

NO. A-18-902

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

DAEJERRON L. VALENTINE,

Appellant.

APPEAL FROM THE DISTRICT COURT

OF DOUGLAS COUNTY, NEBRASKA

Duane C. Daugherty, District Judge

BRIEF OF APPELLEE

DOUGLAS J. PETERSON, #18146
Attorney General

Nathan A. Liss, #23730
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682
nathan.liss@nebraska.gov

Attorneys for Appellee.

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STATEMENT OF THE CASE

A. Nature of the case

Valentine appeals from his convictions for possession of a firearm by a prohibited person – second offense, a Class IB felony, and possession of marijuana (under an ounce), an infraction. He was found guilty of the offenses after a series of pretrial hearings, including two suppression hearings, followed by a jury trial. This is a direct appeal. This Court has jurisdiction.

B. Issues before the district court

For purposes of this appeal, the three issues below were:

1. Whether to grant or deny Valentine's motions to suppress, which alleged that the stop and subsequent search of Valentine's vehicle was unlawful;
2. Whether to grant or deny Valentine's motion to quash, which alleged that he was charged under the incorrect version of § 28-1206; and
3. Whether to grant or deny Valentine's proposed jury instructions.

C. How the issues were decided in the district court

The district court resolved all three of the issues against Valentine. Additional details are set forth below.

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. Petsch*, 300 Neb. 401 (2018). Regarding historical facts, an appellate court reviews the trial court's findings for clear error, but

whether those facts trigger or violate Fourth Amendment protection is a question of law that an appellate court reviews independently of the trial court's determination. *Id.* The ultimate determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search are reviewed de novo, and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *Id.*

Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court. *State v. Phillips*, 302 Neb. 686 (2019).

Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Mann*, 302 Neb. 804 (2019).

PROPOSITIONS OF LAW

I.

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 (2018). 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.*

II.

A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Jasa*, 297 Neb. 822 (2017). In reviewing a challenge to the legality of an automobile stop, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation; instead, a stop of a vehicle is objectively reasonable when the police officer has probable cause to believe that a traffic violation has occurred. *Id.*; *State v. Sanders*, 289 Neb. 335 (2014); *State v. Prescott*, 280 Neb. 96 (2010). If an officer has probable cause to stop a violator, the stop is objectively reasonable and any ulterior motivation is irrelevant. *State v. Sanders, supra*.

III.

Under the “automobile exception” to the 4th Amendment, the warrantless search of is lawful if 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. See *State v. Seckinger*, 301 Neb. 963 (2018). Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *Id.* Probable cause, as the name implies, is based on probabilities. *Id.* It “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *Id.* Thus, to find probable cause, officers are not required to rule out all innocent explanations for suspicious facts. *Id.*

IV.

The smell of marijuana, standing alone, provides probable cause to search a vehicle. See *State v. Seckinger*, 301 Neb. 963 (2018).

V.

Penal statutes are considered in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Carman*, 292 Neb. 207, 210 (2015). An appellate court will try to avoid, when possible, a statutory construction which would lead to an absurd result. *Id.*

VI.

An appellate court can examine an act's legislative history if a statute is ambiguous or requires interpretation. *State v. McColery*, 301 Neb. 516 (2018).

VII.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Parnell*, 294 Neb. 551 (2016). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately

cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *Id.*

VIII.

In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. *State v. Swindle*, 300 Neb. 734 (2018).

Although the law does not require that a jury instruction track the exact language of the statute, using the specific language of a statute is an effective means of implementing the intent of the Legislature. *Id.* This practice provides the added benefits of easing the process of preparing jury instructions and creating certainty for trial courts that the jury has been provided the essential elements of an offense. *Id.*

STATEMENT OF FACTS

Introduction

This case arises out of a traffic stop in Omaha, which led to the search of Valentine's vehicle and the discovery of approximately an ounce of marijuana, items of contraband, and a firearm. Valentine was ultimately charged with possession of a firearm by a prohibited person – second offense, a Class IB felony, and possession of a firearm while in possession of a controlled substance with intent to deliver, a Class II felony. Valentine filed several pretrial motions, which were denied, and then a jury trial ensued and he was found guilty of possession of a firearm by a prohibited person and possession of marijuana (less than an ounce). The evidence adduced at the suppression hearings and trial was as follows.

