

NO. A-15-668

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

GREGORY S. DUNCAN,

Appellant.

FILED

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COURT OF APPEALS

APPEAL FROM THE DISTRICT COURT

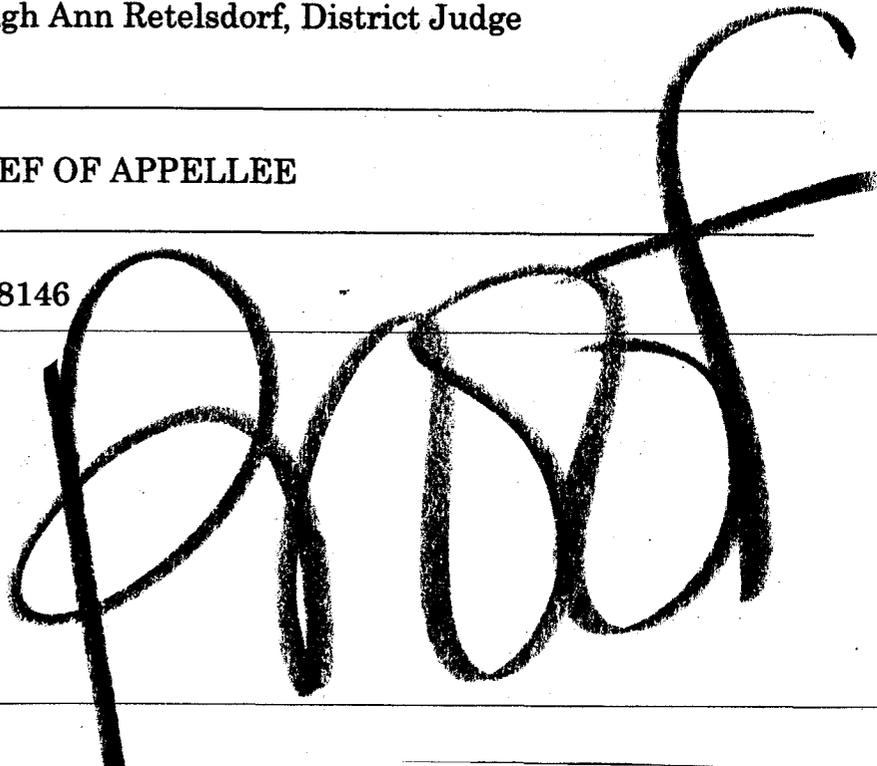
OF DOUGLAS COUNTY, NEBRASKA

The Honorable Leigh Ann Retelsdorf, District Judge

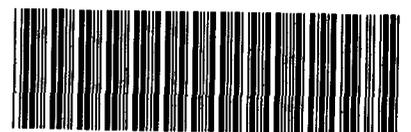
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TABLE OF CONTENTS

STATEMENT OF THE CASE.....	1
PROPOSITIONS OF LAW.....	2
STATEMENT OF FACTS.....	5
ARGUMENT.....	12
Assignments of Error 1 through 3: Denial of directed verdict.....	12
Assignment of Error 4: Denial of proposed jury instruction.....	16
Assignment of Error 5: Ineffective assistance of counsel claims.....	20
A. The inquiry about Ryan’s picture being “morphed”.....	21
B. The “sex on the sidewalk” theory.....	22
C. The “gay agenda” theory.....	23
Assignment of Error 6: Excessive sentence claim.....	24
CONCLUSION.....	25
PROOF OF SERVICE.....	26

TABLE OF AUTHORITIES

CASES CITED:

