No. S-24-0235

IN THE NEBRASKA SUPREME COURT

STATE OF NEBRASKA,

Appellee,

v.

JOHN L. PARKS SR.,

Appellant.

APPEAL FROM THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

The Honorable Duane C. Dougherty, District Judge

BRIEF OF APPELLEE

Michael T. Hilgers, #24483
Attorney General

Austin Relph, #24718
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682
austin.relph@nebraska.gov

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Statement of the Case

A. Nature of the Case

On May 7, 2021, the State charged Parks with seven felony offenses, including two counts of first degree murder. See (T1–T3). The State later also alleged that Parks was a habitual criminal. See (ST5–ST8). On September 19, 2022, two days before trial was scheduled to begin, Parks filed a motion to discharge (which he amended the next day) on both statutory and constitutional speedy trial grounds. See (T67–T70); (ST9–ST12). Following a hearing, the district court denied Parks' motion. See (T77–T85); (Vol. I, 74:11–123:19).

Parks appealed the district court's order. See *State v. Parks*, 2023 WL 3477425 (unpublished opinion). In a memorandum opinion, the Court of Appeals affirmed the district court's order as to the statutory speedy trial claim but did not address the district court's order as to the constitutional speedy trial claim because it lacked jurisdiction to do so. See *id.* Parks petitioned for further review, which this court denied, and the case was mandated on July 10, 2023. See *State v. Parks*, Case No. A-22-0691.

Thereafter, the case proceeded to jury trial, which took place December 11 through 19, 2023. See (Vol. V, 2:9–1482:6). The jury found Parks guilty of each of the seven charged offenses. See (T141–T147). At the sentencing hearing on March 13, 2024, the district court found Parks to be a habitual criminal and sentenced him to life in prison on the murder charges, as well as significant terms of incarceration on the other charges, with all of the sentences to be served consecutively. See (T158–T162).

Parks appealed.

B. Issues Before the District Court

As relevant here, the issues before the district court were the disposition of Parks' motion to discharge on constitutional speedy trial grounds, the disposition of Parks' motions to receive and maintain his own discovery materials at the jail, and Parks' motion for mistrial.

C. How the Issues Were Decided in the District Court

The district court denied Parks' motion to discharge on constitutional speedy trial grounds. See (T77–T85). The district court also denied Parks' motions to receive and maintain his own discovery materials at the jail. See (T32–T33); (T64–T66). And the district court denied Parks' motion for mistrial. See (Vol. V, 1251:5–1252:13).

D. Scope of Review

Consideration of plain error occurs at the discretion of an appellate court. See *State v. Rush*, 317 Neb. 622, 11 N.W.3d 394, opinion modified on denial of rehearing, 317 Neb. 917, 12 N.W.3d 787 (2024).

Generally, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. See *State v. Short*, 310 Neb. 81, 964 N.W.2d 272 (2021).

Discovery in a criminal case is generally controlled by either a statute or court rule. See *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014). Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion. See *id.*

The decision whether to grant a motion for mistrial is within the trial court's discretion and will not be disturbed on appeal in the absence of an abuse of discretion. See *Rush, supra.*

Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. See *State v. Kipple*, 310 Neb. 654, 968 N.W.2d 613 (2022).

Propositions of Law

I.

In appellate proceedings, the appellate court is confined to questions which have been determined by a trial court, and the responsibility for obtaining a ruling on a motion falls primarily on the party that brought it.

See *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997).

II.

Determining whether a defendant's constitutional right to a speedy trial has been violated requires application of a balancing test first articulated by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

See *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

III.

That test involves consideration of four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.

See *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

IV.

None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial.

See *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016).

V.

Rather, the factors are related and must be considered together with other circumstances as may be relevant.

See *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016).

VI.

The length of delay, however, is a triggering mechanism for the four-factor test.

See *State v. Short*, 310 Neb. 81, 964 N.W.2d 272 (2021).

VII.

Until there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance in determining if the right to a speedy trial has been violated.

See *State v. Short*, 310 Neb. 81, 964 N.W.2d 272 (2021).

VIII.

Additionally, it is well established that while the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other, Neb. Rev. Stat. § 29-1207 (Reissue 2016) provides a useful standard for assessing whether the length of a trial delay is unreasonable under the U.S. and Nebraska Constitutions.

See *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

IX.

Regarding the fourth factor, that is to be assessed in light of the interests of defendants which the speedy trial right was designed to protect.

See *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

X.

The *Barker* Court identified three such interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."

See *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019).

XI.

As noted previously, discovery in a criminal case is generally controlled by either a statute or court rule.

See *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

XII.

Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion.

See *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

XIII.

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.

See *State v. Geller*, 318 Neb. 441, __ N.W.3d __ (2025).

