

No. S-17-235

IN THE NEBRASKA SUPREME COURT

STATE OF NEBRASKA,

Appellee,

v.

DESIDERIO C. HERNANDEZ,

Appellant.

**APPEAL FROM THE DISTRICT COURT
OF RICHARDSON COUNTY, NEBRASKA**

The Honorable Daniel E. Bryan, Jr., District Judge

BRIEF OF APPELLEE

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Statement of the Case

A. Nature of the Case

This is a direct appeal from Appellant Desiderio C. Hernandez's jury convictions of first degree murder, possession of a firearm by a prohibited person, and use of a firearm to commit a felony.

B. Issues Before the District Court

The issues before the district relevant to this appeal involve Hernandez's statement to law enforcement and his motion for mistrial following the State's closing argument.

C. How the Issues Were Decided in the District Court

The district court found Hernandez's statement to law enforcement to be admissible at trial, denied certain redactions to the videotape statement that were requested by Hernandez, and overruled the motion for mistrial. (T12-17; T28-29; 1688:1-6)

D. Scope of Review

An appellate court independently decides questions of law presented on appeal. *State v. Burries*, 297 Neb. 367 (2017). Whether a defendant voluntarily made a statement while in custody and whether a defendant unambiguously invoked his or her right to remain silent or to have counsel present are mixed questions of law and fact. *Id.* An appellate court reviews a trial court's finding of historical facts for clear error and independently determine whether those facts satisfy the constitutional standards. *Id.*

A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *State v. Rocha*, 295 Neb. 716 (2017).

The decision whether to grant a motion for mistrial will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Mitchell*, 294 Neb. 832 (2016).

Propositions of Law

I.

The Due Process Clauses of both the state and the federal Constitutions preclude admitting an involuntary confession into evidence.

State v. McClain, 285 Neb. 537 (2013).

II.

The prosecution has the burden to prove by a preponderance of the evidence that incriminating statements by the accused were voluntarily given and not the product of coercion. In making this determination, an appellate court applies a totality of the circumstances test. Factors to consider include the interrogator's tactics, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne.

State v. McClain, 285 Neb. 537 (2013).

III.

While the totality of the circumstances weighs on the question whether a statement was voluntary, coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.

State v. Grant, 293 Neb. 163 (2016).

IV.

The mere fact of intoxication is not conclusive on the issue of voluntariness of a statement or a consent given by a defendant. A defendant must be so intoxicated that he is unable to understand the meaning of his statements. If the trial judge is satisfied that under the totality of the circumstances the defendant was able to reason, comprehend, or resist, the statements are to be admitted.

State v. Melton, 239 Neb. 790 (1992).

V.

Miranda rights can be waived if the suspect does so knowingly and voluntarily. A valid *Miranda* waiver must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

State v. Goodwin, 278 Neb. 945 (2009).

VI.

If a defendant seeks suppression of a statement because of an alleged *Miranda* violation, the State must prove that the defendant validly waived his or her *Miranda* rights by a preponderance of the evidence.

State v. Burries, 297 Neb. 367 (2017).

VII.

An appellate court looks to the totality of the circumstances to determine whether a defendant validly waived his or her *Miranda* rights during an interrogation.

State v. Burries, 297 Neb. 367 (2017).

VIII.

The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.

State v. Burries, 297 Neb. 367 (2017).

IX.

The safeguards of *Miranda* assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process. If the suspect indicates that he or she wishes to remain silent or that he or she wants an attorney, the interrogation must cease.

State v. Clifton, 296 Neb. 135 (2017).

X.

Before the police are under a duty to cease the interrogation, however, the suspect's invocation of the right to cut off questioning must be unambiguous, unequivocal, or clear.

State v. Clifton, 296 Neb. 135 (2017).

XI.

If the suspect's statement is not an unambiguous or unequivocal assertion of the right to remain silent, then there is nothing to scrupulously honor and the officers have no obligation to stop questioning. Officers should not have to guess when a suspect has changed his or her mind and wishes the questioning to end, nor are they required to clarify ambiguous remarks.

State v. Clifton, 296 Neb. 135 (2017).

XII.

To be admitted at trial, evidence must be relevant, meaning evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

State v. Rocha, 295 Neb. 716 (2017).

XIII.

Under rule 403, even evidence that is relevant is not admissible 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.

State v. Rocha, 295 Neb. 716 (2017).

XIV.

Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis.

State v. Chauncey, 295 Neb. 453 (2017).

XV.

Prosecutors are charged with the duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial. Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for

various contexts because the conduct will or may undermine a defendant's right to a fair trial.

State v. Dubray, 289 Neb. 208 (2014).

XVI.

Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process. Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.

State v. Dubray, 289 Neb. 208 (2014).

XVII.

In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.

State v. Dubray, 289 Neb. 208 (2014).

Statement of Facts

Procedural History

Appellant Desiderio Hernandez was charged by information with first degree murder, use of a firearm to commit a felony, and possession of a firearm by a prohibited person. (T1-2) Prior to trial, Hernandez filed a motion to suppress the statement he made

to law enforcement on August 6, 2015, along with a request to determine the voluntariness of that statement. (T4-9) Following an evidentiary hearing, the district court entered a written order denying the motion to suppress and finding Hernandez's statement to law enforcement to be voluntary. (T12-17) Hernandez then filed a motion in limine requesting that various portions of the videotaped statement be excluded under rule 401 and rule 403. (T19-21) The district court granted Hernandez's motion in limine in part, but denied the remainder of the motion, finding the statements at issue necessary for the fact finder to consider context within the interview and the voluntariness of Hernandez's ultimate confession. (T28-29) Additional facts relating to Hernandez's motions will be set forth in the relevant argument sections below.

A five-day jury trial took place in the district court. (140:11-1736:22) Although no objections were made during the State's closing argument, Hernandez moved for a mistrial following the State's closing remarks. (1654:12-1688:6) The district court denied the motion for mistrial, finding that if there was any error, it was harmless. (1688:1-6) Additional facts regarding the State's remarks and Hernandez's motion for mistrial will be set forth in the argument section below.