Flanagin v. DePriest, 182 Neb. 776 (1968) 19

Omaha Nat. Bank v. Manufacturers Life Ins. Co., 213 Neb. 873 (1983) 19

Otte v. Taylor, 180 Neb. 795 (1966) 19

State v. Abdullah, 289 Neb. 123..... 2

State v. Armagost, 291 Neb. 117 (2015)..... 4, 18, 19

State v. Bundy, 1994 WL 595193 (1994).....19

State v. Custer, 292 Neb. 88 (2015).....2

State v. Davis, 290 Neb. 826 (2015).....1

State v. Davlin, 272 Neb. 139 (2006)19

State v. Dominguez, 290 Neb. 477 (2015).....3, 17

State v. Frazier, 2001 WL 379025 (2001)19

State v. Jungclaus, 176 Neb. 641 (1964)19

State v. Kudlacz, 288 Neb. 656 (2014).....19

State v. Kunath,248 Neb. 1010 (1995).....15

State v. Neal, 187 Neb. 413 (1971).....19

State v. Nguth, 13 Neb. App. 783 (2005)3, 15

State v. Ortega, 290 Neb. 172 (2015)2

State v. Rivera, 14 Neb. App. 590 (2006).....25

State v. Sanders, 269 Neb. 895 (2005).....19

State v. Seberger, 284 Neb. 40 (2012)2, 12

State v. Sexton, 240 Neb. 466 (1992)3, 15

State v. Sikes, 286 Neb. 38 (2013).....5, 24

State v. Sing, 275 Neb. 391 (2008).....2, 3, 15

State v. Stricklin, 290 Neb. 542 (2015).....2

State v. Vanderpool, 286 Neb. 111 (2013).....4, 21

State v. Watt, 285 Neb. 647 (2013).....4, 17

STATUTES CITED:

Neb. Rev. Stat. § 28-111.....12, 14, 16, 18, 20, 23, 24

Neb. Rev. Stat. § 28-310.....12, 13, 14, 23, 24

STATEMENT OF THE CASE

A. Nature of the case

Duncan is appealing from his conviction for third degree assault, discrimination based, a Class IV felony. He was found guilty after a jury trial. This is a direct appeal.

B. Issues before the district court

For purposes of this appeal, the issues before the district court were: (1) whether the evidence was sufficient to accept the jury's guilty verdict, (2) whether to give Duncan's proposed instruction on the definition of "sexual orientation," and (3) the determination of an appropriate sentence.

C. How the issues were decided in the district court

The district court declined to give Duncan's proposed jury instruction; accepted the jury's guilty verdict; and sentenced Duncan to a period of 12 to 18 months' imprisonment.

D. Scope of review

In reviewing a claim that the evidence was insufficient to support a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Davis*, 290 Neb. 826 (2015).

Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Stricklin*, 290 Neb. 542 (2015).

Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Ortega*, 290 Neb. 172 (2015). Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Abdullah*, 289 Neb. 123

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Custer*, 292 Neb. 88 (2015).

PROPOSITIONS OF LAW

1.

In a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. *State v. Seberger*, 284 Neb. 40 (2012).

2.

When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. *State v. Sing*, 275 Neb. 391 (2008).

3.

The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Sing*, 275 Neb. 391 (2008).

4.

Whether a defendant possesses the requisite state of mind is a question of fact and may be proved by circumstantial evidence. *State v. Nguth*, 13 Neb. App. 783 (2005).

5.

In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor. *State v. Sexton*, 240 Neb. 466 (1992).

6.

In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *State v. Dominguez*, 290 Neb. 477 (2015).

7.

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 the evidence, there is no prejudicial error necessitating reversal. *State v. Watt*, 285 Neb. 647 (2013).

8.

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. Armagost*, 291 Neb. 117 (2015).

9.

To prevail on a claim of ineffective assistance of counsel under *Strickland*, a defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show deficient performance, the defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Vanderpool*, 286 Neb. 111 (2013).

10.

In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts surrounding the defendant's life. An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Sikes*, 286 Neb. 38 (2013).

STATEMENT OF FACTS

On the night of October 26, 2013, Ryan Langenegger went to a couple bars in downtown Omaha with two of his friends, Joshua Foo and Jacob Gellinger. (533:6-543:22) Ryan is heterosexual, and both Joshua and Jacob are homosexual. (536:6-19) When Jacob goes out, he often dresses up in women's clothing and goes by the name of Fendi Blu, which is Jacob's "drag persona," or his alter ego as a homosexual crossdresser. (438:16-441:10; 457:7-462:11)

On this particular night, October 26, Ryan, Joshua and Jacob went to a drag show at a gay bar in downtown Omaha. (438:16-442:1) Ryan was wearing a suit and tie. (213:23-214:11; 257:4-258:3) Joshua was wearing jeans, a scarf, a women's shirt with sequins, and a black suit jacket. (210:15-19; 256:12-17) And Jacob, who is 6'5" and was dressed as his drag persona Fendi Blu, was wearing 3-inch heels, a two-piece dress that went to the middle of his thighs and showed off his midriff, makeup, and a women's wig. (201:25-212:2; 258:15-259:2; 273:4-13; 441:11-442:1)

After the drag show, at about 2:00 or 2:30 a.m., Ryan, Josh and Jacob went to a nearby PepperJax Grill to get some food. (197:10-201:24; 533:6-543:22) The three of them ordered their food and sat down to eat, and while they were eating, Joshua noticed that there were three guys at a nearby table, about 12 feet away, who were joking and looking at Ryan, Joshua, and Jacob's table. (212:25-220:12) It is undisputed that the three guys at the other table were Joey Adriano, Paul Larson, and the appellant, Gregory Duncan.

