

Brian S. Munnely
Attorney at Law
626 S. 19th Street, Suite 9
Omaha, NE 68102

Phone (402) 991-8100

Attorney

Fax (402) 934-1030

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IN THE NEBRASKA COURT OF APPEALS

FILED

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NEBRASKA SUPREME COURT
COURT APPEALS

State of Nebraska,)	No. A-15-317.
)	No. A-15-323.
Appellee,)	MEMORANDUM OPINION
v.)	AND
Rashad Washington,)	JUDGMENT ON APPEAL
)	
Appellant.)	

MOORE, Chief Judge, and INBODY and RIEDMANN, Judges.

INBODY, Judge.

I. INTRODUCTION

Rashad Washington filed a motion for postconviction relief.

Following an evidentiary hearing, the district court granted Washington postconviction relief in the form of a new direct appeal.

II. STATEMENT OF FACTS

Washington is appealing from nine convictions and sentences for first degree assault; second degree assault; possession of a deadly weapon by a prohibited person; discharging a firearm in certain cities, villages, and counties; three counts of use of a deadly weapon to commit a felony; possession of a firearm by a



prohibited person; and possession of a stolen firearm; based on incidents which occurred on March 17 and 27, 2010.

1. MARCH 17, 2010 INCIDENT

On March 17, 2010, at 4:38 p.m., law enforcement received a dispatch for shots fired at 40th and Maple Streets in Omaha, Nebraska. Bill's Convenience Store is located at the corner of 40th and Maple Streets. City of Omaha police officer Sean Gardner was the first officer on the scene. When he arrived on the scene, it was chaotic, so he began securing the scene, scanned the area for suspects, tried to find victims, and spoke to potential witnesses. Gardner tended to one victim who was still at the scene. That victim, Antoinette Clark, had been shot suffering two graze wounds. Gardner was advised that another victim had also been shot and had fled the area on foot. That victim, Jestun Haynie, was taken to the hospital by Quinetta Pinkney, a motorist who happened to be passing by and knew Haynie. Haynie suffered multiple gunshot wounds which caused injuries including the removal of his left kidney and a 20-centimeter section of his bowel, a broken leg, and two broken arms.

Omaha police officer Zachary Petrick responded to Bill's Convenience Store, contacted the store's owner, learned the store had a surveillance system, and obtained permission to view the store's surveillance system. Upon observing the store's surveillance system video recording, Petrick discovered that the

recording covered the surrounding area and recorded the shooting. Petrick obtained a description of both the suspect vehicle and the suspect and relayed that information over the police radio. Petrick described the suspect vehicle as "a newer model SUV similar to a Nissan Murano, that it was dark in color, either gray or black," and described the suspect as "a black male" with "a thin build" wearing "light-colored clothing." Later that evening, an Omaha Police Department Crime Lab criminalist with specialized training in forensic video analysis copied the video surveillance recordings from Bill's Convenience Store. On March 24, law enforcement identified Washington as a suspect and obtained a warrant for his arrest.

As a result of these events, Washington was charged in case No. 183-663 with first degree assault, a Class II felony; two counts of second degree assault, Class III felonies; possession of deadly weapon by a prohibited person, a Class ID felony; and three counts of use of a firearm to commit a felony, Class IC felonies. See Neb. Rev. Stat. § 28-308 (Cum. Supp. 2014) (first degree assault); Neb. Rev. Stat. § 28-309 (Supp. 2009) (second degree assault); Neb. Rev. Stat. § 28-1206 (Supp. 2009) (possession of a deadly weapon by a prohibited person); Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2014) (use of a firearm to commit a felony).

2. MARCH 27, 2010 INCIDENT

At around 8 p.m. on March 27, 2010, Omaha police officer Chad Frodyma and his partner Petrick were parked at the Bucky's Convenience Store at 30th and Dodge Street when the officers saw Washington exit the store and approach an early 1990's silver or gray Oldsmobile sitting at one of the gas pumps. Petrick and Frodyma were aware that Washington had an active felony arrest warrant. The officers watched as Washington got into the front passenger seat of the Oldsmobile. There were two other occupants in the Oldsmobile: a person in the driver's seat and a person in the back seat by the passenger door.

After Washington entered the Oldsmobile, Petrick approached the passenger front door of the Oldsmobile, and confirmed Washington's identity. Petrick then drew his service weapon and ordered Washington to put his hands up. After Washington failed to comply, Petrick gave several commands directed to the vehicle's occupants including to turn the vehicle off and for all of the vehicle's occupants to put their hands up. When the occupants of the car ignored Petrick's commands, he attempted to open the front passenger door, but it was locked. Petrick observed Washington turn and say something to the driver of the Oldsmobile, at which point the Oldsmobile drove away.

Petrick and Frodyma began pursuing the Oldsmobile in their patrol cruiser. While turning north on 30th Street during the pursuit, Frodyma observed that the Oldsmobile's front passenger

door was open and an arm was halfway outside of the door throwing a "dark, hard object" out of the car which object landed on the east side of the street. Petrick relayed that information to dispatch along with the general location where the object had been thrown from the Oldsmobile. After a short pursuit, officers arrested Washington, who was wearing a bulletproof vest.

Within five minutes after the pursuit, Officer Kenneth Fortune retrieved a Glock 9-millimeter handgun from the area which had been identified as the area where the object had been thrown from the Oldsmobile. The handgun retrieved by Fortune was later identified as being one of the guns used in the shooting on March 17, 2010. The gun was also identified as being stolen.

As a result of these events, Washington was charged in case No. 183-664 with possession of a deadly firearm by a prohibited person, a Class ID felony, and possession of a stolen firearm, a Class III felony. See § 28-1206 (possession of a deadly weapon by a prohibited person); Neb. Rev. Stat. § 28-1212.03 (Reissue 2009) (possession of a stolen firearm).