The jury received the case at 1:43 p.m. on December 2, 2016, and returned a verdict that same day, finding Hernandez guilty of all three counts. (T52-53) Hernandez was subsequently sentenced to consecutive prison sentences of life for first degree murder, 5 to 10 years for use of a firearm to commit a felony, and 3 to 7 years for possession of a firearm by a prohibited person. (1743:12-1744:6; T54-55) Hernandez was given credit for 544 days previously served to be applied to his sentence for possession of a firearm by a prohibited person. (1743:17-22; T55)

Jury Trial Evidence

The Night of the Shooting

On August 4, 2015, at approximately 11:40 p.m., Esperanza Ogden was at her home in Falls City, Nebraska, when Hernandez, her brother, knocked on the door and entered her home. (524:15-25; 526:6-527:6) Esperanza went outside to the front porch with Hernandez to smoke cigarettes. (527:21-528:17) When Esperanza asked Hernandez for a cigarette, he stated, "That will probably be the last cigarette I ever give you." (528:18-23) Hernandez asked Esperanza for a ride, but she told him that it was too late at night. (529:1-23) Hernandez then stated, "I fucking shot Joey," and pointed his fingers to his forehead. (530:1-531:2) Hernandez was talking about their cousin Joey Debella, who had been living with Hernandez at Jason Brownell's house in Falls City since early July. (506:18-23; 525:10-15; 564:22-567:11; 922:16-924:5; 979:19-20; 981:9-18) Hernandez then left Esperanza's house on foot. (531:11-532:25)

Esperanza spoke to her sister-in-law Amber on the phone around midnight and told her what Hernandez said about shooting Joey. (533:14-21; 569:21-570:7) Amber, whose family had a close relationship with Joey, woke up her husband Chris, who was Esperanza and Hernandez's brother. (564:5-21; 570:7-18; 727:20-728:15; 729:1-11; 730:1-11) Amber and Chris were sitting outside on their porch when they saw Hernandez walking down the street from the direction of Esperanza's house. (570:19-571:11; 730:12-17) Once Hernandez was on the sidewalk near their house he stated, "I shot that motherfucker." (571:12-573:2; 731:19-20) Chris asked who Hernandez was talking about and Hernandez replied, "Joey;" Chris asked why he shot Joey and Hernandez responded, "His bitch shouldn't have been late." (573:6-8) At one point, Hernandez also stated, "I told

you guys I wasn't fucking around." (574:5-11) According to Amber and Chris, Hernandez appeared excited, hyper, and full of adrenaline. (574:12-16; 731:5-13) Hernandez stated that someone should call 911 since it had been at least ten minutes since he shot Joey. (573:9-22; 732:1-4) Hernandez then left on foot and headed south. (575:1-5)

After Hernandez left, Amber picked Esperanza up in her car and they drove to Brownell's house to check on Joey. (535:6-536:8; 577:21-25; 578:21-579:2) They began knocking on the door, but no one answered and the door was locked. (536:9-24; 579:2-7) While they were knocking, Dave McPherson arrived at the house on foot, and John Hall and Brett Winters, who had been inside while they were knocking, opened the door and spoke to the women. (537:4-538:20; 579:8-581:7) While the women asked for Joey, Hall continued to ask the women if they knew where Hernandez was. (538:21-539:3; 581:17-24) Hall eventually told Amber and Esperanza that Joey was in the basement. (581:17-6) Hall also told the women not to call the police because they were on probation. (581:25-582:3)

The women entered the house and headed toward the basement. (539:3-10; 582:8-13) As they approached the basement, both Amber and Esperanza could hear moaning, labored breathing, and gurgling coming from Joey. (540:11-541:20; 582:14-22; 583:14-17) Esperanza described the sounds as a "death hurl" or a "death gurgle." (540:13-25) Esperanza went into the basement and found Joey lying face down with blood by his head. (541:21-544:4; 583:1-25) She yelled at Amber to call 911 while she called her brother Chris and told him to call 911. (544:8-545:9; 584:1-2; 733:12-17) Esperanza went back upstairs, and she and Amber saw Hall and Winters bringing duffle

bags out of one of the back bedrooms. (545:10-18; 546:18-25; 584:4-10) The men put the bags in the green car that was parked outside of the house. (547:13-16)

Hall, McPherson, and Winters all testified for the State at trial. Hall and Winters also lived at Brownell's house. (922:16-924:5; 979:19-20) Drug activity often took place there and almost everyone who lived in the house was dealing methamphetamine on a daily basis. (983:2-8; 1079:5-22) Joey was the main methamphetamine dealer, while Winters, Hall, and Hernandez helped Joey distribute the methamphetamine. (983:9-16; 1079:23-1080:2) According to Winters, Hernandez was upset about his role in Joey's methamphetamine business and they often argued about Hernandez owing Joey money. (983:17-24) Hernandez was also upset with Joey for having other people in the house involved in the methamphetamine business, and Hernandez did not like Joey's girlfriend being around. (984:13-85:9)

Prior to the shooting, McPherson and Hall met up at Kwik Shop where they made a plan to smoke methamphetamine. (927:16-928:19; 1082:15-19; 1093:18-1094:2) After dropping a female friend off at another house, McPherson and Hall drove to Brownell's house and went straight to Hall's bedroom to smoke methamphetamine. (926:18-25; 928:6-17; 931:2-21; 1093:20-1094:10; 1098:12-18) While in Hall's bedroom they heard a gunshot. (926:3-17; 931:13-932:12; 1099:15-18) McPherson asked Hall if he had heard the gunshot. (932:16-17) Hall responded, "Yeah. They're probably shooting that gun in the basement, again." (932:17-18; 1100:21-24) Hall was apparently referring to the previous night (August 3) when Joey fired a shot during an argument with Jeff Morley about drug money. (998:14-999:2; 1137:14-1140:7) Morley threatened to kill Joey if he wasn't out of town by the next day, and in response, Joey threatened Morley and fired a

bullet into the ceiling. (999:6-1000:1; 1009:23-1010:10) Hernandez was present at the time and stood up for Joey after Morley threatened him. (999:3-5; 1000:2-8) After the incident, Morley paid Joey the money he owed and the conflict between the two was resolved at that point. (1010:11-24; 1139:6-12)

