

**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 APPELLANT**

---

**Respectfully submitted:**

**ROBERT W. KORTUS, #19206  
Nebraska Commission on Public Advocacy  
140 N. 8<sup>th</sup> St., Suite 270  
Lincoln, NE 68508  
(402) 471-7774  
[rkortus@ncpa.ne.gov](mailto:rkortus@ncpa.ne.gov)**

**ATTORNEY FOR APPELLANT**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
I. STATEMENT OF JURISDICTION .....	1
II. STATEMENT OF CASE .....	1
III. ASSIGNMENTS OF ERROR .....	2
IV. PROPOSITIONS OF LAW .....	2
V. STATEMENT OF FACTS .....	4
VI. SUMMARY OR ARGUMENT .....	14
VII. ARGUMENT .....	20
VII. CONCLUSION .....	48

## TABLE OF AUTHORITIES

### Cases Cited:

<i>Darden v. Wainwright</i> , 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) . . . . .	45
<i>Hartley v. Metro. Utils. Dist. of Omaha</i> , 294 Neb. 870, 885 N.W.2d 675 (2016) . . . . .	38
<i>Jackson v. Denno</i> , 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) . . . . .	23
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) . . . . .	<i>passim</i>
<i>State v. Barfield</i> , 272 Neb. 502, 723 N.W.2d 303 (2006) . . . . .	45
<i>State v. Beeder</i> , 270 Neb. 799, 707 N.W.2d 790 (2006), <i>overruled on other grounds</i> ,	
<i>State v. McCulloch</i> , 274 Neb. 636, 742 N.W.2d 727 (2007) . . . . .	41
<i>State v. Burries</i> , 297 Neb. 367, ___ N.W.2d ___ (2017) . . . . .	23, 29, 35
<i>State v. DeJong</i> , 287 Neb. 864, 845 N.W.2d 858 (2014) . . . . .	22, 30
<i>State v. Dubray</i> , 289 Neb. 208, 854 N.W.2d 607 (2014) . . . . .	4, 23, 40, 47
<i>State v. Gibbs</i> , 253 Neb. 241, 570 N.W.2d 326 (1997) . . . . .	1
<i>State v. Gonzales</i> , 294 Neb. 627, 884 N.W.2d 102 (2016) . . . . .	4, 42, 44
<i>State v. Iromuanya</i> , 272 Neb. 178, 719 N.W.2d 263 (2006) . . . . .	38, 46
<i>State v. Lester</i> , 295 Neb. 878, 898 N.W.2d 299 (2017) . . . . .	40
<i>State v. Oldson</i> , 293 Neb. 718, 884 N.W.2d 10 (2016) . . . . .	35
<i>State v. Poe</i> , 276 Neb. 258, 754 N.W.2d 393(2008) . . . . .	38
<i>State v. Rocha</i> , 295 Neb. 716, 890 N.W.2d 178 (2017) . . . . .	35, 44
<i>State v. Rogers</i> , 277 Neb. 37, 760 N.W.2d 35 (2009) . . . . .	3, 20-22, 28-30
<i>State v. Sandoval</i> , 280 Neb. 309, 788 N.W.2d 172 (2010) . . . . .	3, 40
<i>State v. Smith</i> , 286 Neb. 856, 839 N.W.2d 333 (2013) . . . . .	47

*State v. Williams*, 295 Neb. 575, 889 N.W.2d 99 (2017) ..... 41

**Statutes Cited:**

Neb. Rev. Stat. § 25-1911 (Reissue 2016) ..... 1

Neb. Rev. Stat. § 27-401 (Reissue 2016) ..... 13, 16, 21, 24, 36-37

Neb. Rev. Stat. §§ 27-403 (Reissue 2016) ..... 13, 15-16, 21, 23-24, 35-37

Neb. Rev. Stat. § 28-303 (Reissue 2016) ..... 1

Neb. Rev. Stat. § 28-1205(1)(a) (Reissue 2016) ..... 1, 2

Neb. Rev. Stat. § 28-1206(1)(a) (Reissue 2016) ..... 1, 2

**Other Authorities:**

Neb. Const. art. I, §3 ..... 23

Neb. Const. art. I, § 23 ..... 1

## I. STATEMENT OF JURISDICTION

This is a direct appeal from judgments of conviction and sentences of life imprisonment for the offense of first degree murder, Neb. Rev. Stat. § 28-303 (Reissue 2016), a Class IA felony; a consecutive sentence of three to seven years imprisonment for possession of a firearm by a prohibited person, Neb. Rev. Stat. § 28-1206(1)(a) (Reissue 2016), a Class 1D felony; and a sentence of five to years imprisonment, to run consecutive to the other two sentences for the offense of use of a firearm to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1)(a) (Reissue 2016), a Class 1C felony. The sentences were entered January 31, 2017. (T54)

A direct appeal was filed, and the Nebraska Commission on Public Advocacy was appointed to represent appellant, Mr. Desiderio C. Hernandez.

Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires this Court to reach a conclusion independent from the district court. *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997). Appellate jurisdiction is conferred with the filing of a notice of appeal and poverty affidavit within thirty days of the final order that is appealed. Neb. Rev. Stat. § 25-1911 (Reissue 2016) and Neb. Const. art. I, § 23. Notice of appeal and poverty affidavit were filed herein within thirty days of the challenged order.

## II. STATEMENT OF CASE

Following a jury trial, appellant, Desiderio C. Hernandez was found guilty of each of the three charges he faced. (T53) He was sentenced on January 31, 2017 and received the following: Count I, life imprisonment for the offense of first degree murder, Neb. Rev. Stat. § 28-303 (Reissue 2016), a Class IA felony; Count II, a sentence of five to years imprisonment to run consecutive to the other two sentences for the offense of use of a firearm to commit a felony in

violation of Neb. Rev. Stat. § 28-1205(1)(a) (Reissue 2016), a Class 1C felony; and Count III, a consecutive sentence of three to seven years imprisonment for possession of a firearm by a prohibited person, Neb. Rev. Stat. § 28-1206(1)(a) (Reissue 2016), a Class 1D felony. This direct appeal followed. (T124)

The appellate court's scope of review is to consider assigned errors, note plain error on the record, and consider abuse of discretion.

### **III. ASSIGNMENTS OF ERROR**

- A. The district court abused its discretion in admitting into evidence appellant's video statement to law enforcement which was obtained involuntarily and in violation of the right against self incrimination.
- B. The district court abused its discretion in admitting into evidence appellant's video statement to law enforcement which was obtained involuntarily and in violation of the right against self incrimination as appellant did not sufficiently waive his right against self incrimination and his subsequent invocation of the right to remain silent was ignored.
- C. The district court abused its discretion in allowing irrelevant and unduly prejudicial evidence to be received by the jury through the video statement of appellant.
- D. The district court abused its discretion in overruling the defense objections and motion for mistrial on the grounds of prosecutorial misconduct.

### **IV. PROPOSITIONS OF LAW**

- A. A two-part standard of review is used in appellate consideration of claims that a custodial statement was involuntary or procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d

694 (1966). Historical facts are examined for clear error. Determining whether a constitutional violation has occurred, however, is a question of law which we review independently of the trial court's determination. *State v. Rogers*, 277 Neb. 37, 46-7, 760 N.W.2d 35, 47 (2009)

- B. It is a mixed question of law and fact whether a statement was voluntarily made, whether a custodial interrogation has occurred, whether sufficient *Miranda* warnings were given to the suspect, whether properly advised *Miranda* rights were thereafter waived, whether there has been an unambiguous invocation of the right to remain silent or to have counsel, and whether invocation of those rights has been scrupulously honored. All these questions involve the application of the facts surrounding the confession to the constitutional rubric mandated by the U.S. Supreme Court, and are reviewed under the two-point standard of review set forth above. *State v. Rogers, supra* at 47-49m 760 N.W. 2d at 47 (footnotes omitted)
- C. Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *State v. Sandoval*, 280 Neb. 309, 337, 788 N.W.2d 172, 201 (2010) (Citations omitted)
- D. 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. In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, we consider 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, 222-223, 854 N.W.2d 584, 601-602 (2014).