3. PRETRIAL PROCEEDINGS

On September 9, 2010, the State filed a motion to consolidate case Nos. 183-663 and 183-664. The parties had oral argument on the motion on October 4, the court took the motion under advisement, but after no ruling was forthcoming, the State refiled the motion on January 28, 2011. The State also sought

leave to file an amended information in case No. 183-663 to add additional charges of discharging a firearm in certain cities, villages, and counties and use of a deadly weapon to commit a felony. See Neb. Rev. Stat. § 28-1212.04 (Supp. 2009) (discharge of firearm in certain cities, villages, and counties); § 28-1205 (use of a deadly weapon to commit a felony).

On February 7, 2011, a hearing was held on the State's motion to consolidate the cases for trial and the State's request for leave to file an amended information in case No. 183-663. The State informed the district court that the facts and circumstances regarding the additional two charges were the same that set forth the basis for the other charges that Washington was facing, the additional counts would not change the evidence that was going to be adduced, and there was no prejudice to Washington who was on notice that the State was seeking to add the two additional charges. The district court granted the State's motion for leave to amend the information at case No. 183-663 noting that the charges all arose from the March 17, 2010, incident.

The State then argued that case Nos. 183-663 and 183-664 should be consolidated. A synopsis of the State's argument for consolidation was that after officers stopped Washington on March 27, 2010, officers found the gun which they believed was dropped by him as that car sped away and the State was going to offer evidence at trial to show the connection of that gun to

the shootings on March 17. The State also set forth that it was going to present evidence that the gun used by Washington was stolen.

The district court sustained the motion to consolidate reasoning:

The State's going to have to present all of this evidence in the trial, and everybody has known that this evidence was going to be introduced by the State for some time.

If the Court doesn't consolidate this, then we're going to have to have another trial with the exact same evidence and we're just going to be repetitive about the same thing. This Court is of the opinion that the jury is savvy enough and intelligent enough along with the instructions to understand that these are different situations . . . and to make different judgments accordingly regarding those different dates.

The district court granted the motion to consolidate over Washington's objection..

4. JURY TRIAL

Just before jury selection, the State dismissed two of the charges in case No. 183-663: one count of second degree assault and one count of use of a weapon to commit a felony. This left a total of nine charges for trial: seven charges in case No. 183-663 which related to incidents on March 17, 2010 consisting of first degree assault; second degree assault; possession of a firearm by a prohibited person; discharging a firearm in certain cities, villages, and counties; and three counts of use of a

weapon to commit a felony; and two charges in case No. 183-664 relating to incidents on March 27 consisting of possession of a firearm by a prohibited person and possession of a stolen firearm.

The jury trial in this case was held in March 2011. Evidence was adduced that established the facts as previously set forth. Further, the parties stipulated that Washington was a convicted felon resulting from a conviction dated November 17, 2006.

Washington's allegations regarding the insufficiency of the evidence center on whether he was one of the shooters; thus, for the ease of the reader, we have narrowed our focus of the extensive amount of evidence presented at trial in this case to focus on evidence relevant to that particular issue.

This case was not a case of eyewitness testimony identifying Washington as the shooter on March 17, 2010. Although there were several witnesses at the scene of the March 17 shooting, none of those witnesses could positively identify the shooter.

Clark's mother testified she was present at the scene on March 17, 2010, and while she was inside Bill's Convenience Store, she heard what sounded like a gunshot. As she exited the store, she walked right in the middle of gunfire. Although she was aware the shooter was on her left, she did not focus on the shooter and could not identify the shooter.

Pinkney, the motorist who happened to drive by the scene, encountered the injured Haynie, and drove him to the hospital, testified that she glanced in the direction of where she heard the shots coming from, but she was not sure she saw anyone with a gun and she would not be able to recognize that person again.

Rebecca Hale, who lived in the area of 40th and Maple Streets, testified that at approximately 4:30 p.m. on March 17, 2010, she heard gunshots, and she observed a hatchback-type vehicle stop on Maple Street, three black males get out of the vehicle, and continue shooting. She described the driver as having short hair and wearing jeans and a hoodie; the second person was wearing a red and black wind suit; and the third person wore a blue jean jacket. Hale testified that the driver ran toward Bill's Convenience Store and started shooting, then ran back to the vehicle and drove away. Hale testified that she was not able to get a good look at any of the faces because of their distance from her.

Although the State did not have eyewitness testimony identifying Washington as the shooter on March 17, 2010, the State did adduce evidence including video surveillance obtained from Bill's Convenience Store showing the shooter was a black male wearing light-colored clothing. Still photos obtained from the video surveillance were also admitted into evidence which provided more close-up views of the shooter.

Additionally, video surveillance was obtained from the Omaha police station a few hours prior to the shooting when Washington came to the police station to be interviewed on another matter. Omaha police department homicide detective Christopher Gordon testified that about 1 p.m. on March 17, 2010, Washington voluntarily arrived at the Omaha Police Department Central Headquarters for an interview. During the interview, Washington was wearing gray sweatpants, a white t-shirt, a gray zip-up hoodie, and white tennis shoes. Gordon described that the back of the hoodie had "a round dark-colored logo with some sort of lighter-colored border around it." Gordon's interview with Washington was videotaped and was admitted into evidence as exhibit 4. Although the videotape did have sound, the videotape was being used by the State to show Washington's clothing, so no sound was played to the jury. Exhibits 5 and 6 were also admitted into evidence: exhibit 5 showed Washington entering the lobby of the Omaha Police Department Central Headquarters for his interview at about 1 p.m. and exhibit 6 showed Washington exiting the building at about 1:30 p.m. after the conclusion of his interview.