Shortly after hearing the gunshot on August 4, Hernandez came into Hall's bedroom and asked if they wanted to go into the basement and smoke. (933:3-13; 1082:20-21; 1101:4-1103:6) The next thing McPherson and Hall heard was Hernandez leaving the house through the front door. (936:9-17; 1103:6-20) After Hernandez left, Hall walked toward the basement and heard Joey breathing really fast. (1103:24-1104:8) Hall called for him, but there was no response. (1104:9-11) Hall went downstairs and found Joey lying face down on the floor. (1104:12-15; 1105:18-1106:4) Hall saw blood coming from Joey's head and there was blood on the floor. (1106:5-13) Joey was shaking and it looked like he was having a seizure. (1107:16-18)

Hall yelled to McPherson, who was getting ready to leave the house, that Joey had been shot. (925:23-926:2; 938:1-18; 1104:1-23) Hall told McPherson to call Brownell; Brownell didn't answer his phone so McPherson started walking to Brownell's work, which was nearby. (938:20-940:2) After learning that Joey had been shot in the basement, Brownell asked McPherson to walk back to the house to see if everything was okay. (940:3-21) McPherson arrived back at the house as Amber and Esperanza were knocking on the front door. (940:21-22; 941:14-942:7) After they went inside, McPherson realized that he didn't need to be there so he left and went home. (940:23-25; 944:15-20)

Winters arrived at the house shortly after Joey had been shot. (985:16-19; 1129:9-25) When he arrived, McPherson was leaving the house and Hall was coming up from

the basement saying that Joey had been shot. (987:10-14) Winters went downstairs and saw Joey lying face down on the floor. (987:15-988:3) Winters asked if they should take Joey to the hospital, but Hall was paranoid and worried about the drugs and paraphernalia inside of the house. (990:21-991:5; 1109:17-1110:9) Hall panicked and started to grab various drug items in the basement so he could get rid of them. (1105:12-17) He took a scale and a pipe, which was wrapped in a bandanna, from the basement. (991:6-8; 1108:16-1109:16; 1123:17-1124:6) Hall threw the items out in the yard by his car, where they were later located by law enforcement. (685:3-22; 781:20-782:19; 1110:10-14; 1127:21-1128:7; 1128:17-17-20; 1366:18-25; E30-E34; E102) Law enforcement also found a holster in the yard, but Hall denied throwing out the holster. (1126:24-1127:20; 1128:8-16)

Winters and Hall got back upstairs as Amber and Esperanza arrived at the house. (992:1-9) After speaking with them, Hall went into his bedroom and started packing his bags, which were then placed into Hall's car. (992:9-17; 1129:1-8) Hall's car was later searched. (799:3-21; E27; E28) No firearms were located in Hall's car and nothing of significance was found in the duffle bags. (847:12-15; 1367:2-22) A small plastic baggie containing 0.3 grams of methamphetamine was found on Hall's person when he was arrested that night for tampering with evidence. (1319:11-1321:11; 1131:2-16; E112; E155)

Law enforcement and an ambulance arrived at Brownell's house shortly after Amber called 911. (547:22-24) Deputy Richardson County Sheriff Jonathan Kirkendall was one of the first officers at the scene, and when he arrived, Hall told Kirkendall that Joey was downstairs. (624:6-15) Hall led Kirkendall into the basement where he found

Joey on the floor in a pool of blood. (624:16-20; 627:9-24; 629:23) Joey, who had a single gunshot wound to his forehead, was taken from the scene by ambulance to the local hospital. (679:4-680:6; 717:6-13; 719:22-25)

Joey was eventually flown by helicopter to a hospital in Lincoln where he was removed from life support on August 13, 2015. (510:20-512:17; 514:21-515:21; 758:6-10) Dr. Michelle Elieff, who performed the autopsy on Hernandez's body, testified that Joey's cause of death was a gunshot wound to the head and that the manner of death was consistent with a homicide. (1416:20-23; 1420:5-19) Dr. Elieff testified that it was her opinion that, based on his injuries, Joey would not have been capable of living without the assistance of machines. (1454:14-17) There was one entrance wound to Joey's forehead and no exit wounds. (1429:21-23; E154) Dr. Elieff removed the bullet fragments located inside of Joey's head. (1427:9-25; 1445:2-9; 1449:23-1450:10; E145; E150-E152)

In Brownell's basement, law enforcement located a 6-shot .22 caliber revolver, which contained one fired casing and five unfired cartridges. (636:6-13; 820:22-821:16; 824:4-20; 1512:12-21; E23; E24; E65,2; E66; E126) The revolver belonged to Joey, and it was later determined that the revolver was on the list of possible weapons that could have fired the bullet removed from Joey's body. (994:10-995:11; 1124:7-23; 1552:6-1561:21; E132,2) A large quantity of .22 caliber ammunition was also found in the basement. (632:4-633:16; 812:7-19; 816:4-6; 819:8-22; 820:2-5; 829:15-835:11; E26; E36; E57; E59; E60; E67; E68; E69; E70) Drug residue and paraphernalia was found all over the house. (805:4-14) Joey's wallet was located in his pocket, which contained his ID and his bank card. (633:17-635:5; E71) Law enforcement also located over \$347 in

cash and two baggies of suspected methamphetamine in Joey's pants pockets. (1359:16-1360:23; 1362:2-1363:22; E97-E100; E113-E115)

Hernandez's Arrest and Statement to Law Enforcement

At approximately 10:00 a.m. the next morning, August 5, 2015, Michael Seager awoke to Hernandez standing in his house. (1021:6-1022:5) Hernandez said that he had nowhere to go and he wanted to know if Seager wanted to hang out and get high. (1022:10-23) Hernandez then pulled a baggie containing 2½ to 3 grams of methamphetamine out of his pocket and they smoked methamphetamine in Seager's living room. (1022:17-23; 1023:8-19; 1024:13-1025:12) After smoking, they took Seager's truck to Humboldt because Seager needed to run an errand. (1024:13-1025:16) On the way, they drove past Brownell's house. (1025:2-3; 1026:4-21) Seager asked Hernandez what happened there since the State Patrol's mobile crime lab was parked at the house. (1025:2-3; 1026:4-21) Hernandez replied, "It is what it is." (1025:3-4; 1026:21)

