STATE OF NEBRASKA, APPELLEE, V. JOHN VAUGHN, APPELLANT.

___ N.W.2d ___

Filed May 5, 2023. No. S-22-308.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
3. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.
4. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error.

5. **Motions for Mistrial: Appeal and Error.** An appellate court will not disturb a trial court's decision whether to grant a motion for mistrial unless the trial court has abused its discretion.
6. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
7. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
8. **Constitutional Law: Search and Seizure.** Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
9. **Search and Seizure: Warrantless Searches.** Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.
10. **Warrantless Searches.** The warrantless search exceptions that Nebraska has recognized include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.
11. **Warrantless Searches: Motor Vehicles.** Nebraska has recognized that among the established exceptions to the warrant requirement is the automobile exception.
12. **Search and Seizure: Warrantless Searches: Probable Cause: Motor Vehicles.** The automobile exception to the warrant requirement applies when a vehicle is readily mobile and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle.
13. **Probable Cause: Police Officers and Sheriffs: Motor Vehicles.** Probable cause may result from any of the senses, and an officer is entitled to rely on his or her sense of smell in determining whether contraband is present in a vehicle.
14. **Search and Seizure: Warrantless Searches: Probable Cause: Police Officers and Sheriffs: Motor Vehicles.** When an officer with sufficient training and experience detects the odor of marijuana emanating from a vehicle that is readily mobile, the odor alone furnishes probable cause to suspect contraband will be found in the vehicle and the vehicle may be lawfully searched under the automobile exception to the warrant requirement.
15. **Constitutional Law: Miranda Rights: Self-Incrimination.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), prohibits the use of statements derived during custodial interrogation

unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self-incrimination.

16. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** Under the *Miranda* rule, a "custodial interrogation" takes place when questioning is initiated by law enforcement after a person has been taken into custody or is otherwise deprived of his or her freedom of action in any significant way.
17. **Miranda Rights.** The ultimate inquiry for determining whether a person is "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.
18. **Pretrial Procedure: Pleadings: Evidence: Juries: Appeal and Error.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. Therefore, when a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence is offered at trial in order to predicate error before an appellate court.
19. **Pretrial Procedure: Pleadings: Appeal and Error.** An appellant who has assigned only that the trial court erred in denying a motion in limine has not triggered appellate review of the evidentiary ruling at trial.
20. **Hearsay: Words and Phrases.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
21. **Hearsay.** An out-of-court statement is not hearsay if the proponent offers it for a purpose other than proving the truth of the matter asserted.
22. **Criminal Law: Motions for Mistrial.** A mistrial is properly granted in a criminal case where an event occurs during the course of 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.
23. **Motions for Mistrial: Proof: Appeal and Error.** To prove error predicated on the failure to grant a mistrial, the defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
24. **Sentences: Appeal and Error.** When sentences imposed within statutory limits are alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering well-established factors and any applicable legal principles.
25. **Sentences.** When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and

experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.

26. ____. The sentencing court is not limited to any mathematically applied set of factors, but the appropriateness of the sentence is necessarily a subjective judgment that includes the sentencing judge's observations of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

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

Thomas C. Riley, Douglas County Public Defender, and Rebekah S. Keller for appellant.

Douglas J. Peterson, Attorney General, and Matthew Lewis for appellee.

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

FUNKE, J.

I. INTRODUCTION

In this direct appeal, John Vaughn challenges his convictions and sentences in the district court for Douglas County, Nebraska, for possession with intent to distribute marijuana and failure to affix a tax stamp. Vaughn contends that the district court should have suppressed evidence of marijuana found when law enforcement conducted a warrantless search of a duffelbag and a suitcase on an Amtrak train, as well as statements that Vaughn made to law enforcement. He also contends that the district court should not have allowed testimony at trial about an Amtrak employee's statement that Vaughn owned the duffelbag or about apparent marijuana that was not chemically tested and found to contain "Delta-9-tetrahydrocannabinol" (THC).[1] In addition, Vaughn contends

[1] See Neb. Rev. Stat. § 28-401 (Cum. Supp. 2022).

that the district court should have granted a mistrial because of the admission of hearsay regarding his ownership of the duffelbag and that his sentence of imprisonment was excessive. We affirm.

II. BACKGROUND

Vaughn was a passenger on an Amtrak train traveling from Emeryville, California, to Chicago, Illinois, on February 4, 2021. At approximately 4:50 a.m., Vaughn's train made a scheduled stop in Omaha, Nebraska. Such stops generally last approximately 10 to 15 minutes. In 2021, the U.S. Drug Enforcement Administration had an agreement with Amtrak to search trains stopped in Omaha for "indicators of drug trafficking or drug distribution." One of those indicators was "unmarked luggage," or luggage without tags or identification.

While searching Vaughn's train, Brian Miller, a Pottawattamie County, Iowa, sheriff's deputy assigned to a Drug Enforcement Administration drug interdiction task force, observed an unmarked duffelbag on a luggage rack near room No. 12 (Room 12). Miller smelled the "seam" or "zipper portion" at the top of the duffelbag and detected the odor of marijuana. He opened the duffelbag and saw several sealed packages that appeared to contain marijuana. He asked an Amtrak employee who owned the duffelbag. According to Miller, the Amtrak employee said that the duffelbag belonged to the man in Room 12.

Miller knocked on the door of Room 12, and Vaughn answered. Vaughn had been asleep and was on his bed. Miller claims that he did not enter the doorway, but instead stood in the hall "[t]o the side of the doorway," facing the train's exit. Miller also claims that Vaughn consented to speak with him and admitted to owning the duffelbag and the contents of Room 12. However, Vaughn claims that he told Miller he did not own or recognize the duffelbag.

Vaughn was arrested and taken into the Amtrak terminal. Miller and Drug Enforcement Administration agent Daniel

Pelster then searched Room 12 and found a hard-sided suitcase. In the suitcase, they discovered additional sealed packages apparently containing marijuana. Vaughn claims that the suitcase found in Room 12 was not his and that he had never seen the suitcase before.

The State of Nebraska charged Vaughn with (1) possession with intent to distribute marijuana; (2) possession of marijuana, more than 1 pound; and (3) failure to affix a tax stamp.

1. MOTION TO SUPPRESS

Prior to trial, Vaughn moved to suppress the evidence of marijuana found in the search of the duffelbag and the suitcase, as well as his statements to law enforcement. Miller was the sole witness at the hearing on that motion. Miller testified that marijuana has a distinct odor, which he recognizes based on his training and experience. He also testified that he detected the odor of marijuana when he smelled the seam of the duffelbag. Miller stated that he did not "manipulate" the bag before detecting that odor, although he did subsequently move the bag. According to Miller, he "conducted a probable cause [search]" of the bag and discovered approximately 17 pounds of marijuana. Miller admitted that he did not inform Vaughn that Vaughn did not have to talk to him and was free to leave. However, Miller testified that Vaughn was free to leave. Miller also testified that he and Pelster "conducted a probable cause search" of Room 12 and found a suitcase with approximately 37 pounds of marijuana.

Following Miller's testimony, Vaughn argued that the marijuana found in the luggage should be suppressed because "[t]here is no probable cause exception to the Fourth Amendment." Vaughn argued that under *United States v. Place*,[2] law enforcement cannot just search a bag if there is probable cause or a reasonable articulable suspicion of criminal activity; instead, officers need to seize the property and

[2] *United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983).

request a warrant. Vaughn similarly argued that his statements to law enforcement should be suppressed, because a reasonable person would not have believed that he or she was free to leave the train or refuse questioning, especially because the train was briefly stopped in Omaha and Vaughn was en route to Chicago. The State disagreed.

The district court rejected Vaughn's arguments. As to the evidence of marijuana, the district court found that "the officer had the ability to smell the bag." The court also found that officers have probable cause to search a bag if they "smell[] the odor of marijuana coming from the zipper." Likewise, the court found that Vaughn was not in custody until he was arrested and that "[t]here was no reason to give him [his] Miranda rights" until then. Specifically, the court found that Miller was "at the side of the door" and that Vaughn was free to leave.

Vaughn subsequently preserved the issues raised in his motion to suppress by objecting to the admission at trial of evidence of the marijuana found in the duffelbag and the suitcase and of his statements to law enforcement.

2. Motion in Limine to Exclude Evidence Not Chemically Tested

Thereafter, Vaughn filed a motion in limine to prohibit any evidence or testimony at trial regarding apparent marijuana found in the suitcase that was not subjected to chemical testing by the Douglas County sheriff's office. The suitcase contained 15 plastic bags, only 3 of whose contents were chemically tested; the results of those tests indicated the presence of THC. The contents of the other 12 bags were merely examined visually and resealed.

Vaughn argued that evidence or testimony regarding the contents of the 12 bags that were not chemically tested was irrelevant and more prejudicial than probative. The district court disagreed, instead finding that the contents of the 12 untested bags included "evidence of the narrative of the allegations against [Vaughn]." The court observed that those 12

bags were "packaged similarly and were in the [suitcase]" allegedly in Vaughn's possession and "can be regarded as indicia of the crimes alleged."

3. Motion in Limine to Exclude Amtrak Employee's Statements

Vaughn subsequently made another motion in limine to preclude Miller from testifying that an Amtrak employee told him that Vaughn owned the duffelbag found on the luggage rack near Room 12. Vaughn argued that the testimony was hearsay; that it was more prejudicial than probative, because it related to ownership of the bag where the marijuana was found; and that it violated the Confrontation Clause. Vaughn stated that if the district court overruled his objection, he "assume[d]" it would make a "strong limiting instruction for the jury," but he did not "think that a limiting instruction would go far enough."

The State disagreed, arguing that the statement was not hearsay, because it was offered to prove its impact on the listener, instead of its truth. The State argued that the Amtrak employee's statement about the bag's owner was important to Miller's story, because otherwise there was no apparent reason for Miller to go to Room 12. The district court agreed with the State that the statement was not hearsay and overruled Vaughn's motion. The court declined to decide about a limiting instruction at that time. However, the court subsequently instructed the jury as to what constitutes hearsay and indicated that it was allowing the Amtrak employee's statement, because that statement was not offered to prove the truth of the matter asserted.

4. Jury Trial and Sentencing

A jury trial was held at which the State presented testimony from Miller, Pelster, and a forensic chemist with the Douglas County sheriff's office. Vaughn testified in his own behalf. The testimony of all four witnesses as relevant to this appeal is briefly summarized below.

Miller testified that Vaughn appeared "calm" when Vaughn opened the door and that Miller had a "consensual encounter" with Vaughn in which Vaughn said that he had flown to California 2 days earlier. Pelster testified that he was 15 to 20 feet away during that encounter, but could not hear the conversation or see Vaughn at that time. Pelster also testified that he subsequently saw Vaughn leave Room 12 and that no one else was present in or left the room. Miller and Pelster both opined that it was significant that Vaughn flew to California and returned shortly thereafter by train. Both also opined that the quantity of marijuana suggested that the marijuana was for distribution, because there was more than one person could use before it "depreciate[d]." According to both Miller and Pelster, persons with marijuana for personal use generally have less than 1 pound of the drug; they also generally have rolling papers, pipes, or other paraphernalia.

The forensic chemist testified that both the duffelbag and the suitcase contained multiple sealed black plastic bags, each of which, in turn, contained a clear plastic bag "tied in a knot with a green botanical substance within it." She also testified that the contents of all the plastic bags in the duffelbag and of three of the plastic bags in the suitcase were chemically tested and found to contain greater than 1 percent of THC.

Thereafter, Vaughn testified in his own behalf that he had taken a train to California and spent 2 weeks there, "do[ing] music" and visiting his girlfriend. He also testified that during his encounter with Miller, Miller was "hovering over [him] because the bed's so low," and that they would have been "face to face, [really] close," if Vaughn stood up. Vaughn suggested that "people [were] trying to set [him] up" and that he "was targeted, because of [his] appearance." Vaughn observed that he was "young and black," was "on a sleeper car," and has visible tattoos.

The jury found Vaughn guilty of possession with intent to distribute marijuana; possession of marijuana, more than 1

pound; and failure to affix a tax stamp. However, the district court sustained Vaughn's motion to dismiss the charge of possession of more than 1 pound on double jeopardy grounds. Subsequently, after a sentencing hearing described in more detail later in this opinion, the court sentenced Vaughn to 4 to 6 years' imprisonment for the drug offense and a fine of $10,000 for the tax stamp offense.

Vaughn appeals his convictions and sentences. We moved the matter to our docket on our own motion.

III. ASSIGNMENTS OF ERROR

Vaughn assigns, restated, that (1) the district court erred when it denied his motion to suppress physical evidence and his statements to law enforcement, (2) the district court erred in overruling his motion in limine to "prevent the admission of hearsay statements at trial" and abused its discretion by (a) permitting the admission of hearsay and (b) permitting the admission of hearsay in violation of the Confrontation Clause, (3) the district court's failure to grant his request for a mistrial based on the admission of hearsay constituted a miscarriage of justice, (4) the district court abused its discretion when it denied his motion in limine and permitted the admission of evidence and testimony regarding the apparent marijuana that was not chemically tested, and (5) the district court abused its discretion by imposing an excessive sentence of imprisonment.

IV. STANDARD OF REVIEW

[1,2] When reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[3] Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a

[3] *State v. Albarenga*, 313 Neb. 72, 982 N.W.2d 799 (2022).

question of law that an appellate court reviews independently of the trial court's determination.[4] An appellate court applies a similar two-part standard of review when reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, reviewing the trial court's findings with regard to historical facts for clear error and independently reviewing the trial court's determination as to whether those facts suffice to meet constitutional standards.[5]

[3] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.[6]

[4] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error.[7]

[5-7] An appellate court will not disturb a trial court's decision whether to grant a motion for mistrial unless the trial court has abused its discretion.[8] An appellate court similarly reviews a sentence imposed within the statutory limits for abuse of discretion by the trial court.[9] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[10]

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[4] *Id*.

[5] *State v. Weichman*, 292 Neb. 227, 871 N.W.2d 768 (2015).

[6] *Elbert v. Young*, 312 Neb. 58, 977 N.W.2d 892 (2022).

[7] *State v. Comacho*, 309 Neb. 494, 960 N.W.2d 739 (2021).

[8] *State v. Trail*, 312 Neb. 843, 981 N.W.2d 269 (2022).

[9] *State v. Abligo*, 312 Neb. 74, 978 N.W.2d 42 (2022).

[10] *Mackiewicz v. Mackiewicz*, 313 Neb. 281, 984 N.W.2d 253 (2023).

V. ANALYSIS

1. Overruling Vaughn's Motion to Suppress

In his first assignment of error, Vaughn contends that the district court erred in overruling his motion to suppress the physical evidence obtained from the search of the duffelbag and his statements to law enforcement on the train. We address Vaughn's arguments as to the physical evidence first, before turning to his statements to law enforcement.

(a) Evidence From Search of Duffelbag

Vaughn argues that the district court erred in finding that "an officer's sniff of a bag and subsequent warrantless search of that bag" did not violate his rights under the U.S. and Nebraska Constitutions.[11] We disagree.

[8-12] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.[12] Searches without a valid warrant are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.[13] The warrantless search exceptions that Nebraska has recognized include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest.[14] We have also recognized that among the established exceptions to the warrant requirement is the automobile exception.[15] The automobile exception to the warrant requirement applies when a vehicle is readily mobile

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[11] Brief for appellant at 17.

[12] *State v. Miller*, 312 Neb. 17, 978 N.W.2d 19 (2022).

[13] *Id.*

[14] *State v. Saitta*, 306 Neb. 499, 945 N.W.2d 888 (2020).

[15] *Id.*

and there is probable cause to believe that contraband or evidence of a crime will be found in the vehicle.[16]

[13] Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.[17] Probable cause may result from any of the senses, and an officer is entitled to rely on his or her sense of smell in determining whether contraband is present in a vehicle.[18]

[14] In *State v. Seckinger*,[19] we reaffirmed that when an officer with sufficient training and experience detects the odor of marijuana emanating from a vehicle that is readily mobile, the odor alone furnishes probable cause to suspect contraband will be found in the vehicle and the vehicle may be lawfully searched under the automobile exception to the warrant requirement. Further, both the U.S. Supreme Court and this court have "relied on the automobile exception to a search warrant requirement in upholding searches of containers found during a probable cause search of a vehicle" within which law enforcement has probable cause to believe contraband or evidence is contained.[20] Containers include packages or luggage within the vehicle which might reasonably hold the item for which law enforcement has probable cause to search.[21]

Some courts use the term "vehicle exception," rather than "automobile exception," in recognition of the fact that the

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[16] *State v. Lang*, 305 Neb. 726, 942 N.W.2d 388 (2020).

[17] *Id*.

[18] *State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018).

[19] *Id*.

[20] *State v. Konfrst*, 251 Neb. 214, 230-31, 556 N.W.2d 250, 262 (1996) (citing *California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991), and *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984)).

[21] See *id.*

exception extends to more than just automobiles.[22] Other courts have applied the automobile exception to common carriers, such as buses and trains, on the grounds that those modes of transportation are like automobiles in that they are mobile and involve a reduced expectation of privacy.[23] For example, in *State v. Lovely*,[24] the Idaho Court of Appeals rejected the argument that the suitcases of the defendant—a passenger on a Greyhound bus bound from Oregon to Minnesota—were unreasonably searched after law enforcement detected a "strong odor of marijuana" emanating from the suitcases when the bus made a scheduled stop in Idaho. The defendant did not dispute that there was probable cause to search her suitcases.[25] Instead, she argued that the automobile exception's doctrinal basis in mobility and reduced expectations of privacy "does not apply to a commercial bus."[26]

The court disagreed, finding that the "exigency created by mobility" is not lessened because a passenger is not in control of the bus or because the bus has a predetermined route.[27] The court also observed the pervasive regulation of vehicles capable of traveling on public highways.[28] Accordingly, the court concluded that insofar as there was probable cause to search the defendant's suitcases due to the odor of

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[22] See, e.g., *Brown v. State*, 653 N.E.2d 77 (Ind. 1995); *State v. Leveye*, 796 S.W.2d 948 (Tenn. 1990); *State v. Ramirez*, 121 Idaho 319, 824 P.2d 894 (Idaho App. 1991).

[23] See, e.g., *U.S. v. Tartaglia*, 864 F.2d 837 (D.C. Cir. 1989) (train); *United States v. Pina*, 648 Fed. Appx. 899 (11th Cir. 2016) (bus); *Green v. State*, 334 Ark. 484, 978 S.W.2d 300 (1998) (bus); *Symes v. U.S.*, 633 A.2d 51 (D.C. 1993) (train); *State v. Lovely*, 159 Idaho 675, 365 P.3d 431 (Idaho App. 2016) (bus); *Alvarez v. Com.*, 24 Va. App. 768, 485 S.E.2d 646 (1997) (bus).

[24] *Lovely, supra* note 23, 159 Idaho at 676, 365 P.3d at 432.

[25] *Lovely, supra* note 23.

[26] *Id.* at 677, 365 P.3d at 433.

[27] *Id.* at 678, 365 P.3d at 434.

[28] *Id.*

marijuana, a warrantless search of the suitcases was permitted under the automobile exception.[29]

We find that reasoning persuasive here. Miller was in a public area on the train when he noticed the unmarked duffelbag and sniffed it. Miller testified that he had training and experience in detecting the odor of marijuana and that he smelled the odor of marijuana emanating from the duffelbag. That smell gave Miller probable cause to suspect contraband would be found in the duffelbag. Had Vaughn been in a readily mobile automobile,[30] a warrantless search of the car and the duffelbag would have been permitted pursuant to the automobile exception under *Seckinger* and related cases. We see no reason for a different outcome here because Vaughn used a different mode of transportation, particularly because the Amtrak train from Emeryville to Chicago generally remains in Omaha for only 10 to 15 minutes before departing for other states.[31]

Vaughn does not allege that Miller physically manipulated the duffelbag prior to detecting the odor of marijuana,[32] and

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[29] *Id.*

[30] See *Seckinger, supra* note 18 (vehicle readily mobile whenever not located on private property and capable or apparently capable of being driven on roads or highways).

[31] See, e.g., *United States v. Johnston*, 497 F.2d 397, 398, 399 (9th Cir. 1974) (law enforcement officer "not required to assume that Defendant would stay on the train with the marijuana in the suitcases all the way to New York City," because defendant could "depart with the suitcases at some stop along the way" or hand them over "at some intermediate point to an accomplice"); *U.S. v. Liberto*, 660 F. Supp. 889, 892 (D.D.C. 1987) (upholding warrantless search of train passenger's suitcase; if law enforcement officers wired ahead to another jurisdiction to obtain warrant, they risk situation where "defendant might well have left the train at an earlier stop"), *affirmed without opinion*, 838 F.2d 571 (D.C. Cir. 1988).

[32] Compare *Bond v. United States*, 529 U.S. 334, 120 S. Ct. 1462, 146 L. Ed. 2d 365 (2000) (officer's physical manipulation of bus passenger's carry-on luggage violated Fourth Amendment).

his reliance on *Place*[33] is misplaced. Focusing on the fact that luggage is involved, Vaughn seeks to rely on language in *Place* which he apparently construes to mean that law enforcement must always seize luggage and obtain a warrant before searching it. However, as the U.S. Supreme Court observed in *California v. Acevedo*,[34] *Place* concerned the "temporary detention of luggage in an airport"; it "had nothing to do with the automobile exception."

(b) Vaughn's Statements to Law Enforcement

Vaughn similarly argues that his statements to law enforcement allegedly admitting ownership of the duffelbag and suitcase should be suppressed because he was not advised of his rights under *Miranda v. Arizona*[35] prior to making those statements.

[15-17] *Miranda* prohibits the use of statements derived during custodial interrogation unless the prosecution demonstrates the use of procedural safeguards that are effective to secure the privilege against self-incrimination.[36] The safeguards provided by *Miranda* "'"'come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."'"'[37] Under the *Miranda* rule, a "custodial interrogation" takes place when questioning is initiated by law enforcement after a person has been taken into custody or is otherwise deprived of his or her freedom of action in any significant way.[38] Both the U.S. Supreme Court and this court have emphasized that "the ultimate inquiry for determining

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[33] *Place, supra* note 2.

[34] *Acevedo, supra* note 20, 500 U.S. at 577, 578.

[35] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[36] *State v. Connelly*, 307 Neb. 495, 949 N.W.2d 519 (2020).

[37] *Id*. at 505, 949 N.W.2d at 527.

[38] *Id*.

whether a person is 'in custody' for purposes of *Miranda* '"'is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."'"'[39] We view these two articulations as synonymous.

The term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.[40]

Vaughn's argument apparently concerns the "custody" prong of the *Miranda* rule. Specifically, Vaughn argues that a reasonable person in his situation would not have believed that he or she was free to leave, because "the train was temporarily stopped in Omaha while Vaughn was en route to Chicago" and he would have been "isolated" in an "unknown" city, "unaware of where to go," if he left the train.[41] Vaughn also seemingly suggests that the time and place of his conversation with Miller were inherently coercive. He observes that Miller woke him up at 5 a.m. and that he was in a "closed compartment" with Miller "partially block[ing] the doorway."[42] Those arguments are without merit.

Vaughn was on a train when he spoke with Miller. As such, his setting was no different than other transportation settings where the U.S. Supreme Court has found that a custodial interrogation or an unreasonable seizure does not necessarily result even though a reasonable person would not feel free to leave. Notably, in *Berkemer v. McCarty*,[43] the Court acknowledged that "few motorists would feel free . . . to leave the

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[39] *State v. Montoya*, 304 Neb. 96, 109, 933 N.W.2d 558, 571-72 (2019) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004)).

[40] *Connelly, supra* note 36.

[41] Brief for appellant at 19, 20.

[42] *Id.* at 20.

[43] *Berkemer v. McCarty*, 468 U.S. 420, 436, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).

scene of a traffic stop without being told they might do so." Nonetheless, it rejected the suggestion that any roadside questioning of a person detained pursuant to a routine traffic stop constitutes custodial interrogation within the scope of *Miranda*.[44] In so doing, the Court observed two features of traffic stops which mitigate the danger that the person questioned would be induced "'to speak where he would not otherwise do so freely.'"[45]

First, detention pursuant to a traffic stop is "presumptively temporary and brief."[46] Second, the circumstances of the typical traffic stop are not such that the person detained feels "completely at the mercy of the police"; the typical traffic stop is at least somewhat public, and the person detained typically confronts at most one or two officers.[47] Accordingly, the Court reasoned that an ordinary traffic stop is "substantially less 'police dominated'" than the kinds of interrogation at issue in *Miranda*.[48]

Similarly, in *Florida v. Bostick*,[49] the U.S. Supreme Court observed that a passenger on a bus scheduled to depart would not feel free to leave, but nonetheless rejected the defendant's claim that he was unreasonably seized in violation of the Fourth Amendment. The defendant in *Bostick* argued that police encounters are "much more intimidating" in the "cramped confines of a bus," because police "tower" over seated passengers and there is "little room to move."[50] He also argued that a "reasonable bus passenger" would not have

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[44] *Berkemer, supra* note 43.

[45] *Id*., 468 U.S. at 437 (quoting *Miranda, supra* note 35).

[46] *Id*.

[47] *Id*., 468 U.S. at 438.

[48] *Id*., 468 U.S. at 439.

[49] *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

[50] *Id*., 501 U.S. at 435.

felt free to leave, "because there is nowhere to go on a bus" and the bus was about to depart.[51]

The Court disagreed, finding that the "mere fact that [the defendant] did not feel free to leave the bus does not mean that the police seized him."[52] Instead, the Court observed, the defendant would not have felt free to leave in any case, because his bus was scheduled to depart.[53] The Court similarly observed that the defendant's movements were confined as a "natural result" of being on the bus; it did not necessarily reflect whether or not the police conduct was coercive.[54] As a result, the Court concluded that the appropriate inquiry in such settings was not whether a reasonable person would feel free to leave, but "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[55]

In light of *Berkemer*, *Bostick*, and related cases, we reject Vaughn's suggestion that he was necessarily in custody for purposes of *Miranda*, even assuming that a reasonable person would not have felt free to leave a train (or a cabin on a train) briefly stopped in Omaha. Other factors indicate that Vaughn was not in custody.

Previously, in *State v. Rogers*,[56] we noted the "large body of case law . . . developed since *Miranda*" which has made apparent "certain circumstances that are most relevant to the custody inquiry." Those circumstances include: (1) the location of the interrogation and whether it was a place where the defendant would normally feel free to leave; (2) whether the contact with the police was initiated by them or by the person interrogated, and, if by the police, whether the

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[51] *Id.*

[52] *Id.*, 501 U.S. at 436.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *State v. Rogers*, 277 Neb. 37, 57, 760 N.W.2d 35, 54 (2009).

defendant voluntarily agreed to the interview; (3) whether the defendant was told he or she was free to terminate the interview and leave at any time; (4) whether there were restrictions on the defendant's freedom of movement during the interrogation; (5) whether neutral parties were present at any time during the interrogation; (6) the duration of the interrogation; (7) whether the police verbally dominated the questioning, were aggressive, were confrontational, were accusatory, threatened the defendant, or used other interrogation techniques to pressure the suspect; and (8) whether the police manifested to the defendant a belief that the defendant was culpable and that they had the evidence to prove it.[57]

Applying those factors here, it is true that Miller initiated contact with Vaughn and never told Vaughn that he was free to terminate the interview or leave. However, Miller was in a public area on the train when he knocked on Vaughn's door, and he remained there throughout his conversation with Vaughn. Vaughn was in his own room. It is unclear whether Miller partially blocked the doorway. Vaughn asserts in his brief on appeal that Miller did so. However, Miller testified at trial that he did not. The room was small, but Vaughn does not allege that Miller purported to impose any restrictions on his freedom of movement within or outside of his room.

Miller testified that Vaughn agreed to speak with him, and the exchange between them on the train prior to Vaughn's arrest was relatively brief. Only two law enforcement officers were present at the time of that exchange, and one of those officers may have been outside Vaughn's view. There is no indication that law enforcement verbally dominated the questioning; were aggressive, confrontational, or accusatory; threatened Vaughn; or used other interrogation techniques to pressure him. Nor is there any indication that law enforcement manifested to Vaughn a belief that he was culpable and that they had the evidence to prove it. Miller apparently

[57] *Rogers, supra* note 56.

asked Vaughn about his travel plans, the luggage in his room, and whether he owned the duffelbag, and then Miller arrested him. Accordingly, we find that Vaughn was not subject to custodial interrogation prior to his arrest.

2. Admission of Amtrak Employee's Statement

Next, Vaughn assigns multiple errors related to Miller's testimony about the Amtrak employee's statement that Vaughn owned the duffelbag. We begin with his argument that the district court erred in overruling his motion in limine to exclude that testimony.

(a) Overruling Vaughn's Motion in Limine

[18] A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.[58] It is not the office of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence.[59] Therefore, when a court overrules a motion in limine to exclude evidence, the movant must object when the particular evidence is offered at trial in order to predicate error before an appellate court.[60]

[19] The record on appeal indicates that Vaughan objected at trial when the State offered Miller's testimony about the Amtrak employee's statement. Vaughn also apparently assigns, restated, that the district court erred in permitting such hearsay to be admitted at trial and permitting hearsay in violation of the Confrontation Clause. Accordingly, we discuss those assignments of error below. In contrast, an appellant who has assigned only that the trial court erred in denying a motion in limine has not triggered appellate review of the evidentiary ruling at trial.[61]

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[58] *State v. Ferrin*, 305 Neb. 762, 942 N.W.2d 404 (2020).

[59] *Id.*

[60] *Id.*

[61] *Id.*

(b) Permitting Alleged Hearsay to Be Admitted Into Evidence

Vaughn argues that the district court erred by "permitting the admission of hearsay statements from an unnamed Amtrak employee" that Vaughn owned the duffelbag.[62] Vaughn objected to Miller's testimony about that statement at trial on hearsay grounds, but his objection was overruled. The State counters that the statement was "not definitional hearsay in the context provided."[63] We agree with the State.

[20,21] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[64] Hearsay is not admissible unless otherwise provided for in the Nebraska Evidence Rules or elsewhere.[65] However, by definition, an out-of-court statement is not hearsay if the proponent offers it for a purpose other than proving the truth of the matter asserted.[66] Thus, statements are not hearsay to the extent that they are offered for context and coherence of other admissible statements, and not for "the truth or the truth of the matter asserted."[67] Similarly, statements are not hearsay if the proponent offers them to show their impact on the listener, and the listener's knowledge, belief, response, or state of mind after hearing the statement is relevant to an issue in the case.[68]

Here, the State offered Miller's testimony about the Amtrak employee's statement for context and coherence and to show the statement's impact on Miller. Miller had previously testified that he observed a duffelbag without luggage tags, sniffed it, and detected the odor of marijuana. And Miller

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[62] Brief for appellant at 21.

[63] Brief for appellee at 35.

[64] *Elbert, supra* note 6.

[65] *Id*.

[66] *Id*.

[67] *State v. Wood*, 310 Neb. 391, 428, 966 N.W.2d 825, 854 (2021).

[68] *Elbert, supra* note 6.

subsequently testified that he knocked on the door of Room 12, introduced himself to Vaughn, and asked Vaughn whether Vaughn owned the duffelbag. Miller's testimony that he asked an Amtrak employee who owned the duffelbag, and was told that it belonged to the man in Room 12, bridged those statements. Specifically, it showed why Miller went to Room 12 to ask questions about the duffelbag and encountered Vaughn. Additionally, out of an abundance of caution, the trial court instructed the jury that the testimony as to what the Amtrak employee said was being admitted not to prove the truth of the matter asserted, but to give information as to why Miller went to Room 12. As such, the district court did not err in admitting the challenged testimony about the Amtrak employee's statement over Vaughn's hearsay objections.

Vaughn also argues on appeal that the Amtrak employee's statement was more prejudicial than probative, because it "directly related" to possession of the marijuana, an element of the crime charged.[69] Vaughn sought to exclude, and objected at trial to, Miller's testimony about the Amtrak employee's statement on that basis, among others. However, he does not assign that the district court erred in failing to find that the testimony was more prejudicial than probative.[70] Also, as we explain below, the testimony was not unfairly prejudicial insofar as it was cumulative of other evidence of ownership.