The State also presented evidence which linked Washington to the vehicle used in the March 17, 2010, shooting--a black Nissan Rogue--which had been recovered at 12:40 a.m. the morning after the shooting. When the black Nissan Rogue was processed on March 18, three pieces of mail addressed to Washington were

collected from the passenger side visor and three of Washington's fingerprints were pulled from the car, two from the rear gate and one from the rearview mirror.

Tonya Douglas testified that she was familiar with Washington because he is friends with her children. In March 2010, Douglas rented a black Nissan Rogue from Avis and, during the rental period, she did not give anyone the keys to the vehicle and did not give anyone permission to use the vehicle. Douglas specifically testified she did not give Washington permission to use the black Nissan Rogue; however, she did give him rides several times. Although Douglas testified that she did not know who took the vehicle without her permission on March 17, she did testify that Washington was at her home on March 17, and she usually kept the keys to the rental car on a table in the hallway right by the front door.

At the conclusion of the State's evidence, the parties stipulated as a "way of just speeding things along today" that:

Had Dr. Cemaj been called to the stand, Dr. Cemaj would have testified that on March 17, 2010, he was a physician and surgeon at Creighton University Medical Center and worked on the victim in this case, Jestun Haynie, and had to remove his left kidney as well as a 20-centimeter section of his bowel and that Mr. Haynie also suffered from a broken leg which, they had to place a rod in his leg, and two broken arms. He would have testified that that's the result of multiple gunshot wounds.

The parties also stipulated that "affidavits and orders were entered into to take DNA samples from four individuals. An order was entered and the samples were taken of . . . Washington" and three other individuals. The State then rested its case-in-chief and the defense did not present any evidence.

5. JURY DELIBERATIONS

During deliberations, the jury posed a question "[o]n Count III what is the difference between 2nd degree & 3rd degree assault?" The court instructed the jury to "re-read Instruction No. 6 in its entirety as it sets forth the elements for Second Degree Assault and Third Degree Assault." The pertinent portions of jury instruction No. 6 are set forth in the analysis portion of this opinion.

6. JURY VERDICT

The jury found Washington guilty of the charged offenses. In case No. 183-663, the jury found Washington guilty of first degree assault; second degree assault; possession of a deadly weapon by a prohibited person (possession by a felon); discharging a firearm in certain cities, villages, and counties; and three counts of use of a deadly weapon to commit a felony. In case No. 183-664, the jury found Washington guilty of possession of a firearm by a prohibited person and possession of a stolen firearm.

7. SENTENCING HEARING

On April 18, 2011, in case No. 183-663, the district court sentenced Washington as follows:

<u>Count</u>	<u>Offense</u>	<u>Felony</u>	<u>Sentence</u>
I	First Degree Assault	Class II	30-50 years
II	Use of a Weapon	Class IC	30-50 years
III	Second Degree Assault	Class III	3-5 years
IV	Use of a Weapon	Class IC	5-5 years
VII	Possession by a Felon	Class ID	5-5 years
VIII	Discharging a Firearm	Class IC	5-5 years
IX	Use of a Weapon	Class IC	5-5 years

Counts II, IV, and IX were ordered to run consecutively to all counts and to each other, and all other counts were ordered to run concurrently. Washington was ordered to receive credit on the sentence for first degree assault for 387 days previously served.

In case No. 183-664, Washington was convicted of possession of a firearm by a prohibited person and possession of a stolen firearm. He was sentenced to 5 to 5 years' imprisonment on each conviction with the sentences ordered to run concurrently with each other and concurrently with the sentences imposed in case No. 183-663. Thus, the court sentenced Washington to a total of 70 to 110 years' imprisonment. The district court then informed Washington, incorrectly, that he would eligible for parole in 35 years, less the 387 days already served, and released in 55 years, less the 387 days previously served.

Several days later, on April 20, 2011, the district court attempted to resentence Washington to reflect the court's intent that Washington would be eligible for parole in a certain number of years or be released in a certain number of years.

8. APPEALS

Washington filed a direct appeal of his convictions and sentences, which appeal was dismissed by this court for lack of jurisdiction because he failed to file a proper poverty affidavit. The State also appealed, filing an application to docket error proceedings on the basis that the district court's attempted modification of Washington's sentences was of no effect because a valid sentence had been imposed on April 18, 2011. The State's application to docket error proceedings was granted and this court found that the district court's attempt at resentencing on April 20 was null and void and the sentence imposed on April 18 remained in effect; however, the cause was remanded for proper advisement of good time calculations. In each of the aforementioned appeals, Washington was represented by the same counsel that represented him at trial and sentencing. Upon remand, a hearing was held on May 1, 2012, during which the district court advised Washington that he would be serving the original sentences imposed and informed him of good time calculations. This district court's order finalizing the court's findings was filed on May 3.

Following this sentencing on remand, Washington, represented by new counsel, again appealed to this court, claiming that the evidence was insufficient to support his convictions, the sentences imposed were excessive, and he received ineffective assistance of counsel at the April 18, 2011, sentencing hearing. This court found that Washington's assigned errors were not properly before this court and could not be considered; however, pursuant to the Nebraska Supreme Court's decision in *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), we found plain error existed in Washington's sentencing. Based upon our reliance upon the Supreme Court's language in *Castillas, supra*, that "[m]andatory minimum sentences cannot be served concurrently. A defendant convicted of multiple counts each carrying a mandatory minimum sentence must serve the sentence on each count consecutively," we remanded the cause with directions that the district court resentence Washington to consecutive sentences on his second degree assault and discharging a firearm convictions and recalculate and advise Washington of his good time calculations. *Id.* at 191, 826 N.W.2d at 268. The district court resentenced Washington pursuant to our mandate and the court's order thereon was filed on October 1, 2013.