E. 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. The principle behind the prohibition of expressing personal opinions on the defendant's veracity and guilt is that when a prosecutor asserts his or her personal opinions, the jury might be persuaded by a perception that counsel's opinions are correct because of his position as prosecutor, rather than being persuaded by the evidence. The prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence. Moreover, the jury is aware that the prosecutor has prepared and presented the case and consequently may have access to matters not in evidence; thus, the jury may infer that such matter precipitated the prosecutor's personal opinion. *State v. Gonzales*, 294 Neb. 627, 645-646, 884 N.W.2d 102, 117-118 (2016)

## V. STATEMENT OF FACTS

Appellant, Desiderio C. Hernandez, "Hernandez" was convicted of first degree murder and two other charges arising out of the death of Joseph Anthony Debella, Jr. "Debella." (T53) Debella was shot during the late evening hours of August 4, 2015. A single round penetrated his



forehead. Debella was transported to Lincoln, Nebraska for medical treatment. He was placed on life support. When life support was removed, he died on August 13, 2015. (512:18-23; 515:14-16)

This is a case from Richardson County, Nebraska. (T1) The shooting took place in Falls City in a home occupied by Jason Brownell (“Brownell house”) and others. (564:19-566:14; 567:2-11) The primary occupant of the home was Jason Brownell. He let people stay at the home almost for free. (790:20-25) Some of the people who stayed at the Brownell house included Jason Brownell, John Hall, Cara Cavaness, Adam Lippold, Brett Winters, David McPherson, Debella and Hernandez. (922:3-924:8 (1078:11-1080:8) In a bedroom upstairs there was a blood stain caused by the use of a hypodermic needle. (785:11-787:21) The basement was full of clutter and smelled of feces. (789:16-790:16) There was drug paraphernalia all over the house. (805:4-5) Drug activity occurred at the house involving both the use and distribution of drugs. (925:1-5) Brett Winters testified that everyone at the house was involved in the distribution of methamphetamine and that the main dealer was Debella. (980:1-983:10) John Hall testified that methamphetamine was sold out of the house on a daily basis. (1079:8-15) He further stated that everyone in the house sold the drug and Debella was the primary dealer.

Debella was a recent arrival to Falls City. He came approximately July 4, 2015, and soon after moved into the Brownell house. (509:1-2; 564:19-566:14; 567:2-11) He lived in the basement. (1077:5-10) Everyone else, including Hernandez, slept upstairs. (1078:10-25) Debella and Hernandez were cousins. (520:1-12; 523:1-525:15 ) They lived together in Kansas City for a period of time before Debella moved to Falls City. (521:11-12)

Debella was involved in a shooting incident on the night before he was shot. On August 3, 2015, Debella fired a shot out of a handgun during an argument with Jeff Morley about drug money. (998:14-999:2) This occurred upstairs in the Brownell House. During that argument, Jeff Morley threatened to kill Debella if Debella did not leave town the next day. (999:6-10) Debella responded by firing a revolver in the direction of Morley but at the ceiling. (999:16-181; 1010:3-10; 1137:14-1139:24) After the shot, Hernandez stood up and tried to defend Debella. (1000:6-8) Brett Winters testified that Morley decided to pay Debella the disputed money. This appeared to ease tensions between the two. (1010:11-24) Winters was certain that Morley was at the Brownell House at some point in time on August 4, 2015, prior to Debella being shot. (1009:1-8)

The State's theory of prosecution was that Hernandez was the only living witness to the shooting of Debella on August 4, 2015. There were witnesses to events that occurred around the time of the shooting. The State presented witnesses that observed Hernandez at a time alleged to be after, but close in time, to when Debella was shot. The first witness was Esperenza Ogden. She is a sister of Hernandez and lived in Falls City. (523:22-25; 524:15-20)

Ogden heard a knock at the door on August 4, 2015 at around 11:40 p.m. (526:15-22) Hernandez stepped inside the house. (527:3-6) He had no visible injuries. (527:18-20) Ogden went outside with him and spoke to him on the porch. (528:6-17) He gave her a cigarette and said, "That will probably be the last cigarette I ever give you." (528:21-25) He wanted to go for a ride. (529:6) Ogden declined to give him a ride. He told her he shot Debella and pointed his fingers at his forehead. (530:3-15) He then walked off in the direction of house belonging to

Chris and Amber Hernandez (531:23-532:10) He did so after Ogden accused Hernandez of lying. (553:7-19)

Amber Hernandez is married to Chris Hernandez who is the brother of Desiderio Hernandez. (562:19- 563:18) They also live in Falls City. After Hernandez left Ogden's house he went to the home of Amber and Chris Hernandez. Appellant Hernandez walked up to the home and told them that he "shot that motherfucker." (571:14-16) Chris asked Hernandez who was shot and why. Hernandez answered that it was Debella and because "His bitch shouldn't have been late." (573:6-8) When Hernandez came to the house he was all hyped like he was high or on an adrenalin rush. (602:4-7) Hernandez said that someone should call 911. (573:10-12) Neither Amber or Chris made that call to 911. (578:5-8) Chris adds that Hernandez told them. "I told you guys I wasn't messing around. I ain't playing." (732:12-17)

Amber Hernandez drove to Ogden's home. She picked her up and they headed to the Brownell house. (536:4-6) They went to the front door and knocked, knocked harder, then started yelling and also knocking on windows. (536:16-18) No one responded. (536:19-20) Dave McPherson walked from across the street, approached them, and let them into the home. (537:7-25) As McPherson was opening the door for them from the outside, Hall and Winters began to open the door from inside. (538:4-7) The ladies asked about Debella. They were told he could not come up. (539:3-19). The ladies had to threaten to call police and shove their way past the men to get to the basement. (556:7-23).

The ladies found their way downstairs and discovered Debella who had been shot. (540:13-543:19) 911 was called. (544:23-545:9) The ladies came upstairs and found Hall and Winters bringing duffel bags from a back room outside to a car. (545:14-547:21) Hall asked

them not to call the police. (604:11-13) He told them that Debella was fine. (604:17-19) Neither Hall nor Winters would provide the address so that Amber Hernandez could tell 911. (605:5-12) After about five minutes, police and ambulance services arrived. (548:5-15) McPherson was no where to be seen and Winters had fled. (559:11-560:6)

Deputy Jonathon Kirkendall works for the Richardson County Sheriff's Office. (615:16-18) He was a patrol officer for the Falls City Police Department at the time of the shooting. (615:22-616:22) He responded to the 911 call and arrived about 15 minutes after midnight on August 5, 2015. (620:6-9) The officer went downstairs and found Debella breathing heavily with a pool of blood around his upper body. (627:11-13) There was a gunshot wound to the forehead. (628:5-13) There were rounds of .22 ammunition around the body. (632:6-13) Debella's wallet was still in his pocket, partially protruding out. (633:20-25) A revolver was found on a bed near the body, after moving a couple of blankets. (636:10-16; 643:5-8) The officer believed he saw this before the EMTs arrived. (636:14-16) The handgun found in the basement could hold six rounds. There were five unspent rounds and one fired round. (824:12-16) Deputy Kirkendall opined that there was no evidence of a struggle. (641:3-6)

Dave McPherson testified that he was in an upstairs bedroom with Hall when Debella was shot. (925:23-926:25; 932:11-12) McPherson says that after hearing the shot, Hall commented that the gun was being shot in the basement again. (932:15-20) McPherson said that Hernandez came upstairs about five minutes later and asked if anyone wanted to go smoke in the basement. (933:6-13) After the offer was declined, McPherson next heard the front door open and close. (936:7-21) McPherson stated that Hall went downstairs and yelled up that Debella had been shot. (938:16) McPherson chose not to call 911 and left because he did not want to get

involved. (939:3-15) He left and went to see Jason Brownell who was working at a nearby hotel. (939:4-940:17) He returned to the home and helped let two ladies into the house. (940:17-942:12) When he returned, Winters was at the house. (942:22-943:5)

Brett Winters testified that Hernandez and Debella argued about money and Debella's role. (983:17-984:11) Hernandez was said to be upset about the role other people played in the distribution of drugs. (984:13-19) Winters stated that the revolver on the futon in the basement was Debella's gun which Debella got from Hall in exchange for methamphetamine. (994:10-995:7) There was also a rifle kept upstairs. (996:6-12) Winters told the police that he thought the rifle upstairs was a .22 caliber firearm. (1004:9-18) When Winters went downstairs and saw Debella it looked like someone had tried to stop the bleeding. There were tissues and toilet paper next to the body. (1007:10-23)