(c) Inability to Confront Amtrak Employee

Vaughn further argues that allowing the admission of hearsay regarding his ownership of the duffelbag violated his rights under the Confrontation Clause. Specifically, he argues that the Amtrak employee's statement was testimonial, because

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[69] Brief for appellant at 21.

[70] *State v. Miranda*, 313 Neb. 358, 984 N.W.2d 261 (2023) (alleged error must be both specifically assigned and specifically argued in brief of party asserting error to be considered by appellate court).

the employee was "in the train car near the time that Miller searched the [duffelbag]" and "likely would have known that the conversation with Miller was for an investigation."[71] That argument is without merit.

As we have previously stated, the Amtrak employee's statement was not hearsay, because it was not offered to prove the truth of the matter asserted. Accordingly, we need not reach the issue of whether that statement is testimonial. "A statement that is not hearsay raises no Confrontation Clause concerns,"[72] and the Confrontation Clause does not "bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[73]

Moreover, although we find no error in admitting the statement, the record in this case demonstrates that even if it was error, the error was harmless. Vaughn maintains that the State's evidence that he possessed marijuana was "weak" without Miller's testimony about the Amtrak employee's statement.[74] However, there was testimony and evidence that the contents of the duffelbag were similar in their packaging and nature to the contents of the suitcase that Miller and Pelster claimed to have found in Vaughn's room.

Specifically, the forensic chemist with the Douglas County sheriff's office testified that the duffelbag and the suitcase both contained multiple heat-sealed black plastic bags, each of which, in turn, contained a clear plastic bag "tied in a knot with a green botanical substance within it." Exhibits 10-A through 10-K and 12-A through 12-P illustrated the

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[71] Brief for appellant at 23.

[72] *Barrett v. Acevedo*, 169 F.3d 1155, 1163 (8th Cir. 1999) (en banc). See, also, *Swain v. State*, 2015 Ark. 132, 459 S.W.3d 283 (2015); *Dednam v. State*, 360 Ark. 240, 200 S.W.3d 875 (2005); *Hodges v. Com.*, 272 Va. 418, 634 S.E.2d 680 (2006).

[73] *Crawford v. Washington*, 541 U.S. 36, 60 n.9, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[74] Brief for appellant at 25.

similarities in packaging. And exhibit 5 also indicated the similarities in packaging, as well as the similarities in contents of the plastic bags whose contents were chemically tested.

In addition, Miller testified that Vaughn admitted during their encounter on the train that Vaughn owned the duffelbag. Even if Miller had not been allowed to testify as to why he went to Room 12 and encountered Vaughn, Miller would still have testified that Vaughn acknowledged ownership of the duffelbag and suitcase. Also, Pelster testified similarly that he and Miller found the suitcase in Room 12 after Vaughn's arrest and that he saw no one else present in or exiting Room 12.

Accordingly, Miller's testimony about the Amtrak employee's statement was cumulative of other evidence that Vaughn possessed marijuana. Thus, even if the Amtrak employee's statement was erroneously admitted at trial, the guilty verdicts were surely unattributable to that evidence.[75] Any error in admitting the statement was harmless beyond a reasonable doubt.[76]

(d) Not Granting Vaughn's Motion for Mistrial

In addition, Vaughn argues that the district court erred by denying his motion for a mistrial. Vaughn asked the district court to grant a mistrial after the admission of testimony from Miller about the Amtrak employee's statement that the duffelbag on the luggage rack outside Vaughn's cabin belonged to Vaughn. The district court overruled that motion, finding that the statement was not hearsay. We cannot say the district court abused its discretion in denying Vaughn's request for a mistrial based on the admission of that testimony.

[22,23] A mistrial is properly granted in a criminal case where an event occurs during the course of trial which is

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[75] Cf. *State v. Kidder*, 299 Neb. 232, 908 N.W.2d 1 (2018).

[76] *Id*.

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.[77] A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial.[78] The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.[79]

Vaughn argues that a mistrial was warranted because Miller's testimony about the Amtrak employee's statement was hearsay and, as such, should not have been admitted into evidence. Vaughn also argues that Miller's testimony about the Amtrak employee's statement violated the Confrontation Clause and was more prejudicial than probative.

However, as we have previously discussed, Vaughn cannot show that Miller's statement was improperly admitted. The statement was not hearsay and raises no Confrontation Clause concerns. Moreover, Vaughn does not assign on appeal that the district court erred in finding that the testimony was not more prejudicial than probative.

3. Admission of Evidence Not Chemically Tested

Vaughn further assigns that the district court abused its discretion when it denied his motion in limine to exclude evidence and testimony regarding the marijuana that was not chemically tested and "permitted the admission of untested marijuana into evidence."[80] If that assignment of error were construed to concern only the district court's ruling on the motion in limine, there is nothing for us to review. As we previously noted, an appellant who assigns only that the trial court erred

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[77] *Trail, supra* note 8.

[78] *Id.*

[79] *Id.*

[80] Brief for appellant at 26.

in denying a motion in limine has not triggered appellate review of the evidentiary ruling at trial.[81] However, even if Vaughn's assignment of error here is construed to concern the district court's decision overruling his objections at trial to the evidence and testimony about the apparent marijuana that was not chemically tested, it would still be without merit; we cannot say that the district court abused its discretion in admitting that evidence and testimony.

Vaughn argues that the evidence was not relevant. However, as the trial court observed in its ruling on the motion in limine, the 12 plastic bags apparently containing marijuana whose contents were not chemically tested were described as containing "green botanical substance[s]" and were found in the suitcase with, and "packaged similarly" to, the 3 plastic bags whose contents were chemically tested and found to have THC. As such, they could be seen as relevant to the overall "narrative of the allegations" against Vaughn, as the district court found.

Vaughn also argues that the evidence and testimony were more prejudicial than probative, particularly in light of Pelster's testimony that the "the sheer amount of marijuana that was found, specifically 40 to 50 pounds . . . , demonstrated an intent to distribute," because it was unlikely to be consumed by an individual "before it went bad."[82] However, Vaughn did not assign that the district court erred in overruling his objection at trial to the evidence and testimony on the grounds that they were more prejudicial than probative. Further, Vaughn acknowledges that only approximately 13.5 pounds of apparent marijuana were not chemically tested. Over 30 pounds were chemically tested and found to have greater than 1 percent of THC. And Miller and Pelster both testified that persons with marijuana for personal use generally have, at most, 1 pound. Miller and Pelster also testified that persons with

[81] *Ferrin, supra* note 58.

[82] Brief for appellant at 27.

marijuana for personal use generally have rolling papers, pipes, or other paraphernalia, none of which appear to have been in evidence in the present case.

4. Excessive Sentence of Imprisonment

As his final assignment of error, Vaughn claims that his sentence of 4 to 6 years' imprisonment for possession with intent to distribute marijuana was excessive for an offense that has no mandatory minimum sentence. Specifically, Vaughn argues that his sentence was "primarily based on the nature of the offense" and did not "adequately account" for mitigating factors, including his ties to his family, his plans for further education, and his experience growing up "surrounded by the enticing allure of hip-hop culture."[83] However, Vaughn does not dispute that his sentence was within the statutory range for a Class IIA felony.[84]

[24-26] When sentences imposed within statutory limits are alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering well-established factors and any applicable legal principles.[85] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.[86] However, the sentencing court is not limited to any mathematically applied set of factors, but the appropriateness of the sentence is necessarily a subjective judgment that includes the sentencing judge's

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[83] *Id.* at 30.

[84] See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2022).

[85] *State v. Greer*, 312 Neb. 351, 979 N.W.2d 101 (2022).

[86] *Id*.

observations of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[87]

In the present case, the district court ordered a presentence investigation that detailed the factors the court was to consider when imposing a sentence. Additionally, the court noted that it had reviewed the presentence investigation in advance of the sentencing hearing. Vaughan's presentence investigation indicated that he scored in the very high risk level for procriminal attitude/orientation and in the high risk level for criminal history, education/employment, and companions.

Prior to pronouncing Vaughan's sentence, the court did observe that Vaughn "had over 50 pounds" of marijuana when he was arrested. However, the court's comments prior to sentencing also touched on two of the primary mitigating factors noted by Vaughn; namely, his close relationships with his family, especially his grandmother, and his plans for further education. Moreover, immediately prior to the court's statements, Vaughn and his counsel both made statements to the court emphasizing Vaughn's close family relationships and educational plans when requesting a term of probation or, alternatively, a sentence of time served. For example, Vaughn's counsel stated that the presentence investigation report indicated that Vaughn was a "caregiver" for his "ailing grandmother" and that his "family support system" was one of his "greatest strengths." Counsel also stated that Vaughn planned to go back to school. Vaughn then detailed his plans to transfer from a petroleum engineering program in Louisiana to a music program in Georgia. He also explained that he planned to obtain a commercial driver's license to support himself and his family while in school.

On the other hand, the district court observed that Vaughn was charged with possession of "some small amounts of drugs" in Maryland, allegedly while the present case was pending. That circumstance could be seen to undercut Vaughn's

[87] *Id.*

claim that his denial of "having any issue with alcohol or drug use" was a mitigating factor.[88] More important, the district court found Vaughn less than credible, including in his statements about his family and education. The district court told Vaughn that "[he is] a hard man to believe," apparently because of the difficulty in reconciling his claims about his closeness to and care for his family in Georgia with his conduct elsewhere. Accordingly, we cannot say that the district court abused the "very wide discretion"[89] accorded to it when sentencing Vaughn to 4 to 6 years' imprisonment for possession with intent to distribute marijuana.

VI. CONCLUSION

For the foregoing reasons, we find no merit to Vaughn's assignments of error. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

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[88] Brief for appellant at 31.

[89] *State v. Rogers*, 297 Neb. 265, 275, 899 N.W.2d 626, 634 (2017).

A-22-308

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

THE STATE OF NEBRASKA,

Appellee,

vs.

JOHN VAUGHN,

Appellant,

APPEAL FROM THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Honorable Peter C. Bataillon, District Court Judge

BRIEF OF APPELLANT

THOMAS C. RILEY, #13523
Douglas County Public Defender
Rebekah S. Keller, #26721
Assistant Public Defender
H05 Civic Center
Omaha, Nebraska 68183
Telephone: (402) 444-7175
rebekah.keller@douglascounty-ne.gov
Attorneys for Appellant

TABLE OF CONTENTS

Statement of Jurisdiction of Appellate Court 4
Statement of the Case 4
Assignment of Error 5
Propositions of Law 6
Statement of Facts 8
Summary of Argument 16
Argument I: The district court erred when it denied Vaughn's motion to suppress the physical evidence and statements that were obtained by a warrantless search and interrogation, violating Vaughn's constitutional rights under the fourth and fifth amendments 17
Argument II: The district court erred in overruling Vaughn's motion in limine to prevent the admission of hearsay statements at trial. 20
Argument III: The district court's failure to grant Vaughn's first request for a mistrial based on the admission of the Amtrak employee's prejudicial hearsay statements constituted a substantial miscarriage of justice 24
Argument IV: The district court abused its discretion when it denied Vaughn's motion in limine and permitted the admission of untested mariujuana into evidence. 26
Argument V: The district court abused its discretion by imposing an excessive sentence upon Vaughn 28
Conclusion 34

TABLE OF AUTHORITIES

Cases Cited

Miranda v. Arizona, 384 U.S. 436, 468-470 (1966) 19
Murray v. United States, 487 U.S. 533, 535 (1988) 18,19
State v. Alford, 278 Neb. 818 (2009) 29

State v. Ash, 293 Neb. 583 (2016) 24
State v. Bormann, 279 Neb. 320, 326 (2010) 19
State v. Burries, 297 Neb. 367, 387 (2017) 7,21
State v. Green, 287 Neb. 212 (2014) 25
State v. Harrison, 255 Neb. 990 (1999) 7,29,30
State v. Huff, 282 Neb. 78, 119 (2011) 28
State v. Hunt, 299 Neb. 573, 581 (2018) 5
State v. Kirksey, 254 Neb. 162 (1998) 7,24
State v. Manjikian, 303 Neb. 100, 114 (2019) 28
State v. Miller, 312 Neb. 17, 20 (2022) 6,17
State v. Pedersen, No. A-92-324, 1993 WL 112751, at 8 25
State v. Perry, 292 Neb. 708, 712 (2016) 5,17
State v. Prahim, 235 Neb. 409, 413 (1990) 19
State v. Timmens, 263 Neb. 622, 631 (2002) 7,29,30
State v. Valdez, 239 Neb. 453 (1991) 7,24
State v. Valverde, 286 Neb. 280 (2013) 5
Terry v. Ohio, 392 U.S. 1, 22 (1968) 20
United States v. Place, 462 U.S. 696, 701 (1983) 17,18

Statutes Cited

Neb. Rev. Stat. § 25-1912 4
Neb. Rev. Stat. § 27-401 10,15,27,
Neb. Rev. Stat. § 27-403 10,15,21,26,27
Neb. Rev. Stat. § 27-801 21
Neb. Rev. Stat. § 28-105 4,30
Neb. Rev. Stat. § 29-2101 24
Neb. Rev. Stat. § 29-2301 4
Neb. Rev. Stat. § 29-2306 4
Neb. Rev. Stat. § 29-2308 4,29

Other Citations

U.S. Const. amend. VI. 7

STATEMENT OF JURISDICTION OF APPELLATE COURT

This is an appeal by John Vaughn from his conviction and sentence on count I, delivery, distribution, dispensing, manufacturing, or possession with intent to distribute, deliver, dispense, or manufacture marijuana, a Class 2A felony; and count III, failure to affix a tax stamp, a Class 4 felony, on January 12, 2022, in the District County of Douglas County. (T89). On April 11, 2022, the district court sentenced Vaughn to four to six years on count I and a $10,000 fine on count III. (T118). Vaughn was given credit for 95 days. *Id.*

On April 26, 2022, Vaughn filed a notice of appeal and the Honorable Peter C. Bataillon signed an order allowing Vaughn to proceed *in forma pauperis*. (T121; 125). This appeal is authorized by the Nebraska Constitution, Article I, Section 23 and Neb. Rev. Stat. §§ 25-1912 (Reissue 2016), 29-2301 (Reissue 2016), 29-2306 (Reissue 2016), and 29-2308 (Reissue 2016).

STATEMENT OF THE CASE

(A) Nature of the Case

This is a criminal prosecution wherein the State of Nebraska charged Vaughn with count I, delivery, distribution, dispensing, manufacturing, or possession with the intent to distribute, deliver, dispense, or manufacture marijuana, a Class 2A felony, and count II, possession of a controlled substance-marijuana, a Class 4 felony; and count III, failure to affix a tax stamp, a Class 4 felony. (T118). A Class 2A felony carries a maximum of 20 years of imprisonment and no minimum for imprisonment. Neb. Rev. Stat. § 28-105. A Class 4 felony carries a maximum 2 years imprisonment, a $10,000 fine, or both, and no minimum for imprisonment. Neb. Rev. Stat. § 28-105.

(B) Issues Tried in the Court Below

The issue presented to the court below was whether Vaughn was guilty of the offenses charged beyond a reasonable doubt.

(C) How the Issues Were Decided and Judgment Entered

On January 12, 2022, a jury found Vaughn guilty of delivery, distribution, dispensing, manufacturing, or possession with intent to distribute, deliver, dispense, or manufacture marijuana; possession of a controlled substance-marijuana; and failure to affix a tax stamp. (T118). On April 11, 2022, the district court sentenced Vaughn to a period of four to six years on count I and a $10,000 fine on count III. (T118).

(D) The Scope of Review

"In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination." *State v. Perry*, 292 Neb. 708, 712 (2016).

Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *State v. Valverde*, 286 Neb. 280 (2013).

The scope of review for an excessive sentence is an abuse of discretion. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Hunt*, 299 Neb. 573, 581 (2018).

ASSIGNMENT OF ERROR

I.

The district court erred when it denied Vaughn's motion to suppress the physical evidence and statements that were obtained during a warrantless search and interrogation, violating Vaughn's constitutional rights under the Fourth and Fifth Amendments.

II.

The district court erred in overruling Vaughn's motion in limine to prevent the admission of hearsay statements at trial.

A.

The district court abused its discretion by permitting the admission of hearsay statements made by an unnamed Amtrak employee into evidence.

B.

The district court abused its discretion by permitting the admission of hearsay statements in violation of Confrontation Clause of the United States and Nebraska Constitutions.

III.

The district court's failure to grant Vaughn's first request for a mistrial based on the admission of the Amtrak employee's prejudicial hearsay statements constituted a substantial miscarriage of justice.

IV.

The district court abused its discretion when it denied Vaughn's motion in limine and permitted the admission of untested marijuana into evidence.

V.

The district court abused its discretion by imposing an excessive sentence upon Vaughn.

PROPOSITIONS OF LAW

I.

Searches without a valid warrant are per se unreasonable, subject to a few specifically established and well-delineated exceptions. "The warrantless search exceptions Nebraska has recognized include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) evidence in plain view, and (5) searches incident to a valid arrest." *State v. Miller*, 312 Neb. 17, 20 (2022).

II.

Hearsay is not admissible except as provided by the Nebraska Evidence Rules. *State v. Burries*, 297 Neb. 367, 387 (2017).

III.

The Confrontation clause provides, "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." U.S. Const. amend. VI.

IV.

A mistrial will be granted only if the court determines that a "substantial miscarriage of justice" would result if a mistrial is not granted. *State v. Valdez*, 239 Neb. 453, 457 (1991).

V.

"A mistrial is properly granted when 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 would result in preventing a fair trial." *State v. Kirksey*, 254 Neb. 162, 170 (1998).

VI.

Among the factors to be considered in the imposition of a sentence are the "[d]efendant's age, mentality, education, experience, and social and cultural background, as well as past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime." *State v. Timmens*, 263 Neb. 622, 631 (2002).

VII.

A sentence should fit the offender and not merely the crime. *State v. Harrison*, 255 Neb. 990, 1004 (1999).

STATEMENT OF FACTS

On March 24, 2021, the State of Nebraska filed an information alleging that John Vaughn committed three felony charges. (T1). The State alleged that on February 4, 2021, in Douglas County, Nebraska, Vaughn did 1) deliver, distribute, dispense, manufacture, or possess with the intent to distribute, deliver, dispense, or manufacture marijuana; 2) possess marijuana, more than one pound; and 3) fail to affix a tax stamp. (T1).

On April 27, 2021, Vaughn's counsel filed a motion to suppress physical evidence collected and statements made by Vaughn. (T28). The State called Officer Brian Miller, a Pottawattamie County deputy who is assigned to the DEA Task Force Criminal Interdiction Unit. (2:10-22). As a part of his duties, Miller stated that he is trained to monitor inconsistencies on the train railways that travel through Omaha. (8:19-24). Miller testified that on February 4, 2021, at the Amtrak train station in Omaha, Nebraska, by pure observation, he located a bag with no visible luggage tags or identification on it. (9:16-19; 18:7-9). Miller later testified that it is common for people not to put luggage tags on their bags on the Amtrak. (29:17-19). Miller identified this bag as a dark bag with a Tommy Hilfiger emblem on it that was sitting on the luggage rack in the middle row of the sleeper car. (9:22-25). Miller testified that there were other bags on the luggage rack within a couple of feet of the Tommy Hilfiger bag. (17:23-25; 18:7). The train, Miller testified, originated from Emeryville, California, and was destined for Chicago, Illinois. (10:4-8).

After noticing the Tommy Hilfiger bag, Miller proceeded to smell the seam or zipper portion of the duffel bag. (10:11-18). Miller testified that while smelling the seam of the bag, he detected the odor of marijuana coming from it. (10:14-15). Miller testified that he was a couple of inches away from the seam of the bag when he smelled marijuana. (19:13-14). However, due to the COVID-19 pandemic, Miller was wearing a face mask when he conducted the sniff search on the bag. (19:15-22). Although Miller had a drug-sniffing K-9 dog with

him, and he believes that drug sniffing dogs have a greater ability than humans to detect the odor of drugs and the origin of a smell of contraband or drugs, he did not conduct a K-9 sniff of the bag, but merely relied on his own training and experience and bypassed a dog sniff of the bag. (20:19-25; 21:1-18; 22:23-23:25).

Miller then contacted another agent in the area to come to his location and proceeded to conduct a "probable cause" of the duffle bag. (11:3-8). While aware of the procedures to obtain a warrant, Miller decided not to get a search warrant for the bag. (19:23-25; 20:1-2). Miller also did not try to determine ownership of the duffle bag. (20:6-8). In his search of the bag, Officer Miller located marijuana in vacuum sealed packages. (11:5-8; 20-6-8). Miller testified that he found approximately seventeen pounds of suspected marijuana in raw leaf form in sealed packages. (11:11-17). Miller later testified that if drugs are vacuum sealed or in any kind of plastic wrapping, it would impede his ability to smell marijuana. (26:23-25; 27:1-18).

After conducting his search of the bag, he put it back on the shelf and went to find an Amtrak employee. (20:9-18). An Amtrak employee was questioned by Miller and advised him that the bag belonged to a male party in room 12. (12:4-9). Relying on this information, Miller knocked on the door of sleeper car 12, which was closed, and identified himself as a task force officer with the DEA. (12:23-25; 13:1; 28:2-6). Miller testified that Vaughn answered the door and was willing to speak with Miller. (236:22; 25-237:1-3).

Miller asked Vaughn for his Amtrak ticket. *Id*. While Miller stood to the side of the cabin doorway, Miller did not inform Vaughn that he did not need to talk to Miller and never told Vaughn he was free to leave during their conversation. (24:7-25). Miller testified that Miller pointed to the middle row of the luggage rack outside Vaughn's room and asked if the Tommy Hilfiger bag was his. (14:10-14). Miller testified that he did not actually go over to Vaughn and present the bag to him, but only pointed to it since Miller stated it was in such close proximity. (14:18-22). After Miller pointed to the Tommy Hilfiger

bag and asked Vaughn if it was his, Vaughn acknowledged yes. (14:22-23). Immediately following this acknowledgment, Miller placed Vaughn under arrest for a narcotics violation and detained him. (12:25; 15:1). After Vaughn was arrested and detained, Miller conducted a probable cause search of the cabin and found a suitcase, a search of which revealed approximately 37 pounds of raw leaf marijuana. (15:4-15).

After hearing the evidence and arguments from both parties, the district court overruled Vaughn's motion to suppress on June 8, 2021. (T30). In doing so the judge simply stated, "an officer can smell any bag he wants to smell. If he smells the odor of marijuana coming from the zipper as he said, then I believe that there's – I'm finding that there's probable cause to search the bag." (47:4-11).

On December 7, 2021, Vaughn filed a motion in limine to preclude:

- On page 1 of 2, Item 3 (items submitted for testing), and page 2 of 2, Item 3a-1 (corresponding test result) of the Chemistry Division Lab Report dated December, 3, 2021.
- On page 1 of 2, Item 5 of the Chemistry Division Lab Report dated December 3, 2021, the words "fifteen (15)," "three (3) tested," and "Gross weight of the twelve (12) bags not tested: 6,252.9 grams +/- o.3 grams."

(T 64-65; E12-A-12-O, p. 325-326). Defense counsel argued that because evidence of such items that cannot be determined to be cannabinoids without chemical testing, the evidence is irrelevant and is more unfairly prejudicial than probative, and, as a result, should not be admitted into evidence at trial pursuant to Neb. Rev. Stat. §§ 27-401 and 27-403. (T42). The motion in limine was overruled on December 16, 2021. (T68). A jury trial commenced on January 10, 2022. (T72). Before the trial began, counsel for Vaughn sought to preserve the prior motion to suppress, but the court overruled Vaughn's renewed motion to suppress the physical evidence. (211:20-23; 211:25).

Trial commenced and the State called Officer Miller, (212:1-11). Miller testified that on February 4, 2021, he boarded the Amtrak train and his objective was to look for indicators of criminal activity. (224:15-17). Miller stated that one "indicator of criminal activity" on the Amtrak could be a bag with no identification tags on it. (225:24-226:2). Miller further testified that on February 4, 2021, in the middle portion of the luggage rack, a Tommy Hilfiger bag with no identification tags caught his attention. (228:20-25; 229:1-4). After noticing the Tommy Hilfiger bag, and, without touching the bag, Miller smelled the seam of the bag and stated he smelled an odor of marijuana. (230:3-4). The State then asked Miller at the time he smelled the seam, whether he did anything to the bag. (230:6-7).

Counsel for Vaughn renewed the previous motion to suppress and asked for a continuing objection. (230:8-9). The court overruled counsel's renewed motion to suppress but permitted the continuing objection. (230:10).

Miller testified that after he smelled the odor of marijuana, he conducted a probable cause search of the bag. (230:11-13). During this search, Miller testified that he saw a black vacuum-sealed bag along with a clear vacuum-sealed bag of a green leafy substance he believed to be marijuana. (230:15-18). Notably, Miller testified that he did not find identifiable information linking Vaughn to the bag. (228:24-229:1). After the search of the bag, Miller zipped the duffle bag up and requested assistance from another officer in his unit. (230:19-23). Special Agent Daniel Pelster responded to Miller's call and was in route to the train car. (233:2-10). While Miller was awaiting Pelster's arrival, he asked the Amtrak attendant if she knew who the bag belonged to. (233:23-24).

At this time, Vaughn renewed the previous motion in limine and hearsay objection. (233:19-20). The court overruled counsel's hearsay objection to the Amtrak employee's statement. (233:21-22). The Court reasoned that it was allowing the testimony as to what the attendant said because it was not to prove the truth of the matter asserted, it was

just to give information as to why Miller took his next step. (234:6-10). In allowing the testimony, the district court gave the following limiting instruction:

> Ladies and gentleman, the objection to the testimony by the officer here is that of hearsay. And hearsay is an out-of-court statement being used to prove the truth of the matter asserted.
> In this situation, I'm allowing that testimony as to what the attendant on the Amtrak train said because it's not to prove the truth of the matter asserted, it's just to give information as to how Officer Miller – why he took his next step.

(234:2-10). Vaughn objected to the hearsay statement as well as the limiting instruction given. (234:12-235:3). The court overruled the objection and the request for a further limiting instruction. (235:3).

Miller went on to testify that he was told by the employee that the Tommy Hilfiger bag belonged to a male that was in room 12. (233:23-25). Based on what the Amtrak employee said, Miller's intention was to go directly to room 12 upon Pelster's arrival. (235:12-14). Miller testified that the Tommy Hilfiger bag was six or eight feet from room 12. (236:16-18). Miller then knocked on the door of room 12 and made contact with a gentleman later identified as John Vaughn at 5:00 a.m. (236:22-25; 237:1-7). Miller identified himself as a DEA Task Force Officer when Vaughn answered the door. (237:21-23). When Vaughn answered the door; his demeanor was calm and he was seated in the cabin. (237:24-238:1). When Miller spoke to Vaughn, he was position to the side of the entrance of the cabin. (238:18-20). Miller explained to Vaughn that he was a law enforcement officer and the purpose of Miller being on the train was to perform routine checks and security on the Amtrak. (239:2-10). Miller asked if Vaughn would have a conversation with him and Vaughn stated "yes." (239:13-16). Miller

also testified that the Amtrak is on a timely schedule and was only allotted a 10 or 15 minute stop in Omaha. (224:8-11). Given that the stop in Omaha would only last 10 or 15 minutes before departing, Vaughn lacked options of where to go if he was free to leave without being stranded in Omaha. (224:8-11). The State asked Miller what happened in regard to his conversation with Vaughn. (239:12-18).

Vaughn then immediately objected and renewed his motion to suppress in regard to Vaughn's statements. (239:20-21). The court overruled counsel's objection to Vaughn's statements. (239:22).

Miller testified that he asked Vaughn for his ticket and asked Vaughn where he was traveling from, which Vaughn responded that he had flown into California and now was taking a train to Washington D.C. (240:1-9). Miller went on to testify that that he asked Vaughn whether he was responsible for all of the luggage inside of his room, and Vaughn stated "yes." (241:3-4). Further, Miller pointed to the luggage rack where the Tommy Hilfiger bag was located and asked Vaughn if it belonged to him and Vaughn responded "yes." (241:9-13).

Miller stated that the fact that Vaughn told Miller he had flown from California and was taking the train back was significant because he believed most people take one form of travel for one direction and not two. (241:17-23). Further, Miller testified that he believed the trip not to be cost-effective since the trip from Emeryville to Washington would take approximately three days and the train ticket cost $1,200. (242:2-5). Counsel for Vaughn objected based on hearsay regarding Miller's statement. (242:7-8). The court overruled the hearsay objection and allowed Miller's statements regarding the pricing of the ticket and his belief whether the trip was cost-effective. (242:9).

After Vaughn indicated the Tommy Hilfiger bag was his, Miller advised Vaughn that he was under arrest for a narcotics violation. (243:1-6). Miller handcuffed Vaughn, conducted a pat-down search, and escorted him into the train terminal. (243:8-10). Miller stated that during the search of room 12, he located a hard-sided suitcase and a black backpack. (244:15-18).

Vaughn objected to the black backpack that Miller testified to. (244:19). Outside the presence of the jury, the State explained that the parties agreed not to discuss the backpack. (245:17-25). While outside the presence of the jury, Vaughn sought to make a clearer record of the continuing objection and renewed his motion to suppress, the motion in limine regarding the marijuana and the admission hearsay testimony. (245:17-18; 248:13-18). The court stated that the continuing objection as to the motions in limine and the motion to suppress had been granted in regard to Miller's testimony. (249:1-4).

At this time, Vaughn argued that a limiting instruction does not cure the prejudice that was made against Vaughn regarding the hearsay. (249:11-14). Counsel argued that the only sound course of action would be to declare a mistrial to retry the case without the hearsay being permitted. (249:20-23). The court declared that the statement by Miller is not hearsay. (250:13-14). Vaughn proceeded to formally ask for a mistrial based on hearsay since there was not a limiting instruction that can be crafted to cure the prejudice of the hearsay statement to which Miller was permitted to testify. (250:18-24). The court overruled the defense's request for a mistrial. (251:7).

During his testimony, Miller was also permitted to testify that the gross weight estimate of the marijuana located in the Tommy Hilfiger bag, Exhibit 10, was 14,500 grams, or approximately 17 pounds. (267:22, 266:16-19). Miller was also permitted to testify that the gross estimate of the marijuana in the hard-sided black suitcase was 8,119 grams, or approximately 32 pounds. (267:23, 322:20-21).

Christine Gabig was called to the stand to testify to the results of the chemical analysis of the marijuana she performed in the case. (308:4-12). The State first asked Gabig about Exhibit 10, the Tommy Hilfiger bag. (308:13-15). Vaughn renewed his motion in limine for the marijuana that was not chemically analyzed. (308:16-19). The court overruled the objection, but granted a continuing objection with respect to Christine Gabig's testimony. (308:20-23). Gabig testified that during her initial analysis of Exhibit 12, she was only going to analyze three

of the 15 bags located inside the hard-sided suitcase, but since she could not see the bag's contents, Gabig looked inside the other 12 bags and said, "okay, it's a green substance, and then sealed it back up." (323:1-4). The 12 additional bags in the suitcase were not chemically analyzed. (322:14-22). The gross weight of the untested 12 bags was 6,252.9 grams plus or minus 0.3 gram. (324:21-22).

Vaughn objected to Gabig's testimony as to not chemically analyzing 12 of the bags of marijuana and renewed the motion in limine concerning Neb. Rev. Stat. § 27-401 and § 27-403. (323:1-6). The court overruled the renewed motion in limine concerning the untested marijuana, and permitted Gabig's statement of not chemically analyzing 12 bags of marijuana. (323:8).

Finally, Agent Pelster testified. Pelster testified that no single person could use this much marijuana before it went bad. (367:13-16). The State then rested.