9. POSTCONVICTION PROCEEDINGS

On January 13, 2014, Washington filed identical motions for postconviction relief in case Nos. 183-663 and 183-664 alleging,

inter alia, that his counsel was ineffective for failing to properly file a direct appeal. He also filed a motion requesting the appointment of postconviction counsel which was granted by the district court. Following an evidentiary hearing, the district court found that Washington requested that his trial counsel file a direct appeal within 30 days of his sentencing, trial counsel did file a notice of appeal, but failed to file a new poverty affidavit with the appeal. The district court granted postconviction relief in the form of a new direct appeal which is the appeal currently pending before this court.

10. BRIEFING IN APPELLATE COURT

The appellant's brief was filed with this court on August 28, 2015. A "Pro Se Brief of Appellant" was filed on October 27, 2015. The following day this brief was stricken by order of this court for failure to receive leave of court to file same and for failure to comply with Neb. Ct. R. App. P. § 2-109. The appellee's brief was filed by the State on November 25. Washington's reply brief was filed on January 14, 2016.

On Thursday, June 2, 2016, three business days prior to oral argument being held in this case, Washington filed a "REQUEST FOR LEAVE OF COURT TO FILE PRO SE BRIEF" which was signed by his counsel. The same day, Washington filed a "Pro Se Brief of Appellant" which was signed by Washington, but stated that it was "[p]repared by" his counsel. On June 3, the State filed a motion to strike Washington's "pro se" brief for the

following reasons: (1) the brief was not actually a "pro se brief" because it was prepared by his counsel; (2) the briefing in the case had concluded months earlier on January 14, 2016, when Washington filed his reply brief and oral argument was scheduled for oral argument on June 7, 2016; and (3) the purported "pro se" brief appears to raise new claims for the first time on appeal and because of the late filing, the State will not have an opportunity to address those claims. Oral argument was held on June 7 and the parties did debate whether the "pro se" brief should be accepted or stricken by this court.

Washington's request to file his "pro se" brief was filed after the State's brief and, therefore, his brief should be considered a "reply brief." However, Washington's "pro se brief" contained additional assignments of error not contained in his initial brief. Further, Washington's unreasonable delay in waiting until mere days prior to oral argument, and months after briefing had concluded, before requesting to file his pro se brief cannot be disregarded. Thus, we deny Washington's request to file his "pro se brief." The State's motion to strike Washington's "pro se brief" is denied as moot.

III. ASSIGNMENTS OF ERROR

Washington assigns as error: (1) the district court denied him a fair trial by allowing the State to consolidate case Nos. 183-663 and 183-664 and to amend the information in case No. 183-663 to add additional counts on the eve of trial; (2) the

evidence was insufficient to support his convictions; (3) plain error occurred at his resentencing; and (4) he received ineffective assistance of trial counsel.

IV. ANALYSIS

1. DENIAL OF FAIR TRIAL

Washington contends the district court denied him a fair trial by granting the State's motion to consolidate and granting the State's motion to file an amended information.

(a) Motion to Consolidate

Washington contends that the district court erred in granting the State's motion to consolidate case No. 183-663, which encompassed the charges arising from the incidents on March 17, 2010, and case No. 183-664, which encompassed the charges arising from the incidents occurring on March 27.

A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

A defendant has no constitutional right to a separate trial on different charges. *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014); *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010). The standard for joinder of offenses is set forth in Neb. Rev. Stat. § 29-2002 (Reissue 2008). This section states, in relevant part:

(1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(2) The court may order two or more indictments, informations, or complaints, or any combination thereof, to be tried together if the offenses could have been joined in a single indictment, information, or complaint, or if the defendants, if there is more than one, are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The procedure shall be the same as if the prosecution were under such single indictment, information, or complaint.

(3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses . . . for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints . . . or provide whatever other relief justice requires.

In determining whether offenses were properly joined under § 29-2002, we first decide whether the offenses were properly joinable and then decide whether an otherwise proper joinder was prejudicial to the defendant. See *State v. Knudson*, *supra*. A defendant is not considered prejudiced by a joinder where the evidence relating to both offenses would be admissible in a trial of either offense separately. *State v. Stricklin*, *supra*.

Additionally, prejudice usually does not occur from joined charges if the evidence is sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations. *State v. Knutson*, *supra*. A defendant opposing joinder of charges has the burden of proving prejudice. *Id.*

In the instant appeal, the charged offenses in case No. 183-663 were based upon the offenses related to the incidents arising out of the events occurring on March 17, 2010, and the charged offenses in case No. 183-664 related to the incidents arising out of the events occurring on March 27, 2010. The State contends that the offenses were joinable because they were "based on the same act or transaction or on two or more acts or transactions connected together. . . ." Brief for appellee at 16 quoting § 29-2002(1). The State further contends that "joinder was not prejudicial to Washington because the evidence supporting the charges was simple and distinct." Brief for appellee at 14.

In the instant case, officers identified Washington as a suspect in the shootings that occurred on March 17, 2010, through surveillance video from Bob's Convenience Store and the Omaha police department. On March 27, officers located Washington and attempted to arrest him pursuant to an outstanding warrant, but he and two others fled in an Oldsmobile. As officers pursued the Oldsmobile, Frodyma saw Washington throw a "dark, hard object" out of the Oldsmobile,

which object, a gun, was retrieved by Officer Fortune and was later identified to be one of the guns used in the March 17 shooting. When officers caught up to Washington and arrested him, Washington was wearing a bulletproof vest. The offenses arising from the incidents on March 17 and March 27 were sufficiently related and thus were properly joinable. Further, the evidence presented was sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations. Thus, the offenses were properly joinable pursuant to § 29-2002 and Washington was not prejudiced by the joinder.

