faggots" and again looked at his friends and said "Should I?," at which point Duncan and Larson started laughing and Jacob said, "I know. I

am just a boy in a dress," and Adriano said, "Yeah, and you're fucking disgusting." (229:23-233:7; 338:25-339:15; 543:23-550:24) Ryan tried to calm down the situation and told Adriano and that they were not looking for trouble and just wanted to go home, and then Adriano again called Ryan and the others "faggots" and said to Ryan, "Come on, you fucking pussy." (233:8-234:23; 550:25-555:22)

At that point, Ryan and Joshua explained, Adriano was standing about an arm's length away from Ryan, and Duncan and Larson were just behind Adriano. (234:6-235:13; 585:10-593:3) Ryan again tried to tell Adriano that they just wanted to go home, but before he finished his sentence, Duncan stepped forward and punched Ryan in the face. (234:24-238:19; 449:25-455:22; 554:14-555:16) Ryan and Joshua testified that, both before and after the punch, Ryan never raised his voice and he never threatened, pushed, or had any other physical contact with anyone in Duncan's group. (237:2-19; 555:19-558:8; 589:16-590:11) Jacob testified that he recalls Ryan getting "sucker punched," but does not really recall anything from that night because he was so intoxicated. (442:2-455:22)

After getting punched by Duncan, Ryan immediately started bleeding from a gash on his face and then Duncan, Adriano and Larson walked away laughing. (237:20-241:5; 555:23-563:20) Ryan, Joshua and Jacob went to their vehicle and called 911 and an officer with the Omaha Police Department, Officer Zipay, arrived on the scene within about five to ten minutes. (244:8-246:6) Officer Zipay spoke with Ryan and Joshua about what happened and then Officer Zipay and fellow officers in the area looked for the group of suspects but could not find them.

(244:8-246:6; 388:19-395:13; 555:25-567:13) Ryan opted not to file a police report because he did not think the guys would get caught, so no photos were taken at that time and a police report was not initially filed. (395:14-397:15; 555:25-567:13)

After speaking with police, Ryan and Joshua took Jacob home and then went back to Joshua's apartment, where Joshua took a picture of Ryan's face to document his injuries – a copy of which was introduced at trial. (244:8-247:14; E9) After that, Joshua and Ryan went to see one of Joshua's neighbors, who is in the medical field and bandaged Ryan's face, and then Ryan and Joshua went back to Joshua's apartment and went to sleep. (247:15-248:23) Then, the next day, Joshua put a post on Facebook about what happened the night before, along with the picture of Ryan's injuries, so that word would spread about what happened and the guy who punched Ryan might get caught. (248:24-250:14; 336:15-337:10) Officer Zipay, the officer who spoke with Ryan and Joshua right after the incident, was shown the picture of Ryan's face that was posted on Facebook and confirmed that it was almost exactly how Ryan looked right after the incident. (391:17-25)

Soon after Ryan's picture was posted and circulated on Facebook, the media got involved and then the Omaha Police Department (OPD) got involved again too. (248:24-250:14) OPD Detective Michael Curd met with Ryan and Joshua and then went to PepperJax to obtain surveillance videos and credit card transaction information to see if they could identify the suspects, and their investigation eventually led to Adriano, Larson and Duncan. (408:2-423:21; 428:14-438:10) Detective Curd testified that, after interviewing Larson and Adriano, they

arrested Duncan and he did not seem surprised at all that he was being arrested for a hate crime. (423:7-428:3)

The State also called both Joey Adriano and Paul Larson to testify at trial. Adriano's testimony, in summary, was that he remembers going out drinking with Duncan and Larson on the night in question but does not really recall anything else because he blacked out from drinking. (343:2-362:6) Adriano was shown a DVD of the video surveillance from PepperJax and confirmed that it was him in the video, along with Duncan and Larson, but said he does not recall any other details from that night, not even the assault. (343:2-362:6) On cross examination, however, he testified that he remembers being at PepperJax and knows that he did not call anyone a "faggot." (369:6-15) He also testified that he knows he did not call anyone a "fag" or "faggot," which is a derogatory term for homosexuals, because he has friends and family that are homosexual and does not use that term. (362:11-384:25)

Larson's testimony, in summary, was that he was out drinking with Duncan and Adriano on the night in question and was there when Duncan punched Ryan outside of PepperJax, but he has no idea what led up to the assault. (472:4-592:2) He testified that the did not even notice Ryan, Joshua and Jacob that night until they got outside and Ryan and Adriano started arguing, at which point Duncan punched Ryan. (472:4-515:15) He testified that he did not hear any of the words exchanged, though, because there were a lot of people outside and he was just having a cigarette on the sidewalk and was not really paying attention to Adriano.