XIV.

This court recently set forth the relevant legal framework:

> Our case law makes clear that a mistrial is properly granted in a criminal case where an event occurs during the course of trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. In order to prove error predicated on the failure to grant a mistrial, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. In the context of a denial of a motion for mistrial, actual prejudice means prejudice that is " '[e]xisting in fact; real.' " In defining the term, we have drawn on its meaning in similar legal contexts to determine that actual prejudice requires "a reasonable probability that, but for [the] errors, the result of the proceeding[s] would have been different." "A reasonable probability is a probability sufficient to undermine confidence in the outcome."
>
> . . . .
>
> A trial court is vested with considerable discretion in passing on motions for mistrial . . . and an appellate court will not disturb a trial court's decision whether to grant a motion for mistrial . . . unless the court has abused its discretion. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. An appellate court's deference to the trial court stems in part from the recognition that the trial judge is better situated than a reviewing court to

> pass on questions of witness credibility and the surrounding circumstances and atmosphere of the trial. The trial judge has a special perspective on the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record.

State v. Lenhart, 317 Neb. 787, 793–94, 11 N.W.3d 661, 667–68 (2024) (internal citations omitted).

XV.

When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective assistance which is known to the defendant or is apparent from the record.

See *State v. Dap*, 315 Neb. 466, 997 N.W.2d 363 (2023).

XVI.

Otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding.

See *State v. Dap*, 315 Neb. 466, 997 N.W.2d 363 (2023).

XVII.

An appellant sufficiently raises an ineffective assistance of counsel claim on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court.

See *State v. Dap*, 315 Neb. 466, 997 N.W.2d 363 (2023).

XVIII.

When a claim of ineffective assistance of counsel is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel.

See *State v. Dap*, 315 Neb. 466, 997 N.W.2d 363 (2023).

XIX.

Moreover, in *State v. Mrza*, 302 Neb. 931, 935, 926 N.W.2d 79, 86 (2019), this court held that "assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance, and an appellate court will not scour the remainder of the brief in search of such specificity."

XX.

Once raised, an appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.

See *State v. Dap*, 315 Neb. 466, 997 N.W.2d 363 (2023).

XXI.

The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice as a matter of law, or that trial counsel's actions could not be justified as a part of any plausible trial strategy.

See *State v. Dap*, 315 Neb. 466, 997 N.W.2d 363 (2023).

XXII.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's

performance was deficient and that this deficient performance actually prejudiced his defense.

See *State v. Dap*, 315 Neb. 466, 997 N.W.2d 363 (2023).

XXIII.

To show that counsel's performance was deficient, the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.

See *State v. Dap*, 315 Neb. 466, 997 N.W.2d 363 (2023).

XXIV.

To show prejudice from counsel's deficient performance, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.

See *State v. Dap*, 315 Neb. 466, 997 N.W.2d 363 (2023).

Statement of Facts

On May 7, 2021, the State charged Parks with two counts of first degree murder under Neb. Rev. Stat. § 28-303 (Reissue 2016), a Class IA felony; two counts of use of a deadly weapon (firearm) to commit a felony under Neb. Rev. Stat. § 28-1205 (Reissue 2016), a Class IC felony; one count of possession of a controlled substance (cocaine) with intent to deliver under Neb. Rev. Stat. § 28-416 (Cum. Supp. 2020), a Class IC felony; and two counts of possession of a deadly weapon (firearm) by a prohibited person under Neb. Rev. Stat. § 28-1206 (Cum. Supp. 2020), a Class ID felony. See (T1–T3). The charges were in relation to the shooting deaths of Michael Harbour and Nicole Hatten, which occurred on July 30, 2020, at around 7:30 a.m., in the parking lot of a hotel in Omaha, Nebraska. See (T1–T3); (309:19–311:1); (1405:12–14). The State later also alleged that Parks was a habitual criminal. See (ST5–ST8).

Thereafter, the district court held various pre-trial hearings. The first three such hearings occurred on June 25, 2021, August 13, 2021, and September 23, 2021; however, none of those hearings were on the record or included in the bill of exceptions. See (T11–T13); (T14–T16); (ST1–ST4); (Vol. I, p. 1). The transcript, though, contains the district court's orders following each hearing, which were ultimately continued. See (T11–T13); (T14–T16); (ST1–ST4). The district court's orders following the first two hearings indicated that Parks appeared personally and with appointed counsel; that Parks' counsel, on Parks' behalf, moved to continue the hearing; that Parks' counsel confirmed that she had advised Parks that the continuance would toll the speedy trial clock and that Parks understood and consented to the same; and that the district court therefore granted the continuance and found the speedy trial clock tolled as a result. See (T7–T8); (T11–T13); (T14–T16). The district court's order following the third hearing was essentially identical to the first two, except that the district court did not indicate that Parks was personally present. See (ST1–ST4).