1st Suppression Hearing

Valentine's first motion to suppress alleged that any and all evidence obtained in this case should be suppressed because the traffic stop was unlawful, and thus, any evidence obtained as a result of the traffic stop was fruit of the poisonous tree and should be excluded under the 4th and 14th Amendments of the U.S. Constitution and the corresponding provisions of the Nebraska Constitution. (T29)

The evidence adduced at the first suppression hearing established that on October 12, 2017, at about 10:51 p.m., Detectives Dempsey and Ramsay of the Omaha Police Department (OPD) were patrolling north Omaha when they saw a white Dodge Avenger with windows that appeared to be too dark in violation of our state law on tint levels. (8:21-18:25) Detective Dempsey testified that, by law, the rear windows of a vehicle must allow for at least 20% light transmission and the front windows must allow for at least 35% light transmission, which, he explained, is enough light that you can typically see into a vehicle to some extent and "you can almost see somebody in the vehicle." (*Id.*) He testified that the white Avenger in question had front and rear windows that were all the same color and "we could not see anybody inside the vehicle." (*Id.*) Shortly after that, however, he was asked, "Now, at that time, because of the tinted windows, were able to see if there was more than one person in the car," to which he said, "Yes." (13:17-20)

The detectives made a traffic stop based on the apparent tint violation and made contact with the appellant, Daejerron Valentine, who was the sole occupant in the vehicle. (8:21-18:25) The detectives smelled an odor of both burnt and fresh marijuana coming from Valentine's vehicle during the traffic stop and when they asked him about the smell, Valentine said that his friends had been smoking marijuana but denied that he had smoked any or that there was any in the vehicle. (*Id.*) The detectives had Valentine get out of his vehicle and did a pat down of him, finding nothing on his person, and then they searched the vehicle. (*Id.*) The stop and search of the vehicle were captured by Detective Dempsey's body cam as well as his cruiser camera, copies of which were introduced into evidence. (*Id.*; E1-2)

During the search of the vehicle, the detectives found two bags of what appeared to be marijuana, which were in the center console, and then they also found a digital scale with marijuana residue on it, plastic baggies, and \$240 cash in the vehicle. (8:21-18:25) They also found a handgun in the window control panel of the front passenger door. (*Id.*)

The detectives also measured the tint level on Valentine's vehicle during the traffic stop. (19:1-28:18) Detective Dempsey testified that OPD officers have tint meters in their cruisers, which they test before each shift on a piece of glass with a predetermined tint level to ensure that the meter is working accurately. (*Id.*) They used a tint meter to measure the tint on Valentine's vehicle and determined that the front window had a tint level of 19.1%, which is less than the 35% tint level required by law for front windows. (*Id.*)

The district court took the matter under advisement and denied Valentine's motion to suppress via a 4-page written order. (T32-35) The district court found, in summary, that the stop of Valentine's vehicle was justified and lawful based on the apparent tint violation and the subsequent search of the vehicle was justified and lawful based on the odor of marijuana coming from the vehicle during the traffic stop. (*Id.*)

2nd Suppression Hearing

After the first suppression hearing, Valentine obtained new counsel and filed a Motion to Reconsider the court's ruling on his prior motion to suppress and also filed another motion to suppress entitled "Motion to Suppress Statement." (T53-56) The Motion to Reconsider alleged that a new suppression hearing was warranted because Valentine's prior counsel failed to raise appropriate legal arguments in support of the motion and also failed to adduce relevant evidence. (T55-56) The Motion to Reconsider contained three exhibits, including a transcript of the prior suppression hearing (Exhibit A), a DMV report showing that the vehicle Valentine was driving on the night in question belonged to Lisa Valentine (Exhibit B), and photographs of the street where Valentine's vehicle was stopped and searched (Exhibit C). (TT57-95) The "Motion to Suppress Statements" alleged that any and all statements he made during his contact with law enforcement on the night in question should all be suppressed because they were obtained in violation of his 5th, 6th and 14th Amendment rights. (T53-54)

The district court held a hearing on both motions and Valentine was allowed to reopen the evidence, with no objection from the State. (52:3-89:8) The evidence adduced consisted primarily of additional testimony from Detective Dempsey, who testified at the prior suppression hearing. (*Id.*) Detective Dempsey's testimony was generally consistent and overlapped with his testimony from the first suppression hearing with respect to the stop and search of Valentine's vehicle. (*Id.*) He also testified about the statements Valentine made after he was taken into custody and the circumstances surrounding those statements. (*Id.*)

