

No. A-15-1001

**FILED**

JUL 14 2016

IN THE NEBRASKA COURT OF APPEALS

CLERK  
NEBRASKA SUPREME COURT  
COURT APPEALS

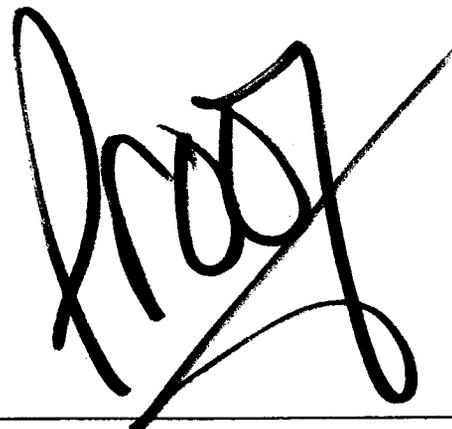
STATE OF NEBRASKA,

Appellee,

v.

ROSARIO BETANCOURT-GARCIA,

Appellant.



APPEAL FROM THE DISTRICT COURT  
OF MADISON COUNTY, NEBRASKA

The Honorable Mark A. Johnson, District Judge

BRIEF OF APPELLEE

**DOUGLAS J. PETERSON, #18146**  
Attorney General

**Austin N. Relph, #24718**  
Assistant Attorney General  
2115 State Capitol  
Lincoln, NE 68509-8920  
Tel: (402) 471-2682  
austin.relph@nebraska.gov

**Attorneys for Appellee**



000073654NSC

**Table of Contents**

STATEMENT OF THE CASE ..... 1

PROPOSITIONS OF LAW ..... 3

STATEMENT OF FACTS ..... 5

ARGUMENT ..... 13

    I.    THE DISTRICT COURT PROPERLY OVERRULED BETANCOURT-  
          GARCIA’S MOTION TO QUASH..... 13

    II.   THE EVIDENCE WAS SUFFICIENT TO SUPPORT A FINDING THAT  
          BETANCOURT-GARCIA WAS “FLEEING FROM JUSTICE” DURING  
          THE RELEVANT TIME PERIODS..... 15

    III.  BETANCOURT-GARCIA’S CLAIMS OF INEFFECTIVE ASSISTANCE  
          OF COUNSEL MAY BE DISPOSED OF (IN ONE WAY OR ANOTHER)  
          ON DIRECT APPEAL..... 19

    IV.  THE DISTRICT COURT CORRECTLY DETERMINED THAT THE  
          KIDNAPPING CHARGE WAS A CLASS IA FELONY..... 22

    V.   THERE WAS PLAIN ERROR IN THE CLASSIFICATION OF, AND THE  
          SENTENCE FOR, BETANCOURT-GARCIA’S CONSPIRACY  
          CONVICTION..... 23

CONCLUSION..... 24

PROOF OF SERVICE ..... 25

## Table of Authorities

### CASES CITED:

|   |              |
|---|--------------|
| <i>Barker v. Wingo</i> , 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).....         | 21           |
| <i>Colling v. State</i> , 116 Neb. 308, 217 N.W. 87 (1927).....                             | 17           |
| <i>Emery v. State</i> , 138 Neb. 776, 295 N.W. 417 (1940).....                              | 14           |
| <i>Pierce v. Underwood</i> , 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) .....  | 3, 22        |
| <i>State v. Abdullah</i> , 289 Neb. 123, 853 N.W.2d 858 (2014).....                         | 2, 21        |
| <i>State v. Ash</i> , 293 Neb. 583, 878 N.W.2d 569 (2016).....                              | 21           |
| <i>State v. Bobo</i> , 872 So. 2d 1052 (La. 2004).....                                      | 18, 19       |
| <i>State v. Casares</i> , 291 Neb. 150, 864 N.W.2d 667 (2015).....                          | 4, 5, 20     |
| <i>State v. Duncan</i> , 293 Neb. 359, 878 N.W.2d 363 (2016).....                           | 2, 3, 15, 16 |
| <i>State v. Filholm</i> , 287 Neb. 763, 848 N.W.2d 571 (2014) .....                         | 4, 19, 20    |
| <i>State v. Gozzola</i> , 273 Neb. 309, 729 N.W.2d 87 (2007).....                           | 2, 3, 14     |
| <i>State v. Jones</i> , 293 Neb. 452, 878 N.W.2d 379 (2016) .....                           | 23           |
| <i>State v. Loyd</i> , 269 Neb. 762, 696 N.W.2d 860 (2005) .....                            | 14, 16       |
| <i>State v. Morgan</i> , 286 Neb. 556, 837 N.W.2d 543 (2013).....                           | 4, 20        |
| <i>State v. Russell</i> , 292 Neb. 501, 874 N.W.2d 8 (2016) .....                           | 23           |
| <i>State v. Sims</i> , 272 Neb. 811, 725 N.W.2d 175 (2006).....                             | 20           |
| <i>State v. Thomas</i> , 236 Neb. 84, 459 N.W.2d 204 (1990).....                            | 17           |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .. | 4, 20        |
| <i>Taylor v. State</i> , 138 Neb. 156, 292 N.W. 233 (1940).....                             | 14           |
| <i>U.S. v. Catino</i> , 735 F.2d 718 (2d Cir. 1984).....                                    | 17           |
| <i>U.S. v. Gonsalves</i> , 675 F.2d 1050 (9th Cir. 1982) .....                              | 18           |