The first pre-trial hearing that was on the record occurred on November 29, 2021. See (Vol. I, 4:9–20:14). That same day Parks' counsel filed two motions to take depositions. See (T30); (T31). At the hearing, the district court addressed Parks' pro se oral motion to dismiss his counsel and Parks' pro se written motion to receive and maintain his own discovery materials at the jail. See (T25–T26); (Vol. I, 4:9–20:14). Regarding the motion to dismiss his counsel, Parks indicated that he was frustrated with his counsel because of the lack of communication and differences in opinion regarding trial strategy. See (Vol. I, 6:3–15:11). Parks also expressed his discontent with the prior motions for continuance made by counsel and with counsel's desire to take depositions. See (Vol. I, 6:3– 15:11). The district court denied that motion. See (Vol. I, 6:3–15:11). Regarding the motion for discovery, Parks indicated that he wanted access to the discovery himself at the jail. See (Vol. I, 15:14–20:14). The district court also denied that motion. See (Vol. I, 15:14–20:14). The district court did not rule on

Parks' motions for depositions and Parks' counsel did not request a ruling. See (Vol. I, 4:9–20:14).

Parks hired new counsel on January 24, 2022, and his previously appointed counsel withdrew the next day. See (T34–T35); (T36–T37). Thereafter, in February and March 2022, the district court held additional pre-trial hearings, at which Parks' counsel moved to continue the proceedings. See (Vol. I, 21:8–23:12, 24:9–26:24, 28:8–30:15). At a hearing on March 9, 2022, Parks' counsel also moved to continue the trial, which was originally scheduled to start on May 16, 2022. See (Vol. I, 28:8–30:15). The district court granted those motions, and the trial was rescheduled for September 21, 2022. See (Vol. I, 21:8–23:12, 24:9–26:24, 28:8–30:15).

On August 25, 2022, the district court held another pre-trial hearing and addressed various motions by the parties. See (Vol. I, 31:10–73:12). One of those motions was Parks' renewed motion (this time through counsel) to receive and maintain his own discovery materials at the jail. See (T62–T63); (Vol. I, 41:3–46:13). After hearing from the parties, the district court again denied that motion. See (T64–T66); (Vol. I, 41:3–46:13).

On September 19, 2022, Parks' counsel filed a motion to discharge (which he amended the next day) based on statutory and constitutional speedy trial grounds. See (T67–T70); (ST9–ST12). The district court held a hearing on the motion on September 20, 2022. See (Vol. I, 74:11–123:19). At the hearing, the State offered a transcript of the proceedings, an affidavit from the prosecutor regarding the scheduling of depositions, and a two-page document showing that a witness deposition was conducted on August 9 as well as a certified copy of the entire docket for the case. See (Vol. I, 76:3–81:8). Parks testified at the hearing that he was not aware of and did not consent to the motions to continue orally made by his previous appointed counsel. See (Vol. I, 83:15–87:19). The court denied Parks' motion. See (T77–T85); (Vol. I, 88:24–89:8, 112:4–118:10). Regarding the statutory speedy trial claim, the district court determined that only 49 days had

run. See (T77–T85). And regarding the constitutional speedy trial claim, the district court determined that it was "meritless and patently frivolous." See (T77–T85).

Parks appealed the district court's order. See *Parks, supra*. In a memorandum opinion, the Court of Appeals affirmed the district court's order as to the statutory speedy trial claim but did not address the district court's order as to the constitutional speedy trial claim because it lacked jurisdiction to do so. See *id.* Parks petitioned for further review, which this court denied, and the case was mandated on July 10, 2023. See *State v. Parks*, Case No. A-22-0691.

Thereafter, the case proceeded to jury trial, which took place December 11 through 19, 2023. See (Vol. V, 2:9–1482:6). Parks' motions to depose were never ruled on or withdrawn. On the first day of trial, Parks renewed his motion to discharge, which the district court again denied. See (Vol. V, 3:6–4:7). Thereafter, during the evidentiary portion of the trial, the State called many witnesses and introduced hundreds of exhibits. See (Vol. V, 303:12–1381:2). Because Parks' assigned errors on appeal are primarily concerned with pre-trial issues (i.e., Parks' motions to depose, for discharge, and for discovery, as well as related ineffective assistance of counsel claims), see brief of appellant, at 10–11, a detailed summary of the evidence adduced at trial is not necessary. In short, that evidence indicated that in the early morning hours of July 30, 2022, Parks, Harbour, Hatten, and Evelyn Lee were hanging out together in a hotel room in Omaha, Nebraska; that at around 7:30 a.m., as they were all exiting the hotel, Parks shot and killed Harbour and Hatten in the parking lot; that Parks then forced Lee to drive him from the scene; and that Parks ultimately fled to Texas where he was later apprehended. See, e.g., (Vol. V, 1405:15–1411:11, 1424:13–1425:7). Following the close of the evidence, the jury found Parks guilty as charged. See (T141–T147).