Joshua testified that at one point as they were eating, one of the three guys, later identified as Adriano, came up to their table and then looked back at his friends and said, "Should I? Should I?" (220:13-222:9) Josh did not like the tone of Adriano's voice, so he told Ryan and Jacob that they should leave. (222:10-15) Joshua and Jacob gathered up their stuff to leave, but Ryan, who testified that he did not realize the severity of the situation, went to talk with a girl he knew in the restaurant while Joshua and Jacob went outside. (222:16-229:22; 533:6-543:22) Joshua testified that, as he and Jacob left, he heard derogatory comments such as "fag" coming from the area of Adriano, Larson and Duncan's table. (222:16-224:4)

When Joshua and Jacob got outside, Joshua helped Jacob put on his high heels and then Ryan came out at the same time as Adriano, Duncan and Larson. (224:5-229:22) Ryan, Joshua and Jacob started discussing whether they should take an alternate route to their car, and then Adriano came up to them and called them "queer" and "faggots" and again looked at his friends and said "Should I?," at which point Duncan and Larson started laughing and Jacob said, "I know. I

am just a boy in a dress,” and Adriano said, “Yeah, and you’re fucking disgusting.” (229:23-233:7; 338:25-339:15; 543:23-550:24) Ryan tried to calm down the situation and told Adriano and that they were not looking for trouble and just wanted to go home, and then Adriano again called Ryan and the others “faggots” and said to Ryan, “Come on, you fucking pussy.” (233:8-234:23; 550:25-555:22)

At that point, Ryan and Joshua explained, Adriano was standing about an arm’s length away from Ryan, and Duncan and Larson were just behind Adriano. (234:6-235:13; 585:10-593:3) Ryan again tried to tell Adriano that they just wanted to go home, but before he finished his sentence, Duncan stepped forward and punched Ryan in the face. (234:24-238:19; 449:25-455:22; 554:14-555:16) Ryan and Joshua testified that, both before and after the punch, Ryan never raised his voice and he never threatened, pushed, or had any other physical contact with anyone in Duncan’s group. (237:2-19; 555:19-558:8; 589:16-590:11) Jacob testified that he recalls Ryan getting “sucker punched,” but does not really recall anything from that night because he was so intoxicated. (442:2-455:22)

After getting punched by Duncan, Ryan immediately started bleeding from a gash on his face and then Duncan, Adriano and Larson walked away laughing. (237:20-241:5; 555:23-563:20) Ryan, Joshua and Jacob went to their vehicle and called 911 and an officer with the Omaha Police Department, Officer Zipay, arrived on the scene within about five to ten minutes. (244:8-246:6) Officer Zipay spoke with Ryan and Joshua about what happened and then Officer Zipay and fellow officers in the area looked for the group of suspects but could not find them.

(244:8-246:6; 388:19-395:13; 555:25-567:13) Ryan opted not to file a police report because he did not think the guys would get caught, so no photos were taken at that time and a police report was not initially filed. (395:14-397:15; 555:25-567:13)

After speaking with police, Ryan and Joshua took Jacob home and then went back to Joshua's apartment, where Joshua took a picture of Ryan's face to document his injuries – a copy of which was introduced at trial. (244:8-247:14; E9) After that, Joshua and Ryan went to see one of Joshua's neighbors, who is in the medical field and bandaged Ryan's face, and then Ryan and Joshua went back to Joshua's apartment and went to sleep. (247:15-248:23) Then, the next day, Joshua put a post on Facebook about what happened the night before, along with the picture of Ryan's injuries, so that word would spread about what happened and the guy who punched Ryan might get caught. (248:24-250:14; 336:15-337:10) Officer Zipay, the officer who spoke with Ryan and Joshua right after the incident, was shown the picture of Ryan's face that was posted on Facebook and confirmed that it was almost exactly how Ryan looked right after the incident. (391:17-25)

Soon after Ryan's picture was posted and circulated on Facebook, the media got involved and then the Omaha Police Department (OPD) got involved again too. (248:24-250:14) OPD Detective Michael Curd met with Ryan and Joshua and then went to PepperJax to obtain surveillance videos and credit card transaction information to see if they could identify the suspects, and their investigation eventually led to Adriano, Larson and Duncan. (408:2-423:21; 428:14-438:10) Detective Curd testified that, after interviewing Larson and Adriano, they

arrested Duncan and he did not seem surprised at all that he was being arrested for a hate crime. (423:7-428:3)