After the errand in Humboldt, Seager and Hernandez drove to a friend's house in Hiawatha, Kansas, where they smoked more of Hernandez's methamphetamine. (1028:1-1029:4) They then drove to Preston, Nebraska, because Hernandez wanted to trade some methamphetamine for weed. (1029:5-1030:8) After the trade was made, they smoked the remainder of Hernandez's methamphetamine and returned to Seager's house. (1030:9-1031:10; 1036:9-16) Seager had to leave the house briefly, and after he returned, Hernandez asked for Seager's help in getting in touch with his cousin Tiffany Gates. (1031:11-1032:25; 1033:4-13; 1215:1-25) Seager obtained Tiffany's number, and Hernandez called Tiffany around 5:00 p.m. (1033:14-1034:16; 1222:10-1223:1) Hernandez told Tiffany he needed a place to go and Tiffany said he could come to her

house. (1224:1-5) Joey was also Tiffany's cousin, and she had learned from another family member prior to speaking to Hernandez that Joey had been shot and that people were looking for Hernandez. (1219:6-1220:10)

After calling Tiffany, Hernandez asked Seager to give him a ride to Tiffany's house in Horton, Kansas. (1034:17-1035:24; 1215:1-25) Hernandez and Seager left for Horton around 6:00 p.m. in Seager's vehicle, and arrived around 6:30 p.m. (1035:25-1036:8; 1036:23-25; 1229:10-1230:10) When they arrived, Tiffany asked if Hernandez had a gun and she patted him down. (1042:14-20) Hernandez said that he left the only gun he had at Brownell's house. (1042:21-1043:3) Seager talked to Tiffany's boyfriend while Hernandez talked to Tiffany. (1041:7-11) Tiffany asked Hernandez what happened with Joey, and he laughed and stated, "I got that motherfucker right there." (1233:4-16) Seager saw Hernandez point to his forehead and drop his finger like he was dropping a hammer on a gun. (1042:6-7) Seager also heard Hernandez tell Tiffany, "He was breathing when I got there. He wasn't when I left." (1041:16-24) Hernandez told Tiffany that he thought Joey was using him. (1245:17-25) Hernandez also stated that after he shot Joey he went upstairs and asked the people there if they wanted to smoke. (1237:10-1238:3)

Once she learned that Hernandez was on the way, Tiffany made arrangements to get her children out of the house and for someone to call the Horton Police Department once Hernandez arrived. (1227:3-1229:4; 1232:22-25) Tiffany had also called Esperanza, and thereafter, the Nebraska State Patrol notified the Horton Police Department that Hernandez was headed to Horton. (762:1-14; 1157:6-1158:13; 1226:17-1227:2) Thus, shortly after Hernandez and Seager arrived at Tiffany's residence, law enforcement arrived on scene. (1043:19-1044:1; 1158:14-1159:24; 1240:4-23) Hernandez ran inside

of the house and told Tiffany and Seager to tell law enforcement that he wasn't there. (1044:1-3; 1240:4-23) Tiffany informed the officers that Hernandez was in the house. (1044:13-17; 1161:2-10) The officers attempted to coax Hernandez out of the house, but he would not exit. (1044:17-24; 1161:20-1162:19) This resulted in a 7½ hour standoff with law enforcement that involved a total of seven agencies with close to 20 officers. (1044:25-1045:13; 1164:2-13) Law enforcement arrived at Tiffany's residence at 7:05 p.m. and Hernandez was taken into custody by the SWAT team after they entered the residence at 2:04 a.m. (1044:25-1045:13; 1160:3-6; 1164:14-20; 1165:7-8; 1166:9-1167:11; 1191:17-23; 1194:4-1195:13)

Hernandez was taken to the ambulance on scene where he received medical treatment for a small laceration on the back of his head. (1198:1-3; 1199:19-1200:6) Hernandez was then transported to a local hospital to have the taser prong removed from his left chest area. (1200:7-21) At the hospital, in addition to having the taser prong removed, Hernandez received a staple in his head for the laceration. (1202:5-15) After treating his injuries, Hernandez was medically cleared and turned over to law enforcement. (1202:16-24) Hernandez was arrested and taken to a jail in Kansas around 3:30 a.m. (1203:3-1204:13)

Hernandez was interviewed by Investigators Cory Townsend and Nicholas Frederick of the Nebraska State Patrol on August 6, 2015, at the Brown County Jail in Kansas. (1259:17-24; 1292:14-19; 1386:20-21) The interview began at 2:33 p.m. and concluded at 4:33 p.m., when Hernandez told the investigators that he wanted to end the interview. (1386:22-25; E89) The interview was videotaped and was played for the jury over Hernandez's continuing objections. (1295:14-1296:6; 1311:13-1313:25; 1316:1-

1317:10; E89) Portions of the audio were not played for the jury pursuant to an order of the court. (1312:3-1313:13)

Prior to the interview, the investigators were made aware that Hernandez had been taken to the hospital for some minor treatment after his arrest that morning and that he had been in custody at the jail just short of 12 hours. (1299:4-10; 1301:11-18) Based on his experience, Townsend did not notice anything that led him to believe that Hernandez was under the influence of methamphetamine or any other drugs or alcohol. (1300:4-22; 1343:2-19) Frederick testified that he also did not observe any signs that Hernandez was high on methamphetamine. (1388:2-5) Prior to questioning Hernandez about the shooting, Townsend read Hernandez his *Miranda* rights. (1302:19-1304:18; E86; E89) Hernandez verbally agreed to waive his rights and speak to the officers although he did not sign the rights advisory form at that time. (1305:13-17; E86; E89) During the interview, Hernandez eventually admitted to shooting Joey. (E89)