The district court held the sentencing hearing on March 13, 2024, at which the district court found Parks to be a habitual criminal and sentenced him to life in prison on the murder charges, as well as

significant terms of incarceration on the other charges, with all of the sentences to be served consecutively. See (T158–T162).

Parks appealed.

Argument

I.

PARKS' REQUESTED PLAIN ERROR REVIEW IS INAPPROPRIATE

In his first assigned error, Parks argues that the "[t]he district court committed plain error in failing to rule on Parks' motions to depose witnesses resulting in violations of his statutory and constitutional rights to a speedy trial." See brief of appellant, at 10, 24–30. As will be explained below, however, plain error review under these circumstances is inappropriate.

Reading Parks' assigned error literally, the district court's failure to rule on Parks' motions to depose is not properly before this court. That is because, in appellate proceedings, the appellate court is confined to questions which have been determined by a trial court, and the responsibility for obtaining a ruling on a motion falls primarily on the party that brought it. See *State v. Dean*, 270 Neb. 972, 708 N.W.2d 640 (2006); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). "Because there was no ruling on [Parks'] motion[s], and because [Parks] did not insist upon a ruling, any questions regarding his motion[s]" are not properly before this court. See *Dean, supra*, 270 Neb. at 977, 708 N.W.2d at 645.

Reading Parks' assigned error more broadly, it appears to be directed more toward the district court's ruling on Parks' motion to discharge (on both statutory and constitutional speedy trial grounds), and the effect of the district court's failure to rule on the motions to depose in that context. See brief of appellant, at 10, 24–30. But the Court of Appeals already affirmed the district court's denial of the motion to discharge on statutory speedy trial grounds and in so doing specifically addressed the propriety of the district court's failure to rule

on the motions to depose, see *Parks, supra*, and this court denied Parks' petition for further review of that opinion, see *State v. Parks*, A-22-0691. The law of the case doctrine would therefore preclude reconsideration of that issue now. See *State v. Price*, 306 Neb. 38, 944 N.W.2d 279 (2020). And as for the district court's denial of the motion to discharge on constitutional speedy trial grounds, that would be subject to ordinary appellate review, not plain error review, now that there has been a final judgment. See *State v. Abernathy*, 310 Neb. 880, 969 N.W.2d 871 (2022) (holding that a pre-trial order denying a motion for discharge on constitutional speedy trial grounds is not a final, appealable order). That review can be done when addressing Parks' second assigned error. See *infra*, at 17–19.

II.

THE DISTRICT COURT DID NOT ERR IN DENYING PARKS' MOTION FOR DISCHARGE ON CONSTITUTIONAL SPEEDY TRIAL GROUNDS

In his second assigned error, Parks argues that "[t]he district court erred in denying Parks' second motion for absolute discharge." See brief of appellant, at 10, 30–40. The record shows, however, that there was not a "second" motion for discharge; rather, Parks simply renewed his first (and only) motion to discharge on the first day of trial, without making any new arguments. See (Vol. V, 3:6–4:7). As explained previously, the law of the case doctrine would preclude reconsideration of the district court's order denying the motion to discharge on statutory speedy trial grounds. See *supra*, at 16–17. Thus, the only issue remaining to be addressed with this assigned error is the district court's order denying the motion to discharge on constitutional speedy trial grounds.

Determining whether a defendant's constitutional right to a speedy trial has been violated requires application of a balancing test first articulated by the U.S. Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). See *State v. Lovvorn*, 303 Neb. 844, 932 N.W.2d 64 (2019). That test involves consideration

of four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. See *id.*

None of these four factors standing alone is a necessary or sufficient condition to the finding of a deprivation of the right to speedy trial. See *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016). Rather, the factors are related and must be considered together with other circumstances as may be relevant. See *id.* The length of delay, however, is a triggering mechanism for the four-factor test. See *Short, supra.* Until there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance in determining if the right to a speedy trial has been violated. See *id.*

Regarding the first factor, the length of delay here was more than one year, so it was "presumptively prejudicial." See *Doggett v. U.S.*, 505 U.S. 647, 652 n. 1, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). However, as the district court noted, Parks was charged with significant and numerous felonies, and "[h]is counsel, in preparing for trial, has done anything any other criminal defense attorney would have done." See (T83–T84). Additionally, it is well established that while the constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other, Neb. Rev. Stat. § 29-1207 (Reissue 2016) provides a useful standard for assessing whether the length of a trial delay is unreasonable under the U.S. and Nebraska Constitutions. See *Lovvorn, supra.* Here, there was significant time remaining on the statutory speedy trial clock at the time of the motion to discharge. See *Parks, supra.* Thus, this factor does not favor Parks.