John Hall testified that he was upstairs smoking methamphetamine when he heard a pop. Hernandez came upstairs and asked if they wanted to smoke. Hernandez left the house. Hall went downstairs and found Debella. (1082:18-24; 1099:15-1104:15) Earlier that day, Debella had gone to Kansas City and returned with "plenty" of methamphetamine. (1089:17-1091:8) After finding Debella, Hall started to try and get rid of drug related items. (1105:13-1109:16)

Hall denied that he tried to help Debella by placing tissues on the wound. (1117:7-25) He says he saw the gun for the first time after law enforcement moved the futon and the blankets revealing the gun. (1122:22-1123:1) Hall sold that gun to Debella for drugs and money. (1124:11-18) A gun holster was recovered outside the Brownell House after the shooting. Hall said that this holster was sold with the revolver. Hall denied throwing the holster outside. (1126:19-1127:9) Hall stated that Winters just showed up suddenly. (1129:6-18) Hall testified

that he also had a .30 -30 deer rifle. (1133:1-20) That rifle fired .30-30 shells. (1134:5-10) Hall testified that Hernandez and Debella did not have any physical fights. (1137:1-9)

A person down the street from the Brownell house named Kelley Barker told law enforcement that Hernandez was standing outside her house at the time the ambulance arrived at the crime scene. (895:11-896:9)

Following the shooting, law enforcement found digital scales, drug paraphernalia, and a gun holster outside the Brownell house. (685:3-22) There were also duffle bags found in Hall's vehicle. At the hospital, officers found \$4.00 in cash in the left pocket of the shorts worn by Debella. In the right pocket was \$343.71 in cash, a pink lighter and two baggies of suspected methamphetamine. (1359:18-24) One baggie weighed 9.8 grams and the larger was 28.9 grams. (1362:23-24) Law enforcement testified that Debella possibly had over a thousand dollars worth of methamphetamine in the pockets of his shorts. (1294:2-4)

Michael Seager also lives in Falls City. (1014:13-14) Seager was an acquaintance of Hernandez and Hernandez visited him on August 5, 2015, around 10:00 a.m. (1016:4-7; 1021:6-13) Hernandez said he had no where to go. (1022:12-14) He asked Seager if he wanted to smoke methamphetamine. (1022:12-16) They smoked the drug and then drove to Humboldt so that Seager could run an errand. (1024:5-1025:25) They drove past the house where Debella was shot and it was busy with law enforcement activity (1026:9-17). Seager asked what happened, and Hernandez said, "It is what it is." (1025:1-4)

They again smoked methamphetamine later that day in Hiawatha, Kansas with Travis Tipton. (1028:1-23) Seager and Hernandez left Hiawatha to return to Falls City but stopped to get some marijuana. (1029:7-24) While getting the marijuana they again smoked

methamphetamine. (1030:5-17) Seager and Hernandez returned to Seager's home in Falls City. Hernandez had asked to be able to live with Seager and pay rent. (1064:9-25) After Seager turned him down, Hernandez tried to make arrangements to live with his cousin Tiffany Gates. (1064:22-1065:1) Hernandez asked Seager to use Seager's phone and find a number for Tiffany Gates in Horton, Kansas. A call was then made to Tiffany Gates. (1032:24-1034::24) Seager gave Hernandez a ride to Horton, Kansas. Hernandez indicated he needed a place to stay. (1035:1-21) Seager said he was tired of hanging out with Hernandez and wanted him out of the house. (1035:10-11)

They drove to Tiffany Gates' house in Horton, Kansas. Upon arrival, Seager heard Hernandez tell Tiffany Gates, "He was breathing when I got there. He wasn't when I left." (1041:16-19) Seager added that Hernandez used hand gestures to point at the forehead and to simulate dropping the hammer on a gun. (1042:4-6) Seager also stated Hernandez told Gates that the only gun he had he left at the house. (1042:21-1043:3) Seager observed Hernandez was rambling, often blurting out unintelligible comments or mumbles. (1043:10-16) As police came, Hernandez ran to the trailer and said, "I'm not here." (1043:25-1044:2)

Tiffany Gates is a cousin of Hernandez. (1218:1-2) Hernandez wanted Gates to start setting up people for drug transactions (1224:24-1225:5) After Hernandez arrived on August 5, 2015, he "chuckled" and told Gates, "I got that motherfucker right there." (Indicating.) (1233:14-16) He also said that when he left, Debella was breathing. (1234:15-16) Hernandez complained that he was doing things for people and not making any money. (1236:3-9) He said that Debella was using him. (1245:20-25)

Gates testified that Hernandez talks to people that are not there and imagines people talking to him. (1247:2-1248:2) She told police that on August 5, 2015, she could tell that Hernandez was high. (1248:11-13) During the initial encounter upon Hernandez's arrival, Hernandez was imagining that Gate's boyfriend was speaking to Hernandez even though that was not true. (1248:18-22) When Hernandez called earlier he was also not making much sense. (1248:23-1249:3) Gates has seen Hernandez under the influence of methamphetamine previously and he appeared under the influence of that drug on the day she saw him before his arrest. (1251:23-4) Gates also told police that Debella has been mentally unstable following a drug overdose and that he, too, saw and heard things that were not real. (1249:11-24)

Christopher Horns is a police officer with the Horton Police Department in Kansas. (1156:1-7) The Horton police received a dispatch from Falls City that Hernandez was headed towards a residence in Horton. (1158:1-10) The officer arrived at the residence at about 7:00 p.m. on August 5, 2015. (1160:3-6) Hernandez was in the trailer/residence when the officer arrived. (1161:7-19) The officer, together with another officer, went to the front door and announced their presence. Hernandez did not respond. (1161:20-1162:3) Law enforcement set up a perimeter and waited. (1162:25-1163:21) During the 8 hours of waiting, law enforcement used 3 flash bang devices, loud speaker speeches every 5 to 10 minutes, and bright lights to no avail. (1174:1-1176:8) After about 8 hours, Hernandez came out of the residence and was taken into custody at approximately 3:15 a.m. (1164:14-20)

Hernandez was injured during the arrest. He received a head injury. A taser probe got stuck in his chest. He was taken to a hospital for medical treatment. Sergeant Jonathan Boller is an officer with the Horton Police Department. (1187:18-22) He testified that at the hospital



Hernandez received a staple to his head. The taser probe was removed, and they used a silver nitrate stick to stop the bleeding at that location. (1202:7-15) Medical clearance came less than a half hour after the staple and the nitrate stick. (1211:2-14)

A custodial interrogation took place in Horton starting at 2:00 p.m. that day. (1259:23-24) The interrogation was lead by Cory Townsend, a sergeant with the Nebraska State Patrol and the lead investigator in this case. (745:12-750:13) Also participating in the interrogation was Nicholas Frederick, who is a criminal investigator with the Nebraska State Patrol. (1347:23-24). The video of the statement of Hernandez was offered as Exhibit 89. (E89: 1293:25-1297:5, Vol. VIII) The defense received continuing objections to the admission of this exhibit. The objections were based on the previously filed motion to suppress and motions under Nebraska Evidence Rules 401 and 403, Neb. Rev. Stat. §§ 27-401, 403 (Reissue 2016). (1295:14-1296:15)

Sergeant Townsend said that he was aware that Hernandez received “minor treatment” at the hospital before the interview. (1299:4025) He stated there were no indications that Hernandez may have been under the influence of drugs or alcohol. (1300:13-22) He admitted that the statement is unusual but only goes so far as to state, “[H]e says a lot of strange things, but none of that causes me to believe that he doesn’t understand what’s going on . . . all of the conversation was fine.” (1301:6-10)

At trial, Sgt. Townsend testified that signs of a person being high on methamphetamine include scatterbrained thoughts, thoughts which are not cohesive, paranoia, a search for answers, and delusions (1330:6-1331:23) He was aware that Gates told the officers that Herndandez had a delusional conversation when he arrived at the trailer and that he had a staple placed in his head

for a head injury. The officer was not aware of the medication Hernandez received, if any, and did not feel it was important to know. (1328:23-1332:20)

Frederick testified that indicators of being high on methamphetamine include increased levels of activity, for example looking around when trying to sit still, body jerks, tense muscles, clenched jaw, grinding of teeth, and dilated pupils which may not be noticeable to the naked eye (1387:15-1388:1) He did not recall Hernandez having any of those indicators. (1388:2-5)

The rights advisement form was not signed. (1303:3-9) The form is exhibit 86 received at 1304:14-17. The officer does not know whether Hernandez responded to each of the advisement questions, but states that he thinks Hernandez verbally agreed to waive all his rights. (1305:5-15) The interrogation lasts over two hours. At 3:28 p.m., Hernandez tells his questioners twice that "I think I'll probably stop talking now." The questioning continued without any effort to clarify the words relating to the cessation of questioning.