(b) Leave to Amend

Washington contends that the district court erred in granting the State's motion to file an amended information one month prior to the start of trial "as punishment to Washington for not entering a plea." Brief for appellant at 23. However, the only argument that Washington raised to the district court was that the State's request to file an amended information should not be granted because its request was untimely and filed too close to the start of trial. Appellate courts do not generally consider arguments and theories raised for the first time on appeal. *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015). Additionally, there is simply no evidence to support Washington's claim that the State sought to amend the information "as punishment . . . for [him] not entering a plea."

Brief for appellant at 23. It is incumbent upon an appellant to supply a record which supports the errors assigned. See *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016).

2. INSUFFICIENCY OF THE EVIDENCE

Washington contends that the evidence was insufficient to support his convictions beyond a reasonable doubt. He argues that none of the witnesses of the March 17, 2010, incident were able to identify him as the shooter and there was an innocent explanation for his fingerprints, and some of his mail, being found in the vehicle used in the shooting. Brief for appellant at 25. We note that Washington does not argue in his brief that the evidence was insufficient to support his convictions for possession of a firearm by a prohibited person and possession of a stolen firearm which are related to the incident on March 27, 2010; thus, we decline to address the sufficiency of the evidence to support these two convictions. See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014) (an alleged error must be both specifically assigned and specifically argued in the appellate brief in order to be considered by an appellate court).

Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of 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. *State v. Rothenberger*, 294 Neb. 810, 885 N.W.2d 23 (2016). The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

Relating to the events of March 17, 2010, Washington was charged with, and convicted of, first degree assault; second degree assault; possession of a deadly weapon by a prohibited person; discharging a firearm in certain cities, villages, and counties; and three counts of use of a weapon to commit a felony. Regarding all of these offenses, the basis for Washington's insufficiency of the evidence argument is that none of the witnesses were able to identify him as the shooter on March 17; however, video evidence, when viewed in the light most favorable to the State, established that Washington was the shooter and, additionally, Washington was later found to have thrown the gun out of a car on March 27 while being pursued by law enforcement. Regarding Washington's second claim that there was an innocent explanation for his fingerprints and some of his mail being found in the vehicle used in the shooting, when viewed in the light most favorable to the State, this evidence could be seen as evidence that Washington had access to the

vehicle involved in the shootings on March 17. Thus, as Washington makes no other claims regarding the sufficiency of the evidence supporting his convictions, we find his assigned error is without merit.

3. SENTENCING ERRORS

Washington contends that his re-sentencing pronounced on September 30, 2013, was erroneous and should be addressed by this court pursuant to the plain error doctrine. On September 30, pursuant to the mandate from this court, the district court resentenced Washington including sentencing him to consecutive sentences on the offenses of second degree assault and discharging a firearm. Washington's resentencing was based upon this court's reliance on the following language from the Nebraska Supreme Court's opinion in *State v. Castillas*, 285 Neb. 174, 191, 826 N.W.2d 255, 268 (2013): "Mandatory minimum sentences cannot be served concurrently. A defendant convicted of multiple counts each carrying a mandatory minimum sentence must serve the sentence on each count consecutively."

However, following Washington's September 2013 resentencing, the Nebraska Supreme Court clarified its holding in *Castillas, supra*, stating, "We were not speaking of enhancements under the habitual criminal statute, but of those specific crimes that required a mandatory minimum sentence to be served consecutively to other sentences imposed." *State v. Lantz*, 290 Neb. 757, 759, 861 N.W.2d 728, 730 (2015) quoting

State v. Berney, 288 Neb. 377, 847 N.W.2d 732 (2014). Thus, the Supreme Court held: "To the extent that our language in *Castillas* can be interpreted to mean that all convictions carrying a mandatory minimum sentence must be served consecutively to all other sentences, such interpretation is expressly disapproved." *State v. Lantz*, 290 Neb. at 763, 861 N.W.2d at 732. Based upon this clarifying case law released after Washington's September 2013 resentencing, we agree that Washington's 2013 resentencing resulted in plain error. Thus, we vacate the district court's September 2013 resentencing order which was entered pursuant to our mandate.

The question then becomes whether this court should remand the cause for an entirely new resentencing or for reinstatement of Washington's original sentence. Washington contends that his case should be remanded for resentencing pursuant to *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014). In *Berney*, *supra*, the Nebraska Supreme Court remanded his case for resentencing because, although the district court had appropriately determined that Berney was guilty of two counts of burglary and was a habitual criminal, the district court sentenced Berney under the mistaken belief that it was required to impose consecutive sentences. Since the district court was not required to impose the enhanced habitual criminal sentences to be served consecutively, the Nebraska Supreme Court remanded for resentencing for the district court to utilize its discretion in

determining whether Berney's sentences should be served concurrently or consecutively.

The distinction that arises between *Berney, supra*, and the instant case, is that the original sentences imposed upon Washington by the district court on April 18, 2011, were valid. In case No. 183-663, Washington was sentenced as follows: first degree assault, 30 to 50 years' imprisonment; use of a weapon to commit a felony, 30 to 50 years' imprisonment; second degree assault, 3 to 5 years' imprisonment; use of a weapon to commit a felony, 5 to 5 years' imprisonment; possession of a firearm by a prohibited person, 5 to 5 years' imprisonment; discharging a firearm, 5 to 5 years' imprisonment; and use of a weapon to commit a felony, 5 to 5 years' imprisonment. The use of a weapon convictions were ordered to run consecutively to all counts and to each other, and all other counts were ordered to run concurrently. Washington was ordered to receive credit on the first degree assault sentence for 387 days previously served.

At case No. 183-664, Washington was convicted of possession of a firearm by a prohibited person and possession of a stolen firearm. He was sentenced to 5 to 5 years' imprisonment on each conviction with the sentences ordered to run concurrently with each other and concurrently with the sentences imposed in case No. 183-663.