*U.S. v. Sotelo-Salgado*, 201 F. Supp. 2d 957 (S.D. Iowa 2002) .....18, 19

**STATUTES CITED:**

18 U.S.C. § 3290 .....18

Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014) .....23

Neb. Rev. Stat. § 28-202 (Reissue 2008) .....23

Neb. Rev. Stat. § 28-313(3) (Reissue 2008).....3, 13, 22, 23

Neb. Rev. Stat. § 29-110(1) (Supp. 2015) .....16

**OTHER AUTHORITIES:**

42 CJS *Indictments and Informations*, § 227 (2014).....14

## **Statement of the Case**

### **A. Nature of the Case**

Betancourt-Garcia is appealing from his convictions and sentences for Kidnapping, Use of a Deadly Weapon (Firearm) to Commit a Felony, and Conspiracy to Commit Kidnapping, based on incidents that occurred on or about November 15, 2003. See (T54–T55); (T189–T191). Betancourt-Garcia was initially arrested in Texas in 2004, but after he'd waived extradition to Nebraska, he was mistakenly released to INS and subsequently deported. See (508:17–24); (545:19–549:16). A few months after being deported, Betancourt-Garcia illegally re-entered the country and began living in Texas. See (549:25–550:9); (568:12–21); (571:1–10). In 2013, Betancourt-Garcia was again arrested and after waiving extradition, was brought back to face the charges against him. See (550:19–551:9); (551:25–553:19). After a trial, the jury found Betancourt-Garcia guilty. See (T189–T191). The district court sentenced him to life imprisonment on the kidnapping charge, 10 to 30 years' on the Use charge, to be served consecutively, and 30 to 50 years' on the Conspiracy charge, to be served concurrently. See (T202–T203); (665:24–673:5).

### **B. Issues Before the District Court**

As relevant here, the issues before the district court were (1) the proper disposition of Betancourt-Garcia's motion to quash; (2) the proper disposition of Betancourt-Garcia's motions for directed verdict; and (3) whether the kidnapping charge was a Class IA felony or a Class II felony.

### **C. How the Issues Were Decided in the District Court**

After a hearing, the district court overruled Betancourt-Garcia's motion to quash. See (T74–T78). The court also overruled both of Betancourt-Garcia's motions for directed verdict, one at the close of the State's case-in-chief, and one at the close of Betancourt-Garcia's case-in-chief. See (516:23–517:12); (585:21–586:10). The court determined that the kidnapping charge was a Class IA felony. See (Supp. BOE 20:13–23:22).

### **D. Scope of Review**

Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court. See *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

Regardless whether the evidence is direct, circumstantial, or a combination thereof, and regardless whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing 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. See *State v. Duncan*, 293 Neb. 359, 878 N.W.2d 363 (2016).

Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

Because whether the mitigating factors contemplated by Neb. Rev. Stat. § 28-313(3) (Reissue 2008) exist is a question of fact, the State submits that a finding in that regard should be subject to a clearly erroneous standard of review. See *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (“For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’).”).

### **Propositions of Law**

#### **I.**

Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.

See *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

#### **II.**

Regardless whether the evidence is direct, circumstantial, or a combination thereof, and regardless whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing 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.

See *State v. Duncan*, 293 Neb. 359, 878 N.W.2d 363 (2016).

### III.

On direct appeal, the resolution of ineffective assistance of trial counsel claims turns on the sufficiency of the record.

See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

### IV.

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), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.

See *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

### V.

To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.

See *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013).

### VI.

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.

See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

## VII.

An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice.

See *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015).

### **Statement of Facts**

#### THE INCIDENT

On November 15, 2013, at about 7:15 p.m., Deputy Sheriff Ross Bartlett received a call about a suspicious vehicle at an abandoned house on Quincy Street in Madison, Nebraska. See (365:24–367:14). While en route to that location, at about 7:26 p.m., Bartlett received another call about “a Hispanic male on somebody’s porch that was bound and gagged.” See (368:15–369:18). Bartlett responded immediately to that call and arrived roughly one minute later. See (368:23–369:18). Bartlett explained that he was able to get there so quickly because he was already headed in that direction, since it was basically the same area as the suspicious vehicle call. See (369:11–18). Two other officers, Waterbury and Thress, arrived shortly after Bartlett. See (369:19–370:13).