(472:4-515:15) He testified that he did not hear anyone laughing or making any comments toward Ryan, Joshua and Jacob – inside or outside the restaurant. (472:4-515:15) He testified that he recalls laughing at Adriano once while they were inside eating, because Adriano was so drunk, but other than that he does not recall anyone from his table laughing or making any comments toward Ryan, Joshua and Jacob's table while they were inside, nor once they were outside. (472:4-515:15)

Larson testified that, after the assault, Duncan, Adriano and Larson walked away and went home and he gave the incident no more thought until his wife saw the story in the news and brought it to Larson's attention. (472:4-515:15) Larson testified that he was interviewed by police soon after that, and then he ran into Duncan a week or two later and told Duncan that the police were looking for him, and Duncan responded, "They don't know who I am. They can't find me." (493:1-496:25)

After this evidence was adduced, the State rested and Duncan moved for a directed verdict due to a lack of evidence, which motion was denied. (596:6-599:4) Duncan then presented his case in chief, which consisted of his own testimony.

Duncan's testimony, in summary, was that he did in fact punch Ryan on the night in question but only because he was defending Adriano. (599:21-630:25) Duncan claims that he had no idea anyone in Ryan, Joshua and Jacob's group was homosexual, and did not even notice that Jacob was a man dressed as a woman. (599:21-613:10) He claims he never heard Adriano or anyone else call Ryan,

Joshua or Jacob a "faggot" or any other derogatory term, even while Adriano and Ryan were arguing, and never heard Jacob say that he was "just a boy in a dress." (599:21-622:3) Duncan claims that he was just standing there having a cigarette and did not hear any of this, and did not even know why Ryan and Adriano were arguing, but then he saw Ryan push Adriano so he stepped in and punched Ryan in order to defend Adriano, who was too drunk to defend himself. (599:21-640:15)

Duncan acknowledged, however, that he was right behind Adriano as he was allegedly pushed by Ryan. (639:20-640:15) He also acknowledged that, when Paul Larson testified earlier at trial, Larson testified that he spoke with Duncan before he was arrested and told Duncan the police were looking for him, to which Duncan responded, "They don't know who I am. They can't find me." (645:19-647:4) Duncan claims that this was not true, and testified that Larson never told him that the police were looking for him and he never said anything to the effect of "They don't know who I am. They can't find me." (645:19-647:4)

After Duncan testified, the defense rested and again moved for a directed verdict, which was again denied. (651:10-652:11) The case was then submitted to the jury and Duncan was convicted of third degree assault – discrimination based. (745:17-748:2) He was sentenced to a period of 12 to 18 months' imprisonment. (764:16-22)

This appeal followed.

ARGUMENT

Assignments of Error 1 through 3: Denial of directed verdict.

Duncan's first three assignments of error each relate to the district court's denial of his motion for a directed verdict. His first assignment of error alleges that, in denying his motion for a directed verdict, the district court erred by misapplying the meaning and reach of Nebraska 'hate crime' statute, § 28-111. Appellant's Brief at 3, 22-24. His second assignment of error alleges that the district court erred by not granting his motion for a directed verdict at the close of the State's case, because the evidence was insufficient to support a conviction for third degree assault, discrimination based, in violation of § 28-310 and § 28-111. Appellant's Brief at 3, 25-29. And his third assignment of error alleges that the district court erred by not granting his renewed motion for a directed verdict at the close of his own case in chief, which further rendered the evidence insufficient to support a conviction under § 28-310 and § 28-111. Appellant's Brief at 3, 29-31.