During the interrogation, Hernandez displayed disorganized thinking and speech throughout the interview. There were times when direct answers were provided. Frequently, responses by Hernandez bore no relationship to the question asked. There were denials of shooting Debella. There were admissions to shooting Debella. Townsend interjected many details relating to the crime scene and the criminal investigation that took place, including suggestions that Hernandez may have been offended or used. (*See, for e.g.* 3:32 p.m.)

In respect to the rights advisement portion. Hernandez stated he does not know what his rights are. (2:44 p.m.) The rights form was read out loud, but Hernandez interrupted with ramblings that made no sense, including theories about how various people are related, his ability to prove that humans have two stomachs just like cows and that he is able to defecate children

out of his body. (2:44 p.m. to 2:48 p.m.) When asked directly if he understood the rights read to him, Hernandez responded, "Yeah, I am still focused on the shooting." (2:48 pm.) Eventually, the officer asked Hernandez if he was willing to answer questions. *Id.* Hernandez went on a tangent about being told by others what happened at the house. *Id.* At 2:50 p.m. the officer again asks Hernandez if he is willing to talk and Hernandez replies, "I can try." The officer then asked Hernandez to sign the rights advisement form. Hernandez replied, "I guess" but appeared to lose his train of thought as he looked at the paper and then did not sign the form. Instead, Hernandez went off on another tangent about his name, where he might have been in the 1970s and other ramblings. He also had an emotional breakdown.

The defense filed pretrial motions challenging the admission of the statement. A motion to suppress was filed. (T4). The district court denied the motion. (T12) Findings of fact included a finding that Hernandez "was articulate at times," "appeared coherent throughout the interview" and that Hernandez was playing "a cat and mouse game". (T14) The court commented on the failure of Hernandez to stay focused during the interrogation by finding: "But it appeared to this court that the reason was not because Hernandez was delusional or under some kind of drug but because he 1. Had emotional difficulty trying to admit his actions involving his cousin Joey and 2. He was aware of the legal consequences of his admission." *Id.*

The district court found the statement to be voluntary and that no violation occurred in respect to the *Miranda* warnings. (T14-16) The court further found:

The two (2) hour interview has many statements aside from the admissions that would be barred from admission under a 403 analysis. Yet, the whole interview would need to be included for the fact finder if Hernandez wants the issue

submitted to the jury for a reasonable doubt determination on voluntariness. The issue can be decided later by the Defendant if he files such a 403 motion.

Defendant is left with being between a rock and a hard place in this issue.

(T15)

The defense followed with the filing of two motions in limine to exclude the matters referenced by the district court. (T19. 24) The first motion identified matters objected to under Nebraska Evidence Rules 401, 402 and 403, including Hernandez discussing father and other issues at 2:40 p.m.; a discussion of Debella's mother and other issues at 2:41 p.m.; a discussion of issues with his own mother and father at 2:42 p.m.; a discussion of an identified prior crime; a discussion of life in prison for a prior offense; a statement that he does not believe in God; a discussion about how Hernandez lies to people about whether he is carrying a gun; a comment about "screwing a bitch"; a discussion about prior "gang banging"; a discussion about prior drug dealing; a discussion about his family and sleeping with other women. (T19-20)

At (T28) the district court agreed to keep out evidence relating to a prior crime involving Hernandez and Damon Gates and the slitting of a throat. The court also agreed that the comment about "screwing a bitch" had to be excluded. The remainder of the interview was held to be admissible. In so holding, the district court stated: "This court finds that while there are many statements made by the Defendant during the interview that seem irrelevant any unfair prejudice (403) is outweighed by necessity for fact finder to consider context within interview and Defendants voluntariness of his ultimate confession." (T28-29)

The challenges raised in the motion to suppress and motions in limine were renewed as part of a continuing objection to the admission of the video of Hernandez's statement.

The State's case included expert testimony from a forensic pathologist that Debella died as result of the shot to his forehead. (1420:12) There was also testimony from a person from the Nebraska State Patrol Crime Laboratory that the revolver found in the basement could be a possible source for the round found in Debella but the scientist could not say for certain it was the actual gun used. (1522:22-1553:1)

During closing arguments, the defense objected to a number of comments made by the prosecutor during its statement to the jury. The defense also moved for mistrial. (1684:23-1687:18). The district court determined that any error that may have occurred was harmless error and denied the motion for mistrial. (1688:1-6)

The challenges to the prosecution's comments included the following statements made by the prosecutor:

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 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)

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)

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)

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 heartless, the disgusting acts committed not by just Mr. Herndandez, 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 those 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)

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)

People who lived at the house were “vermin,” “riffraff, ” “lowlife people” that would leave a bleeding man to die on a floor.

(1659:9-25)

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)

The prosecutor spoke about efforts made by Debella to fight for and cling to his life in the hospital and the “heart-wrenching” decision the mother had to make to cut off life support.

(1679:14-23)

## **VI. SUMMARY OF ARGUMENT**

The video statement of appellant, Mr. Desiderio Hernandez, should not have been presented to the jury. The statement was involuntary. Hernandez did not waive his right against self-incrimination. And, during the course of the statement, Hernandez expressly stated his desire to stop answering questions. The second set of claims relates to prosecutorial misconduct committed during closing arguments by the prosecutor. In those closing arguments, the prosecution wrongly argues personal beliefs and opinions, including beliefs labeled as the beliefs of the State of Nebraska. Additionally, the prosecutor stepped over the line with comments designed to inflame the jurors' prejudices or excite their passions against Hernandez and deprive him of a fair trial.

## VII. ARGUMENT

### A. **The District Court Abused its Discretion in Admitting into Evidence Appellant's Video Statement to Law Enforcement Which Was Obtained Involuntarily and in Violation of the Right Against Self Incrimination.**

#### 1. **Standard of Review**

A two-part standard of review is used in appellate consideration of claims that a custodial statement was involuntary or procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Historical facts are examined for clear error. Determining whether a constitutional violation has occurred, however, is a question of law which is reviewed independently of the trial court's determination. *State v. Rogers*, 277 Neb. 37, 46-7, 760 N.W.2d 35, 47 (2009).

It is a mixed question of law and fact whether a statement was voluntarily made, whether a custodial interrogation has occurred, whether sufficient *Miranda* warnings were given to the suspect, whether properly advised *Miranda* rights were thereafter waived, whether there has been an unambiguous invocation of the right to remain silent or to have counsel, and whether invocation of those rights has been scrupulously honored. All these questions involve the application of the facts surrounding the confession to the constitutional rubric mandated by the U.S. Supreme Court, and are reviewed under the two-point standard of review set forth above.

*State v. Rogers, supra* at 47-49m 760 N.W. 2d at 47 (footnotes omitted).



## 2. Introduction

There are three claims on appeal arising from the admission into evidence of a redacted version of the statement of appellant, Mr. Desiderio Hernandez. Each claim will be argued separately. The first claim is that the confession was involuntary. 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. The second claim relates more specifically to whether Hernandez waived his right against self-incrimination and whether law enforcement failed to cease questioning upon an invocation of the right to remain silent. The third claim goes to the district court's decision to permit into evidence statements which were challenged under Rules 401 and 403 of the Nebraska Evidence Rules. The district court allowed the challenged statements into the record because the court wanted the jury to have context to assess whether the entire statement was voluntary.

## 3. Decisional Authorities

*Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and the decisions which follow by the United States Supreme Court and Nebraska's appellate courts create safeguards to assure that law enforcement scrupulously honor a person's Fifth Amendment right to remain silent in the context of custodial interrogations. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009) articulates that those safeguards are necessary to protect against the coercion that is inherent in the setting of a custodial interrogation. *Id.* at 49. 760 N.W.2d at 48-49. The pressures of custodial interrogation have the risk of undermining a person's will to resist and compel a person to speak where that person would not freely do so otherwise. *Id.* at 50, 760 N.W.2d at 49.