In its case in chief, the defense called John Vaughn to testify. (395:13-18). Vaughn testified that that he has never seen the suitcase, Exhibit 12, before and that it was not his suitcase. (407:11-18). Further, Vaughn stated that he did not board the Amtrak with either of these suitcase, nor did anyone give him the suitcase along his way to Omaha. (407:19-24). As for the Tommy Hilfiger bag, Vaughn testified that he told Officer Miller that the bag was not his. (408:2-6).

The case was submitted to the jury on January 12, 2021. After deliberating, the jury found Vaughn guilty of all three charges. (468:9-16). The court accepted the guilty verdicts and ordered a presentence investigation report for Vaughn. (470:16-22).

On April 13, 2022, the district court sentenced Vaughn to a period of four to six years of incarceration on count I, delivery, distribution, dispensing, manufacturing, or possession with intent to distribute, deliver, dispense, or manufacture marijuana and a fine of $10,000 on count III of failure to affix a tax stamp. (T118). The judge gave Vaughn credit for 95 days. (T118). The court dismissed count II, possession of marijuana more than a pound, because it was a lesser

included offense under Nebraska case law and would violate Vaughn's right against double jeopardy. (479:24-25; 480:1-3).

Vaughn filed his notice of appeal on April 26, 2022. (T132). The Honorable Peter C. Bataillon signed an order allowing Vaughn to proceed *in forma pauperis* on April 14, 2022. (T121).

SUMMARY OF THE ARGUMENT

The district court erred in denying Vaughn's motion to suppress the physical evidence and Vaughn's statements because the physical evidence was obtained by a warrantless search and no exception to the warrant requirement of the Fourth Amendment applies. Further, the statements made by Vaughn should not be admitted into evidence because they violated Vaughn's rights under the Fifth Amendment.

Second, the district court abused its discretion by permitting the admission of the hearsay evidence from the unnamed Amtrak employee who identified who the owner of the Tommy Hilfiger suitcase was to Miller. In addition, defense counsel has a right confront every witness against him. Therefore, any statement that the unnamed Amtrak employee made would be testimonial and subject to the Confrontation Clause.

Third, the district court failure to grant the first motion for mistrial was a substantial miscarriage of justice. Further, the district court erred and abused its discretion when it denied Vaughn's motion in limine and permitted testimony regarding the weight of untested marijuana into evidence.

Finally, the sentence imposed on Vaughn by the district court was excessive. The district court's failure to account for mitigating factors deprived Vaughn of a substantial right and denied him a just result, which amounted to an abuse of discretion. Vaughn requests this Court to exercise its statutory authority and reduce his sentence to a more appropriate punishment or such other sentence as this Court deems justified by the evidence.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DENIED VAUGHN'S MOTION TO SUPPRESS THE PHYSICAL EVIDENCE AND STATEMENTS THAT WERE OBTAINED BY A WARRANTLESS SEARCH AND INTERROGATION, VIOLATING VAUGHN'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS.

The district court committed clear error in finding that an officer's sniff of a bag and subsequent warrantless search of that bag was not a violation of Vaughn's Fourth Amendment rights. Article I, § 7 of the U.S. Constitution and the Nebraska Constitution guarantees people the right against unreasonable searches and seizures. U.S. Cont. art. I § 7; Neb. Const. art. I, § 7. This Court reviews a trial court's rulings on a motion to suppress based on a claimed Fourth Amendment violation in two parts. This Court reviews historical facts for clear error but "whether those facts trigger or violation Fourth Amendment protections is a question of law" that is reviewed independently of the trial court's determination. *State v. Perry*, 292 Neb. 708, 712 (2016).

Searches that are conducted absent a valid search warrant are per se unreasonable, subject to a few specifically established and well-delineated exceptions. *State v. Miller*, 312 Neb. 17, 29 (2022). The warrantless search exceptions Nebraska has recognized include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) searches of evidence in plain view, and (5) searches incident to a valid arrest. *Id.*

In fact, The United States Supreme Court held in *United States v. Place*:

> [W]here law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit the seizure of

> property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present."

United States v. Place, 462 U.S. 696, 701 (1983).

In the present case, the district court's analysis of the probable cause exception is flawed and the court should have suppressed the evidence collected by police on February 4, 2021. Officer Miller testified that he conducted a sniff of the bag and that the smell he was able to identify gave him "probable cause" to believe that the luggage contained contraband. (230:11-15). Miller went on to testify that he did not request a warrant, but instead conducted a "probable cause" of the duffle bag and located packages of marijuana. (230:11-15). The search of the Tommy Hilfiger duffle bag was made without warrant, without authority, and without any other enumerated exception to the warrant requirement. (45:9-14).

Additionally, the present record is devoid of evidence suggesting that Officer Miller was unable to seize the luggage and request a warrant to search the bag. *See United States v. Place*, 462 U.S. at 701. Indeed, if Miller's concern was the short length of the train's stop at the Omaha station, he had an obligation, if he truly had probable cause that the Tommy Hilfiger bag contained contraband, to seize the bag, remove it from the train, and seek a search warrant. The State failed to show any of the necessary requirements to justify exigent circumstances, such that a warrantless search of the Tommy Hilfiger bag was proper. Additionally, the State failed to show that Officer Miller could have secured a warrant, had he simply seized the bag and guarded it while he requested a warrant. *See Murray v. United States*, 487 U.S. 533, 535 (1988).

In *Murray v. United States*, the United States Supreme Court held that evidence initially discovered during police officers' illegal entry was admissible at trial because its rediscovery pursuant to a

valid warrant rendered the evidence inevitably discoverable. *Murray v. United States*, 487 U.S. 533, 535 (1988). In this case, however, the State has made no argument that the contraband discovered through Miller's warrantless search was independently and inevitably discoverable. In fact, the record does not support a finding that Miller could have seized the luggage and obtained a valid search warrant. As such, the "inevitable discovery" doctrine does not apply.

Second, the district court erred in failing to suppress Vaughn's custodial statements made to Officer Miller. Prior to questioning a suspect, police must fully apprise him of the State's intention to use his statements in prosecutorial efforts toward a conviction. *Miranda v. Arizona*, 384 U.S. 436, 468-470 (1966). Police must inform the suspect of his constitutional rights to remain silent and to have counsel present if the suspect so desires. *Id.* Moreover, "an 'interrogation' refers not only to express questioning, but also to any words or actions on the part of the police… [they] should know are reasonably likely to elicit an incriminating response from the suspect." *State v. Bormann*, 279 Neb. 320, 326 (2010). A custodial investigation requires two elements: 1) that the defendant is in custody; and 2) that the defendant is subject to questioning or the functional equivalent. *Miranda*, 384 U.S. at 444. Further, a person is seized and in custody for *Miranda* purposes when "in view of all the circumstances surrounding the incident, a reasonable person would not believe that he or she was free to leave." *State v. Prahim*, 235 Neb. 409, 413 (1990).

Without advising Vaughn of his Fourth Amendment rights, Miller began questioning him about his travels and the marijuana. (239:11-25; 240:1-6). Further, Miller did not ever tell Vaughn he was free to leave during Miller's questioning; therefore, using a reasonableness standard, Vaughn did not believe he was free to leave. (24:24-25). Although Miller testified that Vaughn was free to leave when Miller was asking questions about his trip, the train was temporarily stopped in Omaha while Vaughn was en route to Chicago. (25:1-7; 46:17-19). If Vaughn could have left the officer's presence,

Vaughn would have been isolated in a city unknown to him and unaware of where to go. (46:19-20). Moreover, Miller approached Vaughn in a closed compartment, partially blocked the doorway while asking questions, and identified himself as a part of the DEA Task Force. (46:11-14). In addition, Miller knocked on Vaughn's door at five a.m. and woke Vaughn from his sleep. (281:9-11). Vaughn did not have time to gather his thoughts or compose himself before having to answer Miller's questions. (403:4-8). Therefore, it is clear that a reasonable person would not believe they were free to leave that train car at that time or free to refuse questioning. (46:14-17). The initial detention of Vaughn was not based on a reasonable articulable suspicion, sufficient to justify a "Terry" stop and frisk. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). Vaughn's statements on the Amtrak were obtained by Miller without advising him of his constitutional rights under *Miranda*.

In sum, the district court committed clear error in denying Vaughn's motion to suppress. First, the physical evidence that was obtained on the Amtrak was obtained by a warrantless search without any exigent circumstances present, in violation of the Fourth Amendment of the United States Constitution. The search of the luggage was made without a warrant and without the consent of the property's owner. Vaughn's statements were also improperly permitted in violation of the Fifth Amendment by the district court as Vaughn's statements were custodial in nature. Therefore, this Court should find that Vaughn's motion to suppress the physical evidence and statements should have been granted and remand for a new trial.

II. THE DISTRICT COURT ERRED IN OVERRULING VAUGHN'S MOTION IN LIMINE TO PREVENT THE ADMISSION OF HEARSAY STATEMENTS AT TRIAL.

A. THE DISTRICT COURT ABUSED ITS DISCRETION BY PERMITTING THE ADMISSION OF HEARSAY

STATEMENTS MADE BY AN UNNAMED AMTRAK EMPLOYEE INTO EVIDENCE.

The district court denied Vaughn of a fair trial and also erred by permitting the admission of hearsay statements from an unnamed Amtrak employee. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of a matter asserted. Neb. Rev. Stat. § 27-801(3). Hearsay is not admissible except as provided by the Nebraska Evidence Rules. *State v. Burries*, 297 Neb. 367, 387 (2017). Moreover, according to Neb. Rev. Stat. § 27-403, even if evidence is relevant, the evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Rev. Stat. § 27-403.

Here, Miller was permitted to testify that he asked an Amtrak employee who the Tommy Hilfiger bag belonged to and the employee stated it belonged to a male subject in room number 12. (12:4-9). The State argued that the testimony from Miller was being offered to establish a basis for why Miller knocked on room number 12 and began questioning Vaughn. (198:25-199:2). However, the hearsay testimony provided through Miller is prejudicial to Vaughn because the State was permitted to elicit these hearsay statements which directly related to an element of the crimes charged. Whether Vaughn was in possession of the marijuana found inside the suitcases was directly at issue in trial and possession is an element of each of the three crimes charged. (200:15-18; 50:1-17). The prejudicial effect of Miller's statement greatly outweighs any probative value since the effect this statement had on Officer Miller is minimal and does not greatly change or impede the State's case in chief. (199:2-6). The admission of this statement does more harm to Vaughn by removing from the purview of the jury an element of each of the three crimes charged, than its probative value provides to the State's case. As such, the district court committed clear

error and this Court should reverse Vaughn's convictions and remand this case for a new trial.

B. THE DISTRICT COURT ABUSED ITS DISCRETION BY PERMITTING THE ADMISSION OF HEARSAY STATEMENTS IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE UNITED STATES AND NEBRASKA CONSTITUTIONS.

Even if the Court believes the statement by Miller is more probative that prejudicial to Vaughn, the admission of the hearsay statement violated Vaughn's right to confrontation. (199:7-10). The Confrontation Clause provides, "In all prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." Further, the Nebraska Constitution states that, "[i]n all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel, to demand the nature and cause of accusation, and to have a copy thereof; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." Neb. Rev. Stat. Const. art. I, § 11.

Customarily, the Confrontation Clause would allow for the defense counsel to have the ability to impeach and cross-examine the Amtrak employee. (199:10-11). The identity of the Amtrak employee was unknown at the time of trial, and further information regarding how the statement was communicated to Miller was also unknown. (200:8-14). Moreover, since the identity and nature of the statement from the Amtrak employee was unknown, defense counsel was unable to challenge the veracity of the statement; therefore, it is highly prejudicial to Vaughn. (200:14-15).

In addition, it is impossible to know whether the Amtrak employee had any knowledge of what occurred during the search, because Vaughn was not able to interview this witness and the witness

was not present at trial to provide their testimony and permit Vaughn to cross-examine them. At some point, the employee was in the train car near the time that Miller searched the Tommy Hilfiger bag and found the suspected marijuana (199:11-14).Consequently, the statements made by the Amtrak employee likely could be considered testimonial in nature and further subjected to the Confrontation Clause. (199:14-16). Further, Miller and Pelster both testified that they had an agreement with Amtrak to routinely patrol the trains to provide policing and look for criminal activity. (188:20-22; 224:2-7; 350:18-25; 351:1-3). It is possible that this employee was aware of this arrangement, but without an opportunity to effectively cross-examine them, it is impossible to know whether the employee was cognizant of Amtrak's agreement with the Task Force that routinely monitors the trains for criminal activity. Therefore, when Miller, a member of the Task Force, asked the Amtrak employee who the Tommy Hilfiger bag belonged to, the employee likely would have known that the conversation with Miller was for an investigation and was testimonial. The statement made by the Amtrak employee that Miller stated goes to the elements of all three of the charges against Vaughn, as knowingly being in possession of marijuana is the basis for all three charges. (200:15-18).

The State was able to bring evidence from an unnamed and unidentifiable Amtrak employee, whose statements directly formed the basis of an element of the crimes charged against Vaughn. (200:15-18). The element of possession of the marijuana was directly in dispute at trial but the State was permitted to establish that the Amtrak employee told Miller what room Vaughn was in. *Id.* The record does not establish how the Amtrak employee identified Vaughn nor has any information been provided to the court whatsoever in regard to how the Amtrak employee knew the Tommy Hilfiger bag was Vaughn's. (199:7-11). Vaughn was unfairly prejudiced because Vaughn did not have the name, identity, or the ability to confront the Amtrak employee who identified Vaughn and determined the State's basis to

prove that Vaughn knowingly possessed marijuana. (199:10-19). It is imperative that defense counsel and the defendant is given their constitutional right to cross-examine witnesses and the right to confrontation. Thus, this Court should find that Vaughn was denied a fair trial because he was unfairly prejudiced and denied the substantial right of confrontation and the ability to cross-examine a witness who was unavailable to him.

III. THE DISTRICT COURT'S FAILURE TO GRANT VAUGHN'S FIRST REQUEST FOR A MISTRIAL BASED ON THE ADMISSION OF THE AMTRAK EMPLOYEE'S PREJUDICIAL HEARSAY STATEMENTS CONSTITUTED A SUBSTANTIAL MISCARRIAGE OF JUSTICE

The district court's failure to sustain Vaughn's first motion for mistrial constitutes a substantial miscarriage of justice. Nebraska case law states that a mistrial shall be granted only if the court determines that a "substantial miscarriage of justice" which would result if a mistrial is not granted. *State v. Valdez*, 239 Neb. 453 (1991). Further, a new trial may be granted if an irregularity occurred "in the proceedings of the court… or of the witnesses for the state… or abuse of discretion by which the defendant was prevented from having a fair trial" materially affected the defendant's substantial rights. Neb. Rev. Stat. § 29-2101 (Reissue 2018). Events that may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters, to the extent that any damaging effect cannot be removed by proper admonition or instruction to the jury. *State v. Ash*, 293 Neb. 583 (2016).

Further, a mistrial is properly granted when an event occurs during the court of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus would result in preventing a fair trial. *State v. Kirksey*,

254 Neb. 162 (1998). A mistrial is properly granted in a criminal case where an event occurs during trial that is so damaging in nature, that it cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *State v. Green*, 287 Neb. 212 (2014).

Similarly, in *State v. Pedersen*, the district court allowed hearsay statements into evidence that the State used as a basis to prove an element of the crime, penetration, for first degree sexual assault. *State v. Pedersen*, No. A-92-324, 1993 WL 112751, at 8. Without the hearsay statements, the evidence concerning penetration was weak at best. *Id.* Further, the evidence established penetration with far greater specificity that the direct evidence. *Id.* This Court held that the hearsay evidence was prejudicial and if all of the objectionable hearsay was excluded, the State would have lost most of its evidence on penetration. *Id.* at 10.

Pedersen is analogous to the present case because if the hearsay objection of the Amtrak employee's statement had been sustained, the State's evidence to prove the element of knowingly possessing marijuana in all of the three charges would be weak. Therefore, the hearsay evidence was prejudicial against Vaughn, since the hearsay directly related to a key element of all three of Vaughn's charges.

Here, the limiting instruction to the jury was inadequate because the hearsay statement had already been admitted and heard by the jury. The primary piece of evidence that tied Vaughn to the Tommy Hilfiger bag on the Amtrak train was the hearsay statement offered through Officer Miller. (199:4-6). The Amtrak employee's statement that was allowed into evidence directly related to an element of all three charges Vaughn was ultimately convicted of. (200:15-18). No limiting jury instruction after the fact could have been crafted that could cure the prejudicial hearsay that was offered to the jury in violation of Nebraska Evidence Rules and the Confrontation Clause. (250:22-24).

Further, no limiting instruction would have been sufficient to cure the prejudice against Vaughn because the statement violated the

Confrontation Clause, the hearsay rules under the Nebraska Evidence Rules, and it was significantly more prejudicial than probative under Neb. Rev. Stat. § 27-403. Moreover, once this information was presented to the jury, Vaughn was immediately denied a fair trial; thus, the only sound course of action would be to declare a mistrial and to try the case again without the hearsay statement coming in. (249:20-23). Vaughn was prevented from having a fair trial by the improper admission of prejudicial evidence; a limiting instruction cannot remove the damaging effect of the jury being exposed to the hearsay statements.

Not only is the hearsay from the Amtrak employee harmful and prejudicial to Vaughn, but its admission resulted in a substantial miscarriage of justice that prevented Vaughn from having a fair trial. This Court should reverse Vaughn's convictions and remand for a new trial with instructions to exclude the testimonial hearsay evidence.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED VAUGHN'S MOTION IN LIMINE AND PERMITTED THE ADMISSION OF UNTESTED MARIUJUANA INTO EVIDENCE.

Vaughn's motion in limine regarding the untested marijuana should not have been overruled because the untested marijuana being admitted into evidence is more unfairly prejudicial to Vaughn than probative. According to Neb. Rev. Stat. § 27-403, although relevant, evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Neb. Rev. Stat. § 27-403.

In this case, the tested weight of the raw marijuana that was found was 15,046.2 grams (+/- 1.3 grams), or over 33 pounds. (314:14-25; 315:1-25). The weight of the untested marijuana was 6,252.9 grams (+/- 0.3 grams), or over 13 and a half pounds. (324:21-22). Pursuant to

Neb. Rev. Stat. §§ 27-401 and 27-403, the "gross weight of the twelve bags not tested; 6,252.9 grams +/- 0.3 grams" should have been redacted before the State was allowed to offer the lab report into evidence. The evidence of the items that were not chemically determined to contain cannabinoids was more unfairly prejudicial to Vaughn than probative, and therefore, should not have been admitted into evidence at trial.

As a result of admitting the untested marijuana into evidence, the State asked for Agent Pelster's opinion whether the marijuana that was located on the train in Exhibit 12 and Exhibit 10 was for narcotic distribution or for personal use. (367:3-7). Pelster emphasized the sheer amount of marijuana that was found, specifically 40 to 50 pounds of marijuana, demonstrated an intent to distribute. (367:12-14). Pelster went on to express he believed 40 to 50 pounds of marijuana was improbable to be consumed by an individual before it went bad. (367:12-16). The jury was exposed to Pelster's opinion of whether Vaughn had an intent to deliver or distribute based virtually exclusive to the 40 to 50 pounds of marijuana, of which over 13 and a half pounds were untested. (324:17-22). Further, during closing arguments, the State placed great emphasis on the weight of the marijuana. (447:6-8). In addition, the State also stated that "you don't need to be a drug interdiction expert to think that this bag of marijuana has nothing to do with personal use." (447:9-12). The State also stated that "the amount of marijuana in this case alone, over 45 pounds, is compelling and overwhelming evidence of Vaughn's intent to deliver or distribute this marijuana." (456:9-11). The untested marijuana should not have been admitted into evidence because the evidence of the untested items was irrelevant and was more unfairly prejudicial to Vaughn than probative pursuant to Neb. Rev. Stat. §§ 27-401 and 27-403.

The district court failed to meaningfully consider the dangerous precedent of allowing untested marijuana, as the gross weight of the marijuana was used as a basis for the State and Pelster to testify that

Vaughn had an intent to distribute and deliver a controlled substance. The State and Agent Pelster placed great emphasis on the sheer amount of marijuana that was found on the Amtrak on February 4, 2021, and made it known to the jury that the gross weight of the marijuana allegedly depicts intent to deliver or distribute. (367:3-20). The troubling precedent that allowing untested marijuana into evidence authorizes forensic chemical analysts to bypass a portion of the drug testing by merely looking at the drug without chemically testing it to verify its chemical makeup. Moreover, although the district court emphasized that marijuana is illegal in Nebraska, Delta 8 THC is federally legal in the United States and legal in the State of Nebraska under certain chemical concentrations, therefore, the forensic chemical analyst would not know whether the substance was legal or not without chemically testing it.

The admission of the unredacted lab report and the inclusion of evidence as to the weight of suspected marijuana that was never chemically tested was highly prejudicial to Vaughn and its probative value, when over 33 pounds of marijuana was chemically tested in this case, is negligible. This Court should reverse Vaughn's convictions and remand for a new trial.

V. THE DISTRICT COURT ABUSED ITS DISCRETION BY IMPOSING AN EXCESSIVE SENTENCE UPON VAUGHN.

Under Nebraska law, an appellate court will not disturb an imposed sentence that is within the statutory limits unless the sentencing court committed an abuse of discretion. *State v. Huff*, 282 Neb. 78, 119 (2011). An abuse of discretion exists when the reasons or rulings of a sentencing judge unfairly deprive a litigant of a substantial right and deny just results. *State v. Manjikian*, 303 Neb. 100, 114 (2019). When a defendant alleges on appeal that an imposed sentence that is within the statutory limits is excessive, the appellate court must determine whether the sentencing court abused its discretion in considering any applying the relevant factors as well as

any applicable legal principles in determining the sentence to be imposed. *State v. Alford*, 278 Neb. 818 (2009).

Furthermore, actions of the sentencing court, which are clearly against justice, conscience, reason, or evidence, constitute an abuse of discretion. *State v. Harrison*, 255 Neb. 990, 1001 (1999). In part, Neb. Rev. Stat. § 29-2308 (Reissue 2016) provides:

> In all criminal cases that now are, or may hereafter be pending in the Court of Appeals or Supreme Court, the appellate court may reduce the sentence rendered by the District Court against the accused when, in its opinion, the sentence is excessive, and it shall be the duty of the appellate court to render such sentences against the accused as in its opinion may be warranted by the evidence.

Additionally, the Nebraska Supreme Court has listed factors that control any sentence imposed by the district court:

> In imposing a sentence, a judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Timmens*, 263 Neb. 622, 631 (2002).

Thus, if a judge did not consider such factors as the defendant's age, mentality, education, and experience; social and cultural background; past criminal record or law-abiding conduct; motivation for the offense; nature of the offense; and the amount of violence involved in the commission of the crime, the sentence is an action against justice, and therefore constitutes an abuse of discretion.

In the present case, the district court sentenced Vaughn to four to six years of incarceration on count I and a $10,000 fine on count III, for charges that did not have a minimum for imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 2016). Vaughn was credited for 95 days served. (T89). The district court's sentencing decision was devoid of analysis, as it was primarily based on the nature of the offense. The nature of the offense is merely one relevant factor for consideration, and the district court's unreasonable emphasis on this single factor failed to adequately account for other mitigating factors set forth in *Timmens*, thus resulting in an excessive sentence. *See Timmens*, 263 Neb. at 631.

If the district court adequately and meaningfully applied the mitigating factors set forth by the Nebraska Supreme Court, Vaughn's terms of imprisonment would have been substantially shorter. Vaughn's sentence was not appropriately tailored to him, but rather, it was imposed only in response to the nature of the offense charged. This reliance directly contradicts the Nebraska Supreme Court's holding in *State v. Harrison*, 255 Neb. 990 (1999); therefore, Vaughn's sentence should be modified by this Court.

The district court abused its discretion by failing to adequately account for Vaughn's experience. Vaughn is a highly motivated young man who describes himself as "self-sufficient," "accountable," and driven to excel. (PSI, p. 18). Vaughn displays his ability to be a functioning member of society by being just two semesters short of earning his bachelor's degree in Petroleum Engineering. (PSI, p. 18). Throughout Vaughn's life growing up in Atlanta, he was consistently surrounded by the enticing allure of hip-hop culture in his environment. (PSI, p. 18). Vaughn attended a famous high school in which famous singers and rappers graduated, which undoubtedly captivated Vaughn and influenced the direction he chose in life. (PSI, p. 18). While witnessing his mother's struggles as a single mother, Vaughn was manipulated by hip-hop culture to believe that making music was a feasible pathway to make money quickly. (PSI, p. 18).

Regarding plans for his future, Vaughn has financial and professional aspirations of attending the music program at Georgia State and obtaining a degree in music. (PSI, p. 18). Further, Vaughn has already established a route of employment because he has applied and been accepted for a CDL truck driving certification course in Georgia. (PSI, p. 18). Attesting to Vaughn's ability to maintain consistent employment, a letter of support from one of Vaughn's managers, Shani Darmony, stated that Vaughn was proven to be trustworthy as the assistant store manager. (PSI, p. 132). In addition, Vaughn worked wonderfully with his fellow employees and customers from open to close at the store. (PSI, p. 132). Vaughn demonstrated he was a caring individual and ensured a peaceful and pleasant work environment at the store. (PSI, p. 132).

Furthermore, Vaughn denies having any issue with alcohol or drug use, stating that he does not indulge in the personal use of marijuana due to the paranoia and the negative feeling it gives him. (PSI, p. 15). In the PSI's recommendations, it stated that Vaughn was likely to engage in criminal behavior regardless of his circumstances. (PSI, p. 20). On the contrary, based on Vaughn's work and school history, he is a driven and motivated individual. (PSI, p.18). However, Vaughn needs guidance and support in order to be successful in attaining his goals and maintaining expectations. (PSI, p. 18).

Moreover, Vaughn has a demonstrated interest in serving the vulnerable populations in his community. Vaughn has established a drive to aid at-risk youth in his community by founding the "Sell Hope Not Dope" initiative in Atlanta. (PSI, p. 18). In a letter of support written by Vaughn's mother, Stacy Hardy, stated he was a role model within their community and was instrumental in mentoring troubled youth. (PSI, p. 128). Further, his mother stated that Vaughn would host back-to-school drives or Christmas gift-giving that would bring happiness to the children and their family. (PSI, p. 128). Vaughn saw himself in the at-risk youth in Atlanta that came from broken households and were highly susceptible to being involved in criminal

activity. (PSI, p. 128). Not only does Vaughn have the drive and motivation to turn his life around, but he wishes to stop at-risk youth from being involved in criminal activity from the beginning. (PSI, p. 18).

Members of Vaughn's community influenced him to pursue a career in hip hop and rap producing by starting his own record label entitled "Rich One Day Records." (PSI, p. 18). Since Vaughn grew up witnessing the difficulties his mother endured due to being a single parent and working hard to support him, Vaughn sought a way to aid his mother at a young age. (PSI, p. 18, 19). The allure of hip-hop subculture was pervasive in his community and captivated Vaughn to influence the direction he took in his life. (PSI, p. 18) However, Vaughn was manipulated by the prevalent hip-hop culture in Atlanta as a way to escape poverty and help his mother. (PSI, p. 18).

Further, Vaughn's greatest strength in his life has been the support of his family and friends. (PSI, p. 11). Vaughn grew up in a single-parent household where his mother worked as a nurse, but reported his grandmother primarily raised him. (PSI, 12, 13). As Vaughn, his mother, and his girlfriend have attested, Vaughn has a strong relationship with his grandmother. (PSI, p. 12, 13). Vaughn had acted as the dutiful caregiver of his grandmother with dementia and had reported dropping everything when she fell and could no longer take care of herself. (PSI, 12, 13). Due to Vaughn's grandmother's fall, she was placed in the hospital, and Vaughn was at her side daily. (PSI, p. 128). Vaughn's relationship with his grandmother is strong despite her dementia, since Vaughn is the only grandchild she remembers. (PSI, p. 128). Vaughn played a pivotal role in his grandmother's well-being since he provided her with baths, fed her meals, or provided transportation. (PSI, p. 128). Vaughn's grandmother still needs consistent care and would be heartbroken to find out Vaughn was arrested or incarcerated. (PSI, p. 128). Further, Vaughn's girlfriend, Ayechesh Solomon, regards Vaughn as a great man, describing him as smart, loving, generous, funny, and a provider. (PSI, p. 128).

The district court abused its discretion by failing to meaningfully consider Vaughn's lack of prior violent offenses and his motivation for the offense. Without attempting to minimize the present offense, the district court should have considered Vaughn's motivation for the offense. From an early age, Vaughn desired to support his family and establish financial responsibility by utilizing his passion for music. (PSI, p. 18). Vaughn has expressed with great enthusiasm his drive to support his family, create financial stability for his family, and finally "make something" of himself. (PSI, p. 18, 19). In an attempt to create a legacy for himself, as a young man in Atlanta, Vaughn was exploited by the illusion that a rap or hip-hop career was easily attainable and a way to make money quickly. (PSI, p. 16). The likely motive for the offense was the misguided desire to provide financial stability to his family and eventual offspring. (PSI, p. 16). For example, when his mother lost her job while pregnant, Vaughn took it upon himself to seek and attain summer employment as a lifeguard. (PSI, p. 128). Vaughn's mother was impressed by him at a young age by his unselfishness and providing for his family financially as a minor. (PSI, p. 128).

Moreover, considering Vaughn's prior criminal history, he has not been convicted of any violent offenses in his lifetime, including the present offense presented before the court today. (PSI, p. 6). In a letter of support from Jasmine Blalock, one of Vaughn's longtime friends, stated, "I never known John to be a threat to society ever. I've always seen him on such a great path in life and doing positive things for the community, like the "Sell Hope Not Dope" movement. (PSI, p. 134).

The record does not reflect that the district court properly considered any of this mitigating information when forming a sentence for Vaughn. As such, this Court should exercise its statutory authority to form a more appropriate sentence for Vaughn or remand with instructions for the district court to resentence Vaughn.

CONCLUSION

For the aforementioned reasons, Vaughn respectfully requests that this Court reverse his conviction and remand the case for a new trial. A new trial is warranted because of the district court's erroneous denial of the motion to suppress, refusal to exclude the prejudicial introduction of hearsay, permitting of a miscarriage of justice by failing to grant Vaughn's request for a mistrial, and committing harmful, reversible error. Each of the errors the district court made in Vaughn's case individually amounted to reversible error. This Court should reverse and remand for any one of these reasons, but especially the culminating effect of these harmful errors prevented Vaughn from having a fair trial and had the effect on repeatedly trampling on his Constitutional Rights.

Even if this Court is unwilling to consider the egregious evidentiary issues present throughout Vaughn's trial, then the excessive sentence that was imposed on Vaughn must be reconsidered with concern to the mitigating factors set forth by the Nebraska Supreme Court. The sentence imposed was excessive and constituted an abuse of discretion. The district court did not consider the copious mitigating factors that would have justified a lesser sentence. With respect to Vaughn's age, education, experience, mentality, and criminal history, a lesser sentence was merited. Therefore, Vaughn respectfully requests that this Court reverse the district court's sentencing decision and prays this Court order a more appropriate punishment, or remand this case to the district court with instructions to re-sentence consistent with this Court's opinion.

Respectfully Submitted,
THOMAS C. RILEY, #13523
Douglas County Public Defender
H05 Civic Center
Omaha, NE 68183
BEKAH S. KELLER, #26721

Assistant Public Defender
H05 Civic Center
Omaha, NE 68183
rebekah.keller@douglascounty-ne.gov
(402) 444-7175

CERTIFICATE OF WORD COUNT

I certify that the accompanying brief complies with Neb. Ct. R. § 2-103(C), in that it was prepared using Century Schoolbook 12-point typeface and contains 10316 words, excluding this certificate. This certificate was prepared in reliance on the word-count function of Microsoft Word, part of Microsoft Office Professional Plus 2016.

DATED this 31st day of August, 2022.