The State's response, to all three of these assignments of error, is that Duncan waived his right to challenge the denial of his motion for directed verdict because, in a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. See e.g., *State v. Seberger*, 284 Neb. 40 (2012). The defendant may still raise a challenge on appeal to the sufficiency of the evidence for the conviction, see *id.*, but may not challenge the ruling or rationale as to the denial of a direct verdict.

This principle of law applies here, since Duncan presented evidence of his own after his motion for a directed verdict was denied after the State rested its case. So, the district court's ruling and rationale for denying his motion for a directed verdict is not properly before this Court, and he is limited to challenging the overall sufficiency of the evidence.

With that said, the State presumes this Court will treat Duncan's first three assignments of error as both a challenge to the denial of his motion for a directed verdict and a challenge to the sufficiency of the evidence. The latter challenge is properly before this Court, so we will go ahead and address that claim. But again, with respect to Duncan's challenge to the sufficiency of the evidence, that is the only claim properly before this Court, so that is the only claim we will address.

As to the sufficiency of the evidence, Duncan was found guilty of third degree domestic assault, discrimination based, in violation of § 28-310 and 28-111. Section § 28-310, which governs the offense of third degree assault, provides that 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. See § 28-310(1). Third degree assault under § 28-310 is a Class I misdemeanor. See § 28-310(2). But the penalty is enhanced to a Class IV felony if the offense is committed against a person or a person's property "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." See § 28-111.

In this case, the evidence was sufficient to establish that Duncan violated both § 28-310 and § 28-111 when he punched Ryan Langenegger in the face. Duncan violated § 28-310 by the punch itself, and he violated § 28-111 by throwing the punch while his friend, Joey Adriano, was calling Ryan and the others "queer" and "faggots," a derogatory term for homosexuals. (338:25-339:15; 543:23-550:24) This evidence, when viewed in a light most favorable to the State, was sufficient for any rational trier of fact to find that Duncan assaulted Ryan Langenegger because of his sexual orientation or his association with a person of a certain sexual orientation. Especially when, as both Ryan and Joshua explained at trial, Ryan never threatened, pushed, or had any physical contact with anyone in Duncan's group, and there was no other reason for Duncan to have punched Ryan. (237:2-19; 555:19-558:8; 589:16-590:11) Plus, as the record reflects, the jury was instructed on Duncan's defense, i.e., that he punched Ryan to defend Adriano, and the jury rejected that defense. (T43) In light of this evidence, the jury's verdict, and the standard of review, the evidence was clearly sufficient in this case.

Duncan does not dispute that he punched Ryan Langenegger and was guilty of third degree assault under § 28-310, but claims the evidence was insufficient to find him guilty of the enhancement under § 28-111 because there was no evidence that he assaulted Langenegger *because* of his sexual orientation or his association with a person of a certain sexual orientation. Duncan claims that the evidence

failed to establish this element because there was no evidence that Duncan made any derogatory comments toward Ryan or his group; that Duncan was aware of Adriano or anyone else making derogatory comments toward Ryan or his group; or that Duncan even knew the sexual orientation of Ryan or anyone in his group. Appellant's Brief at 25-31. In other words, according to Duncan, the State failed to provide direct evidence of Duncan's intent.

But the offense of third degree assault, as with virtually any other offense, does not require direct evidence of intent. See *State v. Kunath*, 248 Neb. 1010, 1015 (1995). When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. *State v. Sing*, 275 Neb. 391, 396 (2008). Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *Id.* In other words, whether a defendant possesses the requisite state of mind is a question of fact and may be proved by circumstantial evidence. *State v. Nguth*, 13 Neb. App. 783, 791 (2005). In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor. *State v. Sexton*, 240 Neb. 466, 467 (1992).

In this case, as set forth above, the evidence was clearly sufficient for the jury to infer that Duncan assaulted Ryan Langenegger because of either his sexual orientation or his association with a person of a certain sexual orientation.

It was a matter of weight and credibility of the evidence, which is not reweighed on appeal, and the jury's verdict is supported by the evidence adduced at trial. Duncan's assertion to the contrary is without merit.

Duncan's first three assignments of error are without merit.

Assignment of Error 4: Denial of proposed jury instruction.