Isolating a person from the support of friends and family and placing them in an unfamiliar environment and subjecting them to interrogators who use emotional appeals and psychological coercion create a precarious balance where the weakness of individuals is exchanged for a loss of liberty. *Id.* Both *Miranda* and *State v. Rogers* identify some of the emotional appeals, tricks, and psychological coercion that law enforcement have employed: Minimization (rather than asking someone if that person did it, trying to reduce the more seriousness of the reasons why the act may have been done); good cop bad cop (an interplay between befriending and confrontation techniques); an “oppressive atmosphere; and “dogged persistence.” *Id.* at 50-51, 760 N.W.2d at 49-50.

This context is so hostile to freedom that courts have consistently and zealously protected the right of person to cease the interrogation. Regardless of whether a person has initially waived the right to remain silent or even begun to answer questions, the ability to refrain from answering questions at any moment remains with the accused. Any statement taken after a person invokes the privilege to remain silent cannot be anything but the product of compulsion. *Id.* (relying upon *Miranda* 384 U.S. at 474, 86 S.Ct. 1602). Nebraska’s appellate courts have repeatedly cautioned that a person in a custodial interrogation must be afforded the right to “control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.” *Id.* at 63-64, 760 N.W.2d at 58 (quoting *Michigan v. Mosely*, 423 U.S. 96 at 103-04, 102 S.Ct. 321, 46 L.Ed.2d 313 (1975)). *See, also, State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014). Once a person invokes the right to remain silent, law enforcement must scrupulously honor that right, and this means that there must be an appreciable cessation to interrogation. *State v. Rogers, supra* at 52, 760 N.W.2d at 50.

The Due Process Clause of United States Constitution, amendment. XIV and the Due Process Clause of Nebraska Constitution, Neb. Const. art. I, § 3, preclude the State from using the statement or confession of an accused which is not freely and voluntarily made. Such statements may have a tremendous effect on the outcome of a proceeding, and a pretrial hearing outside of the presence of a jury allows for a careful consideration of such influential evidence before the damaging effects take their toll. *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). This Court has examined the totality of the circumstances to decide whether law enforcement officers exploited a mental weakness with coercive tactics that have prevented a person from voluntarily and intelligently answering questions. *See, State v. Burries*, 297 Neb. 367, 388-89, \_\_\_ N.W.2d \_\_\_ (2017); *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 607 (2014).

#### **4. The Decision of the District Court**

The district court denied the motion to suppress. (T12) Findings of fact included a finding that Hernandez “was articulate at times,” “appeared coherent throughout the interview” and that Hernandez was playing “a cat and mouse game.” (T14) The court commented on the failure of Hernandez to stay focused during the interrogation by finding: “But it appeared to this court that the reason was not because Hernandez was delusional or under some kind of drug but because he 1. Had emotional difficulty trying to admit his actions involving his cousin Joey and 2. He was aware of the legal consequences of his admission.” *Id.*

The district court found the statement to be voluntary and that no violation occurred in respect to the *Miranda* warnings. (T14-16) The court further found:

The two (2) hour interview has many statements aside from the admissions that would be barred from admission under a 403 analysis. Yet, the whole interview

would need to be included for the fact finder if Hernandez wants the issue submitted to the jury for a reasonable doubt determination on voluntariness. The issue can be decided later by the Defendant if he files such a 403 motion.

Defendant is left with being between a rock and a hard place in this issue.

(T15)

At trial the video of Hernandez's statement was offered and played. The audio for was turned off during the parts the district court ordered to be excluded.. The video is Exhibit 89. (E89: 1293:25-1297:5, Vol. VIII) The defense received a continuing objection to the admission of this exhibit. The objection was based on the previously filed motion to suppress and motions under Nebraska Evidence Rules 401 and 403, Neb. Rev. Stat. §§ 27-401, 403 (Reissue 2016). (1295:14-1296:15) The objection was overruled.

### **5. Application and Summary**

Red flags were present before the interview began. Law enforcement was aware that following the shooting of Debella, Hernandez was high from the ingestion of drugs and that he continued to smoke methamphetamine and marijuana at least up until the time that he went into the residence of Gates in Horton, Kansas.

Both Amber and Chris Herndandez testified that when appellant Hernandez came to their house on the night of August 4, 2015, he appeared either high or on an adrenalin rush. (602:4-7; 731:5-13). From the testimony of Michael Seager, we learn that Hernandez smoked methamphetamine repeatedly throughout the day of August 5, 2016. (1024:5-1025:25, 1028:1-23, 1030:5-17) Seager observed that Hernandez was rambling, often blurting out unintelligible comments or mumbles. (1043:10-16)

Tiffany Gates testified as to the mental state of Hernandez. Gates testified that Hernandez has talked to people that are not there and has imagined people talking to him. (1247:2-1248:2) She told police that on August 5, 2015, she could tell that Hernandez was high. (1248:11-13) During the initial encounter upon Hernandez's arrival, Hernandez was imagining that Gate's boyfriend was speaking to Hernandez even though that was not true. (1248:18-22) When Hernandez called earlier, he was also not making much sense. (1248:23-1249:3) Gates has seen Hernandez under the influence of methamphetamine previously and he appeared under the influence of that drug on the day she saw him before his arrest. (1251:23-4)

The eight hour stand-off at the trailer in Horton, Kansas is another warning sign. The property was lit up with spot lights. Loud speakers were constantly being used. Three flash bang devices were deployed. None of these brought Hernandez out of the house or even made him visible. When he came out of the house at 3:00 a.m., he sustained a head injury which required medical treatment at a hospital and a staple. You can see the bandage covering the staple in the video. Additionally, a taser was used at the time of arrest and it malfunctioned. A taser probe became lodged in the chest of Hernandez and had to be removed in the hospital. To seal the wound a silver nitrate stick was used. There is no evidence of whether Hernandez had adequate rest, food, or what if any medications he received before the interrogation. The primary interrogating officer was not aware of the medication Hernandez received, if any, and did not feel it was important to know. (1328:23-1332:20) The interrogation began at 2:33 p.m. that same day.

Law enforcement testified about signs look for to see if a person is under the influence of methamphetamine. Those signs include scatterbrained thoughts, thoughts which are not

cohesive, paranoia, a search for answers, delusions, and increased levels of activity, for example looking around when trying to sit still, body jerks, tense muscles, clenched jaw, grinding of teeth, and dilated pupils which may not be noticeable to the naked eye. ( (1330:6-1331:23, 1387:15-1388:1) The video from start to finish involves a barrage of scatterbrained thoughts, incohesive thinking and speech, paranoia and an inability to stay focused.

Civilian witnesses could tell Hernandez was high, but in the eyes of the interrogators Hernandez was fine. However, when you watch the video, it is apparent that Hernandez is not fine. His thoughts are disorganized and his answers are over and over again not responsive to the question being asked. The district court recognized the abnormal behavior. The district court in order to resolve whether the confession was voluntary, needed to address this abnormal behavior and did so. The court commented that law enforcement failed to ask Hernandez questions about drug use or have him submit to testing. (T15) The court found the constant off topic responses were “perfectly normal” for someone “trying to explain the unexplainable” and that is was a commentary on how his life experiences brought him to this moment in life. *Id.* On one hand, the court finds that Hernandez was cagey and playing a cat and mouse game with the interrogators. On the other hand, the court questioned whether the history of drug use on the part of Hernandez contributed to an inability to speak articulately. (T13-15)

The question arises as to which findings of fact are historical facts. In this case, the fact finding is heavily intertwined with the legal conclusion of voluntariness. One can disregard the opinions on intoxication made by the interrogating officers. The woeful minimization of the abnormal behavior discredited their opinions. The behavior of Hernandez was consistent with a person being under the influence of methamphetamine by their own standards.

The district court was able to at least recognize that the unusual thought and speech patterns of Hernandez merited a closer look and an explanation. The explanation by the district court is in error. The court fails to see the most obvious and readily apparent reason for the strange things that Hernandez kept saying. The most logical reason and the reason most supported by the evidence is that the ability of Hernandez to think clearly was impaired by his physical and mental state that he was unable to exercise free will in making admissions. Hernandez was still under the influence of methamphetamine. His behavior is the same as it was before his arrest and interrogation.

Additionally, Hernandez was arrested just after 3:00 a.m. He then had to be transported to the hospital for medical treatment. He had just suffered a head injury and received a staple to his head. A silver nitrate stick chemically burned close a wound to his chest caused by a malfunctioning taser. After receiving medical clearance, Hernandez still had to be processed into the jail. He had at best a few short hours of rest before being questioned. He is unable or unwilling to sign the advisement form. He launches from one incoherent rant to another. Tucked among the rants and rages are a number of admissions to shooting Debella. The question is not whether Hernandez made those admissions. The question is did he do so voluntarily. Under the totality of the circumstances, he did not. The statement is not the product of free will. Intoxication rendered him incapable to make an independent, informed choice of free will.