Regarding the second factor, the reasons for the delay were mostly on the defendant. Specifically, the record shows that Parks' initial appointed counsel repeatedly moved for continuances, see (T11–T13); (T14–T16); (ST1–ST4); *Parks, supra*, and that Parks' later hired counsel (hereinafter "trial counsel") likewise repeatedly moved for

continuances following his hiring, see (T38–T40); (T41–T43); (T44–T45); *Parks, supra*. And while Parks claimed that he did not consent to the motions for continuance filed by his appointed counsel, that is not shown by the record, and in any event, there is no denying that the motions were in fact made by his appointed counsel, which is attributable to Parks. See *Parks, supra*. See, also, *Vermont v. Brillon*, 556 U.S. 81, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009) (holding in the constitutional speedy trial context that "delays sought by counsel are ordinarily attributable to the defendants they represent"). Thus, this factor does not favor Parks.

Regarding the third factor, while Parks did assert his right to a speedy trial at the November 29, 2021, hearing, that was the only time that he did so and his assertion was undermined by his actions (through counsel) both before and after that hearing continuing the proceedings. Thus, this factor does not favor Parks.

Regarding the fourth factor, that is to be assessed in light of the interests of defendants which the speedy trial right was designed to protect. See *Lovvorn, supra*. The *Barker* Court identified three such interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." See *Lovvorn, supra*. The first and second interests seem to cut against Parks, as impliedly determined by the district court, since there was nothing unusual about the situation here. See (T82–T83). As for the third interest, Parks makes various assertions, but there is no evidence in the record to support them. See brief of appellant, at 39–40. Thus, this factor does not favor Parks.

In sum, then, in the State's view, each of the four *Barker v. Wingo* factors cuts against Parks. Accordingly, the district court did not err in denying his motion to discharge on constitutional speedy trial grounds.

III.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PARKS' MOTIONS TO RECEIVE AND MAINTAIN HIS OWN DISCOVERY MATERIALS AT THE JAIL; ALTERNATIVELY, ANY ERROR WAS HARMLESS

In his third assigned error, Parks argues that the district court abused its discretion in denying his motions to receive and maintain his own discovery materials at the jail. See brief of appellant, at 10, 40–44. The State disagrees. Because there were legitimate reasons for denying Parks direct access to his discovery, there was no abuse of discretion here. But even if there was, the State submits that any error was harmless. Accordingly, this assigned error has no merit.

As noted previously, discovery in a criminal case is generally controlled by either a statute or court rule. See *Henderson, supra.* Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion. See *id.* 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. See *State v. Geller*, 318 Neb. 441, __ N.W.3d __ (2025).

Here, there was no abuse of discretion. The record indicates that it was the policy of both the Douglas County Attorney's Office and the Douglas County Public Defender's Office to only provide discovery to the defendant's counsel, who could then review the discovery with the defendant, but no copies of the discovery were to be given to the defendant to personally review on their own time. See (Vol. I, 15:14–20:14). There are good reasons for that policy, primarily safety reasons; it would not make sense to have copies of discovery (which would contain witness names, contact information, etc.) potentially floating around the jail or prison. See (Vol. V, 41:3–46:13). The district court considered those reasons and properly denied Parks' motions. See (T32–T33); (T64–T66); (Vol. I, 15:14–20:14); (Vol. V, 41:3–46:13).

Notably, this court rejected an argument similar to Parks' argument in *State v. Figures*, 308 Neb. 801, 957 N.W.2d 161 (2021). In that case, which was also out of Douglas County, the defendant argued that the district court abused its discretion by denying his request to obtain his own physical copies of discovery materials while incarcerated. See *id.* In addressing that argument, this court observed that "[w]hile not in the record, the State's brief explained that [the defendant's] counsel followed local practice and agreed to not provide physical copies of the discovery to [the defendant] in exchange for the State providing more discovery than was required by statute," *id.*, 308 Neb. at 815, 957 N.W.2d at 178, and that "[a]t oral arguments, [the defendant's] counsel conceded that 'traditionally, the way discovery is disseminated to a criminal defendant is through counsel.' " *Id.* This court then rejected the defendant's argument in a single paragraph:

> [Neb. Rev. Stat. §] 29-1912 [(Reissue 2016)] "permit[s] the defendant to inspect and copy or photograph [discovery]," but does not mandate that the State provide physical copies of discovery for a defendant to possess while incarcerated. [The defendant's] counsel possessed the physical copies of the discovery, which [the defendant] could review. Therefore, we find that the court did not abuse its discretion in denying his request.