/s/ Rebekah Keller
REBEKAH KELLER, #26721
Assistant Public Defender
rebekah.keller@douglascounty-ne.gov
(402) 444-7175

Certificate of Service

I hereby certify that on Wednesday, August 31, 2022 I provided a true and correct copy of this *Brief of Appellant Vaughn* to the following:

State of Nebraska represented by Douglas J Peterson (18146) service method: Electronic Service to **katie.beiermann@nebraska.gov**

Signature: /s/ KELLER, REBEKAH S. (26721)

No. A-22-0308

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

JOHN VAUGHN,

Appellant.

APPEAL FROM THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

The Honorable Peter C. Bataillon, District Judge

BRIEF OF APPELLEE

Douglas J. Peterson, #18146
Attorney General

Matthew Lewis, # 26492
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2683
matt.lewis@nebraska.gov

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

STATEMENT OF THE CASE 9

A. Nature of the Case 9

B. Issues Before the District Court 9

C. How the Issues Were Decided in the District Court 9

D. Scope of Review 9

PROPOSITIONS OF LAW 11

STATEMENT OF FACTS 19

I. Information, Suppression Motion And Hearing, Motion In Limine And Hearing 19

II. Jury Trial: Contested Evidence And Testimony, Motion For Mistrial, And Jury Instructions 24

III. Verdict, Sentencing, And Appeal 30

ARGUMENT 31

I. The District Court's Denial Of Vaughn's Motion To Suppress Was Not In Error 31

II. The District Court's Denial Of Vaughn's Hearsay Objections Was Not In Error; The Contested Statements Are Not Definitional Hearsay 35

III. The District Court Correctly Denied Vaughn's Motion For Mistrial On Alleged Hearsay Grounds. 37

IV. The District Court Did Not Admit Untested Marijuana Into Evidence. 38

V. The District Court's Sentencing Order For Vaughn Is Not Indicative Of An Abuse Of Discretion 40

CONCLUSION.....44

TABLE OF AUTHORITIES

CASES

Golnick v. Callender,
290 Neb. 395, 860 N.W.2d 180 (2015)..... 35

Pantano v. American Blue Ribbon Holdings,
303 Neb. 156, 927 N.W.2d 357 (2019)..... 35

State v. Ash,
293 Neb. 569, 878 N.W.2d 569 (2016)..... 10

State v. Barbeau,
301 Neb. 293, 917 N.W.2d 913 (2018)..... 13, 33

State v. Benson,
198 Neb. 14, 251 N.W.2d 659 (1977)..... 33

State v. Boche,
294 Neb. 912, 885 N.W.2d 523 (2016)..... 39

State v. Briggs,
308 Neb. 84, 953 N.W.2d 41 (2021)..... 9

State v. Britt,
310 Neb. 69, 963 N.W.2d 533 (2021)..... 16, 39

State v. Burries,
297 Neb. 367 36

State v. Childs,
242 Neb. 426, 433, 495 N.W.2d 475, 479 (1993),..... 13, 33

State v. Childs,
309 Neb. 427, 960 N.W.2d 585 (2021)..... 36

State v. Clausen,
307 Neb. 968, 951 N.W.2d 764 (2020)..... 10

State v. Daly,
202 Neb. 217, 274 N.W.2d 557 (1979)..... 33

State v. Davis,
290 Neb. 826, 862 N.W.2d 731 (2015)..... 10, 15, 37-38

State v. Decker,
261 Neb. 382, 622 N.W.2d 903 (2001)..... 40

State v. Devers,
306 Neb. 429, 945 N.W.2d 470 (2020)..... 10

State v. Dixon,
282 Neb. 274, 802 N.W.2d 866 (2011)..... 37

State v. Draganescu,
276 Neb. 448, 755 N.W.2d 57 (2008)..... 10

State v. Drake,
311 Neb. 219, 971 N.W.2d 759 (2022)..... 9, 11-12, 31, 32

State v. Draper,
289 Neb. 777, 857 N.W.2d 334 (2015)..... 10

State v. Ferrin,
305 Neb. 762, 942 N.W.2d 404 (2020)..... 14, 35

State v. Gibson,
302 Neb. 833, 925 N.W.2d 678 (2019)..... 19, 42-43

State v. Greer,
309 Neb. 667, 962 N.W.2d 217 (2021)..... 10, 41-42

State v. Hall,
242 Neb. 92, 492 N.W.2d 884 (1992)..... 42

State v. Harrison,
255 Neb. 990, 588 N.W.2d 556 (1999)..... 42

State v. Hartzell,
304 Neb. 82, 933 N.W.2d 441 (2019)..... 33

State v. Hassan,
309 Neb. 644, 962 N.W.2d 210 (2021)..... 10, 14, 36

State v. Hunt,
214 Neb. 214, 333 N.W.2d 405 (1983)..... 42

State v. Kibbee,
284 Neb. 72, 815 N.W.2d 872 (2012)..... 38

State v. Lowman,
308 Neb. 482, 954 N.W.2d 905 (2021)..... 9, 12, 32

State v. McCave,
282 Neb. 500 24

State v. McCulley,
305 Neb. 139, 939 N.W.2d 373 (2020)..... 19, 42, 44

State v. Morton,
310 Neb. 355, 966 N.W.2d 57 (2021)..... 10, 16-18, 40, 42-3

State v. Phillips,
242 Neb. 894, 496 N.W.2d 874 (1993)..... 19, 42

State v. Poe,
292 Neb. 60, 870 N.W.2d 779 (2015)..... 36

State v. Prior,
30 Neb. App. 821, 973 N.W.2d 726 (2022) 10

State v. Robinson,
271 Neb. 698, 715 N.W.2d 531 (2006)..... 38

State v. Rodriguez,
288 Neb. 878, 852 N.W.2d 705 (2014)..... 33

State v. Ruzicka,
202 Neb. 257, 274 N.W.2d 873 33

State v. Saitta,
306 Neb. 499, 945 N.W.2d 888 (2020)..... 32

State v. Schmidt,
276 Neb. 723, 757 N.W.2d 291 (2008)..... 35

State v. Schreiner,
276 Neb. 393, 754 N.W.2d 742 (2008)..... 35

State v. Seckinger,
301 Neb. 963, 920 N.W.2d 842 (2018)..... 13, 33

State v. Staten,
238 Neb. 13, 469 N.W.2d 112 (1991)..... 33

State v. Stricklin,
290 Neb. 542, 861 N.W.2d 367 (2015)..... 10

State v. Strohl,
255 Neb. 918, 587 N.W.2d 675 (1999)..... 42

State v. Van,
268 Neb. 814, 688 N.W.2d 600 (2004)..... 42

State v. Watts,
209 Neb. 371, 307 N.W.2d 816 (1979)..... 33

State v. Wood,
310 Neb. 391, 966 N.W.2d 825 (2021)..... 14, 36

Terry v. Ohio,
392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) 11, 32

U.S. v. Ralston,
973 F.3d 896 (8th Cir. 2020) 36

U.S. v. Spencer,
592 F.3d 866 (8th Cir. 2010) 36

STATUTES

Neb. Rev. Stat. § 27-401..... 39

Neb. Rev. Stat. § 27-403..... 24, 36, 39

Neb. Rev. Stat. § 27-801..... 24

Neb. Rev. Stat. § 27-801(3) 36

Neb. Rev. Stat. § 28-105..... 17, 41-42

Neb. Rev. Stat. § 28-105(1) (Supp. 2019) 17, 41

Neb. Rev. Stat. § 28-416 (Supp. 2019)..... 9, 19-20, 40

Neb. Rev. Stat. § 29-2260..... 18, 41-42

Neb. Rev. Stat. § 29-2260(2)(c) (Reissue 2016) 18, 41

Neb. Rev. Stat. § 77-4309..... 9, 20

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 9-13, 32-33, 43

OTHER AUTHORITIES

Robert P. Mosteller ed., 8th ed. 2020,
2 McCormick on Evidence § 249 36

Statement of the Case

A. Nature of the Case

This is John Vaughn's direct appeal of the District Court of Douglas County's judgement related to his convictions for Possession With Intent To Distribute Marijuana, a Class IIA felony under Neb. Rev. Stat. § 28-416 (Supp. 2019) (Count I), and Failure To Affix Tax Stamp, a Class IV felony under Neb. Rev. Stat. § 77-4309 (Count III). (T1-T2; T89-T93; T132-T134). Those convictions followed a jury trial. (Brief of Appellant, pp. 5-6; T89-T93).

B. Issues Before the District Court

For the purposes of this appeal, whether to grant Vaughn's motion to suppress, whether to strike testimony he asserts was hearsay, whether to grant a mistrial request from Vaughn, whether to admit untested seized items into evidence, and what sentences to order for Vaughn. (Brief of Appellant, pp. 5-6).

C. How the Issues Were Decided in the District Court

The district court denied Vaughn's suppression motion, allowed the disputed testimony, denied Vaughn's request for mistrial, and admitted the untested seized items into evidence. (T28-T38). As a result of the convictions, the district court ordered Vaughn to serve four to six years' imprisonment on Count I and pay a $10,000 fine for Count III. (T118-T120).

D. Scope of Review

In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. *State v. Drake*, 311 Neb. 219, 227, 971 N.W.2d 759, 769 (2022) (citing *State v. Lowman*, 308 Neb. 482, 954 N.W.2d 905 (2021) and *State v. Briggs*, 308 Neb. 84, 953 N.W.2d 41 (2021)). Regarding historical facts, an appellate court

reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination. *Id.*

Apart from rulings under the residual hearsay exception, appellate courts review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection. *State v. Hassan*, 309 Neb. 644, 647, 962 N.W.2d 210, 213 (2021) (citing *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008)).

A trial court's order denying a motion for new trial is reviewed for an abuse of discretion. *State v. Ash*, 293 Neb. 569, 590, 878 N.W.2d 569, 577 (2016) (citing *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015) and *State v. Draper*, 289 Neb. 777, 857 N.W.2d 334 (2015)); *see also State v. Davis*, 290 Neb. 826, 833, 862 N.W.2d 731, 737 (2015) (holding that "[w]hether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion").

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Clausen*, 307 Neb. 968, 974, 951 N.W.2d 764, 776 (2020) (citing *State v. Devers*, 306 Neb. 429, 945 N.W.2d 470 (2020)); *see also State v. Prior*, 30 Neb. App. 821, 973 N.W.2d 726 (2022). A trial court's determination of the relevancy and admissibility of evidence must be upheld in the absence of an abuse of discretion. *Id.*

Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits. *State v. Morton*, 310 Neb. 355, 365, 966 N.W.2d 57, 66 (2021) (citing *State v. Greer*, 309 Neb. 667, 962 N.W.2d 217 (2021)). A judicial abuse

of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id*.

Propositions of Law

I.

> The Nebraska Supreme Court has set out three tiers of police-citizen encounters that govern search and seizure in the context of the Fourth Amendment. The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but the voluntary cooperation of the citizen is elicited through noncoercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection.
>
> *State v. Drake*, 311 Neb. 219, 229, 971 N.W.2d 759, 769 (2022).

II.

> The second tier, the investigatory stop, as defined by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a seizure sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime.
>
> *State v. Drake*, 311 Neb. 219, 229, 971 N.W.2d 759, 770 (2022).

III.

The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime.

State v. Drake, 311 Neb. 219, 229, 971 N.W.2d 759, 770 (2022).

IV.

Not every police-citizen encounter rises to the level of a seizure; a seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled. A seizure does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, provided the officer does not indicate that compliance with his or her request is required.

State v. Lowman, 308 Neb. 482, 492, 954 N.W.2d 905, 916 (2021).

V.

Police can constitutionally stop and briefly detain a person for investigative purposes if the police have a

reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment.

State v. Barbeau, 301 Neb. 293, 301, 917 N.W.2d 913, 921 (2018).

VI.

Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id.* at 302, 917 N.W.2d at 921 (citing *Childs*, *supra*, 242 Neb. at 433, 495 N.W.2d at 479-80). When determining whether there is reasonable suspicion for a police officer to make an investigatory stop, the totality of the circumstances must be taken into account.

State v. Barbeau, 301 Neb. 293, 302, 917 N.W.2d 913, 921 (2018).

VII.

The odor of marijuana is sufficient standing alone to furnish probable cause for a search.

State v. Seckinger, 301 Neb. 963, 969-76, 920 N.W.2d 842, 847-51 (2018).

VIII.

The Nebraska Supreme Court has repeatedly held that a motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. This preliminary ruling on the admissibility of evidence does not present a question for appellate review unless the appropriate objections are made at trial. The Supreme Court has also held that an appellant who has assigned

only that the trial court erred in denying a motion in limine has not triggered appellate review of the evidentiary ruling at trial.

State v. Ferrin, 305 Neb. 762, 770-71, 942 N.W.2d 404, 411-12 (2020).

IX.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. Hearsay is not admissible unless otherwise provided for in the Nebraska Evidence Rules or elsewhere. But an out-of-court statement is not hearsay if the proponent offers it for a purpose other than proving the truth of the matter asserted.

State v. Hassan, 309 Neb. 644, 648, 962 N.W.2d 210, 213 (2021).

X.

Statements offered to show their effect on the listener are not hearsay. And statements are not hearsay to the extent they are offered for context and coherence of other admissible statements and not for the truth or the truth of the matter asserted.

State v. Wood, 310 Neb. 391, 428, 966 N.W.2d 825, 853-54 (2021).

XI.

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. Davis, 290 Neb. 826, 834, 862 N.W.2d 731, 737 (2015).

XII.

An admonishment of the jury is typically sufficient to cure any prejudice.

State v. Davis, 290 Neb. 826, 834, 862 N.W.2d 731, 737 (2015).

XIII.

In a motion for mistrial, the moving party faces the burden of proving that he was actually prejudiced by the alleged errors and not merely that the errors created a possibility of prejudice.

State v. Davis, 290 Neb. 826, 834, 862 N.W.2d 731, 737 (2015).

XIV.

When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.

State v. Davis, 290 Neb. 826, 834, 862 N.W.2d 731, 737-38 (2015).

XV.

In some cases, the damaging effect of an event during trial may be such that it cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.

State v. Davis, 290 Neb. 826, 834, 862 N.W.2d 731, 738 (2015).

XVI.

It is incumbent upon an appellant to supply a record which supports his or her appeal. Absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed.

State v. Britt, 310 Neb. 69, 79-80, 963 N.W.2d 533,541 (2021).

XVII.

Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits.

State v. Morton, 310 Neb. 355, 365, 966 N.W.2d 57, 66 (2021).

XVIII.

A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

State v. Morton, 310 Neb. 355, 365, 966 N.W.2d 57, 66 (2021).

XIX.

It is well established that an appellate court will not disturb sentences within the statutory limits unless the district court abused its discretion in establishing the sentences.

State v. Morton, 310 Neb. 355, 365, 966 N.W.2d 57, 66 (2021).

XX.

When sentences imposed within statutory limits are alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering well-established factors and any applicable legal principles.

State v. Morton, 310 Neb. 355, 365, 966 N.W.2d 57, 66 (2021).

XXI.

Neb. Rev. Stat. § 28-105 authorizes a maximum sentence of twenty years' imprisonment with no mandatory minimum sentence for a Class IIA felony, and a maximum sentence of two years' imprisonment and twelve months' post-release supervision and/or a $10,000 fine with no minimum sentence for a Class IV felony.

Neb. Rev. Stat. § 28-105(1) (Supp. 2019).

XXII.

Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because the risk is substantial that during the period of probation the offender will engage in additional criminal conduct; the offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or a lesser sentence

will depreciate the seriousness of the offender's crime or promote disrespect for law.

Neb. Rev. Stat. § 29-2260(2)(c) (Reissue 2016).

XXIII.

The relevant factors for a sentencing judge to consider when imposing a sentence are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.

State v. Morton, 310 Neb. 355, 366, 966 N.W.2d 57, 66 (2021).

XXIV.

The sentencing court is not limited to any mathematically applied set of factors, but the appropriateness of the sentence is necessarily a subjective judgment that includes the sentencing judge's observations of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

State v. Morton, 310 Neb. 355, 366, 966 N.W.2d 57, 66 (2021).

XXV.

Neb. Rev. Stat. § 29-2260 does not control the discretion of the trial court. It also does not require the trial court to articulate on the record that it has considered each sentencing factor, and it does not require the court to make specific findings as to the factors and the weight given them.

State v. McCulley, 305 Neb. 139, 147, 939 N.W.2d 373, 381 (2020).

XXVI.

It is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate.

State v. Gibson, 302 Neb. 833, 843, 925 N.W.2d 678, 685 (2019).

XXVII.

In reviewing a claim of an excessive sentence, the standard is not what sentence the reviewing court would have imposed.

State v. Gibson, 302 Neb. 833, 843, 925 N.W.2d 678, 685 (2019).

XXVIII.

To the sentencing court and not to an appellate court is entrusted the power to impose sentences for the commissions of crimes against the State; the judgement of the sentencing court cannot be interfered with in the absence of an abuse of discretion.

State v. Phillips, 242 Neb. 894, 897, 496 N.W.2d 874, 877 (1993).

Statement of Facts

I. Information, Suppression Motion And Hearing, Motion In Limine And Hearing.

The Douglas County Attorney's Office charged Vaughn with: Delivery, Distribution, Dispensing, Manufacturing, Or Possession With Intent To Distribute, Delivery, Dispense, Or Manufacture Of Marijuana, a Class IIA felony under Neb. Rev. Stat. § 28-416 (Count I);

Possession Of Marijuana – More Than One Pound, a Class IV felony under Neb. Rev. Stat. § 28-416 (Count II); and Failure To Affix Tax Stamp, a Class IV felony under Neb. Rev. Stat. § 77-4309 (Count III). (T1-T2).

Vaughn filed a Motion To Suppress Physical Evidence And Statements in the case. (T28-T29). That motion alleged that the search of Vaughn's person and property was not valid, nor was the detention of him. *Id*. at 28. Consequently, he asserted that the subsequent evidence and statements obtained from him were the product of the unlawful conduct and arrest by law enforcement. *Id*.

At the hearing on that motion, the State called Deputy Brian Miller of the Pottawattamie County Sheriff's Office assigned to the DEA Task Force Criminal Interdiction Unit. (1:1-2:22). Miller reviewed his training and experience as a law enforcement officer and with drug investigations. (2:23-7:18; 21:3-22:22).

Miller confirmed that he encountered Vaughn at the Omaha Amtrak Station on February 4, 2021 as part of a "routine" DEA task force investigation into "inconsistent" rail travel, typified by untagged, unusual, or falsely identified luggage. (7:19-9:15; 26:1-7). During that investigation at the Amtrak station, Miller saw a "dark colored duffle bag with a Tommy Hilfiger emblem on it" with no luggage or identification tags "on a luggage rack [in] the middle row of the sleeper car 630." (9:16-10:1; 18:7-19:10). Miller identified the train as the "No. 6" originating in Emeryville, California and headed to Chicago, Illinois. (10:2-8). The train stopped in Omaha and Miller identified the time as 5:40 A.M. (10:2-11).

Upon seeing the unidentified duffle bag on the luggage rack, Miller "smell[ed] the seam of the bag and detect[ed] the odor of marijuana coming from it . . . the zipper portion." (10:11-22). Miller denied having to manipulate the bag to detect the smell. (10:23-25; 30:23-25). On cross-examination Miller maintained this assertion despite a line in his report of the incident suggesting he "lifted" the

duffle bag prior to detecting the marijuana scent. (31:1-32:18). Miller denied using a K9 to sniff the bag for lack of need given the odor coming from the bag. (20:19-23:25). After detecting the smell, Miller conducted a probable cause search of the duffle bag. (11:1-10). Inside, he found approximately "[s]eventeen pounds" of marijuana "[i]n raw leaf vacuum sealed packages." (11:4-16; 27:15-23).

Miller contacted another officer, Agent Pelster, to help locate the person to whom the duffle bag belonged. (11:1-12:2). Miller spoke with an Amtrak employee assigned to the sleeper car who identified a "male party . . . in Room 12" as the bag's owner. (12:3-9). Miller elaborated that Room 12 was "[a]lmost right next to where the luggage rack was at" where the bag was found. (12:10-12). Miller knocked on the door of Room 12, identified himself with his identification to Vaughn (the sole occupant of Room 12), and asked if Vaughn would speak with him. (12:15-13:15; 27:24-28:16). Miller denied telling Vaughn that he did not have to speak with the officers or that he was free to leave. (24:21-25). He denied blocking the doorway or entering Room 12. (24:4-17; 28:17-21). Vaughn agreed to speak with the officers, identified himself, produced his ticket, and described his travel itinerary as having flown to California where he stayed for two days before taking the train home to Atlanta, Georgia. (13:4-14:7).

Miller asked Vaughn if the Tommy Hilfiger bag on the luggage rack was his and Vaughn agreed that it was. (14:8-23). At that confirmation, Miller placed Vaughn under arrest and detained him. (14:24-15:1). A search of Room 12 followed, locating "a hard-sided suitcase . . . that contained approximately 37 pounds of marijuana and also a backpack which contained . . . 1800 grams of marijuana . . . wax." (15:2-15). The officers took Vaughn in handcuffs to the Amtrak terminal where they Mirandized him. (15:19-24). Vaughn gave no additional statement. (15:25-16:4).

Counsel for Vaughn followed Miller's testimony with an offer of three exhibits into evidence: Exhibit 1, a copy of body camera footage from Investigator Steven Peck; Exhibit 2, a printout from the

Nebraska State Patrol's website about their Police Service Dog Division; Exhibit 3, legislative information from California regarding the legalization of marijuana in that state; Exhibit 4, a summary of the legislation from Illinois legalizing marijuana in that state. (38:20-40:9; E1-E4). The district court received Exhibit 1 as an offer of proof and Exhibits 2 through 4 over the State's objection. (40:10-42:1; E1-E4).

The district court heard argument from both parties. (42:5-47:1). Following those comments, the district court denied Vaughn's motion to suppress. (48:13-15). The district court found that: Miller "had the ability to smell the bag," whether the bag had identification or not; Miller had probable cause to search the bag given the odor of marijuana coming from it; based on the contents of the bag after the search, Miller contacted the car attendant who directed him to Vaughn; Miller asked Vaughn if he would speak with him and Vaughn agreed; Vaughn identified the bag with the marijuana as his; after this identification of the bag, Vaughn was in custody; there was no reason to Mirandize Vaughn before this moment since he was not in custody; prior to his arrest, Miller was standing at the side of door and Vaughn was free to leave while acknowledging the close quarters of the train car; this first search and arrest led to the second search and discovery of additional contraband; it is illegal to transport marijuana in Nebraska, where Vaughn was at the time of his arrest; and that the vacuum sealing of the contraband indicated that Vaughn was attempting to hide his transporting of marijuana. (47:4-48:13). A written order confirmed the denial. (T35-T38).

Vaughn also filed a Motion In Limine seeking to prohibit evidence or testimony regarding items listed in what later became Exhibit 5, a Chemistry Division Lab Report prepared by the Forensic Services Bureau of the Douglas County Sheriff's Office. (T62-T65; *see also* E5). Specifically, that motion wanted to exclude evidence or testimony about all or some of: Item 3, the backpack seized from Vaughn's room; Item 3a-1, purported marijuana wax found within the backpack; and Item 5 the hard-shell suitcase recovered from Vaughn's

room and its contents. (T62; E5). Vaughn argued that the lab only tested some of the contents of Item 5 and Item 3a-1 "cannot be determined to contain cannabinoids," rendering that evidence irrelevant and unfairly prejudicial. (T62).

A hearing on that motion took place on December 14, 2021 and the district court released an order denying Vaughn's motion in limine on December 16, 2021. (T68-T71). The district court reasoned that "[a]ll three bags" in Exhibit 5 "were confiscated when [Vaughn] was arrested." (T69). "All the bags in Item 3 and Item 4 were tested and three of the fifteen bags in Item 5 were tested," the district court continued. *Id*. The district court noted that the bags in Item 3 were tested and determined present of cannabinoids, even if the overall concentration levels were not determined. *Id*. As for the untested bags in Item 5, they were "packaged similarly and were in the large bag . . . which is alleged to be in the possession of" Vaughn. *Id*. The district court concluded that the finder of fact is "entitled to hear and understand all the circumstances of this arrest," and Vaughn is free to argue the untested bags are irrelevant as the State is free to do the opposite. *Id*.

The district court later heard argument from the parties about a motion in limine from Vaughn prior to the start of the State's case. (198:5-203:8). There, counsel for Vaughn argued that the State was likely to elicit at trial hearsay testimony from Miller about his actions on February 4th and the Amtrak employee who led Miller to Vaughn and his duffle bag. (198:9-24). Counsel for Vaughn asserted that the State intended to introduce that testimony "to show why Officer Miller did what he did for its impact on a listener," but that "the prejudicial effect outweighs any probative value of that piece of evidence." (198:25-199:6). Counsel for Vaughn continued: "[t]he problem is that that statement related directly to an element of a crime, which is the ownership of the bag which was where the marijuana was found." (199:3-6). Consequently, the defense felt that the State should be limited to "prov[ing] that fact by calling the actual Amtrak employee"

that told Miller to whom the bag belonged. (199:7-23). If overruled, counsel for Vaughn asked for a limiting instruction, but asserted his concern that a limiting instruction would not go "far enough" given the perceived violation of the confrontation clause and hearsay rules, and the prejudice per Neb. Rev. Stat. § 27-403. (199:24-200:19).

In response, the State cited Neb. Rev. Stat. § 27-801 and quoted a holding from *State v. McCave*, 282 Neb. 500, 8045 N.W.2d 290 (2011), that "[a] statement offered to prove its impact on the listener, instead of its truth, is offered for a valid nonhearsay purpose if the listener's knowledge, belief, response, or state of mind after hearing the statement is relevant to an issue in the case." (200:22-201:4). The State argued that it intended to offer Miller's testimony as nonhearsay about the Amtrak employee's disclosure of the bag's owner due to its effect on Miller and how it informed his next actions. (201:5-18). Counsel for Vaughn then argued that the statement and its effect on Miller was not relevant and overly prejudicial. (201:21-202:10).

The district court overruled the motion in limine. (202:25-203:1). The district court reasoned that the statement would not be offered to prove the truth of the matter asserted, but to show "the information the policeman had to go on . . . the necessary steps to get to room 12 . . . why the policeman did this." (202:11-23).

II. Jury Trial: Contested Evidence And Testimony, Motion For Mistrial, And Jury Instructions.

At trial, the State called Deputy Miller. (211:19). Counsel for Vaughn renewed the defense's prior motions, which the district court overruled. (211:20-25). During his testimony, Miller detailed his current employment, DEA task force assignment, duties with that DEA assignment, training, and experience much as he had during the suppression hearing. (212:1-221:22; E13).

Turning to February 4, 2021, Miller mirrored his suppression hearing testimony while describing to the jury his investigation at the Omaha Amtrak station of the No. 6 train as part of the DEA task

force's "daily routine." (221:23-228:19). Miller described the task force's interest in luggage that meets certain criteria for suspicion, including a lack of identification tags. (225:5-226:11).

Miller revisited his suppression hearing testimony about the Tommy Hilfiger duffle bag that caught his attention for lack of identification tags, identifying it in Exhibit 10. (228:20-232:19; E10). Counsel for Vaughn renewed their previous objections, which the district court overruled. (230:8-10). Miller testified that he smelled the seam of the bag, detecting from it the odor of marijuana. (229:3-230:3). A recollection of the ensuing search and discovery of vacuum-sealed marijuana bags inside the duffle bag followed. (230:11-232:19; E10).

Miller radioed for Agent Pelster to meet him and then set about finding the bag's owner. (232:20-233:14). At this time, Miller saw "the attendant of the car . . . an Amtrak employee . . . standing in the hallway," so he "asked her if she knew who the bag belonged to." (233:14-24). At this point, counsel for Vaughn again renewed their objection, which the district court overruled. (233:19-21). Miller continued that the Amtrak attendant "said that [the duffle bag] belonged to a male that was in room 12." (233:24-25). At this point, the district court stopped the testimony and provided an explanation of the defense's objection as one pertaining to hearsay. (234:1-5). The district court explained that it was "allowing that testimony as to what the attendant on the Amtrak train said because it's not to prove the truth of the matter asserted," but instead "it's just to give information as to how Officer Miller – why he took the next step." (234:6-10). Counsel for Vaughn objected again, asking first for a limiting instruction and then on hearsay grounds. (234:12-235:10). The district court overruled those objections. (234:12-235:11).

Miller continued by describing the arrival of Pelster, proceeding to Room 12, the location of the duffle bag in relation to Room 12, contacting Vaughn as the sole occupant of the room, his identification of himself as a DEA task force officer, and the physical dimensions of the train car and Room 12 as he did during the suppression hearing.

(235:12-239:12). Deputy Miller testified that Vaughn was seated on the bed in the room and that he was standing in the hallway to the "side of the door" for Room 12. (238:7-239:1). Vaughn agreed to speak with the officer, showed him his Amtrak ticket, described his travel plans, and claimed ownership for the Tommy Hilfiger duffle bag on the hallway luggage rack outside the room. (239:13-241:16). Counsel for Vaughn again renewed objections based on pretrial motions which the district court overruled. (239:20-22). Deputy Miller then described the criminal inferences he drew from the information Vaughn gave him, drawing another overruled hearsay objection. (241:17-242:15).

Miller detailed the subsequent arrest and search of Room 12 and the discovery of additional contraband in Vaughn's additional luggage as in the suppression hearing. (242:25-252:20). This drew another objection and renewal of the defense's pretrial motions, the subsequent discussion noting additionally that both sides agreed not to discuss the black backpack and its contents discussed during pretrial. (244:18-249:5). Additional discussion followed:

> THE COURT: And when you're asking for a limiting instruction, you want me to make a decision on that in the middle of his testimony?
>
> [Counsel for Vaughn]: A limiting instruction as to what?
>
> THE COURT: That's what you asked me for.
>
> [Counsel for Vaughn]: You gave a limiting instruction. It's our objection that the limiting instruction doesn't cure the prejudice that's been – there isn't a limiting instruction that could exist that would –
>
> THE COURT: Then why did you ask me for one? You said you wanted me to expand on the limiting instruction.
>
> [Counsel for Vaughn]: I said it doesn't go far enough.

THE COURT: So how far do you want me to go with the limiting instruction?

[Counsel for Vaughn]: I think that – in my opinion, it's my position that the only sound course of action would be to declare a mistrial and to try the case again without that hearsay coming in.

THE COURT: Oh, so you don't want me to expand on the limiting instruction; you want a mistrial?

[Counsel for Vaughn]: I just –

THE COURT: I'm just trying to figure out what you're asking for here. What you're saying that there's no limiting instruction I could give, but you wanted my to – you made the objection, you didn't go far enough with the limiting instruction. What you're saying is, it's not that I didn't [go] far enough, I shouldn't have given the limiting instruction and you want a mistrial. Is that what you're asking for?

[Counsel for Vaughn]: What I'm asking for is that Your Honor keep that hearsay out, which that –

THE COURT: Well, I'm not going to do that. It's not hearsay.

[Counsel for Vaughn]: And I know that Your Honor is going to let that in, and I know the way Your Honor ruled. So in that event, I think that, you know, absent a mistrial, if you're not going to grant a mistrial on that, which obviously the Court is not –

THE COURT: You haven't asked for one.

[Counsel for Vaughn]: Well, I'll formally ask for one now based on that hearsay. I don't believe that there is a limiting instruction that can be crafted that can cure the prejudice –

THE COURT: And I appreciate that. But when you said it didn't go far enough with the limiting instruction, what I understand

that means is I needed to explain more about the limiting instruction. But now what I understand is you're not asking for a limiting instruction, you're asking for a mistrial; correct?

[Counsel for Vaughn]: Yes.

THE COURT: All right. The mistrial is overruled.

[249:6-251:7].