The admission of the involuntary statement deprived Hernandez of a fair trial. Other witnesses were able to testify that Hernandez said he shot Debella. The videotape, however, was

necessary for the State to argue how and why the conduct of Hernandez met the threshold for first degree murder.

**B. The District Court Abused its Discretion in Admitting into Evidence Appellant's Video Statement to Law Enforcement Which Was Obtained Involuntarily and in Violation of the Right Against Self Incrimination as Appellant Did Not Sufficiently Waive His Right Against Self Incrimination and His Subsequent Invocation of the Right to Remain Silent Was Ignored.**

**1. Standard of Review**

A two-part standard of review is used in appellate consideration of claims that a custodial statement was involuntary or procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Historical facts are examined for clear error. Determining whether a constitutional violation has occurred, however, is a question of law which is reviewed independently of the trial court's determination. *State v. Rogers*, 277 Neb. 37, 46-7, 760 N.W.2d 35, 47 (2009).

It is a mixed question of law and fact whether a statement was voluntarily made, whether a custodial interrogation has occurred, whether sufficient *Miranda* warnings were given to the suspect, whether properly advised *Miranda* rights were thereafter waived, whether there has been an unambiguous invocation of the right to remain silent or to have counsel, and whether invocation of those rights has been scrupulously honored. All these questions involve the application of the facts surrounding the confession to the constitutional rubric mandated by the U.S.



Supreme Court, and are reviewed under the two-point standard of review set forth above.

*State v. Rogers, supra* at 47-49m 760 N.W. 2d at 47 (footnotes omitted).

## 2. Decisional Authorities

Miranda warnings are "an absolute prerequisite to interrogation' . . . and 'fundamental with respect to the Fifth Amendment privilege.'" 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. We look 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, 388-89, \_\_\_ N.W.2d \_\_\_, \_\_\_ (2017).

Once a person invokes the right to remain silent, law enforcement must scrupulously honor that right, and this means that there must be an appreciable cessation to interrogation. *State v. Rogers, supra* at 52, 760 N.W.2d at 50. What does "scrupulously honor" require? *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009) answers that question, as well. It means to stop asking questions, and it prevents the interrogators from plowing ahead and pressing on with little or no cessation in the interrogation, or attempting to wear down, erode and get a person to change the person's mind about the interrogation. *Id.* at 70-71; 760 N.W.2d at 62.

The invocation of the right to remain silent must be "unambiguous," "unequivocal" or "clear." *Id.* To make this assessment, the Nebraska Supreme Court directs trial courts to consider the words the persons used as well as the context of the invocation. *Id.* at 64-65, 760 N.W.2d at 60. Circumstances that assist in the analysis include the words spoken by the accused,

the response to those words by the interrogators, the speech patterns of the accused, the content of the questioning, the demeanor and tone of the interrogators, the behavior of the accused during questioning, the point during the interrogation where the invocation is made, and who was present during the interrogation. *Id.*

*State v. Rogers, supra* observes that some phrases such as “I think,” “maybe”, “I believe,” or answers given in the form of a hypothetical response often lean in the direction of equivocation. *Id.* The Court further notes that there are occasions where clear wording may not be unequivocal expressions when paired with a mere recitation of events or the desire to shut down only a particular question or particular theme or is otherwise attached to other language which is inconsistent with the desire to cut off questioning. *Id.*

*State v. Rogers* points out that there are certain types of statements which are generally and routinely considered clear and unambiguous invocations of the right to remain silent. The list set forth by *Rogers* of “pristine” invocations includes the following: (1) “I don’t even wanna talk about this no more”; (2) “Uh! I’m through with this”; (3) “I plead the Fifth”; (4) “I don’t want to talk about this anymore.”; (5) “I have nothing further to say.”; (6) “I’m going to stop talking.”; (7) “I’m done talking.”; and (8) “I’m done.”

In *Rogers*, the statement made by the accused was a response to a question to get to the truth with this language: “No, I’m not. I’m done. I won’t.” *Id.* at 69, 760 N.W.2d at 61. This was then followed with “I’m not talking no more.” The Court held this was an unequivocal invocation of the right to remain silent that law enforcement failed to scrupulously honor.

In *State v. DeJong*, 287 Neb. 864, 845 N.W.2d 858 (2014), the Court determined that the statement “I’m, tired. I wanna go to bed, please. I’m done.” was an unequivocal invocation and

that law enforcement are not permitted to try and interrupt a person while they are making an expression relating to the cessation of questioning in order to avoid the ramifications of the triggering words.

### **3. Decision of the District Court**

There are two parts to this claim. The first is that the appellant, Mr. Desiderio Hernandez did not effectively waive his rights against self-incrimination. The second is that, if this Court holds that he did, then Hernandez subsequently invoked this right and that the invocation was not scrupulously honored. The district court held that even though Hernandez did not sign the advisement form he voluntarily conversed with law enforcement and that Hernandez stated he would try to talk. (T17) The district court also determined that the words “I oughta probably stop talking now” were not a clear, unequivocal, unambiguous invocation of the right to remain silent. *Id.*

### **4. Application and Summary**

The rights advisement form was not signed. (1303:3-9) The form is exhibit 86 received at 1304:14-17. In respect to the rights advisement, Hernandez told the officers he does not know what his rights are. (2:44 p.m.) The rights form was read out loud, but Hernandez interrupted with ramblings that made no sense, including theories about how various people are related, his ability to prove that humans have two stomachs just like cows and that he is able to defecate children out of his body. (2:44 p.m. to 2:48 p.m.) These scattershot statements followed bizarre statements about a pencil in his eye (2:38 p.m.) and taking an oath at birth (2:43 p.m.)

When asked directly again if he understood the rights read to him, Hernandez responded, “Yeah, I am still focused on the shooting.” (2:48 pm.) The officers again asked Hernandez if he

was willing to answer questions. *Id.* Hernandez went on a tangent about being told by others what happened at the house. *Id.* At 2:50 p.m. the officer again asks Hernandez if he is willing to talk and Hernandez replies, "I can try." The officer then asked Hernandez to sign the rights advisement form. Hernandez replied, "I guess" but appeared to lose his train of thought as he looked at the paper and then did not sign the form. Instead, Hernandez went off on another tangent about his name, where he might have been in the 1970s and other ramblings. He also had an emotional breakdown.

This is not a situation where a person acknowledges an awareness of his or her constitutional rights and simply completes the interview without signing the advisement form. The circumstances in this case involve a person telling law enforcement that the constitutional rights described are not understood. Hernandez did not sign the rights advisement after being asked to do so. He did not use clear, unequivocal and unambiguous language to express a willingness to answer questions. And, at that time, he was not answering the questions. He was digressing with nearly every question. For instance, after stating that he can try to answer questions, Hernandez immediately launches a series of unfocused tangents including a discussion about whether he is Desiderio Hernandez. (2:50 p.m.)

Instead of taking the time to insure a valid, comprehensible expression of voluntary consent to cooperate and submit to questioning, the interrogators just plowed forward in an effort to see where the interview might go from that point forward. There was no valid waiver at the outset. The entire statement should have been held to be inadmissible.

At 3:28 p.m., Hernandez tells his questioners twice "I think I'll probably stop talking now." The questioning continued without any effort to clarify the words relating to the cessation

of questioning. After the first time Hernandez said that statement the interrogator asked, "What's that?" Hernandez repeated the same statement. The interrogator said "Okay" and then told Hernandez that his story is important and unique, attempting to get Hernandez to tell that story.

An examination of the totality of the circumstances needs to consider the words by the interrogators, the speech patterns of the accused, the content of the questioning, the demeanor and tone of the interrogators, the behavior of the accused during questioning, the point during the interrogation where the invocation is made, and who was present during the interrogation. Just prior to the invocation at approximately the 3:25 p.m. point, Hernandez was meandering through a story where a girlfriend sodomized his son with a bar like instrument and Hernandez "flew into her," "whopped her," and "smacked her." At 3:26 p.m. Hernandez was asked about being at Michael Seager's house. This brought about a response which included thoughts about communities taking advantage of things and whether Hernandez had been at the home of convicted killer Michael Ryan. At 3:27 p.m. there was another direct question about Tiffany Gates and whether Hernandez had two guns. Again, the answer strays and Hernandez explains how he deceives people into believing he has a gun. A question about whether Hernandez received the gun from a particular person followed. Hernandez answered with a rant that attacked a number of people as being stupid and people who take bait. And it was at this point that Hernandez invoked. The invocation came immediately after three sets of pointed questions where Hernandez was confronted with incriminating evidence and asked to explain that evidence to his questioners.