When he arrived, Bartlett saw a younger Hispanic male in front of the door, on the porch, who was later identified as Pedro Jesus Rayon-Piza. See (372:5–18); (372:25–373:11). Bartlett saw that Pedro’s hands (which were behind his back) and his feet were bound with duct tape and that Pedro had duct tape wrapped tightly around his head, covering his mouth. See (372:11–18) (E22) (showing duct tape residue and, by inference, the location of the duct tape). Pedro had no shoes or coat and it was a pretty cold night. See (373:18–374:5). Bartlett hurried up the sidewalk to the porch to help Pedro, who was

terrified. See (372:19–24); (374:6–375:17). Bartlett cut the duct tape from Pedro’s ankles with his knife and then asked the residents of the home for a pair of scissors to cut the rest of the duct tape because it was so tight and Bartlett did not want to risk cutting Pedro. See (376:3–377:2). One of the residents returned with a pair of scissors and cut the rest of the duct tape off of Pedro. See (377:3–16). At that point, Bartlett observed that there was also a “shoestring type cord” wrapped around Pedro’s wrists and ankles. See (377:3–10).

Once freed, Pedro began talking excitedly in Spanish and pointing across the street at a house, the same house where the suspicious vehicle had been reported and which was later identified as the home of Betancourt-Garcia. See (377:17–379:2); (380:19–381:6); (415:21–25). None of the officers spoke Spanish, but Pedro kept saying “mi hermano,” which the officers later learned meant “my brother,” as well as the name “Jose,” which the officers later learned was the name of Pedro’s brother, Jose Rayon-Piza. See (377:17–378:14); (414:8–415:7). Bartlett and Thress went to the house to investigate while Waterbury stayed with Pedro. See (380:19–381:6). Bartlett and Thress conducted a “dynamic entry” into the house (which is where they “basically go busting in[.]”) and searched each room, finding no one. See (381:16–382:4). They found a shed in the back, with no door, and a pair of shoes inside. See (382:22–386:4); (398:5–11).

After searching the house and shed, Bartlett and Thress returned to Pedro and Waterbury. See (386:5–13). By that point, Waterbury had found someone to translate for them. See (386:14–21). In short, Pedro told them that he had been kidnapped at gunpoint by two people, one of whom was his uncle, Betancourt-Garcia, and that Betancourt-Garcia had been looking for his wife, who he believed was in a relationship with Jose.

See (387:8–18); (418:25–419:19); (440:20–24). After speaking with Pedro, the officers put out a BOLO for the suspects and their vehicles, as well as for Jose. See (387:3–390:13). The officers and Pedro headed to Jose’s home (where Pedro lived too) to try and find Jose. See (388:18–389:4); (390:16–391:9). The officers cleared the house but did not find Jose. See (391:22–392:15). So they decided to wait there in the event that Jose would return, which he did. See (392:16–393:25). Thereafter, the officers took both Pedro and Jose back to the police station. See (394:1–23).

#### GETTING BETANCOURT-GARCIA

At that point, the search for the suspects—Betancourt-Garcia and Leonel Torres-Garcia (apparently also known as “Jose Trevino” and “Jaime”)—began in earnest. See (418:25–419:5); (420:1–12); (435:18–436:1); (450:11–14); (576:20–23). Multiple agencies were involved. See (420:12–24); (E14). One of the vehicles involved was recovered, but neither the suspects nor the guns they used were found. See (420:12–24); (424:7–20); (425:1–15). That Monday morning (the incident occurred on a Saturday evening), arrest warrants were issued for both Betancourt-Garcia and Torres-Garcia. See (T6); (T8); (E14, 7); (408:8–12); (421:24–422:5). The State also filed a complaint against Betancourt-Garcia that same day in county court, charging him with Kidnapping and Use of a Deadly Weapon (Firearm) to Commit a Felony. See (T2).

On May 7, 2004, Betancourt-Garcia was pulled over for a traffic violation in Plano, Texas and arrested based on the Nebraska warrant. See (508:17–24); (537:22–538:23). Betancourt-Garcia waived extradition to Nebraska and shortly thereafter, Nebraska sent people down to Texas to get Betancourt-Garcia. See (538:24–539:4); (545:19–549:4); (E36). But on May 17, before the Nebraska people had arrived, Texas authorities

mistakenly released Betancourt-Garcia to INS and he was subsequently deported. See (547:4–548:11). A few months after being deported, Betancourt-Garcia illegally re-entered the country and began living in Texas. See (549:25–550:9); (568:12–21); (571:1–10). Betancourt-Garcia lived in Texas for almost 10 years. See (547:25–551:9). On July 1, 2013, Betancourt-Garcia was pulled over for a traffic violation and again arrested based on the Nebraska warrant. See (508:17–24); (551:2–9). Betancourt-Garcia waived extradition to Nebraska and shortly thereafter, Nebraska sent people down to Texas to get Betancourt-Garcia; this time, they were successful. See (551:25–553:19).