Miller's testimony continued, detailing the search of the Tommy Hilfiger bag from the luggage rack and the hard-sided suitcase found in Room 12 as seen in Exhibit 12. (251:20-255:9; E12). Further testimony and exhibits identified the relevant contents of both bags as suspected marijuana and described the submission of some of those contents to a lab for testing. (255:11-264:24; E10A-E10J; E11; E12; E12P). There was an objection from Vaughn to renew his suppression motion which the district court overruled. (261:11-262:5). Miller told the jury that this packaging was consistent with drug distribution and reviewed the amounts of marijuana recovered from Vaughn's luggage. (264:21-268:23). Miller provided additional testimony about the case on continued direct, cross, and redirect examinations. (268:24-303:13).

The State also called Christine Gabig, a forensic chemist at the Douglas County Sheriff's Office Crime Lab, who described her education, training, experience, and duties. (304:11-308:12; E17). The State asked Gabig to identify Exhibit 10, the duffle bag, which she recognized as "an item that contains substances that [she] analyzed . . . to determine if they were marijuana." (308:13-311:7; E10). Vaughn objected to renew his suppression motion which the district court overruled. (308:16-23). Gabig also identified Exhibits 10A-10K as items contained within Exhibit 10 and described them. (311:8-316:1; E10A-E10K). After describing the procedures utilized to determine whether the contents of Exhibit 10 were marijuana, Gabig testified that her examination of those items confirmed that they were marijuana. (316:2-318:24).

Gabig also testified similarly about the items contained in Exhibit 12. (319:8-320:23; E12). Gabig identified fifteen smaller bags in Exhibit 12, three of which she chose to chemically test at random and identified as Exhibits 12A, 12B, and 12C after consulting with the County Attorney's Office. (320:4-322:1; E12A-E12C). She only weighed and visually inspected the contents of the other twelve bags from inside Exhibit 12 and confirmed that what was inside was "a green substance." (322:14-324:22; E12D-E12O). Exhibit 12A, 12B, and 12C were chemically analyzed and confirmed to be marijuana. (323:9-325:16; E12A-E12C). The defense objected on the basis of its suppression motion and motion in limine which the district court overruled. (323:5-8; 325:17-326:16). The district court received Exhibits 12A through 12O into evidence. (326:17-25).

Gabig testified further about the substances found in Exhibits 10 and 12, and that chemical analysis she performed determined that a green botanical substance found in Exhibit 11 was also marijuana. (327:14-332:15). Some of this testimony about Exhibits 12D through 12O drew more motion in limine based objections from Vaughn that were overruled. (331:16-23).

The State's final witness was Daniel Pelster, a Special Agent with the DEA, who described his training, his experience, his assignment with the Commercial Interdiction Unit task force, and the duties and composition of that task force. (341:14-349:1). Pelster recalled the Amtrak investigation of February 4, 2021 which led the task force to Vaughn with similar details as Deputy Miller. (349:2-357:5).

Pelster testified as to the search of Vaughn's room on the train after his arrest and the discovery of the black suitcase in Exhibit 12, and duffle bag in Exhibit and 10. (357:6-358:24; E10; E12). The defense objected to Pelster's testimony about Exhibit 12, renewing its suppression arguments which the district court overruled. (357:14-358:6). Pelster continued, recalling for the jury the vacuum-sealed contents of Exhibits 10 and 12 as "consistent with [the task force's]

experience with marijuana." (358:25-359:25). Based on his training and experience, Pelster concluded that the circumstances surrounding Vaughn on February 4th indicated he was engaged in marijuana distribution. (360:7-367:20).

During the jury instruction conference, counsel for Vaughn asked the district court to supplement the "oral limiting instruction on the hearsay statement over [the defense's] objection to that hearsay" attributed to "the unnamed Amtrak employee" with "a written instruction . . . to explain that that testimony was offered for the limiting purpose for how the investigation proceeded and not for the truth of the matter." (438:8-439:7). The State objected and the district court overruled that request. (438:17-439:7).

III. Verdict, Sentencing, And Appeal.

The jury returned verdicts of guilty for Vaughn on all counts. (467:17-470:15; T89). The district court accepted those verdicts on all counts. (470:16-17; T92-T93).

At the sentencing hearing, the district court made clear that it had reviewed the presentence investigation report. (472:24-473:3). Counsel for Vaughn and the State asserted the same. (473:10-474:3). Before the sentencing portion of the hearing, the district court heard double jeopardy arguments from the defense related to Count II and dismissed that count as a result. (474:9-480:3; *see* T116-T117; *see also* T98-T102).

Following that dismissal, the district court heard sentencing arguments from both parties and comments from Vaughn. (481:7-487:7). The district court provided comments of its own prior to pronouncing sentences for Vaughn:

> Mr. Vaughn, I have thought an awful lot about you and what to do in this case. As soon as you were convicted, I was intending to run the Counts I and Count II concurrent because I believe that Count II at that time was a lesser included to Count I.

> Notwithstanding that, you're a hard man to believe. You're a very family man, family man, family man, but here you are running drugs across the country. You're involved in the drug business. You're going to give up a degree, I guess, in some type of engineering for a music degree. You're out on bond. You're not with your grandmother in Atlanta but you're in Maryland doing stupid things. You got two guns that you've got possession of along with some small amounts of drugs. [THE DEFENDANT: No, it wasn't, sir.] Such is life. You had around – you had over 50 pounds of marijuana and marijuana wax. Initially you told police that these were your bags. Later on you told them they weren't your bags. The jury did not agree to that and I'm bound by what the jury finds. As such, it will be the sentence of this Court, sir, I don't find you a candidate for probation based upon the actions that you took in this matter.
>
> [487:13-488:13].

Consequently, the district court sentenced Vaughn to four to six years' imprisonment on Count I and pay a $10,000 fine for Count III. (488:13-489:2; T118-T120). The district court awarded Vaughn ninety-six days' credit for time served and provided him with a truth-in-sentencing advisement. (488:19-24; T118).

Vaughn appealed. (T132-T134).

Argument

I. The District Court's Denial Of Vaughn's Motion To Suppress Was Not In Error.

First, Vaughn challenges the district court's having overruled his suppression motion challenging the warrantless search of Vaughn's duffle bag and the admission of statements made by Vaughn about his ownership of the that bag. (Brief of Appellant, pp. 17-20). The State does not agree that such errors occurred.

The Nebraska Supreme Court has set out three tiers of police-citizen encounters that govern search and seizure in the context of the Fourth Amendment. *State v. Drake*, 311 Neb. 219, 229, 971 N.W.2d 759, 769 (2022) (citing *State v. Lowman*, 308 Neb. 482, 954 N.W.2d 905 (2021)). The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but the voluntary cooperation of the citizen is elicited through noncoercive questioning. *Id.* (citing *Lowman*, *supra*); *see also State v. Saitta*, 306 Neb. 499, 945 N.W.2d 888 (2020)). This type of contact does not rise to the level of a seizure and therefore is outside the realm of Fourth Amendment protection. *Id.*

The second tier, the investigatory stop, as defined by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), is limited to brief, nonintrusive detention during a frisk for weapons or preliminary questioning. *Id.* at 229, 971 N.W.2d at 770. This type of encounter is considered a seizure sufficient to invoke Fourth Amendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. *Id.*

The third type of police-citizen encounters, arrests, is characterized by highly intrusive or lengthy search or detention. *Id.* The Fourth Amendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime. *Id.* (citing *Lowman*, *supra*).

Not every police-citizen encounter rises to the level of a seizure; a seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *Lowman*, *supra*, 308 Neb. at 492, 954 N.W.2d at 916 (citing *Saitta*, *supra*). In addition to situations where an officer directly tells a suspect that he or she is not free to go, circumstances indicative of a seizure may include the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen's person, or

the use of language or tone of voice indicating the compliance with the officer's request might be compelled. *Id*. A seizure does not occur simply because a law enforcement officer approaches an individual and asks a few questions or requests permission to search an area, provided the officer does not indicate that compliance with his or her request is required. *Id*. (citing *State v. Hartzell*, 304 Neb. 82, 933 N.W.2d 441 (2019)).

Also, police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the Fourth Amendment. *State v. Barbeau*, 301 Neb. 293, 301, 917 N.W.2d 913, 921 (2018) (citing *State v. Childs*, 242 Neb. 426, 433, 495 N.W.2d 475, 479 (1993), quoting *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991) (quotations omitted)). Reasonable suspicion entails some minimal level of objective justification for detention, something more than an inchoate and unparticularized hunch, but less than the level of suspicion required for probable cause. *Id*. at 302, 917 N.W.2d at 921 (citing *Childs*, *supra*, 242 Neb. at 433, 495 N.W.2d at 479-80). When determining whether there is reasonable suspicion for a police officer to make an investigatory stop, the totality of the circumstances must be taken into account. *Id*. at 302, 917 N.W.2d at 921 (citing *State v. Rodriguez*, 288 Neb. 878, 852 N.W.2d 705 (2014)).

The Nebraska Supreme Court has repeatedly and somewhat recently held that the odor of marijuana is sufficient standing alone to furnish probable cause for a search. *See State v. Seckinger*, 301 Neb. 963, 920 N.W.2d 842 (2018) (discussing adoption and evolution of "plain smell" doctrine in *State v. Benson*, 198 Neb. 14, 251 N.W.2d 659 (1977), *State v. Daly*, 202 Neb. 217, 274 N.W.2d 557 (1979), *State v. Ruzicka*, 202 Neb. 257, 274 N.W.2d 873, and *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1979); discarding argument that legality of marijuana in other states erodes plain smell doctrine in Nebraska).

At the suppression hearing the State established through Deputy Miller's testimony that: Miller is a trained and experienced law enforcement officer assigned to a DEA taskforce at the time of Vaughn's arrest; the DEA task force entered the Amtrak train for drug interdiction and investigation purposes; the DEA task force members looked for indicia of suspicious travel as part of this routine investigation, including untagged luggage; Miller saw a Tommy Hilfiger duffle bag on a luggage rack in a sleeper car without a baggage tag; Miller smelled the seam of the bag and recognized the smell of marijuana coming from the bag; an Amtrak employee indicated her belief that the passenger to whom the bag belonged was staying in Room 12 which was near the Tommy Hilfiger duffle bag; the indicated passenger, later identified as Vaughn, agreed to speak with Miller and claimed ownership of the Tommy Hilfiger duffle bag, leading to his arrest under suspicion of marijuana possession; and that DEA officers conducted a search of the Tommy Hilfiger bag, finding inside large quantities of suspected marijuana which is a controlled substance under Nebraska law. That search and seizure led to a search of Vaughn's cabin, netting another large quantity of marijuana in a suitcase.

The evidence and testimony supplied by the State at the suppression hearing is a near textbook tier one encounter as articulated by *Drake* that escalated to a tier three arrest. There was no restraint of Vaughn's liberty until Miller confirmed he was the owner of the bag containing suspected contraband. Vaughn voluntarily cooperated with Miller during his noncoercive questioning. There was no indication that Miller actually or implied threats if Vaughn did not cooperate to compel that cooperation. The confines of the train restricted movement but Miller indicated that he was not blocking the door to Vaughn's cabin prohibiting Vaughn's movement. Moreover, Vaughn maintained at several points, including his testimony during trial, that the bags at issue were not his and that the officers essentially planted the luggage in his possession which confuses his suppression rationale now.

Given the scent of marijuana coming from Vaughn's bag, the State believes that Miller not only had sufficient reasonable suspicion to approach Vaughn, but probable cause to conduct the warrantless search as well. Vaughn has not supplied any law or argument that, in this context, required the officers to get a search warrant. He has also not sufficiently demonstrated why the statements he made to the officer would be subject to suppression given the caselaw. As such, the State submits that district court correctly overruled Vaughn's suppression motion and that this assignment of error is without merit.

II. The District Court's Denial Of Vaughn's Hearsay Objections Was Not In Error; The Contested Statements Are Not Definitional Hearsay.

Next, Vaughn assigns that the district court "erred in overruling [his] motion in limine to prevent the admission of hearsay statements at trial." (Brief of Appellant, p. 6). The State offers that the district court correctly determined the contested statements from Deputy Miller to be not definitional hearsay in the context provided.

As an initial matter, the Nebraska Supreme Court has "repeatedly held that a motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury." *State v. Ferrin*, 305 Neb. 762, 770, 942 N.W.2d 404, 411 (2020) (citing *Pantano v. American Blue Ribbon Holdings*, 303 Neb. 156, 927 N.W.2d 357 (2019), *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015), and *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008)). This preliminary ruling on the admissibility of evidence does not present a question for appellate review unless the appropriate objections are made at trial. *See id.*; *see also State v. Schmidt*, 276 Neb. 723, 732-33, 757 N.W.2d 291, 298 (2008). The Supreme Court has also held that "[a]n appellant who has assigned only that the trial court erred in denying a motion in limine has not triggered appellate review of the evidentiary ruling at trial." *Ferrin*, *supra*, 305 Neb. at 770-71, 941 N.W.2d at 411-12 (citing *Pantano*, *supra*).

As for the Vaughn's challenge of the statements at issue as alleged hearsay, "[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." *State v. Hassan*, 309 Neb. 644, 648, 962 N.W.2d 210, 213 (2021) (citing *State v. Poe*, 292 Neb. 60, 870 N.W.2d 779 (2015)). "Hearsay is not admissible unless otherwise provided for in the Nebraska Evidence Rules or elsewhere." *Id*. "But an out-of-court statement is not hearsay if the proponent offers it for a purpose other than proving the truth of the matter asserted." *Id*.

Likewise, "[s]tatements offered to show their effect on the listener are not hearsay." *State v. Wood*, 310 Neb. 391, 428, 966 N.W.2d 825, 853-54 (2021) (citing 2 McCormick on Evidence § 249 (Robert P. Mosteller ed., 8th ed. 2020)). And "statements are not hearsay to the extent they are offered for context and coherence of other admissible statements and not for the truth or the truth of the matter asserted." *Id*. at 428, 966 N.W.2d at 854 (citing *U.S. v. Ralston*, 973 F.3d 896 (8th Cir. 2020), *U.S. v. Spencer*, 592 F.3d 866 (8th Cir. 2010), and *State v. Childs*, 309 Neb. 427, 960 N.W.2d 585 (2021)).

For support, Vaughn offers only: Neb. Rev. Stat. § 27-801(3), the hearsay definition provided by statute; a cite to *State v. Burries*, 297 Neb. 367, 900 N.W.2d (2017), providing that "[h]earsay is not admissible except as provided by the Nebraska Evidence Rules;" Neb. Rev. Stat. § 27-403, allowing for the exclusion of relevant evidence due to outsized prejudice; and the Confrontation Clause of the U.S. Constitution. (Brief of Appellant, pp. 21-22). He essentially surmises that, because Miller offered the out-of-court statement of the Amtrak employee it must have been for the truth of the matter asserted and, therefore, must be hearsay and violative of other essential elements of due process by nature.

The State does not believe that this is the case. The statement provided by Miller during the trial at issue here was limited to his asking the train car attendant if she knew who the untagged duffle bag belonged to after the deputy found it and determined that it smelled of

marijuana. The car attendant indicated the person in Room 12 was the bag's owner. Subsequent questions from the State drew narrative answers from Miller detailing that, now armed with this information, he went to that room, knocked on the door, spoke with the person inside, and asked him if the bag was his. That person was Vaughn and he indicated that the duffle bag was his. That context makes clear that the State did not ask the question, nor did it use the attendant's statement, to establish definitively Vaughn's ownership over the bag and its contents. Miller himself established Vaughn's ownership of the bag when he spoke with Vaughn about whether the bag belonged to him. Since the statement was offered for its effect on Miller and how it furthered his investigation, rather than for the matter asserted, it is not inadmissible hearsay.

Moreover, the district court offered a limiting instruction that identified the statement at issue, directed the jury as to how it should use that testimony, and admonished the jury from using it for the truth of the matter asserted. The district court provided the jury instruction contemporaneously with the testimony. That limiting instruction was more than capable of curing the prejudice, if any, that attached.

III. The District Court Correctly Denied Vaughn's Motion For Mistrial On Alleged Hearsay Grounds.

Vaughn follows with a related argument that the district court erred by not granting his request for a mistrial related to Miller's testimony that he alleges is hearsay. (Brief of Appellant, pp. 24-26). The State submits that the district court correctly overruled Vaughn's mistrial request.

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. Davis, 290 Neb. 826, 834, 862 N.W.2d 731, 737 (2015) (citing *State v. Dixon*,

282 Neb. 274, 802 N.W.2d 866 (2011)). An admonishment of the jury is typically sufficient to cure any prejudice. *Id*. Therefore, the moving party faces the burden of proving that he was actually prejudiced by the alleged errors and not merely that the errors created a possibility of prejudice. *Id*. (quoting *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006)) (internal quotation marks omitted). When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case. *Id*. at 834, 862 N.W.2d at 737-38 (citing *Robinson*, *supra*). But in some cases, the damaging effect of an event during trial may be such that it cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *Id*. at 834, 862 N.W.2d at 738 (citing *State v. Kibbee*, 284 Neb. 72, 102, 815 N.W.2d 872, 896 (2012)).

As provided above, the State maintains that the statement at issue was not hearsay and the determination by the district court to allow it was not in error. Even still, the prophylactic limiting instruction provided as a measure of caution was sufficient to cure any prejudice that might have occurred. And the statement of an Amtrak car attendant providing that the person in Room 12 owned the untagged duffle bag could not have be more prejudicial than Miller's testimony that Vaughn identified himself as the bag's owner on approach. Given the State's collective arguments on the issue, it would submit that the district court correctly denied Vaughn's mistrial request.

IV. The District Court Did Not Admit Untested Marijuana Into Evidence.

Vaughn also assigns that the district court "abused its discretion when it denied Vaughn's motion in limine and permitted the admission of untested marijuana into evidence." (Brief of Appellant, p. 6). The State has a few problems with this assignment of error.

First, Vaughn has not provided a record of the motion in limine hearing in the Bill of Exceptions. Instead, we have in the transcript a copy of the motion and notice of hearing for December 14, 2021 filed on December 7, 2021 and the order from the district court denying the motion filed on December 16, 2021. (T62-T65; T68-T71). In that order from the district court, the first sentence provides that "[t]his matter came on for hearing on December 14, 2021, on the Defendant's Motion in Limine." (T68). The next sentence states that "Defendant appeared with his attorneys" and notes the State's appearance as well. *Id.* The order proceeds with summaries of the parties' positions and the district court's conclusions. (T68-T70). The Request For Transcript and Request For Bill Of Exceptions do not include this hearing by name or date. (T135-T141). And "[i]t is incumbent upon an appellant to supply a record which supports his or her appeal." *State v. Britt*, 310 Neb. 69, 79-80, 963 N.W.2d 533,541 (2021) (citing *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016)). "Absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed." *Id.* at 80, 963 N.W.2d at 541 (citing *Boche*, *supra*).

Second, the record makes clear that the district court did not necessarily admit "untested marijuana" into evidence. Instead, Gabig stated during her testimony that she only weighed and visually inspected the contents of the other twelve bags from inside Exhibit 12 at issue and confirmed that what was inside was "a green substance" or a "green botanical substance." Miller and Pelster commented that all the bags in Exhibit 12 were consistent with illicit marijuana packaging and transport. Not a single witness claimed that the materials in the untested twelve bags was definitively proven to be marijuana.

Moreover, Vaughn claims repeatedly that the additional untested bags admitted into evidence was irrelevant under Neb. Rev. Stat. § 27-401 and unduly prejudicial under Neb. Rev. Stat. § 27-403 but never really explains why beyond "the gross weight of the marijuana allegedly depicts intent to deliver or distribute." (Brief of

Appellant, p. 28). The confirmed weights of tested marijuana in Exhibits 10 and 12 were found in several vacuum sealed bags. Those vacuum sealed bags were found in Vaughn's luggage while he was a ticketed passenger on a cross-country train. Gabig testified that she tested and confirmed 15,476.7 grams of marijuana in this case. *See* 331:1-6. That included 1,282.2 grams tested from Exhibit 12 (331:7-12). Gabig stated that 6,259.9 grams went untested from Exhibit 12 (331:16-332:1). Given the total amounts at issue, their packaging, and the circumstances under which they were found, the untested amount makes it no less likely or unlikely that Vaughn was exposed to a potential criminal conviction under Neb. Rev. Stat. § 28-416 for the purposes of Count I. And Count II was dismissed in its entirety, but the tested amounts for that offense were well in excess of one pound. However, the additional untested bags implied to contain other contraband are highly relevant in a criminal case because they were potentially illegal items seized while in Vaughn's constructive possession.

V. The District Court's Sentencing Order For Vaughn Is Not Indicative Of An Abuse Of Discretion.

Finally, Vaughn argues that his sentences are excessive and, thus, an abuse of discretion. (Brief of Appellant, pp. 28-33). He argues in support that the district court "fail[ed] to adequately account for [his] experience" and alleges that, after his review of his personal factors, the district court must not have "properly considered any of th[at] mitigating information when forming a sentence for Vaughn." *Id*. at 30-33. The State disagrees that the record evidences the alleged abuse of discretion.

"It is well established that an appellate court will not disturb sentences within the statutory limits unless the district court abused its discretion in establishing the sentences." *State v. Morton*, 310 Neb. 355, 366, 966 N.W.2d 57, 66 (2021) (citing *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001)). When sentences imposed within statutory limits are alleged on appeal to be excessive, the appellate

court must determine whether the sentencing court abused its discretion in considering well-established factors and any applicable legal principles. *Id*. (citing *State v. Greer*, 309 Neb. 667, 962 N.W.2d 217 (2021)).

Neb. Rev. Stat. § 28-105 authorizes a maximum sentence of twenty years' imprisonment with no mandatory minimum sentence for a Class IIA felony, and a maximum sentence of two years' imprisonment and twelve months' post-release supervision and/or a $10,000 fine with no minimum sentence for a Class IV felony. Neb. Rev. Stat. § 28-105(1) (Supp. 2019).

Neb. Rev. Stat. § 29-2260 includes that:

> [w]henever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because . . . [t]he risk is substantial that during the period of probation the offender will engage in additional criminal conduct; [t]he offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or [a] lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.
>
> [Neb. Rev. Stat. § 29-2260(2)(c) (Reissue 2016)].

Similarly, the relevant factors for a sentencing judge to consider when imposing a sentence are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount

of violence involved in the commission of the crime. *Morton*, *supra*, 310 Neb. at 366, 966 N.W.2d at 66 (citing *Greer*, *supra*).

But "the sentencing court is not limited to any mathematically applied set of factors;" instead, "the appropriateness of the sentence is necessarily a subjective judgment that includes the sentencing judge's observations of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life." *Id*. Likewise, § 29-2260 does not control the discretion of the trial court. *State v. McCulley*, 305 Neb. 139, 147, 939 N.W.2d 373, 381 (2020) (citing *State v. Hunt*, 214 Neb. 214, 333 N.W.2d 405 (1983)). It also does not require the trial court to articulate on the record that it has considered each sentencing factor, and it does not require the court to make specific findings as to the factors and the weight given them. *Id*.

In total, it is not the function of an appellate court to conduct a de novo review of the record to determine whether a sentence is appropriate. *See State v. Gibson*, 302 Neb. 833, 843, 925 N.W.2d 678, 685 (2019). It follows that, in reviewing a claim of an excessive sentence, "the standard is not what sentence" the reviewing court "would have imposed." *Gibson*, *supra*, 302 Neb. at 843, 925 N.W.2d at 685 (citing *State v. Harrison*, 255 Neb. 990, 588 N.W.2d 556 (1999), *State v. Van*, 268 Neb. 814, 688 N.W.2d 600 (2004), and *State v. Strohl*, 255 Neb. 918, 587 N.W.2d 675 (1999)). This is because "to the sentencing court and not to an appellate court is entrusted the power to impose sentences for the commissions of crimes against the State; the judgement of the sentencing court cannot be interfered with in the absence of an abuse of discretion." *State v. Phillips*, 242 Neb. 894, 897, 496 N.W.2d 874, 877 (1993) (citing *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992)).

Turning first to statutory appropriateness, Neb. Rev. Stat. § 28-105 provides that the sentences ordered for Vaughn are within the statutory ranges allowed for the offenses convicted. Moving next to abuse of discretion, the record supports the reasoning and facts utilized by the district court in its sentencing determinations for

Vaughn. The district court provided its concerns on the record prior to pronouncing the sentences. Specifically, the district court noted its concerns with the facts of the case and Vaughn's subsequent arrests for firearm and drug offenses.

The PSI report undergirds those concerns, as well as provides other details to support the sentences ordered by the district court. That report documents a prior criminal history which includes charges for: battery (dismissed); driving under suspension; marijuana possession; failures to appear on minor offenses; first degree assault (dismissed); fourth degree burglary (dismissed); second degree assault (dismissed); theft and possession of MDMA (two months' jail); violation of a noise ordinance (conviction, 30 days jail). (Presentence Investigation Report, pp. 4-8). The PSI also documents Vaughn's subsequent offenses in Maryland for two counts of marijuana possession, possession of a loaded handgun un a vehicle, and possession of a handgun spanning two different arrests for which he was awaiting trial at the time the PSI was compiled. *Id*. at 7-8.

Additionally, the PSI contains Vaughn's LS/CMI scores, showing three categories in the "medium risk" range, three categories in the "high risk" range, and one category in the "very high" risk range. *Id*. at 10-23. Vaughn scored "high" risk overall for recidivism. *Id*. at 10, 20. Similarly, Vaughn's SAQ scores included two categories in the "medium risk" range, one category in the "problem" risk range, and one category in the "maximum" risk range. *Id*. at 14. His SRARF scores also placed him in the "high risk for criminal recidivism" range. *Id*.

Overall, Vaughn requests that this court conduct a de novo review of the record and the sentences ordered for him, which need not be done. *See Gibson*, *supra*. Despite his feelings that his sentences are excessive, it is the district court's subjective judgement that determines the appropriateness of a sentence. *See Morton*, *supra*. Here, the district court determined that a term of imprisonment and fine was appropriate for Vaughn and that other sentences were not. That the district court did not address specific issues, discuss other facts, assign

weights to factors, weight factors differently, or make particular findings is not an error requiring reversal. *See McCulley*, *supra*.

Thus, the sentences ordered for Vaughn are not only statutorily allowable, but also not illustrative of an abuse of discretion.

Conclusion

For the reasons noted above, the appellee respectfully requests that this Court affirm the judgment of the district court.

STATE OF NEBRASKA, Appellee,

BY Douglas J. Peterson, #18146
Attorney General

BY **s/ Matthew Lewis**
Bar Number: 26492
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2683
matt.lewis@nebraska.gov

Attorneys for Appellee

Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 11,380 words, excluding this certificate. This brief was created using Word Microsoft 365.

s/ Matthew Lewis
Bar Number: 26492
Assistant Attorney General

Certificate of Service

I hereby certify that on Monday, October 24, 2022 I provided a true and correct copy of this *Brief of Appellee State* to the following:

John Vaughn #214828 represented by Jessica Clark West (24664) service method: Electronic Service to **jessica.west@douglascounty-ne.gov**
John Vaughn #214828 represented by Rebekah Shea Keller (26721) service method: Electronic Service to **rebekah.keller@douglascounty-ne.gov**
John Vaughn #214828 represented by Theodore Charles Turnblacer Jr. (26445) service method: Electronic Service to **ted.turnblacer@douglascounty-ne.gov**

Signature: /s/ LEWIS, MATTHEW (26492)

A-22-308

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

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THE STATE OF NEBRASKA,

Appellee,

vs.

JOHN VAUGHN,

Appellant,

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APPEAL FROM THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

Honorable Peter C. Bataillon, District Court Judge

REPLY BRIEF

THOMAS C. RILEY, #13523
Douglas County Public Defender
Rebekah S. Keller, #26721
Assistant Public Defender
H05 Civic Center
Omaha, Nebraska 68183
Telephone: (402) 444-7175
rebekah.keller@douglascounty-ne.gov
Attorneys for Appellant

TABLE OF CONTENTS

Statement of Jurisdiction of Appellate Court 4
Statement of the Case 4
Assignment of Error 4
Propositions of Law 4
Reply Brief Propositions of Law 4
Statement of Facts 5
Summary of Arguments 5
Arguments
A.: The trial court erred in denying Vaughn's motion to suppress the evidence searched and seized by law enforcement 6
B.: The trial court erred in overruling Vaughn's hearsay objection as to the Amtrak employee's statements to law enforcement 12
Conclusion 13

TABLE OF AUTHORITIES

Cases Cited

California v. Acevedo, 500 U.S. 565 (1991) 7
Carrol v. United States, 267 U.S. 132 (1925) 7
Coolidge v. New Hampshire, 403 U.S. 443 (1971) 5
Rodriguez v. U.S., 575 U.S. 348 (2015) 6
State v. Miller, 312 Neb. 17 (2022) 5,6
State v. Wilson, 225 Neb. 466 (1987) 5,12
United States v. Place, 462 U.S. 696 (1983) 5

Statutes Cited

Neb. Rev. Stat. § 25-1912 4
Neb. Rev. Stat. § 27-403 12
Neb. Rev. Stat. § 29-2301 4
Neb. Rev. Stat. § 29-2306 4

Neb. Rev. Stat. § 29-2308.....4
Neb. Rev. Stat. § 29-401.....13

STATEMENT OF JURISDICTION OF APPELLATE COURT

This is an appeal by John Vaughn from his conviction and sentence on count I, delivery, distribution, dispensing, manufacturing, or possession with intent to distribute, deliver, dispense, or manufacture marijuana, a Class 2A felony; and count III, failure to affix a tax stamp, a Class 4 felony, on January 12, 2022, in the District County of Douglas County. (T89). On April 11, 2022, the district court sentenced Vaughn to four to six years on count I and a $10,000 fine on count III. (T118). Vaughn was given credit for 95 days. *Id*.

On April 26, 2022, Vaughn filed a notice of appeal and the Honorable Peter C. Bataillon signed an order allowing Vaughn to proceed *in forma pauperis*. (T121; 125). This appeal is authorized by the Nebraska Constitution, Article I, Section 23 and Neb. Rev. Stat. §§ 25-1912 (Reissue 2016), 29-2301 (Reissue 2016), 29-2306 (Reissue 2016), and 29-2308 (Reissue 2016).

STATEMENT OF THE CASE

Please refer to Pages 4 & 5 of Appellant's direct appeal brief.

ASSIGNMENT OF ERROR

Please refer to Page 5 & 6 of Appellant's direct appeal brief.

PROPOSITIONS OF LAW

Please refer to Pages 6 & 7 of Appellant's direct appeal brief.

REPLY BRIEF—PROPOSITIONS OF LAW

I.

"Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is

present." *United States v. Place*, 462 U.S. 696, 701 (1983) (citing *United States v. Chadwick*, 433 U.S. 1 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

II.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Neb. Rev. Stat. § 27–403.

III.

Probative value . . . "is a relative concept and involves a measurement of the degree to which the evidence persuades the trier of fact that a particular fact exists and the distance of that particular fact from the ultimate issue in the case." *State v. Wilson*, 225 Neb. 466, 471 (1987).

STATEMENT OF FACTS

Please refer to Pages 8 through 16 of Appellant's direct appeal brief.

SUMMARY OF ARGUMENTS

The trial court committed clear error in denying Vaughn's motion to suppress because the officer's warrantless search of the Tommy Hilfiger duffle bag does not fall within any of the recognized exceptions to the warrant requirement. *See State v. Miller*, 312 Neb. 17, 20 (2022). Additionally, the State does this Court an injustice in misrepresenting the sequence of the facts presented to the trial court at the suppression hearing. Considering the actual facts assessed in this case, the trial court erred in denying Vaughn's motion to suppress and this Court should reversed and remand for a new trial.

Second, the trial court erred in overruling Vaughn's hearsay objections to Officer Miller's testimony about the Amtrak employee's knowledge of who owned the Tommy Hilfiger duffle bag. Possession is

a material element of each of the crimes charged. Even if the evidence was not hearsay, it is more prejudicial that probative and the trial court erred in allowing it in. Additionally, the court's limiting instruction was not sufficient to cure the prejudice to Vaughn, and did not actually limit the jury's deliberations in any way. This court should reverse the trial court's ruling and remand for a new trial with instructions to exclude prejudicial hearsay that violates Vaughn's constitutional right to confront the witnesses against him.

ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING VAUGHN'S MOTION TO SUPPRESS THE EVIDENCE SEARCHED AND SEIZED BY LAW ENFORCEMENT.

As this Court is well aware, searches without a valid warrant are per se unreasonable, subject to a few specifically established and well-delineated exceptions. "The warrantless search exceptions Nebraska has recognized include: (1) searches undertaken with consent, (2) searches under exigent circumstances, (3) inventory searches, (4) evidence in plain view, and (5) searches incident to a valid arrest." *State v. Miller*, 312 Neb. 17, 20 (2022). The United States Supreme Court has established one other notable "exception" to the warrant requirement. *Rodriguez v. U.S.*, 575 U.S. 348 (2015). In reality, the motor vehicle exception is more of an expansion of the exigent circumstance exception and not a separate exception to the warrant requirement.

This only becomes relevant because it appears that the State seeks to expand the probable cause exception— as applied to motor vehicles— to personal property. (*See* Brief of Appellee at 33). In fact, the State argues that "the odor of marijuana is sufficient standing alone to furnish probable cause for a search," while referring to five Nebraska cases which discuss whether the odor of marijuana emanating *from a vehicle* as sufficient to provide probable cause to search a vehicle, even without a search warrant. (*See Id.*) The State

fails to provide the Court with any basis in law for an officer's "probable cause" search of personal property absent a warrant.

In fact, personal property has specifically been treated differently in vehicles. For instance, *Carroll v. United States* provides one rule to govern all automobile searches. *Carrol v. United* States, 267 U.S. 132 (1925) (the Court held that a warrantless search of an automobile, based upon probable cause to believe that the vehicle contained evidence of a crime in light of an exigency arising out of the vehicle's likely disappearance, did not contravene with the Fourth Amendment's warrant requirement). Further, *Carroll* specifically noted that personal property searches are distinctly different than automobile searches by recognizing:

> [A] necessary difference between a search of a store, a dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

267 U.S. 132, 153 (1925); *see also California v. Acevedo*, 500 U.S. 565 (1991).

Moreover, the Supreme Court also held in *California v. Carney* that there is a heightened privacy expectation in personal luggage and concluded that the presence of luggage in an automobile did not diminish the owner's expectation of privacy in his personal items. The Supreme Court in *California v. Acevedo* cited *United States v. Chadwick* to reason that a person expects more privacy in his luggage and personal effects than he does in his automobile. *California v. Acevedo*, 500 U.S. at 571 (citing 433 U.S. 1, 11-12 (1977)).

Additionally, in *U.S. v. Place*, 462 U.S. 696, the Supreme Court addressed whether a *Terry* seizure was reasonable as to personal property. In that case, the Court conducted a balancing test to determine the governmental interests weighed against the right of privacy in one's personal property. 462 U.S. at 700-707. The Court began its analysis by recognizing that, "In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." *Id* at 701. The Court concluded that:

> [W]hen an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

Id. at 706. The Court also opined that the purpose of seizure of the suspicious luggage was to arrange for its exposure to a narcotics detection dog. *Id*. at 706. The reason the narcotics detection "canine sniff" was permitted under the Fourth Amendment, given probable cause, is because:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose non-contraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of luggage. Thus, the manner in which information is obtained through this investigative technique is much less

> intrusive than a typical search. Moreover, the sniff discloses on the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.

Id. at 707.

In this case, the State's summary of the facts adduced at the suppression hearing follows below, edited only to place the facts in an accurate chronological order:

1. Officer Miller is a trained and experienced law enforcement officer and was assigned to a DEA taskforce at the time of Vaughn's arrest;
2. The DEA taskforce entered the Amtrak train for drug interdiction and investigation purposes;
3. The DEA taskforce officers looked for indicia of suspicious travel as part of this routine investigation, including untagged luggage;
4. Miller saw a Tommy Hilfiger duffle bag on a luggage rack in a sleeper car without a baggage tag;
5. Miller smelled the seam of the bag and recognized the smell of marijuana coming from the bag;
6. Miller conducted a search of the Tommy Hilfiger bag, finding inside large quantities of suspected marijuana which is a controlled substance under Nebraska law;
7. An Amtrak employee indicated her belief that the passenger to whom the bag belonged was staying in Room 12 which was near the Tommy Hilfiger duffle bag;
8. The indicated passenger, later identified as Vaughn, agreed to speak with Miller and claimed ownership of the Tommy Hilfiger duffle bag, leading to his arrest under suspicion of marijuana possession.

(*See* Brief of Appellee at 34).

As an initial matter, unlike the factual scenario the State attempts to put before this Court, the actual factual scenario before the trial court was whether a missing luggage tag on a piece of luggage properly stored on a luggage rack on a train that is continuing on to another destination is reasonable suspicion of contraband or criminal activity? The next question is, can an officer (1) sniff, in very close proximity (19:13-14), a piece of personal property; and (2) if he does smell the odor of contraband, can he open the piece of personal property and search its contents without a warrant?

It is important that a correct recitation of the factual basis be presented to the court because, in this case, as Officer Miller boarded the train, it is clear that there is no traffic stop of a vehicle and it is not the odor of marijuana that catches Officer Miller's attention. What catches Officer Miller's attention is a piece of personal property, a duffle bag, which does not have a luggage tag. (9:16-19; 18:7-9). The very next thing Officer Miller testified that he did was smell the duffle bag.

Then, Officer Miller testified that, without obtaining consent, without testimony of exigent circumstances, before even knowing whether the property was owned or abandoned, without testimony of an inventory search or plain view, and without a suspect, he sniffed and search a piece of luggage on a train that had temporarily stopped at the Omaha train station. While the officer's sniff of the luggage may not have been intrusive, taking the bag and opening it, and opening the bags inside of it to confirm his suspicions. Neither did he attempt to seize the bag and retrieve his certified narcotics detection dog, who was on scene, to conduct a lawful, non-intrusive search of the luggage. *See U.S. v. Place*, 462 U.S. at 706-707.

The present case is akin to *U.S. v. Place* in that in *Place*, the defendant's luggage was temporarily detained while he waited at the airport to board his plane. Similarly, the Tommy Hilfiger duffle bag was stored on a luggage rack on the Amtrak train for a short period at the Omaha train station. Miller did not simply seize the bag and

request a warrant, he immediately searched the bag upon determining that he smelled an odor on marijuana.

Further, the automobile exception that the State relies on to allege Miller had probable cause to search the duffle bag due to the odor of marijuana alone is inapplicable in the present case. The Tommy Hilfiger duffle bag is clearly not an automobile. Instead, the duffle bag is analogous to the luggage that was mentioned in *Chadwick*, *Carney*, and *Place*. The odor of marijuana by a law enforcement officer does not establish the necessary probable cause necessary in order to conduct a warrantless search of the duffle bag. The duffle bag was personal property, subject to a higher level of privacy than items in automobiles; thus, the court erred in finding that (1) Miller had the sufficient probable cause based on his personal detection of the odor of marijuana; and (2) that probable cause is sufficient to search personal property without a warrant.

This is the most intrusive, most violating search by law enforcement of personal property. This was done without regard for the Constitutional protections, or consideration for the privacy interests of passengers aboard the train. This was unreasonable.

Contrary to the State's summary of the factual scenario, the search of the duffle bag was not done after Officer Miller spoke to Vaughn and established ownership. He had not even talked to the Amtrak employee at the point he deemed it appropriate to open to the public this zipped up personal property. Only after Officer Miller has confirmed that he has located contraband on the train does he do any amount of investigating.

The trial court erred in finding that Officer Miller had probable cause to search the duffle bag because of the odor of marijuana he detected coming from it. This Court should reverse the trial court's ruling and remand for a new trial.

B. THE TRIAL COURT ERRED IN OVERRULING VAUGHN'S HEARSAY OBJECTION AS TO THE AMTRAK EMPLOYEE'S STATEMENTS TO LAW ENFORCEMENT.

The trial court erred in denying Vaughn's objection to the admission of statements made to law enforcement by an Amtrak employee. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of the unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Neb. Rev. Stat. § 27-403. In addition, *State v. Wilson* held that probative value "is a relative concept and involves a measurement of the degree to which the evidence persuades the trier of fact that a particular fact exists and the distance of that particular fact from the ultimate issue in the case." 225 Neb. 466, 471 (1987).

First, possession of the duffle bag evidence of an ultimate issue in the case because it is a material element in each of the charged offenses. Second, the value to the State in eliciting this out-of-court statement is to establish ownership. The value of this is minimal where the State acknowledges in its Brief of Appellee that this evidence was established later through Miller's testimony when he described his interaction with Vaughn in the sleeper cabin. (Brief of Appellee at 37).

Specifically, over objection by the defense, the court permitted Miller to testify that he asked an Amtrak employee who the suitcase (that contained contraband) belonged to, and that the employee identified the sole occupant of room 12. No further information was available as to the Amtrak employee's name, age, position, or basis of knowledge. With such a lack of information surrounding such an important statement, the defense was totally incapable of challenging the veracity of the Amtrak employee.

Again, the actual sequence of events matters. Miller had already searched this bag and was looking for who it belonged to in order to arrest them. The State offered this statement under the guise of

providing context to the investigation, e.g., illustrating why the officer went to room 12. That context is not relevant to the case. The Nebraska Rules of Evidence define relevancy: "relevant evidence means evidence having any tendency to the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence. " Neb. Rev. Stat. §29-401 (emphasis added). Providing context to why the officer chose to go to room 12 is not relevant to the outcome of the case, and if any relevance exits at all, the risk of the jury misapplying the evidence far exceeds the jury's need for this "context."

Given that the challenged statement is material to satisfy an element of each charged offense in favor of the State, the Sixth Amendment to the United States Constitution could not be more offended. There are limits to what a curative instruction can cure, and an out-of-court statement concerning material elements of charged crimes exceed those limits. The curative instruction in this case did not actually tell the jury not to consider the statement for its truth, but simply that he was allowing the statement in to show why the officer took his next steps. This instruction did not actually limit the jury in any way and in fact, was tantamount to asking a jury not to look at an elephant in the back of the courtroom.

The trial court committed clear error in allowing the testimony about statements made by an Amtrak employee. This testimony was inadmissible hearsay and, even if admissible, more prejudicial than probative, and prevented Vaughn from receiving a fair trial. This Court should find harmful error occurred and reverse and remand with instructions to the trial court.

CONCLUSION

For the aforementioned reasons, Vaughn respectfully requests that this Court reverse his conviction and remand the case for a new trial. A new trial is warranted because of the district court's erroneous denial of the motion to suppress, refusal to exclude the prejudicial

introduction of hearsay, and permitting of a miscarriage of justice by failing to grant Vaughn's request for a mistrial. Each of the errors the district court made in Vaughn's case individually amounted to reversible error. This Court should reverse and remand for any one of these reasons, but especially the culminating effect of these harmful errors prevented Vaughn from having a fair trial.

Respectfully Submitted,
THOMAS C. RILEY, #13523
Douglas County Public Defender
REBEKAH S. KELLER, #26721
Assistant Public Defender
Attorneys for Appellant
H05 Civic Center
Omaha, NE 68183
(402) 444-7175
rebekah.keller@douglascounty-ne.gov

CERTIFICATE OF WORD COUNT

I certify that the accompanying brief complies with Neb. Ct. R. § 2-103(C), in that it was prepared using Century Schoolbook 12-point typeface and contains 3371 words, excluding this certificate. This certificate was prepared in reliance on the word-count function of Microsoft Word, part of Microsoft Office Professional Plus 2016.

By: /s/ Rebekah S. Keller
Rebekah S. Keller, #26721
Assistant Public Defender

Certificate of Service

I hereby certify that on Thursday, November 03, 2022 I provided a true and correct copy of this *Reply Brief* to the following:

State of Nebraska represented by Matthew Lewis (26492) service method: Electronic Service to **matt.lewis@nebraska.gov**

Signature: /s/ KELLER, REBEKAH S. (26721)

(At 2:24 p.m. on June 7, 2021, in the District Court of Douglas County, in Omaha, Nebraska, before THE HONORABLE PETER C. BATAILLON, DISTRICT JUDGE, with Mr. Shawn Hagerty appearing as counsel for the plaintiff, and with Ms. Rebekah Keller and Ms. Jessica West appearing as counsel for the defendant, and with the defendant being present in person, the following proceedings were had:)

(Exhibit Nos. 1 through 4 were marked for identification.)

THE COURT: We are here today in the matter of State of Nebraska versus John Vaughn. This is at Case No. CR 21-1009. It looks like Mr. Vaughn is charged with Count I, Delivery, Distribution, Dispensing, Manufacturing, or Possession With Intent To Distribute Marijuana, a Class IIA Felony; Possession Of Marijuana More Than A Pound, a Class IV Felony; and Failure To Affix A Tax Stamp, a Class IV Felony.

The Court will note that Mr. Vaughn, the defendant, is present with his attorneys Jessica West and Rebekah Keller, and that Shawn Hagerty is appearing for the State of Nebraska.

We're here today on a motion to suppress, correct?

MS. KELLER: Correct.

THE COURT: All right. Mr. Hagerty, how would you like to proceed, please?

MR. HAGERTY: Your Honor, I would like to call my first witness, Brian Miller.

THE COURT: Just have a seat up here, please. Just have a seat there. I need to swear you in.

BRIAN MILLER,

Called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

THE COURT: Very well. Mr. Hagerty, please.

MR. HAGERTY: Thank you, Judge.

DIRECT EXAMINATION

BY MR. HAGERTY:

Q. Sir, can you please tell us your name and spell your last name?

A. It's Brian Miller, M-i-l-l-e-r.

Q. How are you employed, Mr. Miller?

A. I'm a Pottawattamie County deputy that's assigned to the DEA Task Force Criminal Interdiction Unit.

Q. How long have you been a Pottawattamie County deputy?

A. Since 2006.

Q. And was that your initial law enforcement experience?

A. No. I was hired in 2001 by Harrison County Sheriff's Office in the state of Iowa.
Q. And was that your initial law enforcement experience?
A. Yes.
Q. Prior to your employment with Harrison County, did you receive any training for that job?
A. Yes. I attended the Iowa Law Enforcement Academy and graduated in 2001.
Q. And then you indicated 2006 is when you started employment with Pott County; is that right?
A. Yes.
Q. Did you receive any additional training at that point in time?
A. No.
Q. Didn't have to take -- retake the academy class?
A. Correct.
Q. Okay. Upon your initial training in 2001, did you receive any kind of training as it relates to the recognition and identification of narcotics?
A. Yes.
Q. And what kind of training did that consist of?
A. At the Iowa Law Enforcement Academy that we were introduced with Drug Recognition Class, classes that pertained to what to look for, the odors of certain narcotics, and what those substances may -- may look

like.
Q. In relation to specifically marijuana, did you receive training at that time as to the recognition and identification of marijuana?
A. Yes.
Q. Both in its appearance and its odor?
A. Yes.
Q. Up until the time you started working with the Drug Enforcement Agency Task Force did you receive any specialized training in narcotics?
A. Yes.
Q. Can you detail for the Court what that consisted of?
A. Since the beginning of my career I have attended several criminal interdiction classes that pertain to interdiction. I'm also a DIAP instructor, which is a Drug Interdiction Assistance Program to where I graduated from and can and have the ability to instruct interdiction classes through the federal government.
Q. And throughout your career have you continued to receive training on the identification and recognition of narcotics?
A. Yes.
Q. Specifically marijuana?
A. Yes.

Q. Prior to your employment as a task force officer, did you receive any additional specialized instruction?
A. Yes. I've also attended interdiction classes that not only pertain to my instructor ability with DIAP but also classes pertaining to criminal interdiction along the roadways, buses, trains, airways, and parcel sorting facilities.
Q. Additionally, Deputy Miller, do you have any experience as a K-9 handler?
A. Yes.
Q. And what experience do you have as a K-9 handler?
A. Since 2008 I've been assigned a dual purpose police service dog which I have certified every year since then.
Q. What does certification involve in terms of recognition and identification of narcotics?
A. Certification requires in the narcotic portion 14 finds within the certification in which you would -- at unknown locations where you would deploy your dog and it would be on the handler in itself and the dog to determine where the strongest source of the odor is in the search area and explain to the instructor on where that location may be.
Q. And you're currently still a certified K-9 handler?
A. Yes.

Q. And when did you start with your role as a DEA Task Force officer?
A. In November of 2018.
Q. And what does that consist of on a day-to-day basis?
A. Our daily -- daily routine would be with criminal interdiction in the Omaha -- out of the Omaha field division pertaining to criminal interdiction along the buses, the trains, parcel sorting facilities, the airport, and any other assignments that we may be given, also pertaining to the highways and hotels that are out of the Omaha field division and our division office.
Q. And when you say working those areas interdiction, what does that -- what does that actually mean in terms of what you actually do?
A. So criminal interdiction is basically looking at the totality of the circumstances which may be consistence or inconsistence in each of those particular things, such as the roadways, what's inconsistent, and the parcel sorting facilities, what is inconsistent and not consistent, and determine whether those inconsistencies may be possibly involved in any criminal interdiction or criminal possibilities.
Q. And by "criminal possibilities," is the focus of DEA Task Force officers illegal narcotics?

A. Yes.
Q. Based on your role as a task force officer, how often, let's say on a weekly basis, do you come into contact with marijuana?
A. A couple times a week.
Q. And those contacts are as a result of you locating marijuana as a result of your work?
A. Yes, or any one of my other fellow members in my unit.
Q. And when I say -- when I use the term "raw marijuana," what do you understand that to mean?
A. The un- -- the harvested marijuana.
Q. Based on your training and experience, does that have a distinct odor?
A. Yes.
Q. All right. And you've come to recognize that odor over the course of your career based on that training and experience?
A. Yes.
Q. So I want to take you to the day of February 4th, 2021, Deputy Miller. Were you working as a task force officer that day?
A. Yes.
Q. And on that particular day did you have contact with an individual that you ultimately identified as John Vaughn?

A. Yes.
Q. And can you tell the Court where that contact occurred?
A. He would be the -- the male with the black shirt seated at the defendant's table.
Q. I'm sorry, my question was can you tell the Court where the contact with Mr. Vaughn occurred on February 4th, 2021. Where did you encounter him at?
A. Sorry. At the Amtrak train station in Omaha, Nebraska.
Q. And when you're working as a task force officer, you mentioned that you work with a team or a unit. How many people were you working with on February 4th, 2021?
A. I can't recall, but our unit is made up of 11 individuals, some of which may or may not have been there. So it ranges whether it be a couple or the whole entire team.
Q. Okay. And when you approach the train station or the Amtrak station on just a random day, what is the objective of your being there?
A. To look what is inconsistent in the motoring traffic that we see along the train railways that travel through Omaha.
Q. Specifically what do you mean by "inconsistent"?

A. Consistent would be that luggage would be marked with identification, which Amtrak requires that you place on -- identification on your bags. It could be an excessive amount of luggage for a short trip. It could be false information that's provided on identification tags. There are several other things that an individual could do, but that's just to give a couple.
Q. So would you say that unmarked luggage with no luggage tags or identification is something that gets your attention?
A. Yes.
Q. That's something that you look for during these investigations?
A. Yes.
Q. And on February 4th, 2021, did you, yourself, locate a bag at the Amtrak station with no luggage or tags or identification on it?
A. Yes.
Q. Okay. And what did that bag look like outside of no luggage tags?
A. It was a dark colored duffle bag with a Tommy Hilfiger emblem on it.
Q. And where did you observe this bag at?
A. On the luggage rack the middle row of the sleeper car

630.
Q. And this was a train that had stopped in Omaha?
A. Yes.
Q. And do we know at that point in time where that train was coming from?
A. It's Train No. 6, and this train travels across the country and originates in Emeryville, California, and it's destined for Chicago.
Q. And approximately what time on February 4th was this?
A. It's 5:40 a.m.
Q. So you see this bag on the luggage rack, and what do you do as a result of making an observation that there's no tags or identification on it?
A. I smell the seam of the bag and detect the odor of marijuana coming from it.
Q. And you said you "smell the seam." What do you mean when you said you smell the seam?
A. The seam I'm referring to the zipper portion of the duffel bag.
Q. And you could smell -- from just a sniff of that you could smell the odor of what?
A. Marijuana.
Q. Did you have to manipulate the bag in any way to do that?
A. No.

Q. Once you smelled what you believed to be the odor of marijuana, what did you do?
A. I made contact with another agent that's part of our team, asked him to come to my location. At that point in time, actually after I had detected the odor of marijuana, I conducted a probable cause of the duffel bag and located marijuana in vacuum sealed packages within.
Q. By "probable cause" you mean you searched the bag?
A. Yes.
Q. And inside that bag you did find what again?
A. Marijuana.
Q. Approximately how much marijuana?
A. Seventeen pounds.
Q. In what form was that marijuana in?
A. In raw leaf in vacuum sealed packages.
Q. And did you indicate that you had done that search before contacting another agent or after?
A. I believe that I had done it before.
Q. Okay. And then you indicated that you contacted officer was it Pelster?
A. Yes, Agent Pelster.
Q. Okay. And what was the purpose of that?
A. Because I was going to attempt to locate on the cabin or the sleeper train who the bag may belong to.

Q. And did you go ahead and try and do that?
A. Yes.
Q. How did you go about doing that?
A. The Amtrak employee that's assigned to that particular sleeper car was in the hallway. I had made contact with her. I had explained to her -- I had asked her if -- who the bag belonged to, and she advised that the bag belonged to the male party that was in -- that was occupied in Room 12.
Q. And in relation to where you had located that bag, where was Room 12?
A. Almost right next to where the luggage rack was at.
Q. After she points you in the direction of Room 12, what did you do next?
A. After the arrival of Agent Pelster, I made a consensual encounter with a male party inside Room 12. That subject was later identified as John Vaughn.
Q. And I'm not familiar with the way the setup is in this car, this Amtrak car. This is a sleeper car that he was in?
A. Yes. So, if I could explain that. In a sleeper car there are individual rooms and the room doors can or cannot be closed. Mr. Vaughn's room door was closed. I knocked on the room and identified myself with my identification and also verbally to the male party

inside who I was and why I was there.
Q. Was he the only person in that room?
A. Yes.
Q. And did you ask him if you could have a conversation with him?
A. Yes.
Q. And his response was what?
A. Yes.
THE COURT: What was the question?
MR. HAGERTY: Your -- his response was what. Excuse me.
Q. (By Mr. Hagerty) His response to your question about having a conversation was what?
A. Yes, that he would ask -- he would answer and engage in that consensual encounter with me.
Q. And, so, what did you -- beyond telling him who you were, what did you tell him you were there for?
A. I explained to him that part of Amtrak asked DEA to provide security along their railways and some of the things that we see are inconsistencies and consistencies along the roadway, and I had asked Mr. Vaughn if I could see his ticket in which he provided me. I asked him if he was the sole occupant in the room in which he did. He identified himself as John Vaughn and provided me a ticket. I can't recall

whether it had been on his phone or an actual hard copy of the phone -- I mean, a hard copy of the ticket. Mr. Vaughn explained to me that he had flown out -- I don't know where he had actually flown out from, but he had flown out from some origin to California, had stayed there two days, and now was taking the train back home to Atlanta.

Q. Any more substantive conversations or questions other than that?

A. Yes. At the conclusion to those questions I pointed to the luggage rack which is on the middle row where the Tommy Hilfiger bag was located. I asked him if that was his bag on the luggage rack and Mr. Vaughn had advised yes.

Q. So after you had searched that bag, you had placed it back where you had found it?

A. Yes.

Q. And when you asked him if it was his bag, did you actually go over to it and present it to him or just pointed to it or --

A. We were in such close proximity that I pointed to it on the -- identified it as the Tommy Hilfiger bag. I pointed to it and he acknowledged yes.

Q. At that point what action, if any, did you take?

A. I explained to Mr. Vaughn that he was under arrest for

a narcotics violation and detained him.
Q. Was anything done in terms of the contents of the cabin he was in?
A. Yes. We conducted a probable cause search of the cabin.
Q. Okay. Any other items of evidence located in that cabin?
A. Yes. There was a hard-sided suitcase located in his room that contained approximately 37 pounds of marijuana and also a backpack which contained, I believe, without referring to my report, 1800 grams of marijuana.
Q. Both of those were leaf marijuana?
A. The marijuana that was located in the backpack was wax, marijuana wax.
Q. Was it determined that Mr. Vaughn had been traveling by himself then?
A. Yes.
Q. At that point Mr. Vaughn is obviously not free to leave, he's detained, he's been handcuffed?
A. Yes.
Q. Okay. Did you Mirandize Mr. Vaughn at that point?
A. Once we got back to the terminal, I Mirandized Mr. Vaughn.
Q. Did he -- well, let me ask you this: Did you ask him

any questions other than his biographical information?
A. No.
Q. But he gave no statement?
A. No.
Q. Okay.
MR. HAGERTY: Can I have just a minute, Judge?
THE COURT: Yes.
MR. HAGERTY: No other questions, Your Honor.
THE COURT: Cross-examination?
MS. KELLER: Thank you, Judge.
THE COURT: Ms. Keller.

CROSS-EXAMINATION

BY MS. KELLER:
Q. Hi, Mr. Miller.
A. Hi.
Q. Is it Deputy Miller?
A. Yes.
Q. Okay.
THE COURT: If you can use the microphone. There you go. Thank you.
Q. (By Ms. Keller) So on the morning of February 1st, you -- your duties that day were to board the train?
A. It was February 4th, but yes.

Q. I'm sorry.

Okay. And what are you looking for when you board a train?

A. What is consistent and inconsistent in the travels in which we see along the Amtrak train.

Q. Okay. Were you wearing a uniform or were you in plain clothes?

A. Plain clothes.

Q. Okay. Were you equipped with a body camera?

A. No.

Q. Okay. As part of your duties do you regularly look at the luggage compartments in the trains?

A. Yes.

Q. And in this particular instance how many bags were in the luggage compartment on this train?

A. I can only recall that there are three -- three levels. There is a bottom level, there's a middle level, and there's an upper level to where luggage was located. I recall that the only bag, the duffel bag with the Tommy Hilfiger, was on the middle rack I should say to the far right, and there was no other bags located, I believe, above it or below it.

Q. Were there any other bags on that shelf on the other end?

A. I believe so.

Q. Okay. Just how far apart would you say the bags were?
A. I -- I can't recall. Obviously, each rack is probably --
Q. You can approximate.
A. -- 8 -- 8 foot in length. I mean, in width, um, I'd say a couple feet, if anything.
Q. Okay. How did you determine that this bag did not have identification on it?
A. By pure observation.
Q. You did not turn the bag or move it from its spot in order to see a luggage tag?
A. Only after I detected the odor of marijuana coming from it.
Q. Okay. So you don't know whether there was a luggage tag on the other end of the bag because you didn't touch it?

MR. HAGERTY: Objection as to that's not -- that's not what he just said.

THE COURT: Overruled. He can answer to clarify it.

A. From my pure observation I could see a large portion of the bag and I observed no luggage tag that would most normally be attached to the top of the bag or an end of the bag.
Q. (By Ms. Keller) So let me ask you this: The bag was

face up?
A. If you can imagine a duffel bag, the zipper on the top of the bag, that would be the handle carrying portion is what I had seen. That's how it was placed on the shelf -- on the rack.
Q. Okay. And you said this bag was in the corner of the shelf?
A. It was on the middle rack I'd say to the far right.
Q. Okay. So you could see three sides of the bag?
A. Yes.
Q. Okay. Was the zipper closed all the way?
A. I never -- I can't recall. Never looked.
Q. How close did you get to the bag to smell it?
A. Um, maybe a couple inches away.
Q. And were you wearing a face mask at the time?
A. I believe that was our policy, that we do wear face masks during that -- I'd say yes.
Q. Okay.
A. Sorry.
Q. And you said the marijuana you located in the duffle was -- how was it packaged?
A. In vacuum sealed packages.
Q. Okay. And are you familiar with the procedures necessary to get a warrant?
A. Yes.

Q. Okay. You did not do that in this case?
A. No.
Q. Okay. And you searched this bag before you obtained consent from its owner, correct?
A. Yes.
Q. Did you try to determine ownership before you searched it?
A. No.
Q. But the Amtrak employee was very readily available to help you find the owner?
MR. HAGERTY: Objection; relevance.
THE COURT: Overruled. He can answer.
A. Yes.
Q. (By Ms. Keller) So you could have determined who the owner was in order to request consent?
MR. HAGERTY: Objection; relevance.
THE COURT: Overruled. He can answer.
A. Yes.
Q. (By Ms. Keller) Did you request a K-9 or did you have your K-9 drug sniffing dog with you?
A. Yes.
Q. Did you conduct a dog sniff of the bag?
A. No.
Q. Why not?
A. Because through my training and experience on -- I

know the odor of marijuana and that's the odor in which I detected coming from the bag.

Q. Okay. I believe you testified that you had some training in narcotics recognition. How long ago was that?

A. In April of 2001 at the Iowa Law Enforcement Academy.

Q. But you testified that your K-9 was certified this year, recertified?

A. He's been certified as a narcotics dog. I have -- I've had two police service dogs. My police service dog career began in 2008, and every year since then I've certified in narcotics and both patrol.

Q. Okay. So on February 4th you had a certified K-9?

A. Yes.

Q. And did you have him with you or her?

A. Yes.

Q. But you did not utilize him or her?

A. No.

Q. Okay. Have you had any training or additional training since 2001 as regards to drug recognition?

A. At our criminal interdiction classes they go over the same type of material that was discussed in my Law Enforcement Academy, how certain substances may be altered. So not only do they show a true pure form of the narcotics, they also show altered alternatives to

how individuals may alter the drug to -- to get by police officers or law enforcement.

Q. Do you recall the most recent interdiction training you had?

A. I believe it was in 2019.

Q. Okay. How long are those trainings typically? How many hours?

A. I believe that the last one I attended in 2019 was a three, three-day interdiction class in Minneapolis.

Q. Okay. And your K-9, how long was his training?

A. I don't understand your question.

Q. Your K-9 to become initially certified how long was the training process?

A. The initial process is approximately 16 weeks before a certification is held.

Q. And annually when you recertify him how many hours of training is that to prepare?

A. We -- typically we're mandated to train eight hours per week every week of the whole year until up to the date of certification. So we would -- eight hours a week pertains to four hours of training narcotics and four hours of training patrol during that day.

Q. So it's fair to say that the dog is better trained than your nose?

MR. HAGERTY: Objection; relevance,

speculation.

THE COURT: Overruled. He can answer.

A. With -- with my training and experience with dogs, dogs have a certain greater ability than humans do to detect a more minute amount of odor coming from areas in which that odor that that dog is determined to detect they may find.

Q. (By Ms. Keller) But additionally your K-9 is better trained to determine more precisely I should say where narcotics are coming -- the origin of the smell?

MR. HAGERTY: Judge, I'm going to object as to, one, relevance. I mean, the dog wasn't used, we get that, that's the argument, but beyond that it's foundation. I mean, we're not getting into the science of a dog's ability to smell being better than humans here.

THE COURT: I appreciate that. He's already testified the dog can smell better than a human, but I'll allow the question to stand.

You may answer, sir, if you understand it.

A. I understand -- could you repeat the question, though?

Q. (By Ms. Keller) I believe the dog is better trained to determine the origin of a smell of contraband or drugs?

A. Yes.

Q. Okay. When you initially made contact with Room 12, you said you knocked on the door, correct?
A. Yes.
Q. How big of a room is this would you say?
A. I would say it's maybe 10 by -- 10 by 5. 10 by 5, 10 by 6.
Q. Okay. When you entered the room, did you stand in the doorway?
A. I was -- I never entered the doorway. I was standing out of the doorway.
Q. Would you say that you were blocking that doorway?
A. No. In fact, I was facing the direction where the exit to the train car would have not been and my back was to the non-exit side.
Q. But as it relates to Mr. Vaughn inside of the room, were you in the doorway or to the side of the doorway?
A. To the side of the doorway.
Q. Okay. When you initially made contact with Mr. Vaughn, what was his demeanor like?
A. Calm.
Q. Okay. Did you inform him that he did not have to talk to you?
A. No.
Q. Did you ever tell him that he was free to leave?
A. No.

