

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff-Appellee,

vs.

SCOTT L. MARSHALL,

Defendant-Appellant.

Case No. CR00-18

JUDGMENT ON APPEAL

DATE OF HEARING: August 3, 2000.

DATE OF RENDITION: August 3, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

TYPE OF HEARING: Oral arguments on appeal from county court.

APPEARANCES:

For appellant: David W. Jorgensen without defendant.

For appellee: Thomas P. Herzog, Holt County Attorney.

SUBJECT OF JUDGMENT: Appeal from county court (case number CR99-305).

PROCEEDINGS: At the hearing, these proceedings occurred:

The bill of exceptions, as filed with the clerk of this court, is deemed as admitted in evidence pursuant to NEB. REV. STAT. § 25-2733(2) (Reissue 1995).

The defendant-appellant's verbal motion to supplement or amend the bill of exceptions was heard. Arguments of counsel were heard or waived. The motion was denied as untimely pursuant to findings stated on the record.

The defendant-appellant specifically marked the bill of exceptions as an exhibit (Exhibits 1 and 1A) and offered the same, which was received without objection. Arguments of counsel on the merits were heard or waived. The decision was pronounced.

Counsel for defendant-appellant verbally moved for continuance of the appeal bond in the event of further appeal. The court declined to consider such motion, concluding that it is not appropriate to an intermediate appellate court for reasons stated on the record.

OPINION:

1. The appellant appeals from the judgment and sentence of the county court upon a jury verdict for driving under the influence of alcohol, second offense.

2. This court stated abbreviated findings on the record at the time of hearing on the appellant's verbal motion to amend or supplement the bill of exceptions.

a. The file shows that the bill of exceptions was filed on May 23, 2000, and counsel were notified in writing on that date of the filing of the bill of exceptions. No briefs were submitted.

b. The problem asserted by the defendant's motion could have been determined at any time prior to oral argument by reasonable diligence.

c. In view of the particular wording of the praecipe for bill of exceptions, the court concludes that the county court stenographer properly omitted the Exhibit 27 from the bill of exceptions. The praecipe specifically directed inclusion of *trial* exhibits. The praecipe only generally requested the "sentencing proceedings." County Court General Rule 52(II)(A) imposes on the appellant the duty to "specifically identify each portion of the evidence *and exhibits* offered at any hearing which the party appealing believes material . . ." (Emphasis supplied.) County Court General Rule 52(II)(C) provides a limitation on requests to supplement the bill of exceptions.

d. This court would have favorably considered any motion to supplement or amend the bill of exceptions filed within any reasonable time after the filing of the bill of exceptions with this court. However, it is not reasonable to wait more than two months after the bill of exceptions is filed and after actual notice of such filing is provided to counsel, and to wait literally until the day of oral arguments on appeal before reviewing the bill of exceptions and raising the matter. This court's approval of such a motion at that late date would reward counsel for failing to specifically request material to be included and failing to promptly and diligently examine the bill of exceptions upon filing.

e. It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed. *In re App. of Sanitary and Improvement District No. 384*, 259 Neb. 351, ___ N.W.2d ___ (2000).

3. Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. Patterson*, 7 Neb. App. 816, 585 N.W.2d 125

(1998).

4. Appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court. *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997). Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Id.* Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.*

5. All of the assignments in the appellant's statement of errors lack merit. None requires further discussion beyond noting that each error is either not supported in the record, waived by failure to object at trial, or cannot be reviewed because the appellant failed to request inclusion of necessary material in the bill of exceptions.

6. This court considers one matter not raised by the appellant. The county court received and displayed to the jury without objection certain portions of a videotape taken from the arresting officer's vehicle. After playing part of the tape and fast-forwarding past a portion not admitted, the trial judge directed the tape to be paused, and stated to the jury:

THE COURT: Just in the way of explan- of explanation, the - the officer has a microphone and he's taping this - the oral part. The - The picture you're seeing is what the camera is taking but the sound is - they're in the hospital at this point and it's taking the sound that's being done around the officer. Go ahead.

118:1-6.

7. In this court's view, there is no doubt that the trial judge overstepped his role in making this comment to the jury.

a. This might be viewed as the judge becoming a witness. NEB. REV. STAT. § 27-605 (Reissue 1995); *State v. Baird*, 259 Neb. 245, ___ N.W.2d ___ (2000); *State v. Rodriguez*, 244 Neb. 707, 509 N.W.2d 1 (1993); *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988).

b. It might also be viewed as commenting on the evidence. *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996); *State v. Rodriguez, supra*; *Hansen v. State*, 141 Neb. 278, 3

N.W.2d 441 (1942).

8. The parties could certainly stipulate to an introductory explanation by counsel. Any necessary introduction could be adduced from the witness in the form of testimony. Such testimony might even be elicited by the trial judge. But a judge crosses the line imposed by § 27-605, as interpreted by the Nebraska Supreme Court, in directly making this type of statement to the jury.

9. Because the appellant did not assign error in this regard, this court only considers the matter if such constitutes plain error. This court finds no Nebraska case expressly considering whether improper testimony by a judge or improper comment on the evidence constitutes plain error. In the recent case of *State v. Toof*, 9 Neb. App. 535, ___ N.W.2d ___ (2000), the Court of Appeals found no error, making it unnecessary to determine whether the particular conduct constituted plain error. In this case, it is also unnecessary to determine whether such conduct could ever constitute plain error, as the court concludes that it does not under the circumstances present here.

10. Another court's application of the harmless error doctrine in such circumstances bolsters that conclusion. *U.S. v. Paiva*, 892 F.2d 148 (1st Cir. 1989) (citing *Chapman v. California*, 386 U.S. 18 (1967)). The harmless error analysis seems inconsistent with any determination that plain error exists. Consequently, if harmless error analysis is appropriate, such error could not constitute plain error.

11. The particular situation in this case persuades this court that such error constitutes harmless error beyond a reasonable doubt. This court concludes that there is no reasonable possibility that the trial court's improper statement might have contributed to the conviction. There was no controversy in the evidence that the defendant was in fact in the hospital or that the sound was that surrounding the officer.

12. The court therefore concludes that no plain error appears in the record. Because the assigned errors lack merit and no plain error appears in the record, the judgment should be affirmed.

ORDER:

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant-appellant's verbal motion to supplement or amend the bill of exceptions is denied as untimely.
2. The judgment of the county court is AFFIRMED.
3. Costs on appeal are taxed to the defendant-appellant.
4. The mandate shall issue as provided by law.

Signed at O'Neill, Nebraska, on August 3, 2000.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties, **and deliver a certified copy to county court.**
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days, **stating “Judgment of county court AFFIRMED”.**
Done on _____, 20__ by ____.
- If not already done, immediately transcribe trial docket entry dictated in open court.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge

**THE FOLLOWING DOES NOT CONSTITUTE ANY PORTION OF THE ABOVE
JUDGMENT OR ORDER AND IS INCLUDED SOLELY FOR THE CONVE-
NIENCE OF THE CLERK OF THE DISTRICT COURT:**

1. Assuming that the clerk of the district court places the file stamp and date upon this order (the “entry” defined by § 25-1301) on Thursday, August 3, 2000, the last day for filing notice of appeal and depositing docket fee for appeal to the Nebraska Court of Appeal would be **Tuesday, September 5, 2000**.
2. If further appeal **is** timely perfected, issuance of the mandate of this court would await the mandate of the higher appellate court.
3. If **no** further appeal is timely perfected, within 2 judicial days after expiration of time for appeal, § 25-2733(1) requires the clerk of the district court to issue the mandate and to transmit the mandate to the clerk of the county court together with a copy of the decision.
4. The clerk of the district court should be prepared to transmit the mandate on **Wednesday, September 6, 2000**.
5. In anticipation, at the clerk’s earliest convenience, the clerk should prepare a draft mandate for review to assure that it is properly completed as to form. The form is provided in the form book. The space for the district court decision would be filled in as “**AFFIRMED**”.
6. The mandate should be prepared in **two** duplicate originals. Both copies would be properly dated as to date of issuance, signed by the clerk, and the district court seal affixed.
7. **One** of the duplicate originals would be filed in the district court file. It would, of course, be file-stamped and docketed.
8. The **other** would be transmitted to county court on the **same day** that it is **issued**. The clerk of the district court would physically hand carry it to the county court clerk for filing in that court. **Attached** to the county court copy should be a **copy of the above judgment or order**. That attached copy does not have to be specially certified. The judge realizes that, pursuant to the court’s instructions, the district court clerk will have already transmitted a certified copy of the judgment or order to the county court at the time of entry. But the statute (§ 25-2733(1)) specifically requires that a copy of the decision be attached to the mandate.