#### PRE-TRIAL PROCEEDINGS

On August 21, 2013, after the case was bound over to the district court, the State filed an information charging Betancourt-Garcia with Kidnapping and Use of a Deadly Weapon (Firearm) to Commit a Felony. See (T21–T24). After pleading not guilty, Betancourt-Garcia filed a motion for absolute discharge on statutory and constitutional speedy trial grounds. See (T38–T39). Following a hearing, the district court overruled Betancourt-Garcia's motion. See (T42–T48); (28:21–42:24). Betancourt-Garcia appealed the court's order, but he subsequently dismissed that appeal. See (44:2–15).

On May 21, 2014, the State filed an amended information. See (T54–T55). The amended information contained the first two charges and added a third charge for Conspiracy to Commit Kidnapping. See (T54–T55). In response, Betancourt-Garcia filed a motion to quash the Conspiracy charge—and only that charge—on the ground that it was barred by the statute of limitations. See (T60); (T76); (50:5–20). After a hearing, the district court overruled Betancourt-Garcia's motion. See (T74–T78). Thereafter, Betancourt-Garcia pleaded not guilty. See (104:3–15). There were other pre-trial

proceedings, see, e.g., (159:11–227:17), but they are not relevant to this appeal and need not be recounted here.

#### TRIAL, VERDICT, SENTENCING

At trial, various witnesses testified. Bartlett and Waterbury testified about the incident and their testimony generally tracked the facts set forth above. See (363:5–400:14); (509:7–22). Gustavo Manriquez, who was a young boy at the time of the incident, testified that he helped the officers by acting as a translator between them and Pedro and that he noticed how scared Pedro was at the time. See (401:12–406:25).

Pedro testified that he Jose had lived with Betancourt-Garcia and his wife Gabriela Ortiz for several months before the incident. See (433:14–435:13); (438:19–22). On November 15, 2003, however, he was living with Jose in a different house. See (435:14–24). Torres-Garcia came by the house and asked for help with his car, which he said was stranded several miles away. See (435:18–24). Torres-Garcia asked for Jose, but Jose was cooking, so Pedro offered to go instead. See (436:2–10). Pedro left with Torres-Garcia in Pedro's car and drove several miles to where Torres-Garcia's car was located. See (436:11–437:1). When Pedro got out of the car to help jump start Torres-Garcia's car, Betancourt-Garcia came out with a gun and put the gun to Pedro's head, threatening to kill him; Torres-Garcia also pulled out a gun and pointed it at Pedro's head. See (436:17–437:8). Pedro testified that Betancourt-Garcia and Torres-Garcia tied him up and that Betancourt-Garcia kept asking where his wife was, to which Pedro replied that he did not know. See (437:9–438:1). She apparently had left Betancourt-Garcia and Betancourt-Garcia believed that she was having a relationship with Jose and that Jose and Pedro knew where she was. See (438:2–15); (440:20–24).

Eventually, they put Pedro in a car and drove to Betancourt-Garcia's house. See (439:9–440:10). On the way, Betancourt-Garcia continued threatening Pedro with a gun and told him “that they were going to put [him] in a bag with stones so they would throw me in the river.” See (439:1–21). When they arrived, they brought Pedro to the shed in the back. See (440:7–10). Pedro testified that Betancourt-Garcia told him that he was going to leave Pedro there, go get Jose and bring him back, and then kill them both. See (440:11–19). Thereafter, both Betancourt-Garcia and Torres-Garcia left. See (440:11–13). At that point, Pedro—whose hands and feet were bound—panicked and started trying to get up; in the process, he took off his shoes. See (439:9–21); (441:16–443:3). Once he was up, he “jump[ed] like a kangaroo” to the nearest house where he was able to get help. See (439:19–21); (441:16–22).

Jose testified similarly about the circumstances leading up to Pedro's abduction. See, e.g., (467:5–11). Jose also testified that he went looking for Pedro but returned after he was unable to find him. See (468:2–17). Jose testified that after he returned, Betancourt-Garcia called him on the phone and threatened to “gut [him] like a deer.” See (468:18–469:7). Betancourt-Garcia apparently made several such threatening calls throughout the night. See (472:6–9). Jose testified that Betancourt-Garcia was angry because he believed that Jose was having a relationship with Betancourt-Garcia's wife. See (469:22–470:2). Jose testified that sometime earlier, there was a meeting between him, Pedro, and Betancourt-Garcia, among others, and that Betancourt-Garcia had accused Jose of having a relationship with Betancourt-Garcia's wife; sometime after that meeting, she had left Betancourt-Garcia. See (470:3–23).