In context with the rest of the interrogation, the words of invocation were among the clearest use of words in the entire interview. Officers asked again to make sure Hernandez said

what he said. Hernandez repeated the invocation word for word. At that point, the interrogation simply proceeded except rather than asking another pointed question using a particular incriminating fact, the officer pulled back and asked a more general question. No attempt was made to clarify the desire of Hernandez—to see if was sure he wanted to end the interrogation. No attempt was made to scrupulously honor the desire of Hernandez to end the questioning at the point of the invocations.

For each of these reasons, the objection to admission of the statement should have been sustained. The admission of this evidence denied Hernandez a fair trial.

**C. The District Court Abused its Discretion in Allowing Irrelevant and Unduly Prejudicial Evidence to Be Received by the Jury Through the Video Statement of Appellant. This Error Denied Appellant a Fair Trial.**

**1. Standard of Review**

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. We review for abuse of discretion a trial court's evidentiary rulings on relevance, whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, and the sufficiency of a party's foundation for admitting evidence. We also review for abuse of discretion a trial court's evidentiary rulings on the admissibility of a defendant's other crimes or bad acts

under rule 404(2), or under the inextricably intertwined exception to the rule. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of a proponent's evidence is a question of law, subject to de novo review.

*State v. Burries*, 297 Neb. 367, 386-387, \_\_\_ N.W.2d \_\_\_, \_\_\_ (2017)

## **2. Decisional Authorities**

“To be relevant, evidence must be probative and material.” *State v. Rocha*, 295 Neb. 716, 741, 890 N.W.2d 178, 199 (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* at 731-732, 890 N.W.2d at 194. “Unfair prejudice means an undue tendency to suggest a decision based on an improper basis. Unfair prejudice speaks to the capacity of 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. When considering whether evidence of other acts is unfairly prejudicial, we consider whether the evidence tends to make conviction of the defendant more probable for an incorrect reason.” *State v. Oldson*, 293 Neb. 718, 751-752, 884 N.W.2d 10, 41-42 (2016).

### 3. The Decision of the District Court

The video statement of appellant, Desiderio Hernandez, contained evidence about matters that were not relevant to the charged offenses. The district court, in ruling on the motion to suppress, made this decision:

The two (2) hour interview has many statements aside from the admissions that would be barred from admission under a 403 analysis. Yet, the whole interview would need to be included for the fact finder if Hernandez wants the issue submitted to the jury for a reasonable doubt determination on voluntariness. The issue can be decided later by the Defendant if he files such a 403 motion.

Defendant is left with being between a rock and a hard place in this issue.

(T15)

The defense followed with the filing of two motions in limine to exclude the matters suggested by the district court. (T19. 24) That is, the defense elected not to have the entire interview submitted to the jury without redaction of evidence that violated Rules 401 and 403 of the Nebraska Evidence Rules. The first motion identified matters objected to under Nebraska Evidence Rules 401, 402 and 403, including Hernandez discussing animosity towards his father and other issues at 2:40 p.m.; a discussion of Debella's mother and other issues at 2:41 p.m.; additional animosity and issues with his own mother and father at 2:42 p.m.; a discussion of an identified prior crime; a discussion of life in prison for a prior offense; a statement that he does not believe in God; a discussion about how Hernandez lies to people about whether he is carrying a gun; a comment about "screwing a bitch"; a discussion about prior "gang banging"; a



discussion about prior drug dealing; a discussion about his family and sleeping with other women. (T19-20)

At (T28) the district court agreed to keep out evidence relating to a prior crime involving Hernandez and Damon Gates and the slitting of Gate's throat. The court also agreed that the comment about "screwing a bitch" had to be excluded. The remainder of the interview was held to be admissible. In so holding, the district court stated: "This court finds that while there are many statements made by the Defendant during the interview that seem irrelevant any unfair prejudice (403) is outweighed by necessity for fact finder to consider context within interview and Defendants voluntariness of his ultimate confession." (T28-29)

The video of the statement of Hernandez was offered as Exhibit 89. (E89: 1293:25-1297:5, Vol. VIII) The defense received continuing objections to the admission of this exhibit. The objections were based on the previously filed motion to suppress and motions under Nebraska Evidence Rules 401 and 403, Neb. Rev. Stat. §§ 27-401, 403 (Reissue 2016). (1295:14-1296:15)

No limiting instruction was given. The jury was not given instruction on the proper purposes, if any, for which they could use this "contextual" evidence. The jury received two instructions about the statement. Instruction Number 7 (T41) is the standard instruction in respect to the statement of an accused and the voluntariness of that statement. Instruction Number 8 (T42) tells the jury not to draw any inference from the fact that some of the audio was not played to the jury during the showing of the video.

#### 4. Application and Summary

An abuse of discretion exists if the evidentiary ruling is untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. That threshold is met.

The religion of an accused has no legitimate bearing on the decision making of the finders of fact. Religious tolerance remains a goal yet to be achieved. People have strong opinions about religion and atheism. By making religion a protected class, our laws seek to protect against improper uses of those prejudices. *See, Hartley v. Metro. Utils. Dist. of Omaha*, 294 Neb. 870, 891, 885 N.W.2d 675, 692-693 (2016). Allowing the jury to hear that Hernandez does not believe in God advances no relevant interest in these proceedings. That personal choice does not elevate his ability to exercise free will and make a voluntary statement. The potential for a jury to misuse this evidence is too great for the minimal value it may contribute to contextual understanding. The religious belief of the people at the Brownell house were wholly irrelevant to any valid consideration in this case.

The discussion about “Gang banging” on the part of Hernandez is another discussion that was too fraught with the potential for misuse to come into evidence. There was no suggestion that gang affiliations played a factor in the charges faced by Hernandez. Calling someone a “gang member” is often a ploy to dehumanize another. This Court is aware of the dangers of such testimony. Such testimony is highly prejudicial and only admissible if relevant to an issue in dispute. *See, State v. Poe*, 276 Neb. 258, 754 N.W.2d 393(2008); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). The discussion on gang activities in the past illuminates nothing in respect to the ability of Hernandez to make a voluntary statement.

Likewise the perceived abuse inflicted upon Hernandez by his parents does contribute to an issue in dispute. The relationship Hernandez has had with women in the past likewise illuminates no issue in dispute. Nor does Hernandez's involvement in prior drug offenses have any bearing on this case.

The interview is over two hours and comes fully loaded with bizarre rants and ramblings. Winnowing out irrelevant material and material that is unduly prejudicial would not have impacted on the ability of the jury to exercise its fact finding function. Confessions are not an all-or-nothing proposition. The Rules of Evidence are not suspended for the sake of completeness. A party may choose not to object on a specific ground or choose not to admit the entirety of a statement, but that choice should not be taken from them by the actions of the trial court. The evidence that slipped into the jury's fact finding functions became tainted by evidence fraught with the potential to lure the jury into declaring guilt on grounds different from proof specific to the offenses charged and on an emotional basis. The admission of the challenged evidence tends to make the convictions of Hernandez more probable for an incorrect reason. The result of this error was the denial of a fair trial.

**D. The District Court Abused its Discretion in Overruling the Defense  
Objections and Motion for Mistrial on the Grounds of Prosecutorial  
Misconduct. The Cumulative Effect of Trial Errors Relating to Prosecutorial  
Misconduct Was to Deprive the Defendant of His Constitutional Right to a  
Public Trial by an Impartial Jury.**

**1. Standard of Review**

“Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.” *State v. Sandoval*, 280 Neb. 309, 337, 788 N.W.2d 172, 201 (2010) (Citations omitted) In criminal cases, a mistrial should be granted where the damaging effects of a trial event cannot be removed by a proper admonition or instruction to the jury and the error prevents a fair trial. *State v. Lester*, 295 Neb. 878, 898 N.W.2d 299 (2017).