Id. The same reasoning and conclusion applies here.

In arguing that the district court abused its discretion, Parks asserts that the district court incorrectly failed to follow the relevant statutes' requirements. See brief of appellant, at 40–41. However, Neb. Rev. Stat. § 29-1915 (Reissue 2016) provides, in relevant part, that a district court, in issuing an order pursuant to § 29-1912 may "prescribe such terms and conditions as are just." Thus, the district court had the power to preclude Parks' direct access to his discovery and effectively incorporated that condition into its previous discovery order by denying Parks' motions. The State submits that was proper.

Additionally, Parks asserts that the district court's denial of his motions violated his due process rights. See brief of appellant, at 42. But the State does not see how that could be, considering that (1) the discovery was provided to Parks' counsel, who were Parks' agents, see *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014), and (2) Parks' counsel was able to review the discovery with Parks. And while Parks' counsel would not be able to review every piece of the discovery with Parks, see (Vol. V, 41:3–46:13), there is no reason that Parks' counsel could not identify the most pertinent pieces of discovery (e.g., portions of the surveillance videos showing the relevant individuals) and then review those with Parks at the jail.

But even if there were error, the State submits that it was harmless. As the State understands it, the only prejudice that Parks alleges is (1) that he might have been able to extract details from the video recordings about who actually shot Harbour and Hatten that others couldn't, and (2) that he might have been able to catch the State's mistake about the video on Harbour's phone before trial, which would have prevented irrelevant evidence about his son's murder a few days prior from ever being adduced. See brief of appellant, at 42–44. The State, however, fails to see any prejudice here. The various individuals on the video recordings were accounted for and ruled out, see, e.g., (Vol. V, 1327:9–1328:11), and in any event, Parks could have reviewed those portions of the videos with his counsel. As for the State's mistake about the video on Harbour's phone, the evidence about Parks' son's murder was coming in regardless, since Lee testified that Parks told her after the shooting that "[Harbour] had something to do with his son getting murdered" and that "[Harbour] had a picture in his phone of his son's dead body." See (593:1–594:6). And that the State's mistake about the video on Harbour's phone came out at trial, as opposed to before trial, was actually probably beneficial to Parks, since it resulted in the video not being admitted into evidence and Parks was then able to attack the State for not producing the video as promised in the State's opening statement. See (Vol. V, 315:2–9, 1426:20–1427:15, 1432:3–16). Thus, any error was harmless.

IV.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PARKS' MOTION FOR MISTRIAL

In his fourth assigned error, Parks argues that the district court abused its discretion in denying Parks' motion for mistrial. See brief of appellant, at 10, 45. Parks' motion for mistrial was based on the State's mistake about the video on Harbour's phone. See (1106:4–1120:18); (1223:11–1252:13). As will be explained below, the State sees no abuse of discretion.

This court recently set forth the relevant legal framework:

> Our case law makes clear that a mistrial is properly granted in a criminal case where an event occurs during the course of trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. In order to prove error predicated on the failure to grant a mistrial, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. In the context of a denial of a motion for mistrial, actual prejudice means prejudice that is " '[e]xisting in fact; real.' " In defining the term, we have drawn on its meaning in similar legal contexts to determine that actual prejudice requires "a reasonable probability that, but for [the] errors, the result of the proceeding[s] would have been different." "A reasonable probability is a probability sufficient to undermine confidence in the outcome."
>
> . . . .
>
> A trial court is vested with considerable discretion in passing on motions for mistrial . . . and an appellate court will not disturb a trial court's decision whether to grant a motion for mistrial . . . unless the court has abused its discretion. A judicial abuse of discretion exists only when the reasons or rulings of a

> trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. An appellate court's deference to the trial court stems in part from the recognition that the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the surrounding circumstances and atmosphere of the trial. The trial judge has a special perspective on the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record.

State v. Lenhart, 317 Neb. 787, 793–94, 11 N.W.3d 661, 667–68 (2024) (internal citations omitted).

Applying that framework here, the district court did not abuse its discretion in denying Park's motion for mistrial. As explained previously, see *supra*, at 22, the State's mistake about the video on Harbour's phone did not cause any prejudice to Parks; in fact, it probably was actually beneficial to Parks. Accordingly, the district court properly denied Parks' motion for mistrial.

V.