Torres-Garcia testified that he and Betancourt-Garcia kidnapped Pedro, though Torres-Garcia denied participating in any plan and tried to downplay his involvement. See (488:8–491:24). Torres-Garcia provided details about the kidnapping itself, Betancourt-Garcia's actions, threatening Pedro with the guns, taking Pedro to the shed at Betancourt-Garcia's home, and then leaving to try and find Jose. See (490:5–496:20). When they were unable to find Jose, they returned to where they had left Pedro and saw officers everywhere. See (496:9–22). So they drove away and discussed what to do; Torres-Garcia testified that he wanted to run while Betancourt-Garcia wanted to go in after Pedro. See (496:21–498:6). Torres-Garcia testified about various phone calls that occurred between Jose, himself, and Betancourt-Garcia. See (498:7–499:13). Torres-Garcia testified that eventually, he and Betancourt-Garcia decided to flee and drove all night to Houston, Texas, a drive that took 15 hours. See (499:14–500:13). Torres-Garcia testified that they threw the guns out of the car along the highway. See (503:3–8).

Ortiz testified that she had been married to Betancourt-Garcia for 25 years. See (510:9–14). She testified that she left with the kids in 2002 and did not tell Betancourt-Garcia where they went. See (511:7–19). She testified that she had been hiding from Betancourt-Garcia for 13 years. See (511:20–25). She corroborated Jose's testimony about the earlier meeting where Betancourt-Garcia accused Jose of having a relationship with Ortiz and testified that Betancourt-Garcia was very upset. See (512:22–513:25). A few months after that, she left. See (514:1–4).

After Ortiz's testimony, the State rested. See (515:6–7). Following the State's rest, Betancourt-Garcia moved for a directed verdict on the ground that "[t]he State's failed to present a prima facie case." See (517:1–3). The State resisted the motion and the court

immediately overruled it. See (517:1–7). Thereafter, Betancourt-Garcia testified. Generally speaking, Betancourt-Garcia denied any involvement in the kidnapping and denied being in Nebraska in November 2003. See (534:10–537:13); (556:3–557:16). Betancourt-Garcia testified about his relationship with his wife, and in particular one incident between them which resulted in him pleading to assault. See (525:8–530:16). He testified that there had only been one incident and that there were never any incidents between him and his children. See (563:21–564:9). He testified about his arrest in 2004, his waiver of extradition, and his being deported. See (538:7–539:4); (545:19–549:16). Betancourt-Garcia testified that when he was deported, he thought everything with Nebraska was cleared up. See (549:17–24). Betancourt-Garcia testified that after a few months, he re-entered the country illegally and lived with his girlfriend in Plano, Texas, for years until he was arrested again in 2013. See (550:4–551:9).

After testifying, Betancourt-Garcia rested. See (585:3–9). Following Betancourt-Garcia's rest, he made another motion for directed verdict on the ground "that no reasonable jury could find [him] guilty based on the evidence presented." See (585:21–586:3). The State resisted the motion and the court immediately overruled it. See (586:4–7). Thereafter, the State presented the testimony of Ruth Ericka Betancourt, Betancourt-Garcia's daughter, to rebut portions of Betancourt-Garcia's testimony. See (587:17–595:18). In short, she contradicted Betancourt-Garcia's testimony regarding the incident with his wife and explained that Pedro and Jose had been the ones to take Betancourt-Garcia's wife to the hospital. See (588:19–593:13). She testified that there was more than one incident between Betancourt-Garcia and his wife and that his testimony to the

contrary was a lie, as was his testimony that he never abused his children. See (593:14–22). That was the end of the State’s rebuttal evidence. See (595:19–20).

Thereafter, the court held a jury instruction conference. See (598:7–613:10). Included in the elements instruction for the Conspiracy charge—and only the Conspiracy charge—were instructions for the jury to consider the “fleeing from justice” issue. See (T183–T184). After closing arguments, the court submitted the case to the jury. See (613:15–656:2). The jury found Betancourt-Garcia guilty on each count. See (T189–T191). Immediately after the trial, the court held a mitigation hearing to determine whether the mitigating factors contemplated by Neb. Rev. Stat. § 28-313(3) (Reissue 2008) existed and, based on that, whether the Kidnapping charge was a Class IA felony or a Class II felony. See (Supp. BOE 11:7–24:14). Based on the evidence, the court found that the mitigating factors did not exist and that the Kidnapping charge was therefore a Class IA felony. See (Supp. BOE 23:19–22). The court sentenced Betancourt-Garcia to life imprisonment on the Kidnapping charge, 10 to 30 years’ imprisonment on the Use charge, to be served consecutively, and 30 to 50 years’ on the Conspiracy charge, to be served concurrently. See (T202–T203); (665:24–673:5). Betancourt-Garcia appealed.

## **Argument**

### **I.**

THE DISTRICT COURT PROPERLY OVERRULED BETANCOURT-GARCIA’S MOTION TO QUASH

Betancourt-Garcia argues that the district court erred in overruling his motion to quash because the amended information showed on its face that it was barred by the statute of limitations. See brief of appellant, at 20–23. The State disagrees. The motion to quash was directed only at the Conspiracy charge and whether that charge was barred

by the statute of limitations turned on whether Betancourt-Garcia was “fleeing from justice” during the relevant time periods. That was a question of fact for the jury. As such, the court correctly overruled the motion to quash.