Duncan's fourth assignment of error alleges that the district court erred by not giving his proposed jury instruction, Instruction No. 3, which defined the term "sexual orientation." Duncan claims that this instruction was necessary because our statutes do not contain a definition of "sexual orientation" and the jury needed to know what it means in order to determine whether Duncan violated § 28-111. Appellant's Brief at 3, 31-33. The State disagrees. We will set forth the relevant facts and then our analysis.

Relevant Facts

At a recess during trial, Duncan's counsel informed the district court that the defense would be offering a proposed jury instruction at the end of trial. Duncan's counsel explained that the instruction, Proposed Instruction No. 3, defined "sexual orientation" as heterosexuality, homosexuality, or bisexuality. (404:17-405:17; T37) Duncan's counsel explained that this definition was taken from other states, since Nebraska's statutes do not define "sexual orientation," and argued that the instruction was necessary to explain that gender identity disorders, such as cross-dressing, are unrelated to one's sexual orientation. (405:16-406:5) In other words, Duncan's counsel explained, "what we're saying is

that in this case, even if this man was harassed because he was cross-dressing, that's not covered by – that's not – that doesn't fall within the definition of sexual orientation." (406:6-10)

The district court took the proposed instruction under advisement and Duncan renewed his request for the instruction at the jury instruction conference, at which point the district court declined to give the instruction. (653:11-655:5) The district court explained that it was not going to give the instruction because "sexual orientation" is a matter of common understanding and does not need to be defined – especially in an case such as this, which was limited to heterosexuality and homosexuality. (653:11-655:5)

Analysis

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Dominguez*, 290 Neb. 477 (2015). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. Watt*, 285 Neb. 647 (2013). 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. Armagost*, 291 Neb. 117 (2015).

In this case, the district court instructed the jury that it could reach three possible verdicts. It could find that Duncan was (a) guilty of third degree assault – discrimination based, (b) guilty of third degree assault, or (c) not guilty. (T41) With respect to the elements of third degree assault, discrimination based, the district court instructed the jury that it must find that:

1. On or about October 27, 2013, Duncan intentionally or knowingly caused bodily injury to Ryan Langenegger;
2. Duncan did so because of Ryan Langenegger's association with a person of a certain sexual orientation;
3. Duncan did so in Douglas County, Nebraska; and
4. Duncan did not act in defense of another.

(T41)

Duncan claims that this instruction was deficient and incorrect because it did not define "sexual orientation." He maintains that the court should have given his proposed instruction – which would have defined "sexual orientation" as heterosexuality, homosexuality, and bisexuality – because the jury needed to know what that term means in order to determine whether he violated § 28-111. Appellant's Brief at 3, 31-33. This assertion is without merit, as explained below, because the term "sexual orientation" is one of common use and understanding so it needs no further definition.

It is well established that, absent anything to the contrary, the language of a statute is to be given its plain and ordinary meaning. See *State v. Kudlacz*, 288 Neb. 656 (2014). Similarly, when instructing a jury on the elements of an offense, the general rule is that it is proper to instruct the jury using the language of the statute. See e.g., *State v. Armagost*, 291 Neb. 117 (2015); *State v. Davlin*, 272 Neb. 139 (2006); *State v. Sanders*, 269 Neb. 895 (2005). And, under the general rule, a trial court is under no duty to define words of common use and understanding. See e.g., *State* v. *Neal,* 187 Neb. 413, 417 (1971) (no need to define "unlawfully"); *State v. Jungclaus*, 176 Neb. 641, 649 (1964) (no need to define "average person"); *State v. Bundy*, 1994 WL 595193 (1994) (no need to define "any drug"); *State v. Frazier*, 2001 WL 379025 (2001) (no need to define "sudden quarrel"); *Otte* v. *Taylor,* 180 Neb. 795, 798 (1966) (no need to define "momentary inattention"); *Flanagin* v. *DePriest,* 182 Neb. 776, 781 (1968) (no need to define "forfeit"); *Omaha Nat. Bank* v. *Manufacturers Life Ins. Co.,* 213 Neb. 873, 878 (1983) (no need to define "misrepresentation").