At the time of Washington's original sentencing on April 18, 2011, the only sentences that were ordered to run

consecutively were sentences imposed on Washington's use of a weapon convictions, which were statutorily required to run consecutively to any other sentence imposed. See Neb. Rev. Stat. § 28-1205(3) (Cum. Supp. 2014). Thus, the factual scenario presented here is more akin to that presented in *State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015), where Lantz' original sentences were not plain error, the Supreme Court remanded the cause with directions for the district court to reinstate the original sentences imposed. Consequently, since Washington's original sentences imposed by the district court on April 18, 2011, were valid sentences, and were not plain error, we remand the cause with directions for the district court to reinstate Washington's original sentences imposed in this case on April 18, 2011.

4. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Washington contends that his trial counsel was ineffective in (a) failing to properly raise and preserve a constitutional challenge to § 28-1212.04; (b) failing to object to jury instructions; (c) failing to object to exhibits 34 and 38, the videos from Bill's Convenience Store, and the photographs made from those videotapes; (d) failing to fully discuss and advise Washington concerning each count of the information and amended information; (e) entering into multiple stipulations with the State without Washington's knowledge and consent; and (f)

failing to recognize plain error at his April 2011 sentencing hearing and his re-sentencing hearing in September 2013.

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016); *State v. Collins*, 292 Neb. 602, 873 N.W.2d 657 (2016). The determining factor is whether the record is sufficient to adequately review the question. *State v. Abejide*, *supra*; *State v. Collins*, *supra*. An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing. *State v. Abejide*, *supra*; *State v. Collins*, *supra*.

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 counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015). A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question. *Id.* When the claim is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel. *Id.* However,

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. *Id.*

(a) Failure to Raise or Preserve
Constitutional Challenge to § 28-1212.04

Washington contends his trial counsel was ineffective in failing to properly raise and preserve a constitutional challenge to § 28-1212.04. He alleges that § 28-1212.04 is a facially unconstitutional criminal statute because it creates small geographic areas of enforcement and other areas of immunity for identical conduct in violation of the Nebraska Constitution and *Galloway v. Wolfe*, 117 Neb. 824, 223 N.W.1 (1929) and its progeny, the equal protection clauses of the Nebraska and U.S. Constitutions, and it discriminates against a protected class because African-Americans are disproportionately represented in the area of enforcement in violation of the equal protection clauses of the Nebraska and U.S. Constitutions, and the decision in *Hunter v. Underwood*, 471 U.S. 222, 105 S. Ct. 1916 (1985). Brief for appellant at 27-28. The record on appeal is insufficient to adequately review this question.

(b) Failure to Object to Incorrect Jury Instructions

Washington contends that his counsel was ineffective for failing to object to incorrect jury instructions. During deliberations, the jury posed the question "[o]n Count III what

is the difference between 2nd degree & 3rd degree assault?" The court instructed the jury to "[p]lease re-read Instruction No. 6 in its entirety as it sets forth the elements for Second Degree Assault and Third Degree Assault." Washington contends that jury instruction No 6. does not contain the elements for third degree assault and, as such, is not a correct statement of the law and his counsel was ineffective for failing to object to that instruction.

Whether the jury instructions given by a trial court are correct is a question of law. *State v. Rothenberger*, 294 Neb. 810, 885 N.W.2d 23 (2016). When reviewing questions of law, an appellate court resolves the questions independently of the conclusion reached by the lower court. *Id.*

Jury instruction no. 6 set forth, in pertinent part:

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the Defendant Rashad Washington of the crime of Assault in the Third Degree under Count III are as set forth below:

That on or about March 17, 2010, in Douglas County, Nebraska, the Defendant Rashad Washington, either alone or by aiding another, did intentionally, knowingly, or recklessly cause bodily injury to the victim, Antoinette Clark.

Neb. Rev. Stat. § 28-310 (Reissue 2008) provides that a person commits third degree assault if he or she either (a)

intentionally, knowingly, or recklessly causes bodily injury to another person; or (b) threatens another in a menacing manner.

Jury instruction No. 6 accurately set forth the elements of third degree assault in the context of this case. Because the jury instruction was correct, Washington's counsel was not ineffective in failing to object to this jury instruction.

(c) Failure to Object to Exhibits

Washington contends that his trial counsel erred in failing to object to exhibits 34 and 38, videos from Bill's Convenience Store, and still photos taken from those videos, on the basis that there was insufficient foundation for their admission into evidence. Brief for appellant at 34.

Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis. *State v. Anglemeyer*, 269 Neb. 237, 691 N.W.2d 153 (2005); *State v. McMillion*, 23 Neb. App. 687, 875 N.W.2d 877 (2016). A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Anglemeyer*, *supra*; *State v. McMillion*, *supra*.

An experienced criminalist with the OPD crime lab testified that he had specialized training in forensic video analysis; he accessed the video DVR system at Bill's Convenience Store on March 17, 2010; and he made accurate copies of the video that was contained on the DVR system. Exhibit 34 is a copy of the

data that the criminalist downloaded from the DVR at Bill's Convenience Store. Exhibit 38 is a sequenced video to make it easier for individuals to view the action as it took place at Bill's Convenience Store. Thus, there was sufficient foundation to support the admission of exhibits 34 and 38 into evidence and Washington's counsel's performance was not deficient and Washington suffered no prejudice in this regard.

Washington also contends that trial counsel erred in failing to object to the photos taken from those videos. The criminalist testified that, in using the system, he was able to capture still images off of Bill's DVR system and exhibits 39, 40, 41, and 219 were still images from the system and also includes some enlargements, which clearly and accurately depict the screen captures or enlarged portions of screen captures. Washington's trial counsel objected to exhibits 39, 40, 41, and 219 on foundational grounds. Since Washington's trial counsel did raise foundational objections to the still photos taken from the videos from Bill's Convenience Store, his claim to the contrary must fail.