(a) Standard of Review

Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court. See *State v. Gozzola*, 273 Neb. 309, 729 N.W.2d 87 (2007).

(b) Analysis

As stated, the motion to quash was directed only at the Conspiracy charge, see (T60); (T74–T78); (50:5–20), and whether that charge was barred by the statute of limitations turned on whether Betancourt-Garcia was “fleeing from justice” during the relevant time periods. That was a question of fact for the jury. See *Taylor v. State*, 138 Neb. 156, 292 N.W. 233 (1940). And contrary to Betancourt-Garcia’s argument in his brief, see brief of appellant, at 21–22, there was no requirement that the State plead an exception to the statute of limitations in the amended information. See *Emery v. State*, 138 Neb. 776, 295 N.W. 417 (1940). Instead, the issue was preserved by Betancourt-Garcia’s plea of not guilty and was an issue for the jury at trial. See *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005); *Emery, supra*. That being the case, Betancourt-Garcia’s motion to quash (which “ordinarily presents a preliminary question of law,” see 42 CJS *Indictments and Informations*, § 227 (2014)), was properly overruled.

## II.

### THE EVIDENCE WAS SUFFICIENT TO SUPPORT A FINDING THAT BETANCOURT-GARCIA WAS “FLEEING FROM JUSTICE” DURING THE RELEVANT TIME PERIODS

Betancourt-Garcia argues that the district court erred in failing to direct a verdict in his favor. This is so, according to Betancourt-Garcia, because the evidence was insufficient to support a finding that he was “fleeing from justice” during the relevant time periods and the prosecution was therefore barred by the statute of limitations. See brief of appellant, at 23–27. The State disagrees. Considering the applicable standard of review, the evidence was sufficient to support a finding that Betancourt-Garcia was “fleeing from justice” during the relevant time periods. This assigned error has no merit.

#### (a) Standard of Review

Regardless whether the evidence is direct, circumstantial, or a combination thereof, and regardless whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing 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. See *State v. Duncan*, 293 Neb. 359, 878 N.W.2d 363 (2016).

#### (b) Analysis

At the outset, the State notes that Betancourt-Garcia’s assigned error and argument is directed at the district court’s overruling his motions for directed verdict. See

brief of appellant, at 23–27. Under *Duncan, supra*, there is some question whether Betancourt-Garcia waived the right to challenge the court's rulings in that regard. See *id.* But even if such a waiver occurred, Betancourt-Garcia did not waive the right to challenge the sufficiency of the evidence to support his conviction. See *id.* And his argument on appeal—that the evidence was insufficient to support a finding that he was “fleeing from justice” during the relevant time periods and that the statute of limitations had therefore run—is a challenge to the sufficiency of the evidence to support his conviction. See *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

The State also notes that Betancourt-Garcia's challenge is directed only at his Conspiracy conviction. This is because whether Betancourt-Garcia was “fleeing from justice” (which goes to the applicability of the statute of limitations) was relevant only to the Conspiracy charge, as evidenced by the fact that the jury was instructed on the “fleeing from justice” issue only on that charge. See (T183–T184). The reason it was relevant only to the Conspiracy charge was because the statute of limitations had already been tolled on the other charges, since the State filed a complaint containing those charges and obtained an arrest warrant just days after the crimes were committed. See (T2); (T8); Neb. Rev. Stat. § 29-110(1) (Supp. 2015). Accordingly, regardless whether Betancourt-Garcia's argument has merit (the State submits that it does not), only the Conspiracy conviction is at issue.

In the State's view, considering the evidence and the applicable standard of review, the evidence was sufficient to support the jury's finding that Betancourt-Garcia was “fleeing from justice” for the relevant time periods. The phrase “fleeing from justice” means to leave one's usual place of abode, or to leave the jurisdiction, where an offense

has been committed, with the intent to avoid detection or prosecution for some public offense. See *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990), disapproved on other grounds, *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999); *Colling v. State*, 116 Neb. 308, 217 N.W. 87 (1927). Here, there was evidence that when Betancourt-Garcia and Torres-Garcia returned to where they left Pedro, they saw law enforcement officers everywhere, so they drove to Texas to avoid being caught. See (496:9–22); (499:14–500:13). The State submits that evidence was sufficient to conclude that Betancourt-Garcia was “fleeing from justice,” at least initially.

The real question, however, is whether the evidence was sufficient to conclude that Betancourt-Garcia was “fleeing from justice” for the period after he initially waived extradition to Nebraska and was mistakenly released to INS and subsequently deported. The State submits that it was. Based on Betancourt-Garcia’s initial waiver of extradition, a rational trier of fact could have found that he was aware of the charges against him and that Nebraska sought to arrest him and bring him back for trial. See (E36). Additionally, there was no evidence that Betancourt-Garcia took any steps to surrender to Nebraska authorities after being mistakenly released to INS and subsequently deported. Accordingly, a rational trier of fact could have found that Betancourt-Garcia intended to avoid prosecution and was “fleeing from justice” during that period. See *U.S. v. Catino*, 735 F.2d 718 (2d Cir. 1984) (explaining that “[t]he intent to flee from prosecution or arrest may be inferred from a person’s failure to surrender to authorities once he learns that charges against him are pending” and that the defendant has a “duty to do all in his power to return to the [prosecuting jurisdiction]”).

