No. A-24-480

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

TRAVIS BELINA,

Appellant.

APPEAL FROM THE DISTRICT COURT OF
MADISON COUNTY, NEBRASKA

The Honorable Mark A. Johnson, District Judge

# BRIEF OF APPELLEE

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## Statement of the Case

### 1. Nature of the Case

Defendant Travis Belina appeals from his jury convictions of two counts of child abuse, two counts of third-degree sexual assault, one count of attempted third-degree sexual assault, and three counts of solicitation of a minor.

### 2. Issues Before the District Court

The issues before the district court were whether to issue a separate instruction to the jury that a person 15 years or old may consent to sexual contact and whether to admit testimony from therapists and investigators regarding their interactions with two of the victims.

### 3. How the Issues Were Decided

The district court did not issue the separate instruction and admitted the testimony.

### 4. Scope of Review

An appellate court reviews the admissibility of evidence for an abuse of discretion when the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *State v. Valverde*, 286 Neb. 280, 288 (2013).

When reviewing the sufficiency of the evidence to sustain a verdict, the appellate court asks whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Alford*, 278 Neb. 818, 835 (2009).

Whether a claim of ineffective assistance of counsel can be determined on direct appeal is a question of law. *State v. Mrza*, 302 Neb. 932, 936-37 (2019).

## Propositions of Law

### I.

Inaction can be a factor in determining whether sexual activity was done without consent. *State v. Mielak*, 33 Neb. App. 309, 325 (2025).

### II.

Coercion can support a finding that a defendant compelled a victim to submit to sexual contact. *State v. McCurdy*, 301 Neb. 343, 363 (2018).

### III.

Evidence admitted through the excited-utterance exception to the rule against hearsay can be considered for the truth of the matter asserted. *U.S. v. Moses*, 15 F.3d 774, 777 (8th Cir. 1994).

## Statement of Facts

### Factual Background

*C.K.*

In 2021, 14-year-old C.K. began working for defendant Travis Belina at a feedlot. (197:3–6, 277:4–7, 278:8–9). The work began innocently enough for the first three months—outside of the fact that Belina regularly provided C.K. with alcohol. (278:12–279:12, 281:22–23). But about four or five months in, Belina began touching C.K., such as by rubbing his neck and belly, even after C.K. told Belina to stop. (281:23–282:14).

Eventually, Belina's touching turned to sexual abuse, and on at least five different occasions sexually abused C.K. at work. The first occasion occurred when Belina called C.K. back out to work at night. (282:19–21, 284:10). Belina drove C.K. out into a field where he then asked for a back rub. (282:22–283:3). C.K. said he did not want that and tried to leave the car. (). Belina locked the doors, trapping C.K. in the car. (283:3–5). C.K. got in the back of the car and put his back against the door. (283:7–8). Belina followed him into the back and began talking about how he wanted his back rubbed. (283:8–11). Belina then began to rub C.K.'s neck and back and then grabbed C.K.'s penis underneath his clothes. (283:24–284:6). C.K. told Belina that he needed to go home. (286:19–20). Belina drove C.K. back, gave him $100 despite no work being done, and told him not to tell anyone about what happened. (286:20–287:13).

The second instance of abuse happened about seven months in, when Belina asked C.K. to ride out with him to check on some cows, and C.K.—fearing that Belina would sexually assault him again—suggested B.C. instead. (290:24–291:5, 292:6–9). Belina took both boys with him. (291:8–10). At one point, both Belina and C.K. sat in the back, and Belina began touching C.K.'s neck and penis. (293:12–294:4).

C.K. froze, not knowing what to do. (293:20–23). Afterwards, Belina paid C.K. and B.C. $200 and told them to stay quiet. (294:7–24).

A third instance of abuse occurred in winter, when C.K. was working alone with Belina at night. (295:10–296:6). Belina drove C.K. elsewhere on the site and tried to touch him outside the car despite C.K.'s protests. (296:4–18). After Belina started removing his own clothes, someone else drove up, and Belina drove off without C.K. (296:19–297:3).

A fourth instance of abuse one night when Belina rode with C.K. in the back of a car, as B.C. and another minor were up front. (299:20–302:5). Belina whispered to C.K. what C.K. should do to him and then began touching C.K.'s genitals. (304:2–16). Belina then asked C.K. to masturbate him, which he did. (305:8–10).

A fifth instance of abuse happened when C.K. helped Belina late at night move his belongings from a rental home into a camper. (317:7-20). Belina began rubbing C.K. and eventually took C.K.'s hands and used them to masturbate him. (318:25–319:11).

The abuse led ultimately led C.K. to unsuccessfully take his own life. (311:11–314:17). C.K.'s parents eventually noticed a mood shift with him. (197:12–22). And when C.K. was 16, he came home from work on July 27, 2022, and disclosed that Belina had sexually assaulted him. (201:18–25, 207:18–208:8, 323:18–22).

*B.C.*

B.C. began working for Belina when he was 14 or 15 years old. (629:20–632:4). Belina first abused B.C. during Belina's second abuse of C.K. Belina had both boys working at night, and during the time that C.K. was driving and Belina and B.C. sat in the back, Belina asked B.C. for a backrub, then began rubbing B.C.'s back and leg, before ultimately removing B.C.'s belt and masturbating him. (635:12–

638:11). B.C. froze and did not know what to do to stop it. (637:8–638:11). He also recognized in the moment that Belina was the man signing his checks. (684:2–7).