(d) Failure to Fully Discuss and Advise Client

Washington claims that his trial counsel was ineffective for failing to fully discuss and advise Washington concerning each count of the information and amended information. The record on appeal is insufficient to adequately review this question.

(e) Entering Into Stipulations Without Client's Knowledge and Consent

Washington also contends that his trial counsel was ineffective for entering into multiple stipulations with the State without his knowledge and consent regarding Dr. Cemaj and the fact that DNA samples had been taken. Washington cannot establish either the deficient performance or prejudice because if he and his counsel had refused to enter into the aforementioned stipulations, the State would have called the relevant witnesses to establish the necessary facts. Thus, this claim is without merit.

(f) Failure to Recognize Plain Error at Sentencing

Washington contends that his trial counsel was ineffective for failing to recognize plain error at his April 18, 2011, sentencing hearing and his re-sentencing hearing in September 2013. Washington's argument regarding his counsel's ineffectiveness at the April 18, 2011, sentencing hearing appears to be that his counsel should have recognized that the trial court erred in sentencing Washington and brought this error to the district court's attention, which would have allowed the court to correctly pronounce the sentence as it originally intended to do. However, defense counsel could not have known the district court's intentions regarding sentencing because it was not until days later, April 20, that the district court articulated that its intent was to sentence Washington in

the area of 80 to 110 years' imprisonment with the expectation that Washington would be eligible for parole in 40 years or be released in 50 years. Stated another way, Washington is claiming defense counsel was ineffective for failing to possess the ability to read the judge's mind to ascertain the court's intent regarding sentencing. This claim clearly does not constitute deficient conduct by counsel and is without merit.

Washington also contends that his defense counsel was ineffective for failing to recognize plain error at his resentencing hearing in September 2013. This resentencing was conducted pursuant to this court's mandate and defense counsel's failure to anticipate that there would be a change in the interpretation of existing law does not constitute deficient performance. See *State v. Sanders*, 289 Neb. 335, 855 N.W.2d 350 (2014) (the failure to anticipate a change in existing law does not constitute deficient performance).

V. CONCLUSION

In sum, we affirm Washington's convictions; however, we reverse and vacate his sentences and remand with directions for the district court to reinstate Washington's original sentences imposed in this case on April 18, 2011. We further find Washington's claims of ineffective assistance of counsel to be without merit except for the following claims which we find the record insufficient to address on direct appeal: that trial counsel was ineffective in failing to properly raise and

preserve a constitutional challenge to § 28-1212.04 and that his trial counsel was ineffective for failing to fully discuss and advise Washington concerning each count of the information and amended information.

AFFIRMED IN PART, AND IN PART REVERSED AND VACATED AND REMANDED WITH DIRECTIONS.

Brian S. Munnely
Attorney at Law
626 S. 19th Street, Suite 9
Omaha, NE 68102

Phone (402) 991-8100

Attorney

Fax (402) 934-1030

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OPINION OF THE SUPREME COURT OF NEBRASKA

Case Title

STATE OF NEBRASKA, APPELLEE,
v.
RASHAD WASHINGTON, APPELLANT.

Case Caption

STATE V. WASHINGTON

Filed October 26, 2018. Nos. S-17-1002, S-17-1026.

Appeals from the District Court for Douglas County: PETER C. BATAILLON,
Judge. Affirmed.

Brian S. Munnelly for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

STATE v. WASHINGTON

Filed October 26, 2018. Nos. S-17-1002, S-17-1026.

- 1. Judgments: Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
- 2. Courts: Appeal and Error.** The order of an appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.

HEAVICAN, C.J., MILLER-LERMAN, STACY, FUNKE, and PAPIK, JJ.

HEAVICAN, C.J.

INTRODUCTION

Rashad Washington appeals from the district court's denial of his motion to vacate and the subsequent reinstatement of sentences originally ordered on April 18, 2011. Washington appeals. We affirm.

BACKGROUND

This case is procedurally complex. Following a jury trial, Washington was convicted of nine counts for first degree assault; second degree assault; possession of a firearm by a prohibited person; discharging a firearm in certain cities, villages, and counties; three counts of use of a weapon to commit a felony; possession of a firearm by a prohibited person; and possession of a stolen firearm. These charges result from separate incidents occurring on March 17 and 27, 2010.

On April 18, 2011, the district court sentenced Washington to a combined total of 70 to 110 years' imprisonment. The district court then informed Washington, incorrectly, that he would be eligible for parole in 35 years, less the 387 days already served, and released in 55 years, less the 387 days already served. Two days later, on April 20, the district court attempted to resentence Washington to reflect the court's intent that Washington would be eligible for parole in a certain number of years or be released in a certain number of years.

Washington appealed, but on June 19, 2011, in case No. A-11-402, his appeal was dismissed by the Nebraska Court of Appeals for lack of jurisdiction, because a poverty affidavit had not been filed.

The State filed a petition to docket error proceedings, which was granted. In its petition, the State argued that the April 20, 2011, attempt to resentence Washington was of no effect. The Court of Appeals agreed and on February 27, 2012, in case No. A-11-416, held that the April 18 sentence remained in effect, but the court remanded the matter for a new advisement on good time calculations. The district court held a hearing to that effect on May 1, 2012, with a written order following on May 3.

By this time, Washington was represented by new counsel. That counsel filed a notice of appeal on Washington's behalf, arguing insufficiency of the evidence, excessiveness of the sentences imposed, and ineffectiveness of counsel at the April 18, 2011, sentencing hearing.¹ The Court of Appeals declined to reach the assigned errors, but found plain error in the sentences imposed based upon this court's decision in *State v. Castillas*.²

The Court of Appeals relied upon our statement in *Castillas* that "[m]andatory minimum sentences cannot be served concurrently. A defendant convicted of multiple counts each carrying

¹ *State v. Washington*, No. A-12-470, 2013 WL 2326983 (Neb. App. May 28, 2013) (selected for posting to court website).