THE LAW OF THE CASE DOCTRINE PRECLUDES RECONSIDERATION OF THE DISTRICT COURT'S RULINGS ON PRE-TRIAL MOTIONS TO CONTINUE AND WHETHER THEY TOLLED THE STATUTORY SPEEDY TRIAL CLOCK, AS WELL AS THE COURT OF APPEALS' AFFIRMANCE OF THE JUDGMENT

In his fifth assigned error, Parks argues that the district court erred in granting his appointed counsel's pre-trial motions to continue and in determining that the continuances tolled his statutory speedy trial rights, for several reasons. See brief of appellant, at 10, 45–46. Additionally, Parks argues that the Court of Appeals erred in affirming the district court's judgment in that regard. See *id.*

As recognized by Parks' assigned error and argument, these arguments were raised in his prior appeal and determined by the

Court of Appeals adversely to him, see *Parks, supra*, and this court denied Parks' petition for further review of that opinion, see *State v. Parks*, Case No. A-22-0691. The law of the case doctrine would therefore preclude reconsideration of these arguments now. See *Price, supra*. To the extent that Parks is raising these arguments as to his constitutional right to a speedy trial, the State has already explained how there was no violation of that right, see *supra*, at 17–19.

This assigned error has no merit.

VI.

THE RECORD IS SUFFICIENT TO ADDRESS PARKS' CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND THEY ARE WITHOUT MERIT

In his sixth through tenth assigned errors, Parks argues that he received ineffective assistance of counsel in various respects. See brief of appellant, at 10–11, 46–50. The State will address each of Parks' claims below, after setting forth the relevant legal framework.

(a) Relevant Legal Framework

When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective assistance which is known to the defendant or is apparent from the record. See *State v. Dap*, 315 Neb. 466, 997 N.W.2d 363 (2023). Otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding. See *id.*

An appellant sufficiently raises an ineffective assistance of counsel claim on direct appeal when the claim alleges deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court. See *id.* When a claim of ineffective assistance of counsel is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations

of the conduct that he or she claims constitutes deficient performance by trial counsel. See *id.* Moreover, in *State v. Mrza*, 302 Neb. 931, 935, 926 N.W.2d 79, 86 (2019), this court held that "assignments of error on direct appeal regarding ineffective assistance of trial counsel must specifically allege deficient performance, and an appellate court will not scour the remainder of the brief in search of such specificity."

Once raised, an appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims. See *Dap, supra*. The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice as a matter of law, or that trial counsel's actions could not be justified as a part of any plausible trial strategy. See *id.*

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his defense. See *Dap, supra*. To show that counsel's performance was deficient, the defendant must show counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. See *id.* To show prejudice from counsel's deficient performance, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. See *id.*

(b) Analysis

Claim that Parks' appointed counsel was ineffective in refusing to assert Parks' statutory and constitutional rights to a speedy trial

In this claim, Parks argues that his appointed counsel was ineffective "in refusing to assert his statutory and constitutional rights to a speedy trial." See brief of appellant, at 10, 47–48. More specifically, Parks argues that his appointed counsel was ineffective for "continuing multiple pre[-]trials without Parks['] knowledge or

consent, and against his expressly stated wishes," in "failing to procure informed consent for the waiver of his speedy trial rights," and in "refus[ing] to withdraw their motions to depose in the face of Parks[']s speedy trial objections." See brief of appellant, at 47–48.

The State submits that the record is sufficient to address this claim and that it is without merit.

Regarding the portion of the claim dealing with the continuing of the pre-trial hearings, that is without merit because Parks' appointed counsel was not required to obtain Parks' consent before moving to continue the hearings. See *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004) (holding that the statutory right to a speedy trial is not a personal right that can be waived only by a defendant, and a defendant is therefore bound by counsel's motion for a continuance even if the defendant is opposed to the motion); *Vermont v. Brillon, supra* (holding in the constitutional speedy trial context that "delays sought by counsel are ordinarily attributable to the defendants they represent"); *United States v. Saguto*, 929 F.3d 519, 524 (8th Cir. 2019) ("Although [the defendant] later took exception to this continuance, a continuance sought by a defendant's attorney, even if unknown to him, 'remains attributable to him.' ") (internal citation omitted).

Regarding the portion of the claim dealing with the motions to depose, that is without merit because it would pertain only to the period between November 29, 2021 (at which Parks stated he did not want any depositions), and January 24, 2022, when Parks' trial counsel entered his appearance and Parks' appointed counsel withdrew (the next day). That period was only 56 days and would not have changed anything regarding the speedy trial analysis, either statutory or constitutional.

Claim that Parks' appointed counsel and trial counsel were ineffective for entering into a contractual agreement with the State without Parks'

knowledge or consent prohibiting him from having direct access to his discovery

In this claim, Parks argues that his appointed counsel and trial counsel were ineffective "for entering into a contractual agreement with the State without Parks[']s knowledge or consent prohibiting him from having direct access to his discovery." See brief of appellant, at 10, 48–49.

The State submits that the record is sufficient to address this claim and that it is without merit.