Argument

I. Assignment of Error 1

Hernandez's first assignment of error is that the district court erred in admitting into evidence his video statement to law enforcement which was obtained involuntarily and in violation of the right against self-incrimination. (Brief of Appellant, p. 2) Hernandez argues that his confession was involuntary because the ability of Hernandez to think clearly was so impaired by his physical and mental state that he was unable to exercise free will in making admissions. (Brief of Appellant, p. 21) Specifically, Hernandez argues that his confession was involuntary because he was under the influence of methamphetamine. (Brief of Appellant, pp. 24-28)

Additional Facts

At the hearing on Hernandez's motion to suppress, Investigator Townsend testified for the State regarding his interview with Hernandez. (24:13-100:10) Townsend's testimony was similar to the testimony he gave at trial. The State also entered into evidence at the suppression hearing a DVD copy of the interview and a copy of the Rights Advisory form Townsend read to Hernandez. (E3; E4)

In its order denying Hernandez's motion to suppress, the district court made detailed factual findings regarding the 2-hour interview. (See T12-14) Regarding Hernandez's claim that his statement was involuntary because he was under the influence of methamphetamine, the court found as follows:

There was evidence that Hernandez had used drugs just prior to the shooting and subsequent to the shooting but prior to his arrest. The [i]nvestigating officer did not ask specific questions about drug use to Hernandez or take any tests. The evidence is that the interview was approximately 11 hours after his arrest by Kansas authorities.

Hernandez claims that the video shows based upon his statements to the [i]nvestigator signs of being under the influence of drugs therefore not freely or voluntarily made. But his conversation with Inv. Townsend in reference to his family history and problems, seems more a conversation by a person who was emotionally aware of what he had done and his attempt trying to explain it. It generally is hard to explain the unexplainable. So any attempt by one who had done what Hernandez did could seem to some odd or that he is under some influence of a drug. But the evidence does not support that Hernandez was at the

time of his statement under the influence of any drug. Hernandez[’s] constant references off the topic of what Inv. Townsend inquired about were perfectly normal given his circumstances and ability to properly express himself. One can view what seemed to be “odd” statements as his personal reflection of his life and how he got to be in this terrible situation. Contrary to Hernandez’s argument in his brief, this court feels that the statements Hernandez made to the officer were rational in relation to what he knew he had done and his attempt to deal with it. Admittedly, Hernandez’s history of drug use could have contributed to his mental burn out and inability to better describe his situation. But the fact that he may have been burnt out from a history of drug use does not mean his statements, even though not articula[tely] spoken, were the subject of the influence of a drug.

(T15)

Argument

The Due Process Clauses of both the state and the federal Constitutions preclude admitting an involuntary confession into evidence. *State v. McClain*, 285 Neb. 537 (2013). The prosecution has the burden to prove by a preponderance of the evidence that incriminating statements by the accused were voluntarily given and not the product of coercion. *Id.* In making this determination, an appellate court applies a totality of the circumstances test. *Id.* Factors to consider include the interrogator’s tactics, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne. *Id.*

While the totality of the circumstances weighs on the question whether a statement was voluntary, “coercive police activity is a necessary predicate to the finding that a

confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.” *State v. Grant*, 293 Neb. 163 (2016).

The district court was correct in finding that Hernandez’s statement was voluntary. Hernandez focuses on Tiffany’s opinion that Hernandez was high on methamphetamine at the time he arrived at her home on August 5. The fact that Hernandez likely had drugs in his system at the time of the interview does not automatically make the statement involuntary. The mere fact of intoxication is not conclusive on the issue of voluntariness of a statement or a consent given by a defendant. *State v. Melton*, 239 Neb. 790 (1992). A defendant must be so intoxicated that he is unable to understand the meaning of his statements. *Id.* If the trial judge is satisfied that under the totality of the circumstances the defendant was able to reason, comprehend, or resist, the statements are to be admitted. *Id.*

Even though Tiffany believed that Hernandez was high when he arrived at her residence at approximately 6:30 p.m. on August 5, Hernandez was not interviewed by the investigators until 2:30 p.m. on August 6. There is also no indication that Hernandez continued to smoke methamphetamine when he was alone in Tiffany’s house for 7½ hours because Seager testified that they smoked the remainder of the methamphetamine hours before they arrived at Tiffany’s home in Horton. (1030:9-1031:10; 1036:9-16)

Moreover, there were no indications that Hernandez was intoxicated at the time of the interview even if he had drugs in his system from the previous day. Townsend testified regarding his training regarding methamphetamine use and signs of someone being under the influence of methamphetamine. (55:14-56:15; 85:13-88:7) Townsend testified that Hernandez did not appear to be under the influence of methamphetamine at the time

of the interview. (57:19-22; 99:18-25) At trial, Investigator Frederick also testified that he did not observe any signs that Hernandez was high on methamphetamine. (1388:2-5)

Townsend explained that he did not ask Hernandez how recently he used controlled substances because he had been in custody close to 12 hours and Hernandez did not display any signs of intoxication. (60:24-62:4) Townsend did acknowledge that Tiffany stated in her interview, which was prior to Hernandez's interview, that she believed that Hernandez was high when he showed up at her house on August 5. (92:13-93:9) Townsend explained that this did not concern him because Hernandez's interview took place approximately 21 hours after Tiffany saw Hernandez. (94:10-22)

Townsend testified that there were portions of the interview in which Hernandez would talk about "odd" subjects or make "odd" statements, but Townsend did not view that as a sign of intoxication. (62:5-15; 88:8-89:5) Townsend explained that he believed that the odd comments stemmed from the nature of Hernandez's personality some of the time and other times he found Hernandez to be putting on "a show or display." (62:16-20; 77:22-79:21) Townsend explained at trial that Hernandez is a "different guy" who "talks about a lot of strange things," but none of that caused Townsend to believe that Hernandez didn't understand what was going on. (1301:1-8) When he was asked specific questions, Hernandez would answer them and he had the ability to finish his thoughts. (1343:15-16) Furthermore, Hernandez demonstrated from the very beginning of the interview that he knew where he was and what he was doing. (1306:21-1307:1) After Townsend introduced himself and Frederick, Hernandez asked him why officers from another state were questioning him in Kansas. (E89 at approximately 2:34)

The district court was correct in finding that, based on the totality of the circumstances, Hernandez's statement was voluntary. Hernandez's first assignment of error has no merit.