Q. And you asked him questions about his trip?
A. Yes.
Q. Was Mr. Vaughn free to leave at that time?
A. Yes.
Q. But you had already located the marijuana at that point?
A. Yes.
MR. HAGERTY: Objection; there's no question there.
THE COURT: Overruled.
A. Yes.
Q. (By Ms. Keller) And your intent in approaching Mr. Vaughn was to determine if he was the owner of the luggage?
A. Yes.
Q. Okay.
MS. KELLER: Can I have a second, Judge?
THE COURT: Yes.
MS. KELLER: Thanks.
Q. (By Ms. Keller) Deputy, you said the train originated from where?
A. Emeryville, California.
Q. And is marijuana legal in Emeryville, California?
MR. HAGERTY: Objection; relevance.
THE COURT: Sustained.

Q. (By Ms. Keller) Deputy, when you do your daily routine at the train station are you looking for a specific thing or a specific person?
A. Not on that particular day.
Q. On February 4th were you on your regular routine or on assignment?
A. Routine.
Q. Okay. You mentioned that you -- there were a couple other bags in the luggage compartment that morning?
A. Yes.
Q. Did you sniff or search any of them or attempt to look for ID tags?
A. I'm sure I paid attention to which bags were identified through a tag.
Q. But did you look for a tag on all bags in the luggage compartment?
A. It's common -- common practice for me to do so, yes.
Q. But on this day did you?

MR. HAGERTY: Objection; asked and answered.

THE COURT: Overruled. He can answer.

A. I can't recall.
Q. (By Ms. Keller) Now, you said you were trained to recognize marijuana odors, but isn't it true that there are things that can impede your sense of smell

with that?
A. Yes.
Q. So, for example, something that was vacuum sealed?
A. Yes.
Q. Heat sealed?
A. Yes.
Q. In a food saver bag?
A. Yes.
Q. In cellophane packaging?
A. Yes.
Q. If it was in a Ziploc bag?
A. Yes.
Q. Or plastic wrapped?
A. Yes.
Q. And this bag that you located in the Tommy Hilfiger bag was heat sealed and vacuum sealed in a food saver bag?
A. Yes.
Q. And it had clear cellophane packaging?
A. I don't -- I don't recall the cellophane packaging, but I know they're vacuum sealed.
Q. And heat sealed?
A. That's how you seal a vacuum sealed bag, yes.
Q. Okay. When you approached Room 12 and knocked on the door, you identified yourself as law enforcement?

A. Yes.
Q. You showed him your badge?
A. Yes.
Q. Told him that you were a police officer or interdiction officer?
A. I identified myself as a task force officer with DEA.
Q. Okay. I apologize.

Did you inform him that you were a part of the Drug Enforcement Agency?

A. Drug Enforcement Administration, yes.
Q. I apologize.

And you informed him that you wanted to ask him questions?

A. Yes.
Q. And you asked if he would consent?
A. Yes, and if he would -- if he could speak with me.
Q. Okay. And you were standing in his doorway?
A. To the side.
Q. When he agreed to speak with you, did you step into his room or stay in the hallway?
A. Stay in the hallway.
Q. Okay. Deputy, you indicated that you're trained to look for inconsistencies?
A. Yes.
Q. And one of those items is luggage IDs?

A. Yes.
Q. But in this instance you only noticed one bag?
A. That I can recall.
Q. Okay. And you -- you testified that excessive luggage was an inconsistency, yes?
A. It can be.
Q. Okay. And in this case you found one bag?
A. That belonged to the individual on the luggage rack, correct.
Q. Right. And you didn't view an ID on one of the three sides that you could see from the luggage rack?
A. Correct.
Q. Okay. And I believe you testified that Amtrak requires luggage tags?
A. It's asked upon Amtrak to provide identification on their bags.
Q. Is it common that people just don't put luggage tags on their bags?
A. Yes.
Q. Is it very common?
A. No, because most people want their possessions. They don't want to lose track of those. And so a lot of people, I'd say a majority of the people, don't want to lose it, so they mark their belongings with identification so that luggage is not lost.

Q. When you entered the train at the luggage rack area were -- all of the luggage you viewed was on a shelf, correct?
A. Yes. If I can explain that, there is three levels. So, for the bottom rack, which would obviously sit on the floor.
Q. Okay.
A. There's a middle rack and there's a top rack. So the bottom row would sit on the floor.
Q. But it's not in a walkway?
A. No, it's -- I can explain. It is in a walkway that allows passengers to walk by and grab their luggage coming in and out of the train --
Q. Okay.
A. -- where anybody that would enter the train could walk by.
Q. And this Tommy Hilfiger bag was on a shelf not blocking the walkway?
A. That's correct.
Q. It was not in the way of anyone entering or leaving the train?
A. No.
Q. Deputy, you testified that you did not manipulate this bag when you initially noticed it, correct?
A. No.

Q. But there is an inconsistency in your report. The way it reads -- you write reports as a part of your job, correct?
A. Yes.
Q. And it's important that they are accurate and correct?
A. Yes.
Q. And thorough?
A. Yes.
Q. And you review them?
A. Yes.
Q. For inaccuracies?
A. Yes.
Q. For errors?
A. Correct.

MS. KELLER: Judge, can I approach?

THE COURT: Yes.

Q. (By Ms. Keller) Deputy, can you explain this inconsistency in your report (indicating)?
A. Are you referring to where I added the word "and detected"? I don't know what you're --

MR. HAGERTY: Judge, at this point I guess I would ask counsel to actually put in the record what she's asking him to address.

MS. WEST: Just read the sentence how it's read.

Q. (By Ms. Keller) If you could just read the sentence?

THE COURT: Why don't you read the sentence that you -- Ms. Keller, why don't you read the sentence that you say there's an inconsistency so he knows what you're talking about and then you can go from there, please.

MS. KELLER: Okay.

Q. (By Ms. Keller) In your report it says: TFO Miller and detected the odor of marijuana emitting from the previously lifted duffle bag.

A. Correct.

Q. Is that an inaccuracy?

A. I should have not added the word "and" in that sentence.

Q. It's not possible that something got deleted instead, potentially that you manipulated or moved or touched this bag?

A. No.

Q. Deputy, on February 4th you were on duty with potentially up to ten other agents?

A. Yes.

Q. And some of them were equipped with body-worn cameras?

A. Yes.

Q. Do they -- is it common practice for them to keep those on while on duty?

MR. HAGERTY: I'm going to object as to speculation, foundation.

THE COURT: Well, overruled. He can answer if he knows.

A. When it comes to body cameras and the policies and procedures pertaining to DEA, there is no policies and procedures, and there is no body cameras worn by DEA. The other members of our team are both Nebraska State Patrol Troopers and Douglas County. It is upon them and the policies and procedures in which they choose to follow with body cameras in respect to how they work, but I fall underneath the DEA's policies and procedures where they do not have a body camera so I don't wear them.

Q. (By Ms. Keller) Okay. And on this evening those other members of your team were on other cars or other train -- cabins of the train?

A. They were scattered throughout the train.

Q. And their duties were the same as yours, to determine consistencies and inconsistencies?

A. Yes.

Q. Deputy, you had testified that these other agents and Nebraska State Patrol and Douglas County officers are part of a team. They're on assignment together with you?

A. Yes.
Q. And are you trained together?
A. Yes.
Q. And you have common assignments?
A. Yes.
Q. And practices and procedures?
A. Yes.
Q. And you would have all been trained the same on how to detect consistencies and inconsistencies?
A. I can't speak for the previous training for other individuals. I can only speak for what training I've attended with other agents and task force officers in which I have attended with.
Q. Have you done training with Nebraska State Patrol officers?
A. Yes.
Q. On how to conduct searches and on trains?
A. Yes.
Q. Are you familiar with Investigator Steven Peck?
A. Yes.
Q. Were you trained together?
MR. HAGERTY: Object to the form of the question, foundation, relevance.
THE COURT: What's the relevance?
MS. KELLER: Judge, I am attempting to lay

foundation for Detective Peck's body-worn camera footage from another incident that same evening.

THE COURT: Isn't that different than this incident?

MS. KELLER: It occurred at the same time.

THE COURT: With this defendant?

MS. KELLER: Different defendant.

THE COURT: Well, how is it relevant?

MS. KELLER: Your Honor, I'm trying to show the practices and methods of this team and how they conduct searches on the trains of luggage.

THE COURT: But how is that relevant to what happened here? So you're saying that -- are you saying that this Deputy Miller does the exact same thing that the other officer did?

MS. KELLER: I believe he's testified that he's been trained similarly to conduct similar searches and since he's not equipped with body cam this is what we have.

THE COURT: Okay. I'm sustaining it as to relevance. If you want to make an offer of proof, go ahead, but I'm sustaining it as to relevance.

So what are we going to do? Are you doing an offer of proof, or we going to proceed with other questioning, or how do you want to proceed?

MS. KELLER: Judge, I believe we're going to do an offer of proof but we are done with questioning of this officer.

THE COURT: You're going to do what now?

MS. KELLER: We're done with questioning of this officer.

THE COURT: Okay. Cross-examination -- I mean, redirect?

MR. HAGERTY: Thank you.

REDIRECT EXAMINATION

BY MR. HAGERTY:

Q. Deputy, you indicated that you may have possibly been wearing a mask based on what it sounded like were COVID procedures instituted by DEA. Is that accurate?

A. Yes.

Q. Okay. What kind of mask were you wearing when you had to wear a mask?

A. A cloth mask.

Q. Did the wearing of that cloth mask in any way cause you not to be able to smell?

A. No.

Q. Deputy, have you ever under any circumstance conducted a K-9 sniff of a piece of luggage after you, yourself, had smelled the odor of marijuana coming from that luggage?

A. No.
Q. Why not?
A. Because with my training and experience the odor of marijuana is distinct and there's no sense bringing in a K-9 to already determine what I've already detected.
Q. Okay. Deputy, based on your experience is it common for marijuana to be located by you in vacuum sealed bags?
A. Yes.
Q. And what is a vacuum sealed bag?
A. It's a type of -- a certain type of packaging to stop the odor of its substance inside from emitting outwards of the bag.
Q. And what's the substance the bag is made out of?
A. Plastic.
Q. And there was a reference to heat sealed. Is that -- is that in relation to vacuum sealed bags?
A. Yes.
Q. What does heat sealed mean?
A. Heat sealed would basically mean to bind the plastic to seal it would require heat and the heat sealer is what would bind the two materials together.
Q. And in reference to the vacuum packaging part of it, what's that in reference to?

A. It's reference to also the heat sealer. It's withdrawing all the air out of the bag that it physically possibly can to pull the odor out.
Q. And in your experience is that an effective way to reduce the odor that raw marijuana emits?
A. Yes, it can be.
Q. Is that a foolproof way?
A. No.
Q. In your experience, are vacuum heat sealed bags still giving off the odor of raw marijuana when they contain raw marijuana?
A. Yes.

MR. HAGERTY: That's all I have.

THE COURT: All right. Thank you.

You may step down. Thank you. Watch your step.

Anything else, Mr. --

MR. HAGERTY: I have no other evidence, Judge.

THE COURT: All right.

MS. KELLER: Judge, we have three -- we have three exhibits to offer.

THE COURT: Very well.

MS. KELLER: Four. Sorry, four. They've been marked as Exhibits 1, 2, 3 and 4.

THE COURT: Are these offered in resistance

to the -- I guess they would be to the -- in assistance, I guess, to your motion to suppress. Are these part of the offer of proof, or are these for other purposes?

MS. KELLER: Exhibits 2, 3 and 4 are for other purposes.

THE COURT: Okay. So what's Exhibit 1?

MS. KELLER: That is the disc with the body-worn camera footage.

THE COURT: All right. The body camera of whom?

MS. KELLER: Investigator Steven Peck.

THE COURT: How do you spell his last name?

MS. KELLER: P-e-c-k.

THE COURT: All right. And Exhibit 2 is what?

MS. KELLER: Judge, it's a printout from the Nebraska State Patrol's website on their Police Service Dog Division.

THE COURT: All right. Exhibit 3 is what?

MS. KELLER: I'm sorry, Judge?

THE COURT: What's Exhibit 3?

MS. KELLER: Exhibit 3 is the legislative information from the state of California regarding the legalization of marijuana in that state.

THE COURT: Okay. And Exhibit 4?

MS. KELLER: It is the summary of the legislation from Illinois legalizing marijuana in that state.

THE COURT: All right. And you're offering Exhibits 1 through 4? Exhibit 1 is for the purposes of the offer of proof, correct?

MS. KELLER: Yes.

THE COURT: All right.

Mr. Hagerty, any objections to one through four?

MR. HAGERTY: Well, I'll object to two, three, and four as to relevance. Three and four I think have zero relevance as they relate to laws of other states. Exhibit 2, I mean, I think any questions that could have been asked regarding K-9 practices and procedures were and could have been asked of the deputy during his testimony so I'll object as to Count -- excuse me, Exhibit 2 on foundation and relevance purposes, Judge.

THE COURT: All right.

All right. So for my purposes I'm receiving Exhibits 2, 3 and 4 into evidence over the objection. Exhibit 1, that's part of your offer of proof.

(Exhibit Nos. 1 to 4 are made a part of this bill of exceptions and may be found in a separate volume.)

THE COURT: Anything else?

MS. WEST: We'll make a record of what the offer of proof would show.

THE COURT: Whatever you're going to do if you need to make a record.

MS. KELLER: Judge, as our offer of proof in Exhibit 1 contains the body-worn camera footage from February 4th, 2021, at approximately 4:45 a.m. At the same time as our client was being -- his luggage was being searched and he was being interviewed, just a couple train cars down members of Deputy Miller's team conducted searches of bags on a separate car. In doing so, they manipulated the bags. Every single bag that they determined they wanted to search they manipulated until they smelled marijuana, unless they did not smell any marijuana, and then searched the bags on the train. I think that this body cam footage is an example of the practices and procedures of this team, that they have a practice of searching bags on trains without a warrant, and by -- and searching them includes manipulating them in order to emanate an odor of marijuana from the bags. And it undermines the credibility of an officer who testified without body-worn camera footage when other officers were equipped and had their equipment active and

functioning.

THE COURT: Very well. Any other evidence then?

MS. KELLER: No, Judge.

THE COURT: The defendant rests?

MS. KELLER: Yes.

THE COURT: The State rests?

MR. HAGERTY: Yes.

THE COURT: Argument, Mr. Hagerty?

MR. HAGERTY: Judge, I think the only evidence the Court heard here today was compelling and convincing evidence of what happened here. Deputy Miller found a bag that was emanating the odor of marijuana. He is extensively trained in the smelling the odor of marijuana. That's been his job for at least the last 12, 15 years as a K-9 handler and now as an interdiction officer. So he's intimately familiar with the smell of marijuana. He was able to determine that the bag that was unmarked, no tags, did have the odor of marijuana coming from it. He determined where that bag likely had come from, made contact with that individual, identified him, and when that person claimed ownership of the bag he was placed under arrest as Deputy Miller had already opened that bag and found 18 pounds of marijuana in it which he

suspected was going to be in there from the smell that he smelled coming from that bag.

There's nothing unusual or toward going on here. This is a straightforward investigation. Additionally, marijuana was located in the room occupied by Mr. Vaughn. That was secured because of the finding of the initial amount of marijuana, and placing Mr. Vaughn under arrest gave officers the right to search that room incident to the arrest.

There's no statement involved here, Judge. He didn't give a statement of anything of note so I don't think that's an issue, it's just really the arrest. And I think that initial encounter with the bag is completely lawful. When you leave an unmarked bag on the train, um, and -- it's going to be treated as abandoned unclaimed property. So the fact that it was only sniffed and not moved around or altered in any way, I don't even think that's even close -- that's not even definitive anyway. Because once that bag is determined to have no ownership on it, it can be treated as an abandoned bag.

THE COURT: Let's assume -- let's assume that there was an owner's name on the thing. Can -- can the officer pick the bag up and smell it?

MR. HAGERTY: I think absolutely he can

smell it.

THE COURT: He can pick the bag up and manipulate the bag, can't he?

MR. HAGERTY: I don't think he -- if he's manipulating it for feel.

THE COURT: No, not for feel, just for smell.

MR. HAGERTY: For smell?

THE COURT: Yeah.

MR. HAGERTY: If he's manipulating it for smell, I think that's an argument that he can do. But that's not even what we're talking about, Judge.

THE COURT: All right.

MR. HAGERTY: That's all I have.

THE COURT: Ms. Keller?

MS. KELLER: Judge, I think there is a very clear distinction between a K-9 sniff and an officer sniff. The United States Supreme Court has held that a dog can walk through luggage, past luggage, and if they alert then that is not considered a search. And officers sticking their noise into or onto someone's luggage in order to smell it, that's not the same. Clearly Officer Miller testified that his training is not nearly as thorough as his dog's.

THE COURT: Well, let me ask you this:

Obviously, the officer's nose is not as good as the dog's. Would we agree with that?

MS. KELLER: Yes.

THE COURT: But if the officer can smell it, what more did he need to do? Does he have to have everybody on his team come in there and they smell it, too, and then they bring the dogs in and they smell it too?

MS. KELLER: The case law says that -- my reading of the case law says that if he smells marijuana he can request a search warrant. There is no probable cause exception to the Fourth Amendment. There's six exceptions, but probable cause searches are not a thing.

THE COURT: Says -- says -- so if he smells marijuana, he can't search the bag?

MS. KELLER: According to United States v. Place, if probable cause or a reasonable or -- not probable cause -- a reasonable and articulable suspicion of criminal activity exists an officer may seize the property and request a warrant.

THE COURT: So you're saying he can't -- he can't open it up to see if marijuana's in there?

MS. KELLER: Correct.

THE COURT: Okay. And there's specific law

to that effect?

MS. KELLER: Correct.

THE COURT: Do you agree with that, Mr. Hagerty?

MR. HAGERTY: I disagree with that.

THE COURT: What now?

MR. HAGERTY: I disagree with that.

THE COURT: Okay. Next, then.

MS. KELLER: Judge, I disagree with Mr. Hagerty as well that there was no statement. I believe that in approaching Mr. Vaughn in a closed compartment and partially blocking the doorway and asking questions while identifying himself as an officer as part of the DEA Task Force it was pretty clear a reasonable person would not believe they were free to leave that train car at that time or refuse questioning. Additionally, this train is temporarily stopped in Omaha. Mr. Vaughn is on his way to Chicago. Where would he go if he could leave the officer's presence? He was not informed of his rights when he made -- answered the officer's questions. And those -- for the purposes of the motion to suppress, I believe that his interaction with the officer he was detained and in custody and his statement should be suppressed.

THE COURT: Okay.

Anything else, Mr. Hagerty?

MR. HAGERTY: No, sir.

THE COURT: All right. The Court finds that the officer had the ability to smell the bag. Whether there was an identification on the bag or not, the officer can smell the bag. An officer can smell any bag he wants to smell. If he smells the odor of marijuana coming from the zipper, as he said, then I believe that there's -- I'm finding that there's probable cause that he could search the bag. Once he searched the bag and found that there was, I believe, 17 pounds of marijuana in the bag, which is raw marijuana, then he inquired as to the attendant there whose bag it was. They indicated that it was the gentleman in compartment 12. He knocked on apartment 12, identified to the defendant who he was, asked if he could speak, and the defendant said he could.

The defendant identified the bag, and once that was done then the officer arrested him and that's when he was in custody. There was no reason to give him Miranda rights prior to him being in custody. The Court finds that he was -- he was free to leave and the officer was at the side of the door. But because of the close characteristics of an Amtrak, you know,

there's certain things you can and you can't do. And then the officer, when he searched for probable cause after he arrested Mr. Vaughn, found additional marijuana.

The fact that California allows marijuana, the fact that Illinois allows marijuana has absolutely no relevance whatsoever. Nebraska doesn't. The train was in Nebraska. You can't transport marijuana. Obviously, it appeared that they were trying to hide that because it was -- it was vacuum sealed and things of that nature. So they knew they weren't supposed to -- normally you know you're not supposed to have marijuana in Nebraska. So, based upon that, the Court hereby overrules the plaintiff's motion -- or the defendant's motion to suppress.

Anything else we need to do today?

MR. HAGERTY: No, sir.

MS. KELLER: No, sir.

THE COURT: Okay. The parties are excused. Thanks.

(3:34 p.m. -- Adjournment accordingly.)

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And this is Scott Srb, my bailiff. Srb is S-R-B. He doesn't use a vowel. Don't hold that against him. And so just go with him, and he'll take care of you.

(Jury excused.)

THE COURT: We are outside the presence of the jury. And just before we begin, I did not do the preliminary instructions. I was going to read those tomorrow morning before we begin.

But we're here at this time on the Defendant's motion in limine.

Ms. Keller or Mr. Turnblacer?

MR. TURNBLACER: Thank you, Your Honor.

I believe that the State is going to elicit testimony through Office Miller that Office Miller boarded the train at about 4:50 a.m. on February 4th and that he then located a piece of luggage that had the odor of marijuana, and he searched that piece of luggage, he found what he suspected to be marijuana, and just minutes later he spoke to an Amtrak employee. He specifically identified that person as an Amtrak attendant for a train car in No. 630 in is police report, and he asked who the duffel bag belonged to. The Amtrak attendant advised that it belonged to a male subject in room No. 12. That's why he knocked on the door in room 12 and made contact with John Vaughn.

I believe the State is trying to introduce this

evidence to show why Officer Miller did what he did for its impact on a listener; however, the prejudicial effect outweighs any probative value of that piece of evidence. The problem is that that statement relates directly to an element of a crime, which is the ownership of the bag which was where the marijuana was found.

So even if the Court thinks that it's relevant to prove why the officer did what he did, it's the defense's position that they should prove that fact by calling the actual Amtrak employee. We would ordinarily be able to impeach and cross-examine the Amtrak employee. The Amtrak employee had knowledge because it appears from the report that they were in the car when Officer Miller searched that bag and found the suspected marijuana, so any statement that this unnamed Amtrak employee made would be testimonial in nature and subject to the confrontation clause. We have a right to cross-examine, we have a right to confrontation, and the State can't assert that by offering it for -- just to show why officer Miller took the next investigatory step that he did. That's not really relevant to the elements of the crime. That's just relevant as to why he did what he did. It just provides context. It doesn't provide any relevant evidence as to guilt or innocent of the Defendant.

So the jury, while I assume -- if the Court overrules our objection, I assume that the Court will make a

strong limiting instruction for the jury. I think we'd be entitled to that if the Court overruled that. However, we don't think that a limiting instruction would go far enough. We believe that it violates the confrontation clause, it violates the hearsay rules, and also it's more prejudicial than probative under 27-403.

So for those reasons, Your Honor, we'd ask that the Court limit the ability of the State to go into that and to elicit that testimony. And it's important to note here that we don't have the name, we don't have the age, we don't have the position, we don't have any information concerning the statement, where it was made, how it was made, whether it was a verbal statement, whether it was a hand gesture, et cetera. We don't have any of those things so that we can attack the veracity of the statement. So it's highly prejudicial. It goes to the elements of all three of the charges. So the knowingly being in possession of marijuana forms the basis of all three of these charges. And for the reasons I stated, Your Honor, we object.

THE COURT: Thank you.

Mr. Hagerty?

MR. HAGERTY: Judge, we're objecting to that. We believe the statements would be non-hearsay. Looking at 27-801, the case cited in the annotations, State vs. McKay, it indicates, "A statement offered to prove its impact on the

listener instead of its truth is offered for a valid non-hearsay purpose if the listener's knowledge, belief, response or state of mind after hearing the statement is relevant to an issue in the case."

I don't disagree with anything Mr. Turnblacer is saying in terms of the facts. The officer requested that -- there that was an Amtrak employee on the train, he asked her, hey, any idea who this bag belongs to, and they directed him to room 12. I mean, that just goes to exactly what State vs. McKay speaks of. You know, this didn't happen in a vacuum. He wouldn't have gone to room 12 but for being told to go there. Otherwise, he had no idea where that bag belonged. So I don't think we can just make up the fact that, oh, I decided to go to room 12. That doesn't make any sense. The explanation is, well, I did ask an employee, and they said they thought it belonged to room 12. So that's exactly why he goes there, and that's why it's non-hearsay, because it's the effect on the here who is our witness, Judge [sic].

THE COURT: Very well.

Mr. Turnblacer?

MR. TURNBLACER: Relevancy is limited under Article 4, the hearsay rule, 27-401, Relevant Evidence.

"Relevant evidence means evidence having any tendencies to make the existence of any fact that is of consequence to the determination of the action more or less

probable than it would be without the evidence."

This statement, why the officer took that next step, isn't relevant to any fact that is of consequence to the outcome of this action. So it's not relevant. Any purported relevance is very minimal. The prejudicial effect is very consequential. It is confrontation, Judge. It shouldn't yield to the State being allowed to put context into the officer's next step of the investigation. If that's important to the State, they should prove that with live testimony and we should have an opportunity to cross-examine.

THE COURT: From what I understand, the evidence is used not to prove the truth of the matter asserted but just as to give information to the officer. It's not evidence that this employee of Amtrak, or whoever the person was, said that there's drugs in here or anything of that nature. He just said that he believes that that bag belonged to room 12. If he was entirely wrong in his assumption, it doesn't make any difference, because that's the information that the policeman had to go on, and the policeman has to give his story as to how he took the necessary steps to get to room 12. There would be a big hole otherwise. But it's not for the truth of the matter asserted, it's just as to why the policeman did this.

For those reasons, I'm finding that it's not hearsay, it is relevant for the purpose of this, and I'm

overruling the Defendant's motion in limine.

Anything else?

MR. TURNBLACER: Does Your Honor intend to give a limiting instruction on that during the trial or after?

THE COURT: I don't know. Let's talk about that. I'm not making a decision on that at this time.

Anything else?

MR. TURNBLACER: Not from the defense.

THE COURT: See you all tomorrow at 9:00, a little before nine, please. Thank you all very much.

(At 4:20 p.m. court stood in recess.)

A. Yes.

Q. In regards to Amtrak, is there any kind of agreement with Amtrak regarding your presence at the station and on the train?

A. Yes. Amtrak has allowed us to work the train terminal, the platform, and board the train in agreement with us.

Q. How long is that train -- what's the schedule for Amtrak for that train to be stopped in Omaha?

A. They run on a timely basis. It's approximately about 10 or 15 minutes they are allotted there in Omaha.

Q. And so is it that time frame that you are operating under when you are doing these investigations on the train?

A. Yes.

Q. When you board the Amtrak train, what's the plan? What are you trying to do?

A. Look for indicators of criminal activity.

Q. And when you say "indicators of criminal activity," what are you talking about?

A. There are seemingly innocent things when either -- they're either heard, smelled or observed during an encounter with an individual or other individuals. And once contact is made with that individual or individuals, it's what they say, how they say it, and in the manner of which it's said, and then for the officer, in taking on the totality of the

circumstances of everything that was seen, heard and observed and the individual saying things make that officer believe that that person may be involved in criminal activity or may not be involved in criminal activity.

Q. And are there indications of criminal activity that you look for independent of -- or prior to making contact with people?

A. Yes.

Q. What are some of those things?

A. Some of those things, but not limited to, are large amounts of luggage, luggage that is hard-sided, luggage that may have a padlock on it, luggage that may have zip ties on it, luggage that may have an identification tag on it but very vague information or false information. We also have individuals that we look for that may avoid law enforcement even though we're in plain clothes. Some individuals may see us as law enforcement, so they may avoid law enforcement. An overabundance of clothing due to the temperature in the area. And if I can explain that, individuals may be body carrying narcotics, so they may be trying to conceal narcotics that they're smuggling.

Again, not limited, but those are some of the things that we look for when we are at the train station.

Q. I don't know if you said this or not. But is a bag with no identification tags on it something that gets your

attention?

A. Yes.

Q. Why is that?

A. Because when you travel, whether it be a plane, a train, or whatever form of transportation you're using, you don't want to lose possession of your items. And a way, if they would become lost, is through identification tags. So it is a common thing that we see that most people that don't want to lose their belongings, they would attach identification tags so that it is not lost, and if it is lost, they can later be identified hopefully.

Q. I think you mentioned you have 11 members on your team. How many members of the team were at the Amtrak station on the day in question?

A. I believe seven.

Q. And what did you do, what was your role -- well, let me ask you this:

Did the No. 6 train arrive approximately on time on February 4, 2021?

A. Yes.

Q. And when that train arrived, what did you do?

A. I boarded the sleeper train car.

Q. And why don't you tell the jury -- can you describe what is a sleeper train car in terms of Amtrak's version?

A. So Amtrak is a passenger train. And on that train

there are -- it's broken up into different train cars. You have coach, which is just normal seating, and then you have the sleeper. We classify it as a sleeper because you have the availability to have a cabin. A cabin is like a small little apartment within the train and which you can purchase while traveling across the country. And also there's a dining car and obviously the engine.

Q. In terms of the layout of the sleeper cars, are those cabins all on one side of the car or both sides of the car?

A. So the cabin -- the train has a walkway. And it has a walkway -- there's two levels. You have a bottom level and you have an upper level. And you go from the front to the back. In the coach, you have seats on either side of that aisle. On the sleeper you have the same thing, you have an aisle with a cabin on both sides of the aisle, both upper and lower.

Q. And on Amtrak trains, on those sleeper cars, are there any places to store luggage outside of the cabins or the rooms?

A. Yes. When you board a train, you board it from the lower level. And then immediately upon boarding the train, you have a luggage rack where you can put all your luggage or items within that area.

Q. I think you touched on this a little bit a second

ago. When you board the train on February 4th, what are you wearing?

A. Plain clothes.

Q. Okay. Why are you wearing plain clothes?

A. Because that is for us to blend in with normal public.

Q. Are you wearing or displaying anything that indicates that you're law enforcement?

A. No.

Q. Were you by yourself when you boarded that sleeper car on February 4th, 2021?

A. Yes.

Q. And is that customary for you and the other task force officers to do that?

A. Yes, because of time restrictions and uneven numbers sometimes.

Q. And how do you maintain any kind of contact with other task force officers?

A. By radio.

Q. Once you boarded that sleeper car, did you come across anything that got your attention?

A. Yes.

Q. And what was that?

A. On the luggage rack on the middle portion of it there was a duffel bag that had a Tommy Hilfiger emblem on

it, and I observed no identification tags on the bag.

Q. You previously described that's an indicator that gets your attention. What did you do after you saw that bag with no tags?

A. I smelled the seam of the bag.

Q. And what do you mean by smelling the seam?

A. So obviously, marijuana puts off a distinct odor. It can be overwhelming at times. And I smelled the seam. What I mean by "the seam" is a different portion of the top part of the duffel bag.

Q. Is that something you would normally do?

A. Yes.

Q. Officer, this has been marked as Exhibit No. 10. Can you tell me if you recognize what Exhibit 10 is?

A. It would be that item that I had seen on the train that day, on the rack.

Q. The Hilfiger bag?

A. Yes.

Q. This is the bag you just described that you smelled the seam of?

A. Correct.

Q. Officer, why don't you come down here for me, please?

A. (Witness complies.)

Q. Can you show the jury what seam we're talking about

that you would have smelled?

A. (Indicating.)

Q. And when you smelled that seam, did you detect an odor of anything?

A. Marijuana.

Q. At that point in time, did you do anything with this bag?

MS. KELLER: Objection, Judge. I'm going to renew my previous motions and ask for a continuing objection.

THE COURT: Very well. Overruled.

Q. (By Mr. Hagerty) Did you do anything with this bag after you smelled the odor of marijuana?

A. I conducted a probable cause search of the bag.

Q. Okay. And how did you go about doing that?

A. I unzipped it, looked inside, saw a black vacuum-sealed bag along with a clear vacuum-sealed bag of a green leafy substance that I believed to be marijuana at the bottom of the bag.

Q. After you opened it and saw what you just described, what did you do next?

A. I zippered it back up, pushed it back into the shelf, I requested assistance from another officer within my unit, and then waited upon his arrival.

Q. Okay. And before I have you sit back down, why don't you -- so the luggage rack on the Amtrak train that's

in the hallway, for lack of a better term, doe that -- that runs the length of the train, lengthwise?

A. Yes.

Q. Okay. So if this is the luggage rack running lengthwise like this (demonstrating), is the bag sitting lengthwise or is it sticking out of the rack like this (demonstrating)?

A. It would be sticking out as such.

Q. Okay. So the bag was perpendicular to the length of the train?

A. Yes.

Q. Okay. Why don't you have a seat -- or actually, you know what -- well, one more question:

This bag as it appears here right now, is there anything about it that is different than when you observed it on February 4th?

A. Yes.

Q. What's that?

A. It has these identification tags from the Nebraska State Patrol as evidence tags and it has writing here on the top (indicating).

Q. And it looks like there's two tags on this bag, one from you said the Nebraska State Patrol and one from --

A. Douglas County.

Q. -- Douglas County.

And those stickers were not on there when you originally observed this bag?

A. Yes.

Q. Outside of that, is this bag in the same or substantially the same condition as when you saw it on February 4th?

A. Yes.

MR. HAGERTY: Judge, I'm going to offer Exhibit 10.

THE COURT: Any objection?

MS. KELLER: Judge, I do have an objection. If we could do a sidebar, please?

(Sidebar discussion off the record.)

THE COURT: Ms. Keller, any objection to the Court receiving this bag?

MS. KELLER: No, Your Honor.

THE COURT: Exhibit 10, the bag, is received into evidence.

(Exhibit No. 10 was received into evidence by the Court and made a part of the record.)

Q. (By Mr. Hagerty) I think we left off before talking about those stickers on that bag that you radioed for backup or assistance after you observed the marijuana. Is that where we were at?

A. Yes.

Q. How did you go about radioing for backup?

A. With my handheld radio.
Q. And did you get a response from any other task force members?
A. Yes.
Q. And who responded?
A. Special Agent Daniel Pelster.
Q. And you've worked with Agent Pelster before?
A. Yes.
Q. And what did he indicate?
A. That he would be in route.
Q. What was the next step after calling for backup at that point? What was in your mind as to what you were going to do?
A. I was trying to find out the owner of the bag. And in turn, while waiting for my fellow officer to arrive, the attendant of the car, which is an Amtrak employee who oversees the train car, was standing in the hallway. And I had asked her --
MS. KELLER: Judge, I'll object. I just renew my previous objection.
THE COURT: Overruled.
You may answer.
A. An Amtrak employee was standing there. And I asked her if she knew who the bag belonged to. The employee said that it belonged to a male that was in room 12.

THE COURT: Let me just give --

Ladies and gentlemen, the objection to the testimony by the officer here is that of hearsay. And hearsay is an out-of-court statement being used to prove the truth of the matter asserted.

In this situation, I'm allowing that testimony as to what the attendant on the Amtrak train said because it's not to prove the truth of the matter asserted, it's just to give information as to how Officer Miller -- why he took his next step.

Mr. Hagerty?

MS. KELLER: Judge, I'm going to object again.

THE COURT: I'm sorry?

MS. KELLER: I have an objection.

THE COURT: Go ahead.

MS. KELLER: Judge, I'm going to ask for a limiting instruction --

MR. TURNBLACER: Your Honor, if we could have a sidebar?

THE COURT: No.

MR. TURNBLACER: Very well.

THE COURT: No. If we're going to do that, we can do that any time. At this time we're just -- your objection was to hearsay; correct?

MR. TURNBLACER: Objection as to hearsay. And our

objection further is to the limiting instruction. We don't believe it goes far enough.

THE COURT: Okay. Overruled.

Q. (By Mr. Hagerty) Officer, after speaking with the Amtrak attendant, she identified which room as a possible room where the owner of the bag was?

A. Yes.

Q. Which room?

A. 12.

MR. TURNBLACER: Objection.

THE COURT: Overruled.

Q. (By Mr. Hagerty) So after you have that information, what was your intention?

A. Go directly to room 12 upon Agent Pelster's arrival.

Q. Okay. What was the purpose of waiting for Agent Pelster?

A. For officer safety.

Q. Is it also common practice to not make contact by yourself or do you normally do that?

A. We try to limit that. We try to always work in teams. But sometimes, obviously, people are out of position. Sometimes there's odd numbers within our group.

Q. But the primary purpose is officer safety though in this instance?

A. Yes.

Q. Does Agent Pelster arrive at your location?
A. Yes.
Q. And I don't think I asked this. Is this on the bottom floor or the top floor of this train car?
A. Bottom.
Q. Okay. Now, once Agent Pelster arrived, what did you do?
A. Made contact with a male in room 12.
Q. And prior to that happening, where does Agent Pelster take up a position in terms of where room 12 is?
A. Down the aisle, I believe off to the side approximately 20 foot.
Q. Is he involved with the contact you're making directly with room 12?
A. Not directly.
Q. How far was the door for room 12 from where you observed this Hilfiger bag?
A. Six or eight foot.
Q. As you stood by room 12, could be observe the Hilfiger bag?
A. Yes.
Q. And how did you try to make contact with anybody in room 12?
A. I knocked on the door.
Q. And did someone answer?

A. Yes.
Q. And who answered the door?
A. A gentleman later identified as John Vaughn.
Q. And approximately what time is this in the morning?
A. 5:00.
Q. Five a.m.?
A. Yes.
Q. And the person that you identified as John Vaughn, do you see him until court here today?
A. Yes.
Q. And could you point him out and describe what he's wearing, please?
A. He's seated at the defense table wearing a black tux -- I mean a black suit -- excuse me -- and a blue shirt.
MR. HAGERTY: Judge, I'd ask that the record reflect Officer Miller has identified the Defendant.
THE COURT: So noted.
Q. (By Mr. Hagerty) And when Mr. Vaughn answers the door, what do you say to him?
A. I identify myself by my federal credentials and I identify myself verbally by advising him that I am a DEA task force officer.
Q. And what's his demeanor when he answers the door?
A. He's calm. It appears that he just -- he possibly

might have just woke up, and he's seated within the cabin.

Q. We really didn't talk about the cabins yet. How big are the cabins?

A. They're approximately five foot in depth, about ten foot in length, and eight foot in height. It's a small cubicle.

Q. So is he like sitting on a bed or --

A. He has the bed down. So he's seated -- because in these cabins, you have chairs that can recline in the bed, and the beds were reclined to be slept on, and he was seated on that bed.

Q. So small enough that he's seated on the bed and he can open the door?

A. Yes.

Q. Okay. And did he remain seated as you were talking to him?

A. Yes.

Q. And how were you positioned at this entrance to room 12?

A. To the side of the door.

Q. Are you in the room or in the hallway?

A. In the hallway.

Q. Are you blocking the doorway?

A. No.

Q. What's the point of that?

A. It's for officer safety, for cover.
Q. By identifying yourself as law enforcement, did you explain to him what your purpose is on the train?
A. Yes.
Q. And what did you tell him?
A. I explained to him that I was a law enforcement officer, and we do routine checks and we provide security for Amtrak, and that what we do here along Amtrak is similar to what TSA would do along the airline, that we provide security for them.
Q. Was there anyone else in the room with him?
A. No.
Q. Did you ask if he had time to speak with you?
A. Yes.
Q. And what was his response?
A. Yes.
Q. And after that, what happened with regard to your conversation?
A. I asked him for --
MS. KELLER: Judge, objection. I'm going to renew my previous motion regarding Mr. Vaughn's statements.
THE COURT: Overruled.
Q. (By Mr. Hagerty) What conversation did you engage in with Mr. Vaughn?
A. I had a consensual encounter with Mr. Vaughn asked

him for his ticket, which he provided me. During that, while overseeing his ticket, I asked him some brief questions, which entailed him saying that he had flown out two days prior from I don't know what origin, but he had flown into California, and now was taking the train back to Washington, and then in turn, he was going to Atlanta.

Q. And by Washington, is that Washington State or Washington D.C.?

A. Washington D.C.

Q. And his home was Atlanta?

A. Yes.

Q. Okay. And his ticket information that he provided, did that corroborate his explanation of his travel?

A. Yes.

Q. He was traveling from Sacramento?

A. Emeryville to Chicago. And in turn, from Chicago, he had to get on a different train to travel then to Washington D.C.

Q. And he told you that was his destination?

A. His ticket identified that.

Q. Okay. Did you ask him if he was traveling by himself?

A. Yes.

Q. And what was his response?

A. Yes.

Q. Did you ask him about any bags that he had in his room, if they were his?

A. I asked him if he was responsible for all the luggage located inside his room, and he said yes.

Q. And ultimately, did you ask him about the Hilfiger bag that was in the hallway?

A. Yes.

Q. What did you ask him about?

A. I pointed to the luggage rack where the Tommy Hilfiger bag was located at, and I asked him if that bag belonged to him.

Q. And his response?

A. Yes.

Q. And from where he was seated inside of room 12, could you see the Hilfiger bag?

A. Yes.

Q. The fact that he told you he had flown to California and was taking the train back, does that have any significance to you?

A. Yes.

Q. What significance does that have to you?

A. That most people that travel take one form of travel one direction and then take the same form of travel back. Also that this form of transportation, when you take a plane somewhere, you're trying to get there quickly. He then in

turn grabs the train, and now it's going to take much longer. That trip is probably going to take, from Emeryville to Washington, approximately three days. So not only is it not time effective but it's not cost effective, because his train ticket was 1200 --

MS. KELLER: Objection, Judge.

THE COURT: What's your objection?

MS. KELLER: It's hearsay.

THE COURT: Overruled.

A. The train ticket itself was approximately 1200. So again, this was not very time effective, because he said he flew out there, stayed only two days, and then was taking another form of travel back. So again, time effective and cost-effective, it doesn't make -- it's very inconsistent in what we see except for people involved in criminal activity.

Q. (By Mr. Hagerty) For a trip of this length that he described to you, did you find any significance in the fact that he had too large suitcases?

A. Yes.

MS. KELLER: Judge, I'm going to object to speculation and facts not in evidence.

MR. HAGERTY: Let me back up. I may have jumped ahead with regard to that.

Q. (By Mr. Hagerty) Inside -- well let's do this: Mr. Vaughn So when you're talking to Mr. Vaughn, and he

indicates that the Hilfiger big was his, what did you do next?

A. After he took possession of the bag, I advised him that he was under arrest for a narcotics violation.

Q. After he said it was his bag though?

A. Yes.

Q. And how did you go about doing that?

A. I asked the individual to stand up, handcuffed him, conducted a pat-down search, and then escorted him into the train terminal.

Q. And did you advise him that he was under arrest?

A. Yes.

Q. When you escort him off of the train, had you done anything in terms of searching that room 12 yet?

A. No.

Q. Did anyone from the task force stay in room 12 or near room 12 while you take Mr. Vaughn off the train?

A. Agent Pelster.

Q. Okay. What do you do with Mr. Vaughn off the train? Where do you take him?

A. I take him inside the train terminal. And inside the train terminal -- there are other officers that are inside the train terminal at that time. And I asked them to be security and watch Mr. Vaughn while I go back onto the train.

Q. So he remains handcuffed and seated in the terminal?

A. Yes.

Q. And do you go back to that room 12 on that car?

A. Yes.

Q. And what do you do in that room?

A. Make contact with Pelster. And Agent Pelster advised me the other suitcase contained --

MS. KELLER: Objection, Judge. That's hearsay.

THE COURT: Sustained as to hearsay as to what Agent Pelster says.

Q. (By Mr. Hagerty) Let me ask this:

Did you search room 12?

A. I assisted in it, yes.

Q. Did you locate any additional luggage in room 12?

A. Yes.

Q. Okay. And what did you locate?

A. A hard-sided suitcase and a black backpack.

MS. KELLER: Objection.

MR. HAGERTY: Your Honor, may we approach?

THE COURT: Sidebar?

MR. HAGERTY: Yes.

(Sidebar discussion off the record.)

THE COURT: Ladies and gentlemen, we're going to take our morning break at this time. We'll resume in 15

minutes. Again, ladies and gentlemen, I'm going to give you the admonition.

"It is your duty not to speak with or allow yourselves to be spoken to by any person on the subject of this trial, and you shall not listen to any conversation, observe, investigate, research or read anything on the subject of the trial, and it is your duty not to form or express an opinion until the case is finally submitted to you."

So we'll see you in about 15 minutes, please.

(Jury in recess.)

THE COURT: We are outside the presence of the jury.

Do we need to put anything on the record at this time, Mr. Hagerty?

MR. HAGERTY: I don't know that we need to put anything on the record, Judge.

MS. KELLER: I think I should make a clearer record of my continuing objection.

THE COURT: I understand that. I haven't got to you yet. Just be patient.

MS. KELLER: Okay.

THE COURT: Mr. Hagerty?

MR. HAGERTY: The parties have an agreement to not discuss the backpack that was located. So the fact that that was brought up was by mistake. I don't want to get into it.

And that's the agreement we have with defense, is to not get into the details of the black backpack.

So I would like to just continue from this point without -- we'll revisit what was found in the room, and we won't get into the black backpack.

THE COURT: Do you have any problem with that?

MR. TURNBLACER: No problem, Judge. I think that just so the record is clear, perhaps the Court should strike the testimony concerning the last answer that dealt with the backpack. Mr. Hagerty can reask his question, and that way, that's stricken from the record.

THE COURT: What does the backpack have to do with anything?

MR. TURNBLACER: The parties stipulated that that wasn't going to be brought up. And if was brought up, I had indicated to Mr. Hagerty that we intended to go down a line of questioning that there wasn't any venue items found in the backpack because there weren't.

Now, Mr. Hagerty believes that that would open up the contents of the bag, which contained THC wax that is not subject to any of the charges here today. The THC wax, it's our position that it would prejudicial. It's not relevant towards anything. Your Honor already ruled on a motion in limine to that effect. The parties had subsequent discussions consistent with what's being presented here.

THE COURT: So you want me to tell the jury to disregard the fact that he found a black backpack in the room?

MR. TURNBLACER: I would prefer that the Court instruct the jury to disregard the last answer, which is --

THE COURT: And I'll tell them what it is, because they're not going to remember.

MR. TURNBLACER: If that's what the Court would rule, then no, I would just let sleeping dogs lie at that point.

THE COURT: Why don't we just do it that way? Wouldn't that be the best way?

MR. TURNBLACER: Well, then I think you're going to draw more attention to the black backpack, which we're trying to not draw attention to at all.

THE COURT: You've already -- it's already been out. The backpack has been talked about. Now, if you want me to tell them to disregard the black backpack, they will regard the black backpack.

MR. TURNBLACER: That's what I'm saying. That's the problem.

MR. HAGERTY: If you're going to include that in any striking of the record, then I would ask that we don't do that and let me just pick up with that same question and we'll talk about the suitcase, not the backpack.

THE COURT: I think that's the best thing. It's up to you guys what you want me to do. But I think the best course of action is just to proceed, that there was a black backpack, and you don't talk about it.

MR. HAGERTY: Well, I'd like to not talk about it anymore, and I don't want to talk about it when they come back out.

THE COURT: Okay.

MR. TURNBLACER: That's fine with us, Judge.

THE COURT: All right.

Do you want to discuss your motion, Ms. Keller?

MS. KELLER: Yes, Judge.

So I briefly stated I am renewing my objections as far as the motion to suppress that Your Honor overruled this summer, as well as the motion in limine that was filed in December regarding the marijuana. And the hearsay objection that we made yesterday on the record about the Amtrak employee.

THE COURT: Yes.

MS. KELLER: I'm just renewing those. I believe under State v. Pope, I'm obligated to renew those objections before each witness' testimony in order to preserve the issues. So I just want to make a clear record that I am continuing to object and would like a continuing objection during Officer Miller's testimony at this time.

THE COURT: You have a continuing objection as to the hearsay objection, and then also as to the motion in limine and the motion to suppress matters with regard to this officer.

MR. KELLEY: Thank you, Judge.

THE COURT: And when you're asking for a limiting instruction, you want me to make a decision on that in the middle of his testimony?

MR. TURNBLACER: A limiting instruction as to what?

THE COURT: That's what you asked me for.

MR. TURNBLACER: You gave a limiting instruction. It's our objection that the limiting instruction doesn't cure the prejudice that's been -- there isn't a limiting instruction that could exist that would --

THE COURT: Then why did you ask me for one? You said you wanted me to expand on the limiting instruction.

MR. TURNBLACER: I said it doesn't go far enough.

THE COURT: So how far do you want me to go with the limiting instruction?

MR. TURNBLACER: I think that -- in my opinion, it's my position that the only sound course of action would be to declare a mistrial and to try the case again without that hearsay coming in.

THE COURT: Oh, so you don't want me to expand on the limiting instruction; you want a mistrial?

MR. TURNBLACER: I just --

THE COURT: I'm just trying to figure out what you're asking for here.

What you're saying that there's no limiting instruction I could give, but you wanted me to -- you made the objection, you didn't go far enough with the limiting instruction. What you're saying is, it's not that I didn't goes far enough, I shouldn't have given the limiting instruction and you want a mistrial. Is that what you're asking for?

MR. TURNBLACER: What I'm asking for is that Your Honor keep that hearsay out, which that --

THE COURT: Well, I'm not going to do that. It's not hearsay.

MR. TURNBLACER: And I know that Your Honor is going to let that in, and I know the way Your Honor ruled. So in that event, I think that, you know, absent a mistrial, if you're not going to grant a mistrial on that, which obviously the Court is not --

THE COURT: You haven't asked for one.

MR. TURNBLACER: Well, I'll formally ask for one now based on that hearsay. I don't believe that there is a limiting instruction that can be crafted that can cure the prejudice --

THE COURT: And I appreciate that. But when you

said it didn't go far enough with the limiting instruction, what I understand that means is I needed to explain more about the limiting instruction. But now what I understand is you're not asking for a limiting instruction, you're asking for a mistrial; correct?

MR. TURNBLACER: Yes.

THE COURT: All right. The mistrial is overruled.

MR. TURNBLACER: And I did ask for a sidebar, which was denied. And I didn't want to get into this colloquy in front of the jury just to preserve the decorum.

THE COURT: I understand that.

All right. Anything else we need to do for you guys?

MR. TURNBLACER: I don't believe so.

THE COURT: All right.

Anything else, Mr. Hagerty?

MR. HAGERTY: No, Judge.

THE COURT: So we'll see you in 10, 15 minutes.

(Recess taken.)

Q. (By Mr. Hagerty) Officer Miller, picking up where we left off, you took Defendant Vaughn to the terminal and left him there with other officers?

A. Yes.

Q. And they went back to the train car, room 12?

A. Yes.

Q. And you indicated, I think, that you assisted with the search of a room?
A. Yes.
Q. And did you locate any additional suitcases in that room?
A. Yes, a hard-sided suitcase.
Q. And was that hard-sided suitcase taken into custody?
A. Yes.
Q. Okay. And what about the Hilfiger bag we already mentioned, what happened with that bag?
A. We took it into evidence as well.
Q. Okay. You got off the train with it?
A. Another officer from our unit did.
Q. Did what?
A. Take the evidence that was in the cabin off the train into the terminal.
Q. Okay. The Tommy Hilfiger suitcase and the hard-sided suitcase?
A. Yes.
Q. Okay. Were those suitcases opened inside the terminal then?
A. Yes.
Q. Okay. Let me start with what has been marked as Exhibit No. 12. You stay there and I'll bring it over to

Justice # ZN1005502
Data # 3601444

County Court CR21 0002215

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA
Plaintiff,

vs.

JOHN VAUGHN,
Defendant.
D.O.B. 6 November 1992.
ADDRESS: 2061 KIMBARY RD
ATLANTA, GA
DR. LIC.:
AR# N1005502
RB# D03746
CMS# N1005502 Z
MC

CR# 21 - 1009

INFORMATION

#37 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
MAR 24 2021
JOHN M. FRIEND
CLERK DISTRICT COURT

The State of Nebraska hereby informs the Court that JOHN VAUGHN is alleged to have violated the following laws of the State of Nebraska:

COUNT 1: DELIVERY, DISTRIBUTION, DISPENSING, MANUFACTURING, OR POSSESSION WITH INTENT TO DISTRIBUTE, DELIVERY, DISPENSE, OR MANUFACTURE OF MARIJUANA Class IIA Felony

On or about 4 February 2021, in Douglas County, Nebraska, JOHN VAUGHN did then and there knowingly or intentionally delivery, distribute, dispense, manufacture, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance, specifically: MARIJUANA, in violation of Neb. Rev. Stat. §28-416(1)&(2)(b), a Class IIA Felony. 28-416(1)(A)-F2A 24803

COUNT 2: POSSESSION OF MARIJUANA MORE THAN ONE POUND Class IV Felony

On or about 4 February 2021, in Douglas County, Nebraska, JOHN VAUGHN did then and there knowingly or intentionally possessing marijuana weighing more than one pound, in violation of Neb. Rev. Stat. §28-416(12), a Class IV Felony.
21986
28-416(12)

002158913D01

COUNT 3: FAILURE TO AFFIX TAX STAMP Class IV Felony

On or about 4 February 2021, in Douglas County, Nebraska, JOHN VAUGHN did then and there being a dealer distributing or possessing marijuana or a controlled substance without affixing the official stamp, label, or other indicium prescribed by the Tax Commissioner in violation of Neb. Rev. Stat. §77-4309 a Class IV Felony.
23588
77-4309

I, SHAWN R. HAGERTY, Deputy County Attorney, allege that this Information is true based upon my information and belief.

/s/ SHAWN R. HAGERTY
SHAWN R. HAGERTY, # 21724
Deputy County Attorney

Witnesses for the State:
DAVID MORAN #F215
GREG BEALL #F216
SHANON TYSOR #S051
CHRISTINE GABIG #S551
STEVEN PECK #N676

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff,	)	CR21-1009
vs.	)	MOTION TO SUPPRESS PHYSICAL EVIDENCE AND STATEMENT
JOHN VAUGHN, Defendant.	)	

COMES NOW the Defendant, by and through his attorney, and moves the Court to suppress and exclude from use against him any and all evidence gained by means of a search of the Defendant's property and any and all statements made by the Defendant to law enforcement conducted by officers of the Drug Enforcement Administration Commercial Interdiction Unit of the Omaha Field Division on or about the 4th day of February, 2021, for the following reasons and each of them:

1. The search of the Defendant's property was made without warrant and without authority.
2. The search of the Defendant's property was made without probable cause and without the consent of the Defendant.
3. The search of the Defendant's person and immediate surroundings was made prior to and not incident to a lawful arrest.
4. The initial detention of the Defendant was not based on a reasonable articulable suspicion, sufficient to justify a "Terry" stop and frisk.
5. Any statements made by the Defendant were subsequent to the unlawful arrest and, therefore, are in violation Defendant's right under Miranda v. Arizona.

WHEREFORE, the Defendant prays that the Court suppress and exclude from use against him any and all evidence obtained as well as obtained in violation of the rights of the Defendant as guaranteed by the Fourth and Fifth Amendments of the Constitution of the United States and Article I of the State of Nebraska.

JOHN VAUGHN, Defendant

By Bekah Keller
Bekah Keller, #26721
Assistant Public Defender
Attorney for Defendant

NOTICE OF HEARING

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that a Motion to Suppress has been filed by the Defendant and said Motion is set for hearing before the District Court at ____ __.M. on the ____ day of _____, 2021, in Courtroom No. 413 before the Honorable Peter C. Bataillon.

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the above and foregoing Motion to Suppress was personally served on Shawn Hagerty, Deputy County Attorney, 100 Hall of Justice, by interoffice mail to his office, this ____ day of April, 2021.

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, vs. JOHN VAUGHN, Defendant.	)	CR 21-1009 **ORDER**

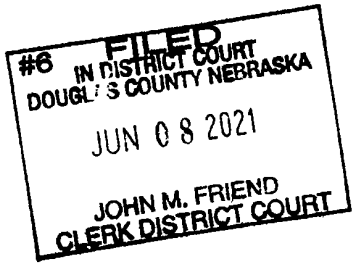
This matter came on for hearing on June 7, 2021, on the Defendant's Motion to Suppress. Defendant appeared with his attorneys Jessica West and Rebekah Keller, and Shawn Hagerty appeared for the State of Nebraska. Evidence adduced, arguments received, and the Court overruled the Defendant's Motion to Suppress. This Court found that the officer involved in this matter had probable cause to search the large bag in question and to question the Defendant in this matter.

As such, the Defendant's Motion to Suppress is hereby overruled.

IT IS SO ORDERED.

Dated this 7TH day of June, 2021.

BY THE COURT:



Hon. Peter C. Bataillon

cc: Shawn Hagerty, Deputy County Attorney

Jessica West and Rebekah Keller, Assistant Public Defenders

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, vs. JOHN VAUGHN, Defendant.	)))))))	CR21-1009 MOTION FOR FINDINGS OF FACT AND LAW

COMES NOW, Bekah Keller, Assistant Public Defender, attorney for John Vaughn, and hereby requests that the Court articulate findings of act and law with respect to its ruling on the Motion to Suppress previously heard in the above-captioned matter, as required by State v. Osborn, 250 Neb. 57 (1996).

DATED this 2nd day of August, 2021

JOHN VAUGHN, Defendant

By Bekah Keller
Bekah Keller, #26721
Assistant Public Defender
Attorney for Defendant

NOTICE OF HEARING

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that a Motion to Suppress has been filed by the Defendant and said Motion is set for hearing before the District Court at 1:15 p.m. on the 11th day of August 2021, in Courtroom No. 413 before the Honorable Peter C. Bataillon.

Bekah Keller

#44 FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
AUG 02 2021
JOHN M. FRIEND
CLERK DISTRICT COURT

002204381D01

(215a)

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the above and foregoing Motion to Suppress was personally served on Shawn Hagerty, Deputy County Attorney, 100 Hall of Justice, by interoffice mail to his office, this 2nd day of August, 2021.

Rebekah Keller

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,)
)
Plaintiff,)
)
vs.)
)
JOHN VAUGHN,)
)
Defendant.)

CR 21-1009

ORDER #6

FILED
IN DISTRICT COURT
DOUGLAS COUNTY NEBRASKA
AUG 11 2021
JOHN M. FRIEND
CLERK DISTRICT COURT

This matter came before this Court on the Defendant's Motion for Findings of Fact and Law. Pursuant to *State v. Osborn*, 250 Neb. 57, 67 547 N.W.2d 139 (1996), "Henceforth, district courts shall articulate in writing or from the bench their general findings when denying or granting a motion to suppress. The degree of specificity required will vary, of course, from case to case."

At the hearing on the Motion to Suppress on June 7, 2021, the Court set forth its specific findings on the record. Attached hereto and made a part hereof are the findings of this Court, which are pages 48 and 49 of the Transcript of the hearing. This Court assumes that these findings should meet the specificity of *State v. Osborn, supra.*

IT IS SO ORDERED.

Dated this 11th day of August, 2021.

BY THE COURT:

Peter C. Bataillon

Hon. Peter C. Bataillon

cc: Shawn Hagerty, Deputy County Attorney,
Jessica West and Rebekah Keller, Assistant Public Defenders

002215823D01

THE COURT: All right. The Court finds that the officer had the ability to smell the bag. Whether there was an identification on the bag or not, the officer can smell the bag. An officer can smell any bag he wants to smell. If he smells the odor of marijuana coming from the zipper as he said, then I believe that there's -- I'm finding that there's probable cause that he could search the bag. Once he searched the bag and found that there was, I believe, 17 pounds of marijuana in the bag, which is raw marijuana, then he inquired as to the attendant there whose bag it was. They indicated that it was the gentleman in compartment 12. He knocked on apartment 12, identified to the defendant who he was, asked if he could speak, and the defendant said he could. The defendant identified the bag, and once that was done then the officer arrested him and that's when he was in custody. There's no reason to give him Miranda rights prior to him being in custody. The Court finds that he was free to leave and the officer was at the side of the door. But because of the close characteristics of an Amtrak, you know, there's certain things you can and you can't do. And then the officer when he searched for probable cause after he arrested Mr. Vaughn found additional marijuana.

The fact that California allows marijuana, the fact that Illinois allows marijuana has absolutely no relevance whatsoever. Nebraska doesn't. The train was in Nebraska. You can't transport marijuana. Obviously, it appeared that they were trying to hide that because it was -- it was vacuum sealed and things of that nature. So they knew they weren't supposed to -- normally you know you're not supposed to have marijuana in Nebraska. So based upon that, the Court hereby overrules the plaintiff's motion -- or the defendant's motion to suppress.

Anything else we need to do today?

MR. HAGERTY: No, sir.

MS. KELLER: No, sir.

THE COURT: Okay. The parties are excused Thanks.

(3:34 p.m. -- Adjournment accordingly.)

CERTIFICATE OF SERVICE

I, the undersigned, certify that on August 12, 2021 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Rebekah S Keller
rebekah.keller@douglascounty-ne.gov

Shawn R Hagerty
shawn.hagerty@douglascounty-ne.gov

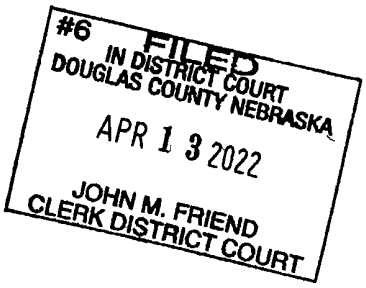
Date: August 12, 2021 BY THE COURT: John M. Friend
CLERK

FOURTH DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

002296142D01

IN THE DISTRICT CO[illegible]EBRASKA

STATE OF NEBRASKA,) CR 21-1009
)
Plaintiff,)
)
vs.) **ORDER**
)
JOHN VAUGHN,)
)
Defendant.)



This matter came on for sentencing on the 11TH day of April, 2022. Defendant was present in Court with counsel, Rebekah Keller and Ted Turnblacer; and Shawn Hagerty appeared for the State. The Defendant was informed of the conviction for the crimes of Count I- Delivery, Distribution, Manufacturing, or Possession with Intent to Distribute Delivery, Dispense, or Manufacture of Marijuana, a Class IIA Felony, and Count III- Failure to Affix Tax Stamp, a Class IV Felony. The Defendant did not object to this matter proceeding to sentence. Thereupon, it was the judgment and sentence of the Court that Defendant be imprisoned in an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of four (4) to six (6) years on Count I, and a fine of $10,000.00 as to Count III. This fine is to be taken from the Defendant's bond. These charges are to run concurrent with each other. No part of this sentence shall be in solitary confinement, and judgment is rendered against the Defendant for the costs of prosecution. Commitment ordered accordingly. Credit for time served time served of 96 days shall be given against this sentence imposed. Mittimus signed. Bond released and exonerated after payment of fine of $10,000.00..

It is further ordered that pursuant to Neb. Rev. Stat. § 29-4106 (Reissue 2008), as amended by L.B. 190, 2010 Nebraska Laws, the defendant shall submit to a DNA test and shall pay to the Nebraska Department of Correctional Services twenty-five dollars ($25.00). Such amount may be taken by the Department of Correctional Services from funds held by the defendant in the

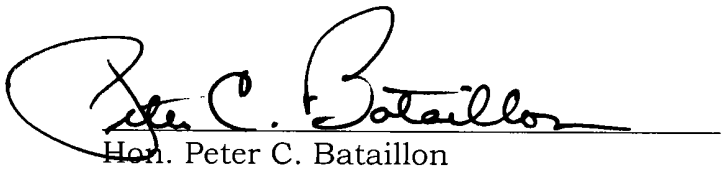
trust account maintained by the Department of Correctional Services on behalf of the Defendant, until the full amount in the order has been remitted.

Pursuant to the Defendant's request for an appeal bond, an appeal bond is set at $20,000.00 cash.

IT IS SO ORDERED.

Dated this 11TH day of April, 2022.

BY THE COURT:



Hon. Peter C. Bataillon

cc: Rebekah Keller, Esq., and Ted Turnblacer, Esq.
Shawn Hagerty, Esq.