This claim is without merit because even assuming appointed counsel and trial counsel performed deficiently, no prejudice resulted. It was the district court's orders denying Parks' motions to receive and maintain his own discovery materials at the jail that ultimately precluded him from having direct access to his discovery, not the actions of his counsel. And in any event, as explained previously, any error that occurred based on the district court's orders in that regard was harmless, see *supra*, at 22, which would also necessarily mean that no prejudice occurred.

Claim that Parks' trial counsel was ineffective by failing to withdraw the motions to depose

In this claim, Parks argues that his trial counsel was ineffective "by failing to withdraw the motions to depose," which tolled Parks' statutory speedy trial clock. See brief of appellant, at 10, 49.

The State submits that the record is sufficient to address this claim and that it is without merit.

This claim is without merit because even assuming deficient performance, no prejudice resulted. Trial counsel's failure to withdraw the motions to depose *before* Parks' prior appeal could at most have allowed ten additional days to run on the statutory speedy trial clock. This is because trial counsel did not enter his appearance until January 24, 2022, and then from February 4, 2022, through September

19, 2022 (when Parks filed his motion to discharge), Parks' trial counsel's motions to continue separately tolled the statutory speedy trial clock. See (T77–T85). And trial counsel's failure to withdraw the motions to depose *after* Parks' prior appeal was immaterial, since by that time Parks had waived his statutory speedy trial right as a matter of law. See *State v. Mortensen*, 287 Neb. 158, 841 N.W.2d 393 (2014) (holding "that a defendant's motion to discharge based on statutory speedy trial grounds will be deemed to be a waiver of that right . . . where (1) the filing of such motion results in the continuance of a timely trial to a date outside the statutory 6-month period, as calculated on the date the motion to discharge was filed, (2) discharge is denied, and (3) that denial is affirmed on appeal.")

Claim that Parks' trial counsel was ineffective by failing to petition for further review of the interlocutory appeal

In this claim, Parks argues that his trial counsel was ineffective "by failing to petition for further review of the interlocutory appeal." See brief of appellant, at 10, 49–50.

The State submits that the record is sufficient to address this claim and that it is without merit.

This claim is without merit for at least two reasons. First, Parks did not have a right to counsel as to the filing of a petition for further review, so he could not have been deprived of effective assistance of counsel based on his trial counsel's failure to file such a petition. See *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015), disapproved on other grounds, *State v. Burries*, 310 Neb. 688, 969 N.W.2d 96 (2022). And second, Parks' trial counsel did in fact file a petition for further review of the opinion in Parks' prior appeal, which this court denied. See *State v. Parks*, Case No. A-22-0691.

Claim that Parks' appointed counsel and trial counsel were ineffective for failing to review the discovery

In this claim, Parks argues that his appointed counsel and his trial counsel were ineffective "for failing to review the discovery" with him. See brief of appellant, at 11, 50.

However, Parks only assigned as error that his appointed counsel and his trial counsel were ineffective "for failing to review the discovery," see brief of appellant, at 11, which the State submits is insufficiently specific under this court's precedents, see *Mrza, supra*, and also does not match what Parks actually argued, see brief of appellant at 50, so this court need not address this claim.

If those issues are put aside, however, the State submits that this claim is without merit.

This claim is without merit because even assuming deficient performance, no prejudice resulted. Parks argues he was prejudiced as a result of the State's mistake about the video on Harbour's phone, which Parks asserts he might have caught earlier had his counsel reviewed the discovery with him. See brief of appellant, at 50. But as explained previously, no prejudice resulted from the State's mistake at trial and, in fact, discovering it at trial probably helped Parks. See *supra*, at 22.

Conclusion

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

STATE OF NEBRASKA, Appellee,

BY Michael T. Hilgers, #24483
Attorney General

BY **s/Austin N. Relph**
Bar Number: 24718
Assistant Attorney General
2115 State Capitol

Lincoln, NE 68509-8920
Tel: (402) 471-2682
austin.relph@nebraska.gov

Attorneys for Appellee

Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 8,770 words, excluding this certificate. This brief was created using Word Microsoft 365.

s/Austin N. Relph
Bar Number: 24718
Assistant Attorney General

Certificate of Service

I hereby certify that on Wednesday, March 05, 2025 I provided a true and correct copy of this *Brief of Appellee State* to the following:

John L Parks Sr. represented by Keith W. Dornan (27570) service method: Electronic Service to **keith@DLTlawyers.com**
John L Parks Sr. represented by Michael Patrick Meckna (21752) service method: Electronic Service to **mmeckna@hotmail.com**
John L Parks Sr. represented by Stuart Jay Dornan (18553) service method: Electronic Service to **stu@dltlawyers.com**

Signature: /s/ Austin N. Relph (24718)