II. Assignment of Error 2

Hernandez's second assignment of error is that the district court erred in admitting into evidence his video statement to law enforcement which was obtained involuntarily and in violation of the right against self-incrimination as he did not sufficiently waive his right against self-incrimination and his subsequent invocation of the right to remain silent was ignored. (Brief of Appellant, p. 2) Hernandez argues that (1) he did not effectively waive his right against self-incrimination and that if this Court disagrees (2) he subsequently invoked his right and that the invocation was not scrupulously honored. (Brief of Appellant, p. 31)

Waiver of Right against Self-Incrimination

The State submits that the district court was correct in rejecting Hernandez's claim that he did not effectively waive his right against self-incrimination. In rejecting such claim, the district court found as follows:

This court's review of the evidence reveals that the *Miranda* rights were properly given to Hernandez by Inv. Townsend. Hernandez possessed the intellectual capacity to understand the *Miranda* rights and did acknowledge he understood the rights. While this court disagrees with the State's assertion that Hernandez appeared to be highly intelligent, it does find he appeared to be of average intelligence and showed he had previous experience with law enforcement to show his knowledge of his rights including the *Miranda* rights.

Hernandez was well-versed in English and had average communication skills. What Hernandez exhibited is street smarts. His statements throughout the interview showed clearly he knew what the Investigators wanted and was willing to play their games.

Even though Hernandez did not actually sign the waiver form, he did voluntarily converse with Inv. Townsend and when asked if he would be willing to talk to them stated, "I can try." An actual signed waiver or expressed waiver is not required in the Defendant clearly shows by his statements his willingness to talk after acknowledging his understanding of his rights. . . .

The State met their burden of proving waiver by a preponderance of the evidence. . . . Defendant Hernandez voluntarily, knowingly and intelligently waived the rights and agreed to answer Investigator Townsend's questions. Any statements made by Defendant Hernandez during that interview and prior to his last statement terminating the interview are admissible.

(T17)

When a person is in custody and interrogated by government officials, *Miranda* requires a now-familiar set of warnings: The police must notify a person that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to an attorney, either retained or appointed. *State v. Bauldwin*, 283 Neb. 678 (2012). *Miranda* warnings are an absolute prerequisite to interrogation and fundamental with respect to the Fifth Amendment privilege. *State v. Burries*, 297 Neb. 367 (2017).

Miranda rights can be waived if the suspect does so knowingly and voluntarily. *State v. Goodwin*, 278 Neb. 945 (2009). A valid *Miranda* waiver must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *State v. Goodwin, supra*. If a defendant seeks suppression of a statement because of an alleged *Miranda* violation, the State must prove that the defendant validly waived his or her *Miranda* rights by a preponderance of the evidence. *State v. Burries, supra*. An appellate court looks to the totality of the circumstances to determine whether a defendant validly waived his or her *Miranda* rights during an interrogation. *State v. Burries, supra*. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct. *State v. Goodwin, supra*.

The district court was correct in finding that Hernandez voluntarily waived his *Miranda* rights. As seen on the DVD copy of the interview (E89 beginning at approximately 2:44 p.m.), Townsend read Hernandez his *Miranda* rights. (62:25-66:3; E4) He placed the rights advisement form in front of Hernandez and read the form to him line by line, pointing to the form with his pen as he read. (E89 at approximately 2:47 p.m.) Hernandez appeared to be following along. (*Id.*) After reading the form, Townsend asked Hernandez if he understood those rights, and Hernandez responded, "Yeah. I'm still focusing on the shooting." (*Id.*) Townsend asked if Hernandez wanted him to explain or repeat any of the rights and Hernandez shook his head no. (*Id.*) Townsend then read the waiver of rights portion of the form to Hernandez. (*Id.* at approximately 2:48 p.m.) After Hernandez tried to get some information out of Townsend, Townsend pointed to the rights advisory form

and asked if Hernandez if he would agree to talk to him. (*Id.* at approximately 2:50 p.m.) Hernandez replied, “I can try.” Townsend asked if he would be willing to sign the form, and Hernandez stated “I guess” and he leaned forward to sign the form although he never actually signed the form at that time. (*Id.*)

As the district court found, the fact that Hernandez did not sign the waiver form does not mean that his waiver was involuntary. Although an express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of the waiver, it is not dispositive. *State v. Burries, supra*. The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. *State v. Burries, supra*.

In this case, Hernandez received appropriate warnings and had ample opportunity to invoke his rights before giving any answers. A review of the videotaped interview also demonstrates that Hernandez understood his rights. Not only did he verbally state that he understood his rights, but it’s apparent that he is of average intelligence, well-versed in English, and had the ability to communicate with the officers. The State also introduced evidence at the suppression hearing that Hernandez had been interviewed by law enforcement in July of 2013 and had been advised of, and waived, his *Miranda* rights at that time. (102:11-107:1; E5) Thus, Hernandez was familiar with his rights prior to the interview with Townsend. Moreover, after two hours, Hernandez demonstrated that he knew how to exercise his rights when he told the investigators that he wanted to “end this interview right now.” (E89 at approximately 4:33 p.m.)

Based on the totality of the circumstances, Hernandez effectively waived his *Miranda* rights and agreed to be interviewed by the investigators. Thus, there was no error by the district court.

Alleged Invocation of Right to Remain Silent

Hernandez next argues that during the interview, he invoked his right to cut off questioning and that his invocation of that right was not scrupulously honored. The district found:

There was a point during the interview [see E89 at approximately 3:28 p.m.] when Hernandez stated, “I oughta properly stop talking now.” This was followed by a statement by Inv. [Townsend] of why it was important to get Hernandez[‘s] side of what happened. Without any hesitation Hernandez just continued to converse with Inv. Townsend answering his questions and the interview continued leading to admissions by Hernandez.

. . .

The court finds that the statement by Hernandez, [“I oughta probably stop talking now.”] was not a clear, unequivocal, unambiguous statement by Hernandez to invoke his right to remain silent. . . .

This court finds no violation of Defendant Hernandez’s *Miranda* rights.

When Defendant clearly communicated to the investigators his desire to stop further questions, the officers honored the accused’s request [see E89 at approximately 4:33 p.m.].

(T17)

The safeguards of *Miranda* assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process. *State v. Clifton*, 296 Neb. 135 (2017). If the suspect indicates that he or she wishes to remain silent or that he or she wants an attorney, the interrogation must cease. *Id.* The right to choose between speech and silence derives from the privilege against self-incrimination. *Id.*

Before the police are under a duty to cease the interrogation, however, the suspect's invocation of the right to cut off questioning must be unambiguous, unequivocal, or clear. *Id.* To invoke the right to cut off questioning, the suspect must articulate his or her desire with sufficient clarity such that a reasonable police officer under the circumstances would understand the statement as an invocation of the *Miranda* right to remain silent. *State v. Clifton, supra.*

If the suspect's statement is not an unambiguous or unequivocal assertion of the right to remain silent, then there is nothing to scrupulously honor and the officers have no obligation to stop questioning. *Id.* Officers should not have to guess when a suspect has changed his or her mind and wishes the questioning to end, nor are they required to clarify ambiguous remarks. *Id.* They are not required to accept as conclusive any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning. *Id.*

In considering whether a suspect has clearly invoked the right to cut off questioning, an appellate court reviews not only the words of the criminal defendant, but also the context of the invocation. *Id.* A suspect need not utter a talismanic phrase to invoke his or her right to silence. *Id.* Relevant facts include the words spoken by the defendant and the interrogating officer, the officer's response to the suspect's words, the

speech patterns of the suspect, the content of the interrogation, the demeanor and tone of the interrogating officer, the suspect's behavior during questioning, the point at which the suspect allegedly invoked the right to remain silent, and who was present during the interrogation. *Id.* A court might also consider the questions that drew the statement, as well as the officer's response to the statement. *Id.*

The district court was correct in finding that a reasonable police officer would not have understood Hernandez's statement that "I oughta probably stop talking now" as an invocation of the right to remain silent. The statement made by Hernandez in this case is similar to the statements presented to this Court in *State v. Hilding*, 278 Neb. 115 (2009). In *Hilding*, the defendant argued that the law enforcement interview should have ended when he said, "I probably shouldn't be answering any of these questions" and "I probably shouldn't be talking about this." *Id.* at 127-28. This Court disagreed, finding that those statements were not unambiguous and unequivocal invocations of *Miranda* rights. The same is true here. Because Hernandez's statement was ambiguous and equivocal, a reasonable officer under the circumstances would have understood only that Hernandez was either considering invoking his right to end the interview or that he finished his colloquy regarding Kyle Clow or John Hall, which is the people he had been discussing immediately before making the statement that "I oughta probably stop talking now."

Because Hernandez did not unambiguously and unequivocally invoke his right to cut off questioning, the district court did not err when it overruled his motion to suppress, and Hernandez's second assignment of error has no merit.

III. Assignment of Error 3

Hernandez's third assignment of error is that the district court abused its discretion in allowing irrelevant and unduly prejudicial evidence to be received by the jury through his video statement. (Brief of Appellant, p. 2) Specifically, Hernandez argues that various comments made throughout the interview should have been excluded under rule 401 and rule 403. (Brief of Appellant, pp. 34-39)

To be admitted at trial, evidence must be relevant, meaning evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *State v. Rocha*, 295 Neb. 716 (2017). Under rule 403, even evidence that is relevant is not admissible 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. *State v. Rocha*, *supra*. Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. *State v. Chauncey*, 295 Neb. 453 (2017). Unfair prejudice speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged, commonly on an emotional basis. *Id.*

Hernandez filed a motion in limine requesting that 15 separate portions of his statement be redacted under rule 401 and rule 403. (T19-25) In its order on Hernandez's motion in limine, the district court found that there were some statements in the interview that would be unfairly prejudicial to Hernandez and the court granted the motion in limine regarding those statements. (T28) Most of these statements were about Hernandez

slitting the throat of another man. (T28) The court denied the remainder of the motion, however, finding that the statements did not violate rule 401 and rule 403 because the statements were necessary for the jury to consider context within the interview and the voluntariness of Hernandez's confession. (T28-29)

Hernandez argues that he was prejudiced because the "interview is over two hours and comes fully loaded with bizarre rants and ramblings." (Brief of Appellant, p. 39) These "bizarre rants and ramblings," however, are also the basis for Hernandez's claim that his statement was not voluntary, which is ultimately an issue that must be decided the jury. The jury in this case was presented with the pattern jury instruction on voluntary statements. (T41; see, also, NJI2d Crim. 6.0) The jury was instructed that it could rely on Hernandez's statement to law enforcement only if it found (1) that Hernandez made the statement; and (2) that Hernandez understood what he was saying; and (3) that the statement was freely and voluntarily made under all the circumstances surrounding its making. (T41) The jury had to find that the State proved those three things beyond a reasonable doubt in order to consider Hernandez's statement. (T41) Thus, Hernandez's "rants and ramblings" were relevant to the issue of voluntariness and were not unfairly prejudicial. Hernandez cannot show an abuse of discretion by the district court.

Hernandez's third assignment of error has no merit.

IV. Assignment of Error 4

Hernandez's fourth assignment of error is that the district court abused its discretion in overruling the defense objections and motion for mistrial on the grounds of prosecutorial misconduct. (Brief of Appellant, p. 2)

Despite his assertion to the contrary (see brief of appellant, p. 17), no objections were made by the defense during the State's closing argument. (1654:12-1684:9) Following the State's closing argument, however, Hernandez did move for a mistrial based on prosecutorial misconduct. (1684:12-1688:6) Relevant to this appeal, the defense argued that (1) the State violated ethical obligations in respect to arguing a personal belief on the part of the evidence when the prosecutor stated, "the State of Nebraska believes" and "to be perfectly honest" (1685:2-15); (2) the State appealed to the prejudices and passions of the jury by stating that Joey didn't need to rest in a coffin and the hardship Joey's mother faced when removing him from life support (1685:16-23); and (3) it was improper for the prosecutor to call people in the house vermin, rat, lowlife. (1686:2-16) The district court denied the motion for mistrial, finding that if there was any error, it was harmless. (1688:1-6)