In this case, as in the above cases, there was no need to provide a definition of "sexual orientation," because it is a term of common use and understanding. Especially given the circumstances of this case, where the sexual orientation at issue was a heterosexual male calling homosexual males "queer" and "faggots." This was a classic case of discrimination based on sexual orientation, as any lay person would understand it, so no further definition was necessary here.

Duncan maintains that a definition of "sexual orientation" was necessary because there was evidence of cross-dressing in this case, as well as references to other types of sexual orientation, such as "genderqeer," i.e., gay cross-dressers. Appellant's Brief at 31-33; (461:13-462:11). But that evidence and information had no bearing on the meaning of "sexual orientation" for purposes of § 28-111 or the State's allegation that Duncan violated § 28-111. The State's allegation in this case was based on the fact that Duncan assaulted Ryan Langenegger while Duncan's friend, Adriano, was calling Ryan and his group "queer" and "faggots," a derogatory term for homosexuals. This was the State's theory of the case, and its basis for charging Duncan with violating § 28-111. The notion that Ryan was assaulted because he associated with cross-dressers, as opposed to homosexuals, was simply a theory that Duncan's counsel tried to inject into the case at trial. It was a red herring below, and it's a red herring again here on appeal.

The district court correctly instructed the jury. Duncan's proposed jury instruction was properly denied. The fourth assignment of error is without merit.

Assignment of Error 5: Ineffective assistance of counsel claims.

Duncan's fifth assignment of error alleges that his trial counsel was ineffective in several respects. He claims his trial counsel was ineffective for (a) inquiring into whether the picture of Ryan that was posted on Facebook had been altered or "morphed," (b) suggesting that Adriano may have been upset because it could have appeared as if Joshua and Jacob were having "sex on the sidewalk," and (c) making disparaging comments during closing arguments about Joshua,

Jacob and Ryan having a "gay agenda" and a motive to fabricate this whole thing. Appellant's Brief at 3, 33-37. The State disagrees. We submit that the record is sufficient to reject each of these claims.

To prevail on a claim of ineffective assistance of counsel under *Strickland,* a 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. Vanderpool*, 286 Neb. 111 (2013). To show deficient performance, the defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *Id.* 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. The inquiry about Ryan's picture being "morphed."

Duncan claims his trial counsel was ineffective for questioning Joshua Foo about whether the picture of Ryan that Foo posted on Facebook had been altered or "morphed." Duncan claims that this appears to show that his trial counsel did not depose the State's witnesses, because if he had, he would have known that the picture was consistent with how Ryan's injuries looked on the night in question. Duncan claims that this was prejudicial to his defense because the State was able to rebut this insinuation of fabrication by calling Officer Zipay, who testified that the picture of Ryan was almost exactly how Ryan looked on the night of the assault, which, in turn, gave the State's witnesses more credibility with the jury. Appellant's Brief at 34.

This claim is refuted by the record because, all other responses aside, there is not a reasonable probability that Duncan would have been acquitted but for this inquiry about the picture of Ryan's injuries. This was a minor issue at trial, given that it was undisputed that Duncan punched Ryan and caused his injuries. Duncan himself admitted this at trial. (599:21-630:25) This was never in dispute. The only dispute was whether Duncan punched Ryan because of his association with homosexuals. The picture of Ryan's injuries, and the extent of his injuries, had no bearing on that issue. Therefore, there is not a reasonable probability that Duncan would have been acquitted but for this inquiry about Ryan's picture.

This claim is refuted by the record. It is therefore without merit.

B. The "sex on the sidewalk" theory.

Duncan also claims that his trial counsel was ineffective for suggesting that it may have appeared that Joshua and Jacob were having sex on the sidewalk outside the restaurant, which could have been the reason that Adriano got upset. Duncan claims that this prejudiced his defense because it was not a credible theory and gave the jury the impression that the defense was grasping at straws. Appellant's Brief at 35.