## **2. Decisional Authorities**

In *State v. Dubray*, 289 Neb. 208, 222-223, 854 N.W.2d 584, 601-602 (2014), the Nebraska Supreme Court utilized a two-step process to consider claims of prosecutorial misconduct. The first step is to decide whether misconduct occurred. The second step is to decide whether misconduct prejudiced a defendant’s right to a fair trial. *Id.*

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. In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, we consider 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.*

Prosecutors have a duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial. They may not inflame the jurors' prejudices or excite their passions against the accused. *State v. Williams*, 295 Neb. 575, 597, 889 N.W.2d 99, 118 (2017). The prosecutor “may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *State v. Beeder*, 270 Neb. 799, 804-805, 707 N.W.2d 790, 795 (2006), *overruled on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007)

[I]n 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.

The principle behind the prohibition of expressing personal opinions on the defendant's veracity and guilt is that when a prosecutor asserts his or her personal opinions, the jury might be persuaded by a perception that counsel's opinions are correct because of his position as prosecutor, rather than being persuaded by the evidence. The prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence. Moreover, the jury is aware that the prosecutor has prepared and presented the case and consequently may have access to matters

not in evidence; thus, the jury may infer that such matter precipitated the prosecutor's personal opinion.

*State v. Gonzales*, 294 Neb. 627, 645-646, 884 N.W.2d 102, 117-118 (2016)

### **3. The Decision of the District Court**

The defense objected and moved for a mistrial following the prosecutor's initial argument to the jury in closing. (1684:23-1687:18). The district court determined that any error that may have occurred was harmless error and denied the motion for mistrial. (1688:1-6)

### **4. Application and Summary**

#### **a. Statement of Personal Belief and the Imprimatur of the Government**

The prosecutor made statements of personal belief. In this case, the statements were usually accompanied with the phrase, "The State of Nebraska believes." On another occasion, the statement of personal belief was preceded by the phrase "to be perfectly honest with you." Following is a list of the challenged statements which shall be numbered for purposes of clarification in the arguments to follow. The challenges to the prosecution's comments included the following statements made by the prosecutor:

- (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 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 heartless, 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 those 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) 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)

The defense objected to the use of expressions of personal belief, the interjection of the State of Nebraska into the statements of personal belief, and the expressions involving reflective commentary of personal honesty. (1684:23-1685:15)

As a twist to the prohibition against expressing personal beliefs in closing arguments, the prosecutor on several occasions substituted “The State of Nebraska” for himself. Both *State v. Gonzales, supra* and *State v. Rocha*, caution against wrapping a statement of fact or belief with the trappings of formal government approval. *Gonzales* teaches that the “prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence. Moreover, the jury is aware that the prosecutor has prepared and presented the case and consequently may have access to matters not in evidence; thus, the jury may infer that such matter precipitated the prosecutor's personal opinion.” *Id.* The prosecutions comments expressly or implicitly seek to exalt the role of the prosecutor over that of the defense. The prosecutor draws unnecessary attention of the jury to the fact he is a public servant paid to represent the people of the community.

As this Court applies the precepts of *Gonzales*, Hernandez asks this Court to be cognizant of the heightened risks occasioned by a prosecutor stating personal opinions as the opinions of the State of Nebraska. The first statement is an opinion that Hernandez is guilty of first degree murder. The statement does not follow a summation of the evidence, it points to the single fact of pointing and shooting a gun and suggests that are other “numerous reasons” to convict. Rather than articulating each of those reasons, the prosecutor invites the jury to merely adopt the prosecutor’s personal conclusion about guilt. The second and third statements have the same failings.



The fourth statement finds the prosecutor reaching out to the jury by saying “to be perfectly honest with you” Hernandez and the other people in the Brownell house are selfish, senseless, heartless and disgusting. They “honestly” made the prosecutor sick. This was paired with the statement that Debella “was the victim of the ultimate injustice that one human can commit against another.” Such opprobrious language is misconduct, even more so when coupled with the an expression that it is a personal belief held by the prosecutor. This is not a summation of the evidence. This was a personal attack designed to inflame the passions of the jury against Hernandez.

The fifth statement relates to the scientist from the Nebraska State Patrol Crime Laboratory. Even though that scientist expressly stated that she has no opinion that the revolver in evidence was used to shoot Debella, the prosecutor in closing claims that the State of Nebraska believes that she corroborated the fact that Hernandez left that gun in the basement.

There is a high degree of probability that the remarks unduly influenced the jury. They were not isolated. They were extensive and cast in a manner to draw special attention to those comments. The curative instruction cannot erase the damage caused by the reckless disregard to the rights of Hernandez to a fair trial. The State was keenly aware that at best their evidence has Hernandez firing the fatal shot. Missing is solid evidence that this was first degree murder.

**(b) Comments That Inflame the Prejudices or Excite the Passions of the Jury  
Against the Accused.**

Citing *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006) and 3-5.8(c) of the ABA Standards for Prosecutors, the defense objected to the following comments.

- (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) People who lived at the house were "vermin," "riffraff," "lowlife people" that would leave a bleeding man to die on a floor. (1659:9-25)
- (8) The prosecutor spoke about efforts made by Debella to fight for and cling to his life in the hospital and the "heart-wrenching" decision the mother had to make to cut off life support. (1679:14-23)

For purposes of this argument the fourth statement should also be considered.

Prosecutors should not make statements or elicit testimony intended to focus the jury's attention on the qualities and personal attributes of the victim or the victim's family. These facts lack any relevance to the criminal prosecution—and they have the potential to evoke jurors' sympathy and outrage against the defendant. *State v. Iromuanya, supra*. The fifth and seventh statements involve comments directed at stripping Hernandez of his human qualities and inviting moral judgments against him. Opprobrious, invective language like that used by the prosecutor has no place in a court of law. They are tools to subvert the fair administration of justice.

The prosecutor directly singled out Hernandez in the fourth comment as being sickening, selfish, senseless, heartless and disgusting. The target of the seventh is everyone that lived in the Brownell house, and that included Hernandez. No legitimate goal can be accomplished by suggesting that an accused citizen should be compared to an animal or other creature that is perceived as despicable and as causing problems for the rest of society.

*State v. Dubray, supra* , strongly disapproved of comments that pull a jury away from a considered, reasoned and dispassionate review of the evidence and towards an improper sympathy for the victim and a disparagement of the accused. *Id.* The sixth statement is an effort to evoke sympathy for DeBella, who it was argued is now laying in a coffin of eternal rest for doing nothing other than stepping on the toes of someone else. The eighth statement seeks to extract sympathy from the horrors faced by a mother having to choose between ending life support or having her son remain in a persistent vegetative state. This is not fair commentary on the evidence. This is prosecutorial misconduct.

Again, there is a high degree of probability that these remarks unduly influenced the jury. They were not isolated. The comments were repetitious and cast in a manner to draw special attention to those comments. No curative instruction could erase the damage caused by the reckless disregard to the rights of Hernandez to a fair trial. The State was keenly aware that at best their evidence has Hernandez firing the fatal shot. Missing is solid evidence that this was first degree murder.

### **(c) Cumulative Error**

While a single trial error might not constitute prejudicial error, the cumulative effect of multiple trial errors may operate to deprive a defendant of the constitutional right to a public trial by an impartial jury. *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013). In this case, both individually and collectively, the comments of the prosecutor amount to misconduct. The misconduct both individually and collectively deprived Hernandez of a fair trial.

The comments were made during the first opportunity the prosecution had to speak during summation. Hernandez did nothing to invite the remarks other than to exercise the right to a jury trial and have his attorneys cross-examine the witnesses against him.

No special curative instruction was given by the district court.

For each of these reasons, the convictions of Hernandez should be reversed and the case remanded for a new trial.

## VII. CONCLUSION

For each of the reasons above, appellant, Mr. Desiderio Hernandez asks this Court to reverse his convictions and remand the matter for a new trial.

Respectfully submitted,

DESIDERIO C. HERNDANDEZ, Appellant.

BY: /s/ Robert W. Kortus  
Robert W. Kortus # 19206  
Nebraska Commission on Public Advocacy  
140 N. 8<sup>th</sup> St., Suite 270  
Lincoln, NE 68508  
(402) 471-7774  
rkortus@ncpa.ne.gov

Attorney for Appellant

# Certificate of Service

I hereby certify that on Monday, August 21, 2017 I provided a true and correct copy of this *Brief of Appellant Hernandez* to the following:

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

Signature: /s/ Kortus,Robert,W (19206)