Belina made a second attempt at abuse when the two were alone together in a car driving. Belina began rubbing B.C.'s leg, only to stop when their car dropped off the side of the road. (642:2–18).

Belina made a third attempt at abuse when he walked into a room in which B.C. was alone, closed the door behind him, and then began rubbing B.C.'s shoulders and sides. (643:3–8). B.C. pushed Belina off of him and went home. (643:7–8).

*Other Victims*

Belina abused or attempted to abuse many other victims.

When W.H. was 16 years old and working for Belina, there was an incident when Belina, after he started rubbing W.H.'s back, attempted to touch his crotch. (530:7–23).

When R.S. was a minor and working for Belina, there was an incident when Belina grabbed his genitalia. (583:7–23).

When T.S. worked for Belina as a minor, Belina asked him to come over to his house at 8:00 p.m. and give him a backrub. (721:2–5). On another occasion, Belina asked T.S. to come over at 3:00 a.m. to give him a backrub in exchange for $100. (721:8–13).

When M.G. was 17 years old, Belina—who had a wife and a child at the time—added her on a messaging app. (439:14–440:10). Belina began sending her near-nude photos of him that showed his pubic hair, as well as pictures of him holding $100 bills. (441:7–13). One night he sat parked outside her parents' house where she lived at around midnight, messaged her a picture of the house, and asked her

to come out with him. (441:23–442:23). At other times he messaged her asking for massages, saying he would pay her, and "that no one would find out." (443:24–444:4). When she told him that he had a wife and child, he said that "she's boring and I just want… something new, and she won't find out." (444:1–4).

When M.T. was 17 years old, Belina messaged her one night, after 1:00 a.m., sending her a picture of her house, asking her to sneak out, telling her that "we can do anything and everything." (499:16–500:23). After she failed to take him up on his offer, he told her "not to tell anybody." (503:2–3).

When A.L. was 15 years old, Belina messaged her, saying that he was her new neighbor, and that he could provide her with alcohol, vapes, and a ride home if she needed it. (514:14–519:15). Belina included a winky face emoji after his comment of giving her a ride home. (519:16–520:3).

When D.R. was a high school student with Belina, the two of them shared a hotel room when they had to travel for a school basketball match. (424:16–425:21). At night, D.R. woke up to find Belina reaching into D.R.'s pants, attempting to touch his penis. (427:11–20).

**Procedural History**

The jury found Belina guilty of two counts of child abuse, two counts of third-degree sexual assault, one count of attempted third-degree sexual assault, and three counts of solicitation of a minor. (T271–278). The district court sentenced him to 30 months of imprisonment and 18 months of post-release supervision for each count of child abuse, 1 year of imprisonment for each count of third-degree sexual assault, 3 months for attempted third-degree sexual assault, and 18 months of imprisonment and 12 months of post-release

supervision for each count of solicitation of a minor. (T280–81). The sentences were imposed consecutively. (T281).

This appeal followed.

## Argument

### 1. The evidence was sufficient to sustain the verdict for third-degree sexual assault of B.C.

Belina assigns as error that the evidence was insufficient to sustain the verdict for third-degree sexual assault of B.C. (Belina's Brief, 4, 18–20). He is due no relief.

#### Standard of Review

When reviewing a criminal conviction for the sufficiency of the evidence to sustain the conviction, the appellate court asks whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Alford*, 278 Neb. 818, 835 (2009). The court views the evidence in the light most favorable to the State, does not resolve conflicts in the evidence, does not pass on the credibility of the witnesses, and does not weigh the evidence. *Id.*

A defendant commits third-degree sexual assault when he subjects another person to sexual contact without the consent of the victim or when he knew or should have known the victim was physically or mentally incapable of resisting or appraising the nature of his conduct. Neb. Rev. Stat. § 28-320 (Reissue 2016). Without consent can mean that the victim (1) was compelled to submit due to the use of force or threat of force or coercion, or (2) expressed a lack of consent through conduct. Neb. Rev. Stat. § 28-318(8) (Cum. Supp. 2024). Coercion includes nonphysical forms of force such as moral or economic. *State v. McCurdy*, 301 Neb. 343, 357–58 (2018).

#### Analysis

Here, the evidence was sufficient to show that Belina committed third-degree sexual assault against B.C. B.C. was a fifteen-year-old high school student and Belina was his boss. (629:15–21, 632:3–4,

637:11–14). One night, while working for Belina, B.C. rode in the back of a pickup truck with Belina, as C.K. drove them to check up on cows at a field site. (633:12–634:18). In the back of that truck, Belina inserted his hand into B.C.'s pants and began to masturbate B.C. (637:4–7). On appeal, there is no dispute that Belina subjected B.C. to sexual contact. The only dispute is whether this sexual contact was done without consent.

Belina subjected B.C. to sexual contact without consent in two different ways. First, the sexual contact was without consent because B.C. expressed his lack of consent through his conduct: by not actively consenting and freezing up. (637:19–638:8). *State v. Mielak*, 33 Neb. App. 309, 325 (2025) (holding that, when it comes to determining whether sexual activity was done with consent, "[d]epending on the circumstances at hand, inaction could be a component of an individual's conduct."). B.C. never consented to any sexual conduct with Belina and Belina knew—or reasonably should have known—that because B.C. had never given him consent and because B.C. froze up, that Belina's action was without consent. *Id*. at 326 (holding that the victim's inaction constituted conduct demonstrating lack of consent when the defendant penetrated the victim while she was sleeping and there had been no prior sexual relationship between them); *See also State v. Stevens*, 311 Mont. 52, 66 (2002) (holding that the State proved that the defendant subjected his massage victims to sexual contact without their consent, noting that "the victims' testimony that they 'froze' out of fear indicated that they did not consent to [the defendant's] sexual contact.").