In arguing otherwise, Betancourt-Garcia emphasizes his initial waiver of extradition to Nebraska, which he contends is inconsistent with an intent to avoid prosecution, as well as Nebraska's "minimal efforts" to bring him back after he was mistakenly released to INS. See brief of appellant, at 23–27. The State acknowledges that Betancourt-Garcia initially waived extradition to Nebraska. See (538:24–539:4); (545:19–549:4); (E36). But once Betancourt-Garcia was mistakenly released to INS and subsequently deported, his "voluntary surrender" ceased to exist and he did not thereafter take any steps to surrender to Nebraska authorities. And the State takes issue with Betancourt-Garcia's characterization of its efforts to bring him back after he was mistakenly released as "minimal." The record indicates that after Texas authorities mistakenly released Betancourt-Garcia, INS deported him relatively quickly. See (33:19–35:18); (547:2–549:16). It's unclear exactly what Nebraska could have done at that point. And up to that point, Nebraska had been actively pursuing Betancourt-Garcia.

Betancourt-Garcia also relies on various federal cases—primarily *U.S. v. Gonsalves*, 675 F.2d 1050 (9th Cir. 1982) and *U.S. v. Sotelo-Salgado*, 201 F. Supp. 2d 957 (S.D. Iowa 2002)—interpreting and applying the federal "fleeing from justice" provision, 18 U.S.C. § 3290, as well as *State v. Bobo*, 872 So. 2d 1052 (La. 2004). See brief of appellant, at 23–27. The State submits that Betancourt-Garcia's reliance on those cases is misplaced. The State has no quarrel with *Gonsalves*' holding (as relevant here) that the statute of limitations is not tolled during the period that a suspect is making a good faith effort to surrender. See *Gonsalves*, *supra*. But as set forth above, once Betancourt-Garcia was mistakenly released to INS and deported, his "voluntary surrender" ceased to exist and he did not thereafter take any steps to surrender to

Nebraska authorities. As for *Sotelo-Salgado* and *Bobo*, those cases are materially distinguishable. In *Sotelo-Salgado*, the defendant never left the jurisdiction where he committed the crime and the court (as the fact finder) determined there was no evidence of intent to avoid prosecution. Additionally, the court faulted the government for doing “virtually nothing” to bring the accused to justice. See *Sotelo-Salgado, supra*. Those circumstances are not present here. And in *Bobo*, the court faulted Louisiana for not exercising due diligence to bring the defendant (who was jailed in Texas) back for trial. See *Bobo, supra*. Here, however, Betancourt-Garcia avoided prosecution through no action (or inaction) or fault of Nebraska.

### III.

#### BETANCOURT-GARCIA’S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL MAY BE DISPOSED OF (IN ONE WAY OR ANOTHER) ON DIRECT APPEAL

Betancourt-Garcia argues that he received ineffective assistance of trial counsel because (1) his trial counsel dismissed his appeal of the district court’s denial of his motion for discharge, and (2) his trial counsel failed to adequately develop and present his alibi defense. See brief of appellant, at 27–29. The State will address each claim in detail below. But in short, the first claim may be addressed on direct appeal and it is without merit, and the second claim—because it is not separately assigned as error—is not preserved for appellate review; alternatively, the second claim is insufficiently alleged and should be dismissed.

#### (a) Legal Framework

On direct appeal, the resolution of ineffective assistance of trial counsel claims turns on the sufficiency of the record. See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d

571 (2014). 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), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. See *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015). To show deficient performance, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. See *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013). 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. See *Filholm, supra*. An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes that trial counsel's performance was not deficient or that the appellant could not establish prejudice. See *Casares, supra*.

#### (b) Analysis

First, Betancourt-Garcia argues that his trial counsel was ineffective for dismissing his appeal of the district court's denial of his motion to discharge. See brief of appellant, at 27–28. In this context, whether trial counsel was ineffective depends on whether there was any merit to the motion to discharge; if there was not, then there was neither deficient performance nor prejudice based on trial counsel's action. Cf. *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006). Here, there was no merit to the motion to discharge, which was based on Betancourt-Garcia's statutory and constitutional speedy trial rights. See (T38–T39). The district court correctly found no violation of Betancourt-Garcia's statutory speedy trial right because the clock only began to run from the filing of the information and various periods of time were excludable. See (T43–T44). And the court correctly

applied the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and found no violation of Betancourt-Garcia's constitutional speedy trial right. See (T44–T48). Because there was no merit to the motion to discharge (which is presumably why trial counsel dismissed the appeal), the record on direct appeal is sufficient to address this claim and it is without merit.