Based on the evidence at the second hearing, the defense argued that suppression was warranted for three reasons. First, it argued that any and all evidence and statements obtained as a result of the stop should be suppressed because the record shows that the officers could adequately see into Valentine's vehicle prior to the traffic stop, which negated the alleged basis for the traffic stop. (89:9-93:22) Second, the defense argued that even if the stop was lawful, the search should have ended once the officers found the two baggies of marijuana in the center console because there was no reason to continue searching after that, so any evidence obtained after that point should be suppressed. (*Id.*) And third, the defense argued that any statements Valentine made during his encounter with police should be suppressed because his statements were involuntary and unlawfully obtained in violation of *Miranda* and *Missouri v. Seibert*, 542 U.S. 600 (2004). (*Id.*)

The State disagreed with respect to the validity of the stop and search, arguing that they were both valid for the reasons set forth by the court in its denial of the prior suppression motion. (93:23-97:14) The State also disagreed that the search had to end once marijuana was found, arguing that the officers would have been derelict to end their search at that point and not search the vehicle further. (*Id.*) As far as Valentine's statements, the State argued that any statements made during the traffic stop should be fair game and admissible, but agreed not to admit or use any statements that he made after his arrest and prior to being *Mirandized*. (*Id.*)

The district court took the matter under advisement and partially granted but partially denied Valentine's motions. (T105-107) The district court agreed with the defense that Valentine's post-arrest statements during his interview at the police station were unconstitutionally obtained and therefore inadmissible. (*Id.*) Other than that, though, the district court denied the remainder of the motions to suppress and incorporated its prior findings and conclusions. (*Id.*)

Jury Trial

The evidence at trial, which again included Deputy Dempsey's testimony, was consistent and overlapped with the evidence from the suppression hearings about the stop and search of Valentine's vehicle and the evidence found in his vehicle. (295:17-336:23) Deputy Dempsey also expanded on his testimony and provided further details about the marijuana and the firearm found in the vehicle. As far as the marijuana, which consisted of about 28 grams, he testified that it

was consistent with distribution given the quantity and the fact that they also found a digital scale, baggies, and cash in the vehicle, which, considered together, is indicative of distribution. (*Id.*) As far as the firearm, which had 10 live rounds in the magazine, he testified that they ran the serial number and found that it was unregistered but had not been reported stolen. (*Id.*; 385:23-405:4)

After the firearm was seized and placed into evidence, it was sent to OPD's crime lab where it was examined by forensic technicians and determined to be operational and functioning properly. (385:23-405:4; 492:23-497:3) A DNA swab was also obtained from the firearm, which was sent to the UNMC DNA Lab for analysis, and it was determined that the swab contained a mixture of two contributors: a minor contributor and a major contributor. (413:23-447:23) The DNA profile of the major contributor matched the DNA profile of Valentine, with odds being 1 in 26.8 septillion that someone else was the major contributor. (*Id.*) The parties also stipulated that on October 12, 2107, the date of the alleged offenses, Valentine had previously been convicted of a felony. (500:1-501:17)

The two bags of marijuana seized from Valentine's vehicle were also sent to UNMC, where they were weighed and tested in the chemistry lab. (483:12-492:15) The two bags had a combined weight of 28.9 grams, including the baggies, which is just over an ounce (28.35 grams). (*Id.*) The substances in both bags tested positive for THC. (*Id.*)

The jury found Valentine guilty of possession of a firearm by a prohibited person and possession of marijuana (less than an ounce). (578:18-579:5) An enhancement hearing was held and the State introduced a copy of Valentine's prior conviction for felon in possession of a firearm, which was received without objection, and the district court enhanced the current charge to a second offense. (586:21-588:4; E45) Valentine was sentenced to 20 to 20 years' imprisonment for the firearm conviction and a \$300 fine for the marijuana conviction. (589:14-591:6)

This appeal followed.

ARGUMENT

Assignment of Error 1: Denial of Valentine's motions to suppress

Valentine claims the district court erred by denying his motions to suppress. He claims that his motions to suppress should have been granted because the traffic stop *and* the continued search after the officers found the two bags of marijuana in his car were both unlawful. Appellant's Brief at 4, 13-20. The State disagrees. The traffic stop and the entire search were both lawful.

A. Validity of the traffic stop

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 (2018). 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.* 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.*

A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Jasa*, 297 Neb. 822 (2017). In reviewing a challenge to the legality of an automobile stop, the question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation; instead, a stop of a vehicle is objectively reasonable when the police officer has probable cause to believe that a traffic violation has occurred. *Id.*; *State v. Sanders*, 289 Neb. 335 (2014); *State v. Prescott*, 280 Neb. 96 (2010). If an officer has probable cause to stop a violator, the stop is objectively reasonable and any ulterior motivation is irrelevant. *State v. Sanders, supra.*

Here, Detective Dempsey testified that the windows on Valentine's vehicle appeared to be too dark in violation of our vehicle tinting laws. Section § 60-6,257, which governs tinting and sunscreening of vehicle windows, provides as follows:

It shall be unlawful for a person to drive a motor vehicle required to be registered in this state upon a highway:

(a) If the windows in such motor vehicle are tinted so that the driver's clear view through the windshield or side or rear windows is reduced or the ability to see into the motor vehicle is substantially impaired;

- (b) If the windshield has any sunscreening material that is not clear and transparent below the AS-1 line or if it has a sunscreening material that is red, yellow, or amber in color above the AS-1 line;
- (c) If the front side windows have any sunscreening or other transparent material that has a luminous reflectance of more than thirty-five percent or has light transmission of less than thirty-five percent;
- (d) If the rear window or side windows behind the front seat have sunscreening or other transparent material that has a luminous reflectance of more than thirty-five percent or has light transmission of less than twenty percent except for the rear window or side windows behind the front seat on a multipurpose vehicle, van, or bus; or
- (e) If the windows of a camper, motor home, pickup cover, slide-in camper, or other motor vehicle do not meet the standards for safety glazing material specified by federal law in 49 C.F.R. 571.205.

Neb. Rev. Stat. § 60-6,257(1) (Reissue 2010).

Detective Dempsey testified that when the front windows of a vehicle are properly tinted to allow for at least 35% light transmission, as the law requires, “you can almost see somebody in the vehicle.” (8:21-18:25) He testified that in this case he and his partner “could not see anybody inside [Valentine’s] vehicle.” (*Id.*) This alone, if true, provided a valid basis a traffic stop under § 60-6,257(1)(a), which prohibits vehicle windows being tinted to the point that it reduces the driver’s view “or the ability to see into the motor vehicle is substantially impaired.”

Valentine argues that there was no basis for a stop under subsection (1)(a) because Detective Dempsey acknowledged later during his testimony that he was able to see there was only one passenger in the vehicle. Appellant's Brief at 16-17. The State questions whether this is actually what he said, though, or at least whether this is what he meant. As noted above in the Statement of Facts, after indicating that they were not able to see anyone inside Valentine's vehicle, Dempsey was asked, "Now, at that time, because of the tinted windows, were able to see *if* there was more than one person in the car," to which he said, "Yes." (12:22-13:20) (Emphasis added). This question and response occurred during the State's direct examination of Dempsey, just six questions after Dempsey said they could not see anyone inside the vehicle, and there was no elaboration on the question or the response. So there is some question as to whether he understood the question. Especially when he again indicated during the second suppression hearing that he did not recall being able to see how many occupants were inside the vehicle. (67:18-68:9)

Either way, though, aside from this purported conflict in the evidence, Dempsey also explained that the windows on Valentine's vehicle appeared to be improperly tinted because the front and rear windows were the same color. (11:23-12:25) This provided an independent basis to believe that there was a potential violation of § 60-6,257(1)(c) and (d), which require that the rear windows of a vehicle have tint that allows at least 20% transparency and front windows that allow at least 35% transparency. So, regardless of whether the officers could

or could not see into the vehicle, there was still a valid basis for a traffic stop to investigate the apparent violation of § 60-6,257. And, of course, the officers subsequently used a tint meter and found that the front windows of Valentine's vehicle had a tint level of 19.1%, which confirmed the violation of § 60-6,257. (19:1-28:18) So there was a valid basis for the traffic stop here.

Valentine claims the traffic stop was unlawful because the officers did not have an "objective standard" to evaluate whether his window tint was too dark. He claims that some type of "objective standard" must be utilized for traffic stops of this nature to be lawful, pointing to *State v. Childs*, 242 Neb. 426 (1993) and *State v. Draganescu*, 276 Neb. 448 (2008). See Appellant's Brief at 15-16. But *Childs* and *Draganescu* impose no such requirement. *Childs* and *Draganescu* merely reiterated and applied the well-established principle that for a traffic stop to be valid under the 4th Amendment, there must be an objective and reasonable basis to believe a traffic violation has occurred. In other words, as *Childs* explains, traffic stops "cannot be based only on a police officer's desire to verify compliance with motor vehicle registration statutes," because this would subject motorists to random and roving stops at the "unfettered discretion of officers in the field." See *State v. Childs, supra*, 242 Neb. at 433-436.

Childs and *Draganescu* do not say that officers must utilize a particularized standard to identify and confirm the existence of a traffic violation before a traffic stop may occur. To the contrary, in fact, *Draganescu* and other cases explain that in determining whether a traffic stop is valid under the 4th Amendment, the State

is not required to prove or corroborate an underlying traffic violation that served as a basis for the traffic stop. See *State v. Draganescu, supra*, 276 Neb. at 101; *State v. Prescott, supra*, 280 Neb. at 101-102. Indeed, this Court itself recently upheld a traffic stop based on uncorroborated testimony from an officer that, among other observations, the defendant's vehicle had "very dark tint on the driver's side windows, which [the officer] believed to be an equipment violation." See *State v. Cook*, No. A-15-1039, 2017 WL 2438531 (Neb. Ct. App. 2017), *review denied* (July 10, 2017). So, contrary to Valentine's assertion, a particularized "objective standard" is not required for a traffic stop to be valid.

In any event, though, the officers in this case did utilize objective standards in determining that the window tint on Valentine's vehicle appeared to be too dark. Detective Dempsey testified that they had trouble seeing into Valentine's vehicle, which is usually not a problem if the windows are tinted at the appropriate level, and he also noted that the front and rear windows were the same color, which, as discussed above, provided a basis to believe there was a potential violation of § 60-6,257(1)(c) and (d), which require that the rear windows of a vehicle have tint that allows at least 20% transparency and front windows that allow at least 35% transparency. So objective standards were utilized here.

The stop of Valentine's vehicle was lawful. This claim is without merit.

B. Validity of the search of Valentine's vehicle

Under the "automobile exception" to the 4th Amendment, the warrantless search of is lawful if 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. See *State v. Seckinger*, 301 Neb. 963 (2018). Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances. *Id.* Probable cause, as the name implies, is based on probabilities. *Id.* It “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *Id.* Thus, to find probable cause, officers are not required to rule out all innocent explanations for suspicious facts. *Id.*

In this case, the officers smelled an odor of marijuana coming from Valentine’s vehicle as they spoke with him during the traffic stop. (8:21-18:25) Detective Dempsey, who is a detective with OPD’s Gang Suppression Unit and is familiar with the smell of marijuana, testified that Valentine’s vehicle had an odor of both burnt and fresh marijuana. (*Id.*) This alone provided probable cause to search the vehicle. Indeed, our appellate courts have repeatedly held that the smell of marijuana, standing alone, provides probable cause to search a vehicle. See *State v. Seckinger*, *supra*; *State v. Watts*, 209 Neb. 371 (1981); *State v. Ruzicka*, 202 Neb. 257 (1979); *State v. Daly*, 202 Neb. 217 (1979); *State v. Benson*, 198 Neb. 14 (1977); *State v. Reha*, 12 Neb. App. 767 (2004).

Valentine argues, as he did below, that the search of his vehicle had to terminate once the officers found the two bags of marijuana in the center console because there was no basis to believe more marijuana would be found elsewhere in his vehicle. See Appellant’s Brief at 17-20. This argument is a nonstarter. The Nebraska Supreme Court rejected this same argument in *State v. Watts*,

supra and *State v. Ruzicka, supra*, and it recently reiterated and reaffirmed the rationale from those decisions in *State v. Seckinger, supra*. Valentine does not acknowledge or address *Seckinger, Watt*, or *Ruzicka*.

The search of Valentine's vehicle was lawful. This claim is without merit.

Assignment of Error 2: Due process claim

Valentine also claims that his conviction for possession of a firearm by a prohibited person is invalid because the version of the offense that is currently in effect, which is what he was found guilty of in this case, was not the version of the offense that was in effect on the date of his offense. So, according to Valentine, his conviction constitutes a due process violation. Appellant's Brief at 4, 20-25. The State disagrees. We will set forth the relevant facts and then our analysis.

Relevant Facts

Valentine was charged with violating § 28-1206, which currently provides as follows:

A person commits the offense of possession of a deadly weapon by a prohibited person if he or she:

(a) Possesses a firearm, a knife, or brass or iron knuckles and he or she:

(i) Has previously been convicted of a felony;

(ii) Is a fugitive from justice; **or**

(iii) Is the subject of a current and validly issued domestic violence protection order, harassment protection order, or sexual assault protection order and is knowingly violating such order; or

(b) Possesses a firearm or brass or iron knuckles and he or she has been convicted within the past seven years of a misdemeanor crime of domestic violence.

Neb. Rev. Stat. § 28-1206(1) (Reissue 2016) (emphasis added). The State's Amended Information incorporated the current version of § 28-1206, including the "or" language used in subsection (1)(a)(ii). (T109-110)

Prior to trial, Valentine filed a motion to quash alleging that his charge for violating § 28-1206 did not comport with the statute in effect at the time of his offense. (T48) The district court held a hearing on the motion and the defense noted that § 28-1206 changed in May 2017 and the "or" in subsection (1)(a)(ii) was removed. (32:1-48:11) The defense acknowledged that the statute was promptly amended and the "or" language was reinserted in July 2018, but noted that the version of the statute with the "or" language removed was in effect at the time of his offense, which occurred in October 2017. (*Id.*) So, according to the defense, the version of the statute without the "or" was controlling and the State should have to prove that all three of the conditions in subsection (1)(a) were present in order to prove Valentine guilty. (*Id.*) In other words, according to the defense, the temporary omission of "or" had to be read as an "and" for that period of time. (*Id.*)

The State disagreed and argued that the legislature never intended to remove the "or" language from the statute. (32:1-48:11) In support of its position, the State offered copies of the legislative history for LB478 and LB848, which led

to the respective changes in May 2017 and July 2018. (*Id.*; E4-8) The exhibits containing the legislative history were received over Valentine's objection. (*Id.*)

The district court took the matter under advisement and denied Valentine's motion to quash. (T96-102) The district court found that § 28-1206 is ambiguous given the confusion surrounding the removal and reinsertion of the "or" language, so it examined the legislative history and noted that the Committee Statement for LB848, which reinserted the "or" language in 2018, provides that "LB 848 simply adds the word 'or' to clean up an error made in drafting statutory changes to Neb. Rev. Stat. 28-1206." (*Id.*; E8) So, the district court concluded, Valentine was appropriately charged under § 28-1206 and it denied the motion to quash. (*Id.*)

At the conclusion of trial, during the jury instruction conference, Valentine objected to the district court's instruction on the elements of § 28-1206 and tendered a proposed instruction, Proposed Instruction #3, which aligned with his interpretation of § 28-1206 at the time of his offense. (511:5-513:8; T141-142) The district court denied the proposed instruction and instructed the jury as follows:

The elements of the crime of Possession of a Deadly Weapon (Firearm) by a Prohibited Person, as charged in Count 2 of the Information, are:

1. That the Defendant did possess a deadly weapon to specifically: a firearm; and
2. That the Defendant did so on or about October 12, 2017 in Douglas County, Nebraska; and
3. That the Defendant had previously been convicted of a felony.

(T124)

Analysis

Valentine maintains that the previous version of § 28-1206 without the “or” language in subsection (1)(a) was controlling for purposes of his case, so the State should have had to prove that all three of the conditions in subsection (1)(a) were present in order for Valentine to be found guilty. Appellant’s Brief at 4, 20-25. The State disagrees.