Second, the sexual contact was without consent because B.C. was required to submit due to the coercive nature of Belina's relationship with B.C. Belina was about a decade older than the fifteen-year-old victim. (423:3–17, 626:5–6); *See State v. Meyers*, 799 N.W.2d 132, 147 (Iowa 2011) (holding that the defendant's sexual acts with his high-school-age stepdaughter were "by force or against the

will" in part because of "the disparity in age"). Belina was B.C.'s boss who signed his checks. (637:13–14); *State v. McCurdy*, 301 Neb. 343, 363 (2018) (holding that the defendant's sexual penetration of his seventeen-year-old stepdaughter was without consent because "coercion within the context of a family or household relationship between a minor and an adult authority figure can support a finding that a defendant compelled a victim to submit to sexual penetration by the use of 'coercion'"). B.C. was, accordingly, not free to openly express his lack of consent. Indeed, B.C. thought in the moment of his sexual assault that he wanted the job and that Belina was signing his checks. (684:2–7). That Belina never explicitly threatened B.C. does not alleviate the inherent coerciveness of the employer-employee relationship between Belina and B.C., especially in context of B.C. being a minor. In total, B.C. was compelled to submit to Belina's sexual contact. *See also Commonwealth v. Rhodes*, 510 Pa. 537 (1986) (holding that the factors in whether sexual intercourse was done by non-physical compulsion include "the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress"); *Powe v. State*, 597 So.2d 721 (Ala. 1991) ("jury could reasonably infer that [the defendant] held a position of authority and domination with regard to his daughter sufficient to allow the inference of an implied threat to her if she refused to comply with his demands").

### 2. The district court did not err in not defining "economic force" and "moral force" as examples of coercion when Belina did not want "coercion" defined in the first place.

Belina assigns as error the district court's instruction to the jury that "coercion" for purposes of sexual assault includes "economic force" and "moral force" without defining the terms. (Belina's Brief, 4, 21). He is due no relief.

#### Background

The district court provided a definition for "coercion" in its proposed jury instructions, defining the term as "overcoming free will by the use of physical force, threat of physical force, and/or other nonphysical forms of force such as economic or moral force." (T260). Belina objected to the definition of "coercion", arguing that the definition should be "limited to strictly what the exact finding in *McCurdy* is, that the coercion includes nonphysical forms of force and should be left at that without giving examples." (800:9–23). The court overruled the objection, explaining that its examples of nonphysical forms of force such as economic and moral force came from *State v. McCurdy*, 301 Neb. 343, 357–58 (2018) ("Black's Law Dictionary defines 'coercion' as '[c]ompulsion of a free agent by physical, moral, or economic force or threat of physical force.'").

#### Standard of Review

Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision. *State v. Custer*, 292 Neb. 88, 99 (2015).

If the given jury instructions, read together and taken as a whole, correctly state the law, are not misleading, and adequately cover the issues supported by the pleading and the evidence, there is

no prejudicial error necessitating reversal. *State v. Jennings*, 312 Neb. 1020, 1032 (2022).

**Analysis**

First, Belina failed to include his proposed instruction in the record on appeal, barring review of his claim. *State v. Custer*, 292 Neb. 88, 100 (2015); *State v. Mielak*, 33 Neb. App. 309, 328 (2025).

Second, Belina objected at trial on a different basis than he objects on appeal, failing to preserve the claim for review. *State v. Watt*, 285 Neb. 647, 662 (2013) ("Although Watt objected to the instruction on another basis, this does not preserve it for our review, because on appeal, a defendant may not assert a different ground for his objection than was offered at trial."). At trial, he objected on the basis that the jury instruction should not define what "nonphysical force" is. (800:9–23) ("So I think that it should be limited to strictly what the exact finding in McCurdy is, that the coercion includes nonphysical forms of force and should be left at that without giving examples. The jury can determine what nonphysical forms of force are."). On appeal, he objects on the basis that the jury instruction should have defined what "nonphysical force" is. (Belina's Brief, 4) ("The district court erred by instruction the jury… that 'coercion' for purposes of sexual assault includes 'economic force' or 'moral force' without defining the terms."). He cannot receive appellate relief on a claim that he argued against at trial.

**3. Belina failed to strictly comply with the notice requirement for challenging the constitutionality of a Nebraska statute.**

Belina assigns as error that Neb. Rev. Stat. §§ 28-320 and 28-318(8)(a)(i) are unconstitutionally vague for failing to define coercion.

(Belina's Brief, 4, 22–23). He is due no relief because he failed to file a timely notice.

**Standard of Review**

A party who asserts that a Nebraska statute is unconstitutional under the Nebraska Constitution or the U.S. Constitution must file and serve notice thereof with the Clerk of the Supreme Court and Court of Appeals. Neb. Ct. R. App. P. § 2-109(E) (rev. 2024). This rule requires strict compliance, such that failure to strictly comply bars relief. *State v. Denton*, 307 Neb. 400, 403 (2020).

**Analysis**

Belina filed his brief on January 21, 2025, and filed his notice on January 27. His notice was late and therefore this Court will not address the claim. *See State v. Clausen*, 33 Neb. App. 12, 19 (2024) (declining to address constitutional challenge when notice was filed two days after brief) (overturned on other grounds); *State v. McDowell*, 246 Neb. 692, 699 (1994) (declining to address constitutional challenge when notice filed at time of filing of reply brief).

**4. The district court did not err in not instructing the jury that a person 15 years or older may consent to sexual contact when the jury had already been so instructed.**

Belina assigns as error the district court's refusal to instruct the jury that a person older than 14 may consent to sexual contact. (Belina's Brief, 4, 23–25). He is due no relief because the substance of his request was already covered by the jury instructions.

**Background**

Belina offered a proposed jury instruction to the district court at the jury instruction conference. (E117; 802:2–806:5). The proposed instruction would instruct the jury that a person may consent to sexual contact in Nebraska if they are 15 years old, though that does not mean that a 15-year-old necessarily consented to sexual contact. (E117). The State objected, noting that the jury instruction was not a correct statement of the law as a 14-year-old can consent to sex with a 15-year-old. (805:13–17). The court ruled against the proposed instruction, finding that the instruction would confuse the jury, as the elements of third-degree sexual assault do not involve age. (805:18–806:2).

**Analysis**

The district court did not err in denying Belina's proposed instruction. The jury instruction for third-degree sexual assault matched the language of the statute. *State v. Hinrichsen*, 292 Neb. 611, 627 (2016) ("[A] jury instruction is sufficient if it uses the language of the statute."). And the jury instructions given to the jury—read together and taken as a whole—correctly stated the law, were not misleading, and adequately covered the issues supported by the pleading and the evidence.

Nothing in the jury instructions indicated that a 15-year-old could not consent to sexual contact. *State v. Samuels*, 205 Neb. 585, 594 (1980) ("The trial court may refuse to give a requested instruction where the substance of the request is covered in the instructions given."). Belina cites no authority for his proposition that when a defendant is charged with other crimes that the jury runs the risk of conflating the elements of the different crimes. Nor was it the State's theory at trial that the victims in this case could not consent to sexual contact because of their ages. Accordingly, there was no prejudicial

error necessitating reversal. *State v. Jennings*, 312 Neb. 1020, 1032 (2022).

### 5. The evidence was sufficient to sustain the verdicts for solicitation of prostitution.

Belina assigns as error that the evidence was insufficient to sustain the verdicts for solicitation of prostitution regarding victims T.S., C.K., and B.C. (Belina's Brief, 4, 25–27). Belina is due no relief.

#### Standard of Review

A defendant commits solicitation of prostitution when he solicits another person, not his spouse, to perform any act of sexual contact or sexual penetration, in exchange for money or other thing of value. Neb. Rev. Stat. § 28-801.01 (Reissue 2016). Sexual penetration includes sexual intercourse and fellatio. Neb. Rev. Stat. § 28-318(6) (Cum. Supp. 2024). Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Neb. Rev. Stat. § 28-318(5) (Cum. Supp. 2024).

When reviewing the sufficiency of the evidence to sustain a verdict, the appellate court asks whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Alford*, 278 Neb. 818, 835 (2009). The court views the evidence in the light most favorable to the State, does not resolve conflicts in the evidence, does not pass on the credibility of the witnesses, and does not weigh the evidence. *Id*.

#### Analysis

As a piece of preparatory explanation, consider two hypotheticals. The first hypothetical involves a repeat customer to a sex worker. For the customer's first visit, the two explicitly lay out an

offer of sex in exchange for a specific monetary amount. For subsequent times, however, the customer only needs to call and say: "I would like to go again if you are available." The customer has not found a loophole in the criminal statute because he has failed (1) to explicitly offer sex, and (2) to do in an explicit exchange for money. Evidence of the first encounter shows that the customer's statement in subsequent encounters is a request for sex in exchange for money. *See State v. Golyar*, 301 Neb. 488, 507 (2018) ("[C]ircumstantial evidence is sufficient to support a conviction… if such evidence and the reasonable inferences that may be drawn therefrom establish guilt beyond a reasonable doubt."). The second hypothetical involves a man who approaches a woman on the street and asks her for sex in exchange for payment. Unbeknownst to the man, the woman does not speak English and does not understand that the man has attempted to solicit prostitution. Nevertheless, the man is not absolved of criminal liability just because the victim did not understand his request. Accordingly, judgment of whether a defendant has solicitated prostitution does not depend on the subjective view of the victim's understanding of a defendant's statement or conduct.

Here, the evidence was sufficient to sustain the verdict of solicitation of prostitution regarding T.S. T.S. testified that Belina offered him $100 to come back to Belina's camper and give him a backrub at 3:00 a.m. (721:8–13). That Belina's offer did not explicitly mention sex is of no merit. A rational trier of fact could have found that Belina's offer was an offer regarding sexual contact. First, a person does not offer his employee $100 to give him a backrub at 3:00 a.m. when he has a spouse and the employee has no special training or skill in giving massages. *See State v. Clausen*, 318 Neb. 375, 388 (2025) ("[I]t is generally recognized that triers of fact may rely on logic as well as their own experience and common sense to draw inferences based on circumstantial evidence."). Indeed, although not required to sustain the verdict, T.S. understood the request to be of a sexual nature.

(724:22–725:11). Second, Belina demonstrated that he would escalate backrubs into sexual contact and give payment in return when given the opportunity, such as when he sexually assaulted C.K. and B.C. and paid them afterwards. (293:12–294:24).

The evidence was also sufficient to sustain the verdict of solicitation of prostitution regarding C.K. C.K. testified that the first two times that Belina sexually assaulted him, that Belina handed him cash afterwards. (286:20–287:13, 294:7–24). This method of payment was not the usual way that wages were handled. (670:4–5). The next time that Belina was successful in sexually assaulting C.K., Belina asked C.K. to scratch and rub his neck and back and then to masturbate him. (304:2–16, 305:7–10). That Belina did not explicitly offer money in exchange for the sexual contact is of no merit. A rational trier of fact could have found that given Belina's history of sexual contact and payment with C.K., that Belina's request for sexual contact was intended to be in exchange for money.

Finally, the evidence was sufficient to sustain the verdict of solicitation of prostitution regarding B.C. B.C. testified that Belina came into a room that B.C. was alone in, closed the door behind him, and began rubbing B.C.'s shoulders and side. (643:6–8). B.C. pushed Belina off of him, clocked out, and went home. (643:7–8). While Belina did not explicitly request sexual contact, it is uncontroversial that physical actions can constitute speech: a victim pointing their index finger at a suspect identifying them as their assailant; or an abusive ex attempting to kick down his ex's door, communicating a threat to harm her. *See State v. Bryant*, 311 Neb. 206, 215 (2022) (noting that for the crime of terroristic threats, a threat may be communicated nonverbally); *State v. Steffens*, A-23-343, 2024 WL 237269 (Neb. Ct. App. 2024) (memorandum web opinion) (holding that the evidence was sufficient to sustain the verdict for terroristic threats when the defendant kicked down his ex's door); or the Ancient Roman crowd's use of the thumb to indicate whether a defeated gladiator should be

killed (the *pollice verso*). The trier of fact knew that Belina had paid B.C. for sexual contact in another circumstance. (637:4–7, 670:4–5). Accordingly, a rational trier of fact could have found that Belina's conduct here constituted a nonverbal offer of sex in exchange for money.

### 6. The district court did not err in not instructing the jury that Carrie Knull's testimony could not be considered as substantive evidence when such testimony was admissible as substantive evidence.

Carrie Knull testified—cumulative to C.K.'s own testimony—that C.K. came home from work upset and, when confronted, disclosed Belina's abuse from that night. (198:2–204:25). Belina assigns as error that the district court should have issued a *sua sponte* jury instruction that the testimony could not be considered substantive evidence of the assault. (Belina's Brief, 5, 27–28). He is due no relief because the evidence was permissible substantive evidence.

The evidence was offered under the excited-utterance exception to the rule against hearsay. (199:17–19, 203:22–24). Such statements are not excluded by the rule against hearsay. Neb. Rev. Stat. § 27-803 (Cum. Supp. 2024). Accordingly, there was no error in the jury considering the statement for its substantive value. *See U.S. v. Moses*, 15 F.3d 774, 777 (8th Cir. 1994) ("[T]he statement could have been admitted for the truth of the matter asserted because it falls within the excited utterance exception.").

Belina's reliance on *State v. Daniels*, 222 Neb. 850 (1986), is inapposite. The testimony at issue in *Daniels* was admitted under an arcane "complaint of rape" rule, a rule which—unlike § 27-803—did not exempt statements admitted under that rule from the rule against hearsay.

### 7. The district court did not err in admitting testimony from therapists and an investigator as to their interactions with C.K. and B.C.

Belina assigns as error that the district court erred by allowing Deb Milligan, Dana Kubo, and Jon Downey to testify and validate the truth of C.K.'s and B.C.'s allegations. (Belina's Brief, 5, 28–30). He is due no relief.

**Background**

Deb Milligan was C.K.'s therapist. (243:8–12). She testified at trial to the behavior of juveniles reporting sexual abuse as well as her interactions with C.K. as his therapist. (239:6–243:7, 244:15–261:10).

Dana Kubo was B.C.'s therapist. (597:15–16). She testified at trial to her interactions with B.C. (597:18–606:18, 611:1–618:5). She also testified to the behavior of juveniles reporting sexual abuse. (606:19–610:25).

Jon Downey was an investigator with the Madison County Sheriff's Office and interviewed both C.K. and B.C. (757:13–24, 759:20–23). As is relevant to Belina's challenge on appeal, Downey testified on redirect examination, over a defense objection, that after interviewing C.K. and B.C., he recommended counseling because he was concerned for their mental health and welfare. (771:25–772:9). He also testified that he recommended counseling "based on the allegations, what [he observed]… All of it. Years of seeing people damage irretrievably…" (772:11–14). Belina objected and the district court sustained the objection and instructed the jury to disregard the testimony. (772:15–18).

**Standard of Review**

An appellate court reviews the admissibility of evidence for an abuse of discretion when the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *State v. Valverde*, 286 Neb. 280, 288 (2013).

**Analysis**

Belina argues on appeal that the State ran afoul of *State v. Doan*, 1 Neb. App. 484, 492 (1993), in that Deb Milligan, Dana Kubo, and Jon Downey all asserted, directly or indirectly, "that the child has in fact been abused or that the child is telling the truth." *See State v. Doan*, 1 Neb. App. 484, 490–91 (1993). Because no witness testified to evidence prohibited by *Doan*, Belina's claim is meritless.

The State is permitted to admit expert evidence regarding the symptoms, behaviors, and feelings generally exhibited by children who have been sexually abused. *Id.* at 494. What is not permitted is for an expert witness, as happened in *Doan*, to testify that they were able to validate a victim's allegations as true based on their statements and behaviors. *Id.* at 495–96 (reversing when the witness testified that "[t]he validation I got in terms of what actually happened was that [the victim] would talk to me about it. Her body would move. She kind of had this humping motion which is the linking of the verbal expression and the behavioral expression, and so this is how I get validation about what happens").

No expert witness here testified to such prohibited evidence. Indeed, the State was well aware of *Doan* and was careful to not run afoul of it. (241:22–25, 253:2–9). Belina identifies as allegedly erroneous testimony from Milligan: that she testified that C.K. was a "'[child] who had been sexually assaulted,' that he was still suffering symptoms, and still needed treatment." (Belina's Brief, 29). The State

on appeal cannot find an instance where Milligan testified that C.K. "had been sexually assaulted." Insofar as Milligan testified that C.K. told her that he had been sexually assaulted, such testimony is not contrary to *Doan*. And a therapist testifying that her client was showing symptoms of sexual abuse and based on those symptoms still needed treatment is not the same as testifying that she had received validation such that she knew that her client had been sexually abused by the defendant.

Belina identifies as allegedly erroneous testimony from Kuno: that B.C. quit coming to therapy "because he was not ready to deal with the emotional trauma of what had taken place", that B.C. quit therapy "against therapist's advice", and that B.C.'s disclosure was consistent with juvenile reporting of sexual abuse. (Belina's Brief, 29–30). Just like Milligan, Kuno did not testify that she was able to validate that B.C. had in fact been abused by Belina based on B.C.'s statements and behavior, as prohibited by *Doan*. She testified, permissibly, that B.C. had come to her alleging sexual abuse and that she was treating him based on the allegations made to her.

Belina identifies as allegedly erroneous testimony from Downey: that he had worked with adolescent males who had been sexually abused, that it is difficult and that it was difficult in this case and that he recommended counseling for B.C. and C.K. because he was "concerned for the mental health and welfare of these two boys." (769:5–16, 771:25–772:9; Belina's Brief, 29). The testimony simply reflected that Downey found it difficult to work cases in which allegations of sexual abuse of children were made and that based upon allegations made he recommended counseling. Downey did not testify that he had been able to validate B.C. and C.K.'s allegations due to being an expert psychologist regarding child sex abuse victims. Insofar as Belina complains about Downey's stricken testimony, even if the testimony had been erroneous, his complaint is meritless because the district court struck the testimony and instructed the jury to disregard.

(772:15–18). *State v. Esch*, 315 Neb. 482, 492 (2023) ("It is presumed that a jury followed the instructions given in arriving at its verdict, and unless it affirmatively appears to the contrary, it cannot be said that such instructions were disregarded.").

### 8. Trial counsel was not ineffective for allegedly not objecting to bolstering testimony when Belina fails to identify the complained-of testimony in the record and when no bolstering testimony occurred.

Belina assigns as error that trial counsel was ineffective by not objecting to Dana Kubo's testimony that bolstered B.C.'s credibility, contra *Doan*. (Belina's Brief, 5, 30–31). He is due no relief.

#### Standard of Review

To prevail on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that this deficient performance actually prejudiced his defense. *State v. Thomas*, 311 Neb. 989, 996 (2022). To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. *Id*. To show prejudice, the defendant must show by a reasonable probability that but for the deficient performance, the result of the proceeding would have been different.

Whether a claim of ineffective assistance of counsel can be determined on direct appeal is a question of law. *State v. Mrza*, 302 Neb. 932, 936-37 (2019). An appellate court decides whether the undisputed record can conclusively answer the question of counsel's performance or whether the defendant was prejudiced. *Id*. at 937. The record is often insufficient to assess counsel's performance because the record is devoted to issues of guilt or innocence. *State v. Filholm*, 287 Neb. 763, 768 (2014).

**Analysis**

Belina is due no relief. First, Belina fails to identify the specific testimony that he is claiming that trial counsel should have objected to. The record reflects that trial counsel in fact objected five times to Kubo's testimony, two of which were explicitly on grounds of *State v. Doan*. (599:10–11, 604:14–15, 604:21–25, 607:14, 609:22). It is not this Court's responsibility to scour the record for statements that sustain Belina's complaint. *State v. Boswell*, 316 Neb. 542, 574 (2024) ("We decline to scour the record searching for statements that fall into one of these categories, and instead, we address only those statements that Boswell's appellate brief specifically identifies by annotation to the bill of exceptions and that were sufficiently argued in the brief."); *State v. Wood*, 310 Neb. 391, 427 (2021) ("We ordinarily do not scour the record in search of facts that might support an appellant's claim.").

Second, there was nothing inadmissible about Kubo's testimony such that trial counsel displayed deficient performance by not objecting. Kubo testified that she had been B.C.'s therapist (597:15–16), that B.C. disclosed sexual touching by his boss (603:7–13, 612:24–616:14), that B.C. was uncomfortable talking about the disclosed abuse (603:25-604:10), and to the phenomenon of delayed disclosures. (607:11–609:17). Kubo nowhere testified that she observed signs that validated B.C.'s allegations, as has been held to be improper. *State v. Doan*, 1 Neb. App. 484, 495 (1993) ("We hold that in a prosecution or sexual assault of a child, an expert witness may not give testimony which directly or indirectly expresses an opinion that the child is believable, that the child is credible, or that the witness' account has been validated.").

### 9. The State did not commit prosecutorial misconduct during closing argument.

Belina assigns as error that the State committed prosecutorial misconduct during closing argument. (Belina's Brief, 5, 31–34). He is due no relief.

**Background**

For ease of reference, the State has numbered the statements made at closing argument, to which Belina objects on appeal:

> And when you – I'm a lawyer, I admit it, and as you saw from [C.K.] and you saw from [B.C.], sometimes lawyers do things to confuse people. Sometimes it's easy, sometimes it's hard. Sometimes it gets caught. In this case more than once.

(815:19–23) (Statement #1).

> It's a good thing you took notes. The reason you took notes, even though you're full-grown adults, you've all had jobs and that type of stuff so you can write down things so you can't be fooled. You can't be misled, at least it's harder to do it that way.
>
> You can't say I can't tell you what the evidence is or what somebody said, or I can't confront you with things that aren't true and try to get you to admit it. That's why you have notes, because sitting in a chair as an adult with life experience is a process. Process that helps.

(818:21–818:5) (Statement #2).

> Now, these kids what, some, but even I think the last ones, July 27, those that came forward then, what did they get for coming forward? A lot of misery. A lot of misery. Court, depositions, hours, pages – hundreds of pages, you saw some of that. Talking to lawyers, including

> me, I'm a lawyer. But being grilled, as you saw, by – I will say that at least growing up trial lawyers in my case. Growing old, but certainly I'm able to trick kids if I want to. Any of us could do that. That's life. That's why they make such good victims.

(818:6–15) (Statement #3).

> So we'll go through all the – I presented a lot of evidence. I mean, my office did I'll say. The kids did. All those kids that – and some adults that put aside their life for a while so they could come and be subjected to a courtroom and lawyers, and I admit that I am one of them. I'm a lawyer at least.

(829:9–14) (Statement #4).

> But Downey was able to talk to him in a non-confrontative way and of course he had to – you know, had to work with the fact that this was fairly recent and they're adolescents and it was sex. And you had to take the situation as he found them before, as you heard from the professionals, they shut down or maybe never disclose at all or disclose 40 years later.
>
> And what do you say two years ago before lawyers and depositions and court hearings and all that bad stuff Yeah. Two to three months on the outside before that type of stuff.

(839:19–840:4) (Statement #5).

> Now, this other thing, I think it was maybe two and three in that list. Did he crawl in the back of a pickup, [or] walk around to get in the back of the pickup? And did Downey not ask him so it didn't happen? Which was three by defense counsel.
>
> This was a fella who was not asked by Downey obviously about all the details. Downey had better sense than that.

> Downey is not a lawyer. His goal is not to trick people. And as a matter of fact, same thing with [$]100,000. I didn't ask the kid that, remember? You know, Joe Smith didn't ask him on [d]irect.

(859:22–860:7) (Statement #6).

> Another thing the seats – I – you may recall or then, were the seats in the car? There was never ever talk about child seats that I recall. This was a Suburban. Remember he said like three rows of seats they were laid back, whatever, reclined.
>
> That – pictures in car seats and stuff, that is not in the evidence. That's made up. That's lawyer talk. You base your stuff on evidence.

(860:11–18) (Statement #7).

> You don't get reasonable doubt based on conjecture. Based on, well, maybe these guys are secretly gay. Maybe something about that poster upset a guy who was getting $19, was suppose to get a raise. Another one that hadn't gotten a raise. Both contact after the 28 or 27 by the defendant.
>
> Inconsistencies, and I started out this last little bit reminding you of at the end, as a defense witness, Chase stood up for himself. Yes, I do. I have it here. You may have thought that was neat. Certainly you saw the person asking the questions sit down right afterwards.

(862:14–23) (Statement #8).

**Standard of Review**

In order to preserve an opponent's misconduct during closing argument as a ground for appeal, the aggrieved party must have objected to improper remarks no later than at the conclusion of argument. *State v. Barfield*, 272 Neb. 502, 511 (2006). Plain error may

be found on appeal when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *Id*.

In assessing allegations of prosecutorial misconduct in closing argument, the reviewing court first determines whether the prosecutor's remarks were improper. *State v. Nolan*, 292 Neb. 118, 134 (2015). If so, the court then determines the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial. *Id*. The jury, however, should be given credit for its ability to filter out the oratorical flourishes found in closing argument. *State v. Barfield*, 272 Neb. 502, 513 (2006).

**Analysis**

Belina did not object at trial to the prosecutor's statements, which are therefore reviewed for plain error.

Statement #1 was not improper. The prosecutor's remark was a comment that lawyers—lawyers generally including the State's own attorney, not defense attorneys specifically—can confuse the issues. Such a statement is not misconduct. *State v. Dubray*, 289 Neb. 208, 227 (2014) ("[A]rguing that a defense strategy is intended to distract jurors from what the evidence shows… is not misconduct."); *State v. Nolan*, 292 Neb. 118, 135 (2015) (holding that prosecution's comments that "defense counsel was going to use 'smoke screens and mirrors'" was not improper, as the comments "did not assert that defense counsel personally or defense lawyers generally are deceitful"); *See also People v. Gionis*, 892 P.2d 1199, 1216 (Cal. 1995) (holding that the prosecution's comments such as "[l]awyers and painters can soon change white to black" was not improper, as the comments "simply pointed out that attorneys are schooled in the art of persuasion; they did not improperly imply that defense counsel was lying."). Indeed, the

comment was ultimately to remind the jury to focus on the evidence presented, as seen by the prosecutor's remark that attempts to confuse the jury could be seen in the record. *See Dubray*, 289 Neb. at 277 ("But when a prosecutor's comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. These types of comments are a major purpose of summation, and they are distinguishable from attacking a defense counsel's personal character or stating a personal opinion about the character of a defendant or witness.").

Statement #2 was not improper. The prosecutor simply commented on the usefulness of taking notes as a juror and even remarked on the utility of notetaking in reference to the fact that the jury's notes control over what the prosecutor tells the jury. (*See* 818:1–3) ("I can't tell you what the evidence is or what somebody said, or I can't confront you with things that aren't true and try to get you to admit it. That's why you have notes."). The prosecutor nowhere commented that Belina's counsel was, or defense attorneys in general are, deceitful. *Nolan*, 292 Neb. at 135 (holding that prosecution's comments that "defense counsel was going to use 'smoke screens and mirrors'" was not improper, as the comments "did not assert that defense counsel personally or defense lawyers generally are deceitful"). Belina seems to interpret the prosecutor's comment that by the jury taking notes, they "can't be misled, at leas it's harder to do it that way," as being a reference to defense counsel. The record does not support this interpretation, given that the prosecutor explained his comments by way of him not being able to tell the jury what the evidence is, but regardless, such an argument by the prosecutor would not have been misconduct. *Dubray*, 289 Neb. at 227 ("[A]rguing that a defense strategy is intended to distract jurors from what the evidence shows… is not misconduct.").

Statements #3, #4 and #5 were not improper. The prosecutor highlighted to the jury that the victims in these cases had to sit through depositions and other court proceedings and be questioned by lawyers (including lawyers representing the State). This was not a comment that, contrary to Belina's representation on appeal (Belina's Brief, 31), that defense attorneys "do 'bad stuff.'"

Statement #6 was not improper. *See Nolan*, 292 Neb. at 135 (holding that prosecution's comments that "defense counsel was going to use 'smoke screens and mirrors'" was not improper, as the comments "did not assert that defense counsel personally or defense lawyers generally are deceitful").

Statement #7 was not improper. Defense counsel had asked C.K. about whether there were car seats in the back of the car during the time that Belina first abused him. (363:10–19). C.K. testified that there had been car seats in the car before, but they were not there when Belina picked him up. (363:10–16). During closing argument, Belina argued that C.K.'s testimony was not credible because "[a]nyone who's had car seats knows what a pain they are to move in and out, so there was no explanation as to why all of a sudden the children's car seats were no longer in the [car]." (848:1–7). The prosecutor's comment was merely a reminder to the jury that there was no evidence in the record about car seats in the back. The prosecutor's reference to "lawyer talk" was innocuous, especially as the prosecutor repeatedly included himself in his comments about lawyers. *See Nolan*, 292 Neb. at 135 (holding that prosecution's comments that "defense counsel was going to use 'smoke screens and mirrors'" was not improper, as the comments "did not assert that defense counsel personally or defense lawyers generally are deceitful"); *People v. Gionis*, 892 P.2d at 1216 (holding that the prosecution's comments such as "[l]awyers and painters can soon change white to black" was not improper, as the comments "simply pointed out that attorneys are schooled in the art of

persuasion; they did not improperly imply that defense counsel was lying.").

Statement #8 was not improper. Belina called C.K. in the defense case-in-chief, where Belina questioned C.K. about alleged discrepancies with one of his allegations and text messages between C.K. and his mother. (783:25–787:17). Belina attempted to emphasize this discrepancy to the jury, only to be rebuffed when C.K. testified to the existence of evidence corroborating his claim that Belina seemingly was not aware of. (787:8–14). The prosecutor simply reminded the jury of this piece of testimony.

**10. Due to the lack of error, Belina is not entitled to relief on his cumulative-error claim.**

Belina failed to assign as error the cumulative error he raises as a claim on appeal. *State v. Canbaz*, 270 Neb. 559, 577 (2005) ("To be considered by an appellate court, an error must be assigned and discussed in the brief of the one claiming that prejudicial error has occurred."). But in any case, because there was no cumulative error, Belina's cumulative-error claim fails.

## Conclusion

The State asks this Court to affirm the judgment of the district court.

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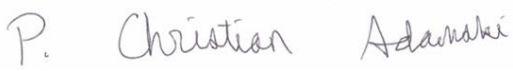
**Certificate of Compliance**

I certify that this brief was written with Microsoft Word 365 Version 2501, complies with the typeface requirements of Neb. Ct. R. App. P. § 2-103, and contains 8956 words.



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# Certificate of Service

I hereby certify that on Monday, April 07, 2025 I provided a true and correct copy of this *Brief of Appellee State* to the following:

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