This claim is refuted by the record because, as with the prior claim above, there is not a reasonable probability that Duncan would have been acquitted but for this "sex on the sidewalk" theory being advanced as to why Adriano may have been upset. Adriano's reason for being upset had no bearing on Duncan's defense. Duncan's defense at trial was that he had no idea why Adriano was upset with

Ryan and the others, and did not even know that Adriano and Ryan were arguing until he saw Ryan push Adriano, at which point Duncan claims that he stepped in and punched Ryan to defend Adriano, who was too drunk to defense himself. (599:21-640:15) Duncan's defense at trial hinged entirely on him having no idea why Adriano was upset, so there is not a reasonable probability that he would have been acquitted but for trial counsel advancing a theory as to why Adriano may have been upset.

This claim is refuted by the record. It is therefore without merit.

C. The "gay agenda" theory.

Duncan also claims that his trial counsel was ineffective for making disparaging remarks during closing arguments about Ryan, Joshua and Jacob, such as suggesting that they were not credible and had a motive to fabricate this whole thing because they had a "gay agenda" wanted to turn this into a case about "gay rights." Duncan claims these comments were illogical and ill-conceived, and it prejudiced his defense because it presented a demeaning theory to the jury. Appellant's Brief at 35-37.

This claim is refuted by the record because, as with the prior two claims, there is not a reasonable probability that Duncan would have been acquitted but for trial counsel's comments. As noted above, there was no dispute at trial that Duncan punched Ryan and was guilty of third degree assault under § 28-310. The only dispute was whether the assault was a 'hate crime' under § 28-111, i.e., whether Duncan punched Ryan because of his association with homosexuals.

This did not hinge on whether someone other than Duncan was trying to push a "gay agenda" or "gay rights." It hinged entirely on *Duncan's reason* for the assault, and whether the jury believed Duncan's testimony that it had nothing to do with anyone's sexual orientation. The jury obviously did not believe his testimony. Therefore, there is not a reasonable probability that he would have bene acquitted but for his trial counsel's assertion that the State's witnesses had a "gay agenda" and wanted to make this a case about "gay rights."

This claim is refuted by the record. It is therefore without merit.

Assignment of Error 6: Excessive sentence claim.

Duncan's sixth and final assignment of error alleges the trial court abused its discretion by imposing an excessive sentence. Appellant's Brief at 3, 37-38. The State disagrees.

In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Sikes*, 286 Neb. 38 (2013). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts surrounding the defend ant's life. *Id.* An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *Id.*

Third degree assault, discrimination based, is a Class IV felony punishable by a maximum of five years' imprisonment and a $10,000 fine. See Neb. Rev. Stat. § 28-310 and § 28-111. Duncan was sentenced to 12 to 18 months' imprisonment.

His sentence is well within the statutory limits, and it was warranted given the nature of the offense, the circumstances of the offense, and all of the information before the court at the time of sentencing. The court noted, among other things, that discrimination-based crimes such as this have a significant impact on society; that Duncan has a prior conviction for possession of a controlled substance for which he was given an opportunity at probation; that Duncan was contacted on several occasions to do a presentence interview and he chose not to participate; and that Duncan failed to appear for sentencing and a warranted had to be issued. (761:3-763:22) In light of this information, the district court felt that a lesser sentence such as probation or jail time would not be appropriate. (763:23-764:21) This was not an abuse of sentencing discretion.

It is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate. See *State v. Rivera*, 14 Neb. App. 590, 604 (2006). So long as the trial court's sentence is within the statutorily prescribed limits, is supported by competent evidence, and is not based on irrelevant considerations, the sentence imposed is not an abuse of discretion. See *id.*

Duncan's sixth assignment of error is without merit.

CONCLUSION

For the reasons above, the State requests that this Court affirm the judgment of the district court.

STATE OF NEBRASKA, Appellee,

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PROOF OF SERVICE

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COUNTY OF LANCASTER)

I, Kim Schwanninger, being first duly sworn, depose and state that a copy of this brief was sent to the appellant by U.S. Mail, postage prepaid, addressed to the appellant's attorney of record, Cindy A. Tate, Assistance Public Defender, H05 Civic Center, Omaha, NE 68183, on December 7, 2015.

Kim Schwanninger
Affiant

Subscribed in my presence and sworn to before me this 7th day of December, 2015.

GENERAL NOTARY - State of Nebraska
DENISE L. FAZEL
My Comm. Exp. June 6, 2016

Denise L. Fazel
Notary Public

NAL/kas