² *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), *disapproved in part*, *State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

a mandatory minimum sentence must serve the sentence on each count consecutively,” to conclude that the district court’s imposition of concurrent sentences for the second degree assault and discharging a firearm convictions were error.³ Accordingly, the Court of Appeals remanded the matter for resentencing on those convictions, with recalculated good time advisements. Washington was so resentenced on September 30, 2013, with a written order filed on October 1.

In January 2014, Washington filed various motions seeking postconviction relief in the form of a new direct appeal and the appointment of counsel for that appeal. Those motions were granted, an evidentiary hearing was held, and a new direct appeal granted.

In an unpublished memorandum opinion dated December 29, 2016, in consolidated cases Nos. A-15-317 and A-15-323, the Court of Appeals affirmed Washington’s convictions, but based on this court’s clarification of *Castillas*,⁴ reversed and vacated the sentences imposed by the district court on September 30, 2013. The Court of Appeals further ordered that the district court reinstate the sentences imposed on April 18, 2011.

The Court of Appeals also found that all but two of Washington’s ineffective assistance of counsel claims were without merit, except for Washington’s claim that counsel failed to preserve a constitutional challenge to Neb. Rev. Stat. § 28-1212.04 (Reissue 2016) and that counsel failed to fully discuss and advise Washington concerning each count of the information and amended information. As to those two claims, the Court of Appeals found an insufficient record. Washington’s motion for rehearing to the Court of Appeals and petition for further review to this court were both denied.

Upon remand, Washington filed a motion to vacate his conviction for discharge of a firearm in certain cities, villages, and counties under § 28-1212.04, arguing the statute is unconstitutional on its face. Washington requested that the motion to vacate be taken up before the court reinstated the sentences as directed by the mandate. The district court concluded that it lacked jurisdiction to do anything other than reinstate the sentences imposed on April 18. Accordingly, the district court denied the motion to vacate and reinstated the April 18 sentences. Washington appeals the denial of his motion to vacate.

ASSIGNMENTS OF ERROR

On appeal, Washington assigns that (1) § 28-1212.04 is facially unconstitutional, as violative of the prohibition against local and special laws as stated in Neb. Const. art. III, § 18, and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, and (2) the district court’s failure to consider the merits of the federal equal protection challenge on the basis of state procedural grounds violated the Supremacy Clause of article VI, clause 2, of the U.S. Constitution.

³ *State v. Washington*, *supra* note 1, 2013 WL 2326983 at *3.

⁴ See *State v. Lantz*, *supra* note 2.

STANDARD OF REVIEW

[1] The construction of a mandate issued by an appellate court presents a question of law on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.⁵

ANALYSIS

The issue presented by this appeal is whether the district court was obligated to consider the constitutional claim raised by Washington in his motion to vacate, when that motion was filed after remand from a decision of the Court of Appeals which ordered the district court to resentence Washington in a particular way. The district court declined to reach the motion, concluding that the mandate from the Court of Appeals allowed it only to resentence Washington. But Washington contends that the federal constitutional challenge trumps the state procedural rules under the Supremacy Clause of the U.S. Constitution, requiring the district court to address his claim.

We have reviewed the cases upon which Washington relies and find them inapplicable here. Washington primarily relies upon cases which involve the collateral review of a statute already found to be unconstitutional and simply hold that the sentence imposed for such a violation is void.⁶ But the statute which Washington argues is unconstitutional has not yet been found to be unconstitutional, and the cases he relies upon do not opine on the underlying procedure that should be followed in making such a determination. We are therefore unpersuaded by Washington's assertion that the lower court was obligated under the Supremacy Clause to address his constitutional claims.

[2] This court has held that when a cause is remanded with specific directions, the court to which the mandate is directed has no power to do anything but to obey the mandate. The order of an appellate court is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by the appellate court can be entered by the trial court.⁷ Thus, pursuant to the mandate of the Court of Appeals, the district court had the power only to resentence Washington. There is no merit to Washington's assertions to the contrary.

CONCLUSION

The district court did not err by not addressing Washington's constitutional challenge. We affirm.

AFFIRMED.

CASSEL and FREUDENBERG, JJ., not participating.

⁵ *State v. Payne*, 298 Neb. 373, 904 N.W.2d 275 (2017).

⁶ See, *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016); *MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013); *State v. Nollen*, 296 Neb. 94, 892 N.W.2d 81 (2017); *State v. Castaneda*, 287 Neb. 289, 842 N.W.2d 740 (2014).

⁷ *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001).

Brian S. Munnelly

Attorney at Law

626 S. 19th Street, Suite 9

Omaha, NE 68102

Phone (402) 991-8100

Attorney

Fax (402) 934-1030

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CLERK OF THE NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS

2413 State Capitol, P.O. Box 98910
Lincoln, Nebraska 68509-8910
(402) 471-3731
FAX (402) 471-3480

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Clerk

Pamela J. Kraus

Deputy Clerk

Jordan M. Flynn

Shelley Holmberg

Lori D. Oliveros

Appellate Clerks

Laura R. Monsees

Bailiff

December 7, 2018

Brian S Munnely
bmunnely1009@gmail.com

IN CASE OF: S-17-001002, State v. Rashad Washington

S-17-001026, State v. Rashad Washington

TRIAL COURT/ID: Douglas County District Court 183-663

Douglas County District Court 183-664

The following filing: Motion Appellant for Rehearing

Filed on 11/04/18

Filed by appellant Rashad Washington #73519

Has been reviewed by the court and the following order entered:

Motion of appellant for rehearing overruled.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals