

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**THE STATE OF NEBRASKA,**

Plaintiff-Appellee,

vs.

**STEVEN R. SCHIFFERN,**

Defendant-Appellant.

Case No. CR03-21

**JUDGMENT ON APPEAL**

**DATE OF HEARING:** September 8, 2003.

**DATE OF RENDITION:** September 10, 2003.

**DATE OF ENTRY:** See court clerk's file-stamp date per § 25-1301(3).

**APPEARANCES:**

For appellant:

Rodney J. Palmer without appellant.

For appellee:

Thomas P. Herzog, Holt County Attorney.

**SUBJECT OF JUDGMENT:** Appeal from county court (case number CR02-519).

**PROCEEDINGS:** See journal entry rendered on date of hearing.

**OPINION:**

1. The appellant appeals from the judgment and sentence of the county court on Count No. 1 pursuant to jury verdict for driving under the influence of alcohol, and on Counts Nos. 3 and 4, for stop sign violation and violation of occupant protection law respectively, simultaneously tried to the court without a jury. The county court adjudged the appellant not guilty on Count No. 2, the charge of open container violation.

2. 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).

3. 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.* Although the statement of errors was filed with the county court and included in the transcript instead of filing the statement in this court as contemplated by Unif. Dist. Ct. R. of Prac. 18, the assignments therein are considered. The court discusses the assignments of error in the order which seems most logical to this court.

4. Appellant argues that the county court erred by failing to make *written* findings of fact and conclusions of law upon overruling the appellant's motion to suppress. In *State v. Osborn*, 250 Neb. 57, 547 N.W.2d 139 (1996), the Nebraska Supreme Court mandated that, henceforth, *district* courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress. At oral argument, appellant's counsel conceded that appellant knew of no case applying this mandate to county courts. However, in *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999), the Supreme Court observed that its "purpose in *Osborn* was to direct the *trial courts* to articulate findings of fact . . ." *Id.* at 281, 603 N.W.2d at \_\_\_ (emphasis supplied). The reference to "trial courts" clearly implies that county courts are subject to the requirement. But *Myers* did not involve an appeal from county court, so that inference constitutes mere dicta and not binding precedent.

5. But even assuming that the *Osborn* mandate does apply to county courts, appellant's claim lacks merit. Contrary to appellant's assignment of error, *Osborn* allows the general findings to be made orally on the record. Here, the record shows that the county court did articulate general findings from the bench. Those general findings are sufficient to permit appellate review.

6. The appellant also claims that the county court erred in denying the appellant's motion to suppress. The arresting officer testified that the appellant failed to stop at a stop sign. The appellant vigorously disputed that claim. In *State v. Lee*, 265 Neb. 663, 658

N.W.2d 669 (2003), the Supreme Court restated the applicable standard. In reviewing a trial court's ruling on a motion to suppress evidence, ultimate determinations of reasonable suspicion are reviewed de novo by an appellate court, while findings of historical fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *Id.* A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *Id.* Upon de novo review, this court finds that the evidence on the motion to suppress was sufficient to show that the appellant failed to stop at the stop sign. Upon conflicting evidence, the county court assessed the credibility of witnesses. This court considers that the county court accepted one version of the evidence and rejected the other. Such failure to stop at the stop sign provided the necessary probable cause for the arresting officer's stop of appellant's vehicle. The appellant's claim on this assignment of error lacks merit.

7. The appellant twice moved for mistrial during the jury voir dire and assigns error in the county court's denial of both motions. The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Cook*, 266 Neb. 465, 277 N.W. 77 (2003). A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003). Voir dire examination of prospective jurors requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exist sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge. *Id.*

8. The first motion for mistrial stated two grounds. The first ground was a voluntary statement by a prospective juror regarding deaths of loved ones in an accident involving a drunk driver. Nothing in the record shows any connection between the described incident and the appellant. Deaths in motor vehicle accidents are not uncommon occurrences

and the mere mention of such an incident does not necessarily taint the entire panel. The county court did not abuse its discretion in overruling the motion on that ground.

9. The second ground of the first motion claimed that the county attorney improperly instructed the jury on the law. The record does not show that the statements improperly or inaccurately stated the applicable law. The record does show that the statements of the law were limited to matters upon which the county attorney properly inquired of the juror's qualifications. The county court did not abuse its discretion in denying the appellant's first motion for mistrial.

10. The second motion for mistrial claimed that the county attorney attempted to improperly instruct the jury on the law concerning reasonable doubt. The record shows that the county attorney engaged in discussing a number of areas of the law and procedure applicable to the case and after discussing a topic of law or procedure, propounded one or more questions to the panel regarding their qualifications on that topic. At the point of the objection, the county attorney had not yet propounded any question on the subject of the prospective jurors' views or opinions concerning the burden of proof. The county court overruled the objection, but directed the county attorney to proceed to questioning on the topic. The county court also admonished the jury upon their return that the court would instruct the jurors regarding the law. The county attorney did not inaccurately state the applicable law. While the county attorney's prelude may have been somewhat longer than necessary, it was not abusive. The county attorney was entitled to inquire on the subject of reasonable doubt and the court did not abuse its discretion in denying the motion for mistrial. The county court properly admonished the jury that the court would instruct the jury on the law and that statements of counsel should not be construed as instructions on the law. Even if the lengthy introduction to the topic was improper, the event was not of such a nature that it could not be cured by admonition. And the county court promptly gave a sufficient admonition. This assignment of error lacks merit.

11. The appellant further assigns error in the county court's denial of the appellant's third motion for mistrial. During closing argument, the county attorney

accidentally referred to one of the charges constituting infractions that were tried simultaneously to the court without a jury. The county court interrupted the argument *sua sponte* and immediately stated that the jury would not consider that issue. After hearing appellant's motion for mistrial in the absence of the jury, the county court overruled the motion. As the county attorney correctly noted, evidence of the open container was already properly in front of the jury on the d.u.i. charge. The county court immediately admonished the jury that it was not to consider the other charge and to disregard that portion of the county attorney's argument. The county court did not abuse its discretion in denying the motion for mistrial.

12. The appellant assigns error in written communications by the county court in response to juror questions during deliberations. In the record, the county court stated, at the time of receipt of verdict, that the appellant's counsel had asked that his presence be waived. However, the only discussion in the record between the county court and appellant's counsel comprised counsel's inquiry, "Your Honor, do I have to be here when the jury comes in? I have – ", and the court's response, "No." The record does not reflect that appellant personally was given the opportunity to object to the additional written instructions given by the county court in response to the jury questions.

13. In *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993), the Nebraska Supreme Court discussed the proper procedure for responding to jury questions and the issue of waiver of that procedure.

Under Neb. Rev. Stat. § 25-1116 (Reissue 1989), if a jury has retired for deliberation and desires information as to

any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

When it becomes necessary for the court to give further instruction to the jury while it is deliberating, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. *In re Estate of Corbett*, 211 Neb. 335, 318 N.W.2d

720 (1982); *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975). The record in this case reveals that the court contacted counsel for the parties by telephone before further instructing the jury. Appellants' counsel asserted at the subsequent hearing on appellants' motion for new trial that he had objected to jury instruction No. 12 in his telephone discussions with the trial court. The trial court's recollection of the two-person conversation was uncertain of appellants' objection, and no record of counsel's objections or consent is available for our review.

Obtaining consent of counsel over the telephone, before giving additional jury instructions outside the presence of the parties or counsel, is potentially troublesome. As illustrated by this case, the failure to obtain the consent of counsel in open court deprived appellants of the opportunity to make and preserve a proper record of their objections to the written jury instructions. To hold that the appellants waived their objections to the jury instruction in light of the ambiguous nature of the record before us would further discount a substantial right of the appellants. Therefore, we reject the Bank's assertion that appellants failed to timely object to the jury instruction.

A party's right to a fair trial may be substantially impaired by jury instructions that contain incorrect information, suggest an improper shift of the burden of proof, misstate the law upon a vital issue, improperly single out or give undue prominence to particular evidence or facts, contain inconsistencies, or confuse or mislead the jury.

*Id.* at 46-47, 497 N.W.2d at \_\_\_\_.

14. For essentially the same reasons that the Supreme Court rejected the waiver argument in *Stastny*, this court declines to find a waiver of the appellant's personal right to be present and object to additional instructions. As the Supreme Court observed in *Breiner v. Olson, supra*, it is error to give instructions to the jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom, this is error without prejudice and not ground for reversal. The State has the burden to prove that a defendant was not prejudiced by any improper communication between the judge and the jury. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). This leads to consideration of the appellant's final assignment of error that the county court erred in the supplemental instruction defining "probable cause."

15. This requires a discussion of a more fundamental problem with the instructions in this case. Although the record does not so reflect, appellant's counsel stated at oral

arguments that appellant requested and the county court gave Instruction No. 7, which stated:

If you find that the Defendant Steve Schiffern, stopped at the stop sign at East State Street and Highway 20 then you should find that there was a lack of probable cause for the arrest of the Defendant and should enter and find the Defendant innocent. If on the other hand you find that the Defendant failed to stop at the stop sign then you should fairly deliberate the facts as presented to you at the trial.

16. Because the appellant concedes that he specifically requested this instruction, this court would normally apply the invited error rule. However, in this case, the erroneous instruction injected a concept, i.e., probable cause, into the jury's deliberations in which the jury had no role for consideration. The Nebraska Supreme Court, quoting applicable United States Supreme Court decisions, long ago reiterated that the issues on a motion to suppress are substantive determinations to be made by the trial court. *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963). As discussed above, the county court did not err in denying the motion to suppress. In effect, the appellant sought to relitigate the trial court's decision not to suppress evidence. The county court should have declined that invitation. The rule allocating decisions on motions to suppress to the trial judge naturally follows from the trial judge's responsibility to initially determine the admissibility of evidence as a matter of law. The exclusionary rule prohibiting admission of illegally-obtained evidence requires the trial judge to make an initial determination of admissibility. Of course, even where, as here, the trial judge allows the evidence to be admitted, the jury determines what weight, if any, to give the evidence *on the issues properly submitted to the jury*.

17. The charge of violation of a stop sign constituted an infraction to be tried by the court without a jury. The only charge properly considered by the jury was the d.u.i. count. While the jury could properly consider the disputed testimony whether the appellant did or did not stop at the stop sign for purposes of assessing the arresting officer's credibility, it did not bear directly on the issues of the d.u.i. charge.

18. The jury communications and the county court's responses demonstrate the prejudice arising from the path appellant induced the court to follow. Because no verbatim record was made of the questions and the court's procedures, if any, before responding, this

court has only the written questions and responses as they appear in the transcript. Because the file stamps show only the date and not the time, and the supplemental instructions do not bear any time of issuance, this court can only infer the order of receipt of questions and submission of supplemental instructions from the order in which they appear in the transcript.

19. The jury apparently first inquired: “Are we to use instruction sheets #2 and #4, or #7? Do we need a Verdict of Jury form for the stop sign violation? Numbers 2 and 4 ask for a DUI verdict, as do our current verdict forms. Number 7, a seeming afterthought instruction, contradicts previous instructions by introducing a technicality. Are we simply to fill out the verdict forms we have?” The county court responded in writing: “The only charge you are to reach a verdict on is the charge of Driving Under the Influence. You should fill out one verdict form on that charge and return both forms.”

20. The jury apparently next wrote on the bottom of Instruction No. 7 the question “Is this to establish probable cause? Can we have a definition?” The county court responded in writing: “Definition of Probable Cause[:] Reasonable cause as shown by the circumstances of the case. A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person in believing the accused to be guilty. In substance, a reasonable ground for belief in guilt.”

21. The last inquiry and response are not necessary to the discussion of this problem and are not repeated here for the sake of brevity.

22. As one sees from the first jury question, the jury immediately recognized the conflict between probable cause and proof beyond a reasonable doubt. 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. *Pribil v. Koinzan*, 266 Neb. 222, \_\_\_ N.W.2d \_\_\_ (2003). A party’s right to a fair trial may be substantially impaired by jury instructions that contain inconsistencies or confuse or mislead the jury. *Id.* Conflicting instructions are erroneous unless it appears that the jury was not misled. *Id.* A jury instruction that misstates the burden of proof has a tendency to mislead the jury and is erroneous. *Id.*

23. Here, the county court's initial agreement to submit Instruction No. 7 introduced a conflicting concept that clearly confused the jury. The supplemental instruction defining probable cause compounded the problem by diluting the State's burden of proof beyond a reasonable doubt to "a reasonable ground for belief in guilt." While the initial error may have been invited by the appellant, the supplemental instruction was apparently given without opportunity for the appellant or his counsel to be heard. The prejudice flowing from the confusion of the burden of proof is obvious and compels that the judgment and sentence of the county court on the charge of driving under the influence be reversed and remanded for a new trial on that count.

24. The county court's verdicts on the other counts are not implicated by the errors discussed above. The judgment of acquittal on Count No. 2 should be affirmed. However, the judgment and sentence imposed by the county court apparently sentenced the appellant to probation on all convicted counts in a single judgment of probation. Because the county court's sentencing judgment did not specify which conviction the sentence corresponded to, this court must vacate the sentences on Counts Nos. 3 and 4 and remand for resentencing on those counts. See *State v. Smith*, No. A-02-1423 (Neb. App. May 20, 2003) (not designated for permanent publication).

25. Consideration of the appellant's assignment of error concerning admission of certain exhibits into evidence over objection is not necessary to the disposition of this appeal. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

**JUDGMENT:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The judgment of the county court is AFFIRMED IN PART, IN PART REVERSED AND REMANDED FOR A NEW TRIAL, AND IN PART SENTENCES VACATED AND CAUSE REMANDED FOR RESENTENCING.

2. Costs on appeal are taxed to the appellee.

3. The mandate shall issue as provided by law.

Signed at **O'Neill**, Nebraska, on **September 10, 2003**;  
DEEMED ENTERED upon file stamp date by court clerk.  
If checked, the court clerk shall:

BY THE COURT:

- Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Mail postcard/notice required by § 25-1301.01 within 3 days (**copy paragraph 1 of judgment section**).  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- If not already done, immediately transcribe trial docket entry dictated in open court.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] **Signed "Judgment on Appeal" entered.**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Mail a copy of this order to all counsel of record and any pro se parties **and certified copy to county court.**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

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**William B. Cassel**  
District Judge

**THE FOLLOWING DOES NOT CONSTITUTE ANY PORTION OF THE  
ABOVE JUDGMENT OR ORDER AND IS INCLUDED SOLELY FOR THE  
CONVENIENCE 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 Wednesday, September 10, 2003, the last day for filing notice of appeal and depositing docket fee for appeal to the Nebraska Court of Appeals would be **Friday, October 10, 2003**.
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 **Tuesday, October 14, 2003**.
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 IN PART, IN PART REVERSED AND REMANDED FOR A NEW TRIAL, AND IN PART SENTENCES VACATED AND CAUSE REMANDED FOR RESENTENCING**”.
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.