The State also called both Joey Adriano and Paul Larson to testify at trial. Adriano's testimony, in summary, was that he remembers going out drinking with Duncan and Larson on the night in question but does not really recall anything else because he blacked out from drinking. (343:2-362:6) Adriano was shown a DVD of the video surveillance from PepperJax and confirmed that it was him in the video, along with Duncan and Larson, but said he does not recall any other details from that night, not even the assault. (343:2-362:6) On cross examination, however, he testified that he remembers being at PepperJax and knows that he did not call anyone a "faggot." (369:6-15) He also testified that he knows he did not call anyone a "fag" or "faggot," which is a derogatory term for homosexuals, because he has friends and family that are homosexual and does not use that term. (362:11-384:25)

Larson's testimony, in summary, was that he was out drinking with Duncan and Adriano on the night in question and was there when Duncan punched Ryan outside of PepperJax, but he has no idea what led up to the assault. (472:4-592:2) He testified that he did not even notice Ryan, Joshua and Jacob that night until they got outside and Ryan and Adriano started arguing, at which point Duncan punched Ryan. (472:4-515:15) He testified that he did not hear any of the words exchanged, though, because there were a lot of people outside and he was just having a cigarette on the sidewalk and was not really paying attention to Adriano.

(472:4-515:15) He testified that he did not hear anyone laughing or making any comments toward Ryan, Joshua and Jacob – inside or outside the restaurant.

(472:4-515:15) He testified that he recalls laughing at Adriano once while they were inside eating, because Adriano was so drunk, but other than that he does not recall anyone from his table laughing or making any comments toward Ryan, Joshua and Jacob's table while they were inside, nor once they were outside.

(472:4-515:15)

Larson testified that, after the assault, Duncan, Adriano and Larson walked away and went home and he gave the incident no more thought until his wife saw the story in the news and brought it to Larson's attention. (472:4-515:15)

Larson testified that he was interviewed by police soon after that, and then he ran into Duncan a week or two later and told Duncan that the police were looking for him, and Duncan responded, "They don't know who I am. They can't find me."

(493:1-496:25)

After this evidence was adduced, the State rested and Duncan moved for a directed verdict due to a lack of evidence, which motion was denied. (596:6-599:4)

Duncan then presented his case in chief, which consisted of his own testimony.

Duncan's testimony, in summary, was that he did in fact punch Ryan on the night in question but only because he was defending Adriano. (599:21-630:25)

Duncan claims that he had no idea anyone in Ryan, Joshua and Jacob's group was homosexual, and did not even notice that Jacob was a man dressed as a woman.

(599:21-613:10) He claims he never heard Adriano or anyone else call Ryan,

Joshua or Jacob a “faggot” or any other derogatory term, even while Adriano and Ryan were arguing, and never heard Jacob say that he was “just a boy in a dress.” (599:21-622:3) Duncan claims that he was just standing there having a cigarette and did not hear any of this, and did not even know why Ryan and Adriano were arguing, but then he saw Ryan push Adriano so he stepped in and punched Ryan in order to defend Adriano, who was too drunk to defend himself. (599:21-640:15)

Duncan acknowledged, however, that he was right behind Adriano as he was allegedly pushed by Ryan. (639:20-640:15) He also acknowledged that, when Paul Larson testified earlier at trial, Larson testified that he spoke with Duncan before he was arrested and told Duncan the police were looking for him, to which Duncan responded, “They don’t know who I am. They can’t find me.” (645:19-647:4) Duncan claims that this was not true, and testified that Larson never told him that the police were looking for him and he never said anything to the effect of “They don’t know who I am. They can’t find me.” (645:19-647:4)

After Duncan testified, the defense rested and again moved for a directed verdict, which was again denied. (651:10-652:11) The case was then submitted to the jury and Duncan was convicted of third degree assault – discrimination based. (745:17-748:2) He was sentenced to a period of 12 to 18 months’ imprisonment. (764:16-22)

This appeal followed.

ARGUMENT

Assignments of Error 1 through 3: Denial of directed verdict.

Duncan's first three assignments of error each relate to the district court's denial of his motion for a directed verdict. His first assignment of error alleges that, in denying his motion for a directed verdict, the district court erred by misapplying the meaning and reach of Nebraska 'hate crime' statute, § 28-111. Appellant's Brief at 3, 22-24. His second assignment of error alleges that the district court erred by not granting his motion for a directed verdict at the close of the State's case, because the evidence was insufficient to support a conviction for third degree assault, discrimination based, in violation of § 28-310 and § 28-111. Appellant's Brief at 3, 25-29. And his third assignment of error alleges that the district court erred by not granting his renewed motion for a directed verdict at the close of his own case in chief, which further rendered the evidence insufficient to support a conviction under § 28-310 and § 28-111. Appellant's Brief at 3, 29-31.