Penal statutes are considered in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *State v. Carman*, 292 Neb. 207, 210 (2015). A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose. *Id.* An appellate court will try to avoid, when possible, a statutory construction which would lead to an absurd result. *Id.*

Here, it is apparent that the removal of the word “or” from subsection (1)(a) in 2017 was inadvertent. The omission was temporary, lasting only about a year, and the versions of § 28-1206 in effect both before and after this time period included the “or” language. So it’s clear that the 2017 omission was just a mistake. It would lead to an absurd result to conclude otherwise. Especially since very few, if any, individuals would ever meet all three criteria under subsection (1)(a). Therefore, the State agrees with the district court’s conclusion that the “or” language remained in the statute. See *State v. Daniels*, 190 Neb. 602, 604 (1973)

(explaining that a court may “supply [an] inadvertent omission” in a statute). Cf. *State v. Wester*, 269 Neb. 295, 299 (2005) (“The laxity in the use of the conjunctive “and” and the disjunctive “or” is so frequent that the doctrine has been accepted that they are interchangeable and that one may be substituted for the other if to do so is necessary to give effect to any part of a statute or to effectuate the intention of the Legislature.”).

Moreover, as the district court noted, even if the Legislature’s intent could not be discerned from the face of the statute, the legislature history shores up any confusion and clearly shows that the legislature never intended to remove the “or” from subsection (1)(a). This is precisely why the legislature amended § 28-1206 again in 2018 and reinserted the “or” language. The Committee Statement and the Introducer’s Statement of Intent for LB 848, the 2018 bill, make this clear. (E7, E8) So even if there is any ambiguity here, the legislative history confirms that Valentine was charged and prosecuted under the correct version of § 28-1206. See *State v. McColery*, 301 Neb. 516 (2018) (An appellate court can examine an act’s legislative history if a statute is ambiguous or requires interpretation.).

Valentine claims that the legislature’s removal of the “or” from § 28-1206 back in 2017 must be taken purely at face value, which, taken solely on its face, shows that the legislature intended this omission. In support of this assertion, Valentine points to an estate case, *In re Estate of Psota*, 297 Neb. 570 (2017), which juxtaposed two estate statutes and concluded that the absence of the word “or” in the applicable statute was significant and was “plainly omitted” by the

legislature, so the court declined to look further into the meaning of the applicable statute. But the two statutes at issue in *Psota* were enacted in the same bill, which is why the court presumed that the legislature was aware of and intended the use of the word “or” in the one statute but not the other. See *id.* at 576-577. *Psota* is clearly distinguishable and inapplicable to the situation at hand.

Valentine was properly charged and convicted under § 28-1206. There was no due process violation here. The second assignment of error is without merit.

Assignment of Error 3: Validity of the jury instructions

Valentine also claims the district court erred by failing to properly instruct the jury. He claims that the court erred by denying his Proposed Instruction # 3 and by denying his proposed changes to Instruction #6 and Instruction #9. Appellant’s Brief at 4, 25-29. The State disagrees. All three of his proposed instructions or proposed changes were properly denied.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Parnell*, 294 Neb. 551 (2016). All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error necessitating reversal. *Id.*

A. Denial of Valentine's Proposed Instruction #3

Valentine's Proposed Instruction #3 pertained to the elements of the offense of possession of a firearm by a prohibited person. His proposed instruction, which aligns with his prior assertion above about the applicable version of § 28-1206, would have instructed the jury as follows:

On or about October 12, 2017, in Douglas County, Nebraska, Daejerron Valentine did then and there possess a deadly weapon, specifically: a firearm, and has previously been convicted of a felony, and is a fugitive from justice, and is the subject of a current and validly issued domestic violence protection order and is knowingly violating such order, or has been convicted within the past seven years of a misdemeanor crime of domestic violence.

(T141-142) (Emphasis added).

Valentine maintains that this instruction correctly set forth the elements of § 28-1206 as the offense existed at the time of his offense, for the reasons set forth above in his previous assignment of error. See Appellant's Brief at 25-29. The State disagrees, for the reasons set forth in our response to the previous assignment of error. Proposed Instruction #3 was not an accurate recitation of the elements of § 28-1206, so it was properly denied. This claim is without merit.

B. Denial of Valentine's proposed change to Instruction #6

Instruction #6, which was given in this case, set forth the elements of possession of a firearm by a prohibited person. It instructed the jury as follows:

The elements of the crime of Possession of a Deadly Weapon (Firearm) by a Prohibited Person, as charged in Count 2 of the Information, are:

1. That the Defendant did possess a deadly weapon to specifically: a firearm; and
2. That the Defendant did so on or about October 12, 2017 in Douglas County, Nebraska; and
3. That the Defendant had previously been convicted of a felony.

(T124)

In conjunction with Instruction #6, the district court also gave a separate instruction which instructed the jury that “[i]ntent is an element of the crimes charged in the Information.” (T126) It also gave another separate instruction, Instruction #9, which provided the following definitions:

“Knowingly” means with knowledge or perception of facts requisite to make up the crime.

“Intentionally” means with a purpose, as distinguished from accidentally.

“Possession” means either knowingly having it on one’s person or knowing of the object’s presence and having control over the object.

(T127)

Valentine argues, as he did below, that Instruction #6 should have required the jury to find that he “knowingly and intentionally” possessed a firearm, not just that he possessed a firearm. (513:18-514:21) He claims that this language should have been included in Instruction #6 because it was a correct statement of the law

and it would have been consistent with the intent element of the drug charge in Count I, which required the jury to find that he “knowingly and intentionally” possessed a firearm while violating § 28-416. (T121-123) So, according to Valentine, the intent element for both charges should have required that he “knowingly and intentionally” possessed a firearm. Appellant’s Brief at 26-27. The State disagrees.

In giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. *State v. Swindle*, 300 Neb. 734 (2018). Although the law does not require that a jury instruction track the exact language of the statute, using the specific language of a statute is an effective means of implementing the intent of the Legislature. *Id.* This practice provides the added benefits of easing the process of preparing jury instructions and creating certainty for trial courts that the jury has been provided the essential elements of an offense. *Id.*; see also *State v. Armagost*, 291 Neb. 117 (2015) (concluding that the Court of Appeals erred by looking beyond the language of the applicable statute in adding an additional element to the offense).

In this case, the district court’s instructions directly incorporated the statutory elements for each of the charged offenses. (T121-123) The elements instruction for the offense of possession with intent to distribute marijuana while in possession of a firearm, as well as the applicable lesser-included offenses, directly tracked the language used in § 28-416(16), (11) and (1). And the elements instruction for the offense of possession of a firearm by a prohibited person directly

tracked the language used in § 28-1206. So the court's instructions were proper. Valentine has failed to show otherwise. See *State v. Armagost, supra*. Therefore, this claim is without merit.

C. Denial of Valentine's proposed change to Instruction #9

Valentine also claims that Instruction 9 was improper because it contained an incorrect definition of "possession," which was defined as follows:

"Possession" means either knowingly having it on one's person or knowing of the object's presence and having control over the object.

(T127)

Valentine argues, as he did below, that this was an incomplete and insufficient definition of "possession." He claims that the jury should have also been instructed that "proximity standing alone is insufficient to prove possession." Appellant's Brief at 27-28. This claim is without merit.

The definition of "possession" in Instruction #9 is consistent with the definition in NJI2d Crim. 4.2, as well as our case law interpreting the meaning of "possession." Just recently, in fact, in *State v. Castellanos*, 26 Neb. App. 310 (2018), *review denied* (Dec. 7, 2018), which also involved a conviction for possession of a firearm by a prohibited person, this Court upheld the use of this same definition of "possession." This Court held in *Castellanos* that the definition of "possession" used by the trial court, which was based on NJI2d Crim. 4.2, was a proper instruction because "[w]henver an applicable instruction may be taken from the Nebraska Jury Instructions, that instruction is the one which should

usually be given to the jury in a criminal case.” See *id.* at 326-327. This Court’s decision in *Castellanos* also rejected the appellant’s assertion that the trial court should have given his proposed instructions on the meaning of “possession,” one of which provided that “[a]ssuming an item is not found on the defendant’s person, the defendant’s proximity to the item, standing alone, is insufficient to prove ‘possession.’” *Castellanos* held that this proposed instruction was properly denied because the instruction given by the trial court was an accurate statement of the law and sufficiently instructed the jury on the issue when read with the other instructions. See *id.*; see also *State v. Milton*, No. A-16-289, 2017 WL 582715 (Neb. Ct. App. 2017).

Castellanos is directly on point here. Valentine does not acknowledge or address this Court’s holding in *Castellanos*. Therefore, he has failed to show that Instruction #9 was incorrect. This claim is without merit.

CONCLUSION

The State requests that this Court affirm the judgment of the district court.

STATE OF NEBRASKA, Appellee,

BY DOUGLAS J. PETERSON, #18146
Attorney General

BY **s/Nathan A. Liss**
Bar Number: 23730
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682

Attorneys for Appellee.