Prosecutors are charged with the duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial. *State v. Dubray*, 289 Neb. 208 (2014). Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial. *Id.* When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's remarks constitute misconduct. *Id.* A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct. *Id.* But if a prosecutor's act were misconduct, an appellate court next considers whether the misconduct prejudiced the defendant's right to a fair trial. *Id.*

Hernandez submits that the following comments constitute prosecutorial misconduct:

- (1) “The fact that he had a point to prove and that he then acted upon that point by shooting Joey Debella is among the numerous reasons that the State of Nebraska believes that this crime is a premeditated first degree murder because it shows he thought about what he wanted to do and hoped to accomplish before he actually did it.” (1655:4-10)
- (2) “The State believes that when you consider all of the evidence, not just one piece, not just two, but you consider all the evidence in totality, the State believes that it has more than satisfied its burden to prove that this is, in fact, a first degree premeditated murder committed by the defendant, Mr. Hernandez, and that he, likewise, used a firearm to commit a felony, that being the murder, and was a felon at the time he committed his offense and it was unlawful for him to possess that gun he used to kill Joey Debella.” (1655:20-1656:5)
- (3) “Accordingly, the State of Nebraska is asking you, based upon the totality of the circumstances, evidence, testimony you’ve heard over these past four days, to return a guilty verdict against Mr. Hernandez for each of these crimes.” (1656:6-10)
- (4) “Ladies and Gentlemen, to be perfectly honest with you, when looking and reflecting back on the testimony and evidence you’ve heard throughout the course of this case, I don’t know that there is sufficient words in the dictionary or adjectives in the thesaurus to describe the selflessness, the senseless, the heartlessness, the disgusting acts committed not by just Mr. Hernandez, but, also, by the likes of John Hall, Brett Winters, and Dave

McPherson. It honestly, made me sick and it makes me sick that the State had to present any of these witnesses before you in its case in chief in hopes that you'll realize that this was only necessary because of the fact that Mr. Debella - - Mr. Debella was the victim of the ultimate injustice that one human can commit against another." (1656:11-1657:1)

- (5) "So the State believes that Amy Weber has helped us corroborate another thing that Desi Hernandez tells us in his statement and that is that he left that gun there." (1678:14-17)
- (6) "From every account you've heard these past four days, including that given by Mr. Hernandez, Mr. Debella's sins were, at most, punishable by incarceration, not eternal rest in a coffin, particularly at the hands of a man whose primary complaint was that Joey Debella was stepping on his toes." (1657:8-14)
- (7) Referring to the people who lived at Brownell's house were "vermin," "riffraff," and "lowlife people." (1659:9-25)
- (8) "We heard from Connie Mast about the heart-wrenching decision she had to make in taking him off those machines, and that was after consultation with the people who were telling her over and over again there's no chance." (1679:14-23)

Hernandez argues that the comments were improper because they either expressed the prosecutor's personal belief, or inflamed the prejudices or excited the passions of the jury. (Brief of Appellant, pp. 42-47) Regarding Hernandez's claim that the prosecutor expressed his personal belief in the above comments, the State disagrees. In

his brief, Hernandez takes issue with prosecutor making comments such as “the State believes” and “to be perfectly honest.” In our view, this not misconduct. It is well established that when a prosecutor’s comments rest on reasonably drawn inferences from the evidence, the prosecutor is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. *State v. Gonzales*, 294 Neb. 627 (2016). Thus, in cases where the prosecutor comments on the theory of defense, the defendant's veracity, or the defendant’s guilt, the prosecutor crosses the line into misconduct only if the prosecutor’s comments are expressions of the prosecutor’s personal beliefs rather than a summation of the evidence. *Id.* In this case, when taken in context, “[t]he prosecutor’s statements are properly viewed as a commentary on the evidence presented at trial, as opposed to an expression of personal opinion.” *Id.* at 649. Thus, Hernandez’s first ground has no merit.

Regarding his second claim, that the comments were improper because they were intended to inflame the prejudices or excite the passions of the jury, Hernandez directs his argument to the fourth, sixth, seventh, and eighth comments. The State emphasizes, as this Court recognized in *Gonzales* and *Dubray* that closing arguments have a “rough and tumble quality about them,” that counsel must be “permitted to present a spirited summation,” and that “something must be allowed for the zeal of counsel in the heat of argument.” *State v. Gonzales*, 294 Neb. at 647; *State v. Dubray*, 289 Neb. at 227. Although the State does not see these comments as misconduct, we recognize that portions of them may come close to crossing the line. To the extent this Court finds them to be misconduct, any error was harmless.

Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process. *State v. Dubray, supra*. Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole. *Id.* In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction. *Id.*

Viewing the trial as a whole, any improper comments by the prosecutor did not deprive Hernandez of a fair trial. The comments made by the prosecutor were relatively isolated. At issue are only four comments that occurred during the initial closing argument of the State which lasted just under one hour. Although no limiting instruction was given to the jury, the jury was instructed not to let sympathy or prejudice influence its verdict (T31) and that the attorneys' statements were not evidence (T46). Moreover, the evidence against Hernandez was strong. Hernandez confessed not only to law enforcement, but also to at least four other people that he shot Joey in the head. Hernandez was also the only person with Joey in the basement when the gun was fired as he was seen leaving the house immediately after Hall and Winters heard the gunshot. Hernandez then fled to Kansas and hid from law enforcement in his cousin's house for over 7½ hours. In addition, in overruling the motion for mistrial, the district court found any error to be harmless. "In most instances the impact of a comment . . . depends on the atmosphere at trial. The trial judge is in a much better position than [an appellate court] to measure the atmosphere at

trial and gauge the probable impact an improper comment has on the jury.” *State v. Reeves*, 216 Neb. 206, 219–20 (1984). Thus, Hernandez cannot establish that the district court abused its discretion in overruling his motion for mistrial.

Hernandez’s fourth assignment of error has no merit.

Conclusion

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

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Certificate of Service

I hereby certify that on Friday, December 15, 2017 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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