Second, Betancourt-Garcia argues that his trial counsel was ineffective for failing to adequately develop and present his alibi defense. See brief of appellant, at 28–29. But Betancourt-Garcia did not separately assign this as error in his brief. See brief of appellant, at 5. That being the case, this argument is not preserved for appellate review. See, e.g., *State v. Ash*, 293 Neb. 583, 594–95, 878 N.W.2d 569, 570 (2016) (“An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.”). Alternatively, the State submits that Betancourt-Garcia's allegation is not sufficiently alleged. In his brief, Betancourt-Garcia asserts that his counsel's performance was defective because he “failed to take all necessary steps in preparation to ensure the presence of witnesses and testimony in support of [Betancourt-Garcia's] alibi claim.” See brief of appellant, at 28. But Betancourt-Garcia did not identify which witnesses or testimony his counsel failed to obtain or present. Thus, this allegation is insufficient and should be dismissed. See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

#### IV.

#### THE DISTRICT COURT CORRECTLY DETERMINED THAT THE KIDNAPPING CHARGE WAS A CLASS IA FELONY

Betancourt-Garcia argues that the district court erred in finding that the mitigating factors contemplated by Neb. Rev. Stat. § 28-313(3) (Reissue 2008) did not exist and that the court therefore erred in classifying the Kidnapping charge as a Class IA felony instead of a Class II felony. See brief of appellant, at 29–30. The State disagrees. The record supports the court’s determination. Accordingly, this assignment of error is without merit.

##### (a) Standard of Review

Because whether the mitigating factors contemplated by Neb. Rev. Stat. § 28-313(3) exist is a question of fact, the State submits that a finding in that regard should be subject to a clearly erroneous standard of review. See *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (“For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’).”).

##### (b) Analysis

Section 28-313(3) provides: “If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.” In his brief, Betancourt-Garcia argues that the court erred in finding that the mitigating factors contemplated by § 28-313(3) did not exist and that the court therefore erred in classifying the Kidnapping charge as a Class

IA felony. See brief of appellant, at 29–30. The State disagrees. The record supported the court's determination. The record showed, among other things, that Betancourt-Garcia left Pedro in the shed bound and gagged, that Betancourt-Garcia told Pedro he was going to bring Jose back to the shed and kill both Pedro and Jose, that Pedro escaped through his own efforts, and that Betancourt-Garcia did not intend to release or liberate Pedro. See (Supp. BOE 20:13–23:22). Considering this evidence, the State submits that the court did not clearly err in finding that the mitigating factors contemplated by § 28-313(3) did not exist. Accordingly, this assigned error is without merit.

## V.

### THERE WAS PLAIN ERROR IN THE CLASSIFICATION OF, AND THE SENTENCE FOR, BETANCOURT-GARCIA'S CONSPIRACY CONVICTION

The State notes plain error in the classification of, and the sentence for, the Conspiracy conviction. The definition of plain error is well known. See, e.g., *State v. Jones*, 293 Neb. 452, 878 N.W.2d 379 (2016). Neb. Rev. Stat. § 28-202 (Reissue 2008) provides that "Conspiracy is a crime of the same class as the most serious offense which is an object of the conspiracy, except that conspiracy to commit a Class I felony is a Class II felony." Here, the most serious offense which was an object of the conspiracy was Kidnapping, a Class IA felony. See § 28-313. Under the plain language of the statute, the Conspiracy charge was also a Class IA felony, and comes with a mandatory sentence of life imprisonment. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014); § 28-202; *State v. Russell*, 292 Neb. 501, 874 N.W.2d 8 (2016). The State asks this court to modify the judgment accordingly.

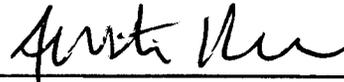
**Conclusion**

For the reasons noted above, the appellee respectfully requests that this Court affirm the district court's judgment as modified.

STATE OF NEBRASKA, Appellee,

BY DOUGLAS J. PETERSON, #18146  
Attorney General

BY



---

Austin N. Relph, #24718  
Assistant Attorney General  
2115 State Capitol  
Lincoln, NE 68509-8920  
Tel: (402) 471-2682

Attorneys for Appellee

Proof of Service

STATE OF NEBRASKA            )  
  ) ss.  
COUNTY OF LANCASTER        )

Kim Schwanger, being first duly sworn, states that a copy of the brief in the above entitled case was served upon the appellant by depositing said copy in the United States Mail, postage prepaid, addressed to the appellant's counsel of record, Mark D. Albin, 108 S. 13<sup>th</sup> St., Norfolk, NE 68701 on July 14, 2016.

Kim Schwanger  
Affiant

Subscribed in my presence and sworn to before me this 14th day of July, 2016.



Kristy R. Gynan  
Notary Public

ANR/kas