The State's response, to all three of these assignments of error, is that Duncan waived his right to challenge the denial of his motion for directed verdict because, in a criminal trial, after a court overrules a defendant's motion for a dismissal or a directed verdict, the defendant waives any right to challenge the trial court's ruling if the defendant proceeds with trial and introduces evidence. See e.g., *State v. Seberger*, 284 Neb. 40 (2012). The defendant may still raise a challenge on appeal to the sufficiency of the evidence for the conviction, see *id.*, but may not challenge the ruling or rationale as to the denial of a direct verdict.

This principle of law applies here, since Duncan presented evidence of his own after his motion for a directed verdict was denied after the State rested its case. So, the district court's ruling and rationale for denying his motion for a directed verdict is not properly before this Court, and he is limited to challenging the overall sufficiency of the evidence.

With that said, the State presumes this Court will treat Duncan's first three assignments of error as both a challenge to the denial of his motion for a directed verdict and a challenge to the sufficiency of the evidence. The latter challenge is properly before this Court, so we will go ahead and address that claim. But again, with respect to Duncan's challenge to the sufficiency of the evidence, that is the only claim properly before this Court, so that is the only claim we will address.

As to the sufficiency of the evidence, Duncan was found guilty of third degree domestic assault, discrimination based, in violation of § 28-310 and 28-111. Section § 28-310, which governs the offense of third degree assault, provides that a person commits the offense of assault in the third degree if he (a) intentionally, knowingly, or recklessly causes bodily injury to another person, or (b) threatens another in a menacing manner. See § 28-310(1). Third degree assault under § 28-310 is a Class I misdemeanor. See § 28-310(2). But the penalty is enhanced to a Class IV felony if the offense is committed against a person or a person's property "because of the person's race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability or because of the person's association

with a person of a certain race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability.” See § 28-111.

In this case, the evidence was sufficient to establish that Duncan violated both § 28-310 and § 28-111 when he punched Ryan Langenegger in the face. Duncan violated § 28-310 by the punch itself, and he violated § 28-111 by throwing the punch while his friend, Joey Adriano, was calling Ryan and the others “queer” and “faggots,” a derogatory term for homosexuals. (338:25-339:15; 543:23-550:24) This evidence, when viewed in a light most favorable to the State, was sufficient for any rational trier of fact to find that Duncan assaulted Ryan Langenegger because of his sexual orientation or his association with a person of a certain sexual orientation. Especially when, as both Ryan and Joshua explained at trial, Ryan never threatened, pushed, or had any physical contact with anyone in Duncan’s group, and there was no other reason for Duncan to have punched Ryan. (237:2-19; 555:19-558:8; 589:16-590:11) Plus, as the record reflects, the jury was instructed on Duncan’s defense, i.e., that he punched Ryan to defend Adriano, and the jury rejected that defense. (T43) In light of this evidence, the jury’s verdict, and the standard of review, the evidence was clearly sufficient in this case.

Duncan does not dispute that he punched Ryan Langenegger and was guilty of third degree assault under § 28-310, but claims the evidence was insufficient to find him guilty of the enhancement under § 28-111 because there was no evidence that he assaulted Langenegger *because* of his sexual orientation or his association with a person of a certain sexual orientation. Duncan claims that the evidence

failed to establish this element because there was no evidence that Duncan made any derogatory comments toward Ryan or his group; that Duncan was aware of Adriano or anyone else making derogatory comments toward Ryan or his group; or that Duncan even knew the sexual orientation of Ryan or anyone in his group. Appellant's Brief at 25-31. In other words, according to Duncan, the State failed to provide direct evidence of Duncan's intent.

But the offense of third degree assault, as with virtually any other offense, does not require direct evidence of intent. See *State v. Kunath*, 248 Neb. 1010, 1015 (1995). When the sufficiency of the evidence as to criminal intent is questioned, independent evidence of specific intent is not required. *State v. Sing*, 275 Neb. 391, 396 (2008). Rather, the intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *Id.* In other words, whether a defendant possesses the requisite state of mind is a question of fact and may be proved by circumstantial evidence. *State v. Nguth*, 13 Neb. App. 783, 791 (2005). In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, and the reasonable inferences which can be drawn from the evidence viewed in its favor. *State v. Sexton*, 240 Neb. 466, 467 (1992).

In this case, as set forth above, the evidence was clearly sufficient for the jury to infer that Duncan assaulted Ryan Langenegger because of either his sexual orientation or his association with a person of